

So a controlled activity would be a better option?

Well with a controlled activity the only thing with risk cases of controlled activity is that there is no public notification necessarily ... nor ability to decline...

A discretionary activity or risk when you're dealing with perceived risk like prisons or anything like that where people are fearful about something, it would be obvious to have a discretionary activity because then the public can have a right to make a submission and then you can have your conditions granted.

Glen Lauder: It is my intention before lunch to hear from MfE and ERMA, just to create some ... where all the views are emerging. Now I have a couple of questions from the audience. Are those questions which have to be taken now or can they be held over till this afternoon.

Good. Make sure you do not lose those questions as the intention is not to shut down.

After this morning's conversations there have been a number of comments about Wellington, about ERMA and central government so I have invited Libby and Russell to speak, and listen through their eyes what they are saying, so you actually hear their perspective what they are bringing to the meeting. If you are listening to disagree you are not going to get a fraction of the value as if you listen for, I can hear what they are saying, then afterwards you can come to a judgement about how persuasive their view was. This is just to give them a bit of space as they have quite a lot to explore in a short time. So I invite either of you to start. I don't invite you to deal with the whole spectrum, just deal with what you can see in front of you right now.

Russell Harding - Ministry for the Environment

Good morning once again, and thank you for the opportunity to be here. I suspect that no small part of that is the result of a letter I authored earlier this year to the Northland Regional Council which enjoyed some circulation. So I am pleased that bore fruit. Coming from Wellington I have some sympathy with the suggestion of using Auckland as a barrier. We would like to see that perhaps at the Bombay Hills. (laughter)

There is some symmetry here. Simon has done a great job on presenting the report you commissioned. The report was fairly broad and Dr Somerville came in and provided some great detail. My role in the Ministry for the Environment is a policy role in relation to HSNO and I can provide a broad perspective where Libby from ERMA will play Dr Somerville's role and will actually fill in a great deal of the necessary detail.

The first thing I would like to say about HSNO, a distinction seems to be growing here, between on the one hand the technical experts are at ERMA doing whatever they do, and the community values on the other hand. With the tacit suggestion being made that ERMA does a good job. It perhaps is not able, because of what it does, to take into account local community values. I'm not sure that is true. HSNO certainly lays out a rigorous risk analysis framework that requires ERMA to take into account benefits and risks and clearly that equation needs to be the benefits for an application need to outweigh the risks, or the risks need to be able to be managed in such a way that enables the benefits to really come to the fore. And it does that, ERMA does a great job under HSNO for doing that. ERMA also is required to take public comment. Now that doesn't just mean that it sits back and

someone writes a letter that's all well and good. Rather it takes a proactive role to notifying local councils of applications in its particular area, and invites submissions back. So I think the intention here is that your job when you are notified actually is to reflect those values back to ERMA so that they can be taken into account in terms of an application that it receives. Libby will fill in more on this, that ERMA takes into account a number of other things, in addition to just the straight technical aspects. It certainly also takes into account physical considerations, cultural considerations, and the submissions it receives from people such as yourselves. So you might want to say, okay Russell, that all sounds really nice. If that is true then why are we all here, what then is the role of the RMA in all of this. This is where I am very much looking forward to the afternoon. This is where we begin, I think to start to draw the boundaries around the kinds of things that we can do. Because I think that what we can't do is say - HSNO is really problematic, lets shove that aside and now have a look at what we can do, completely disregarding the RMA. The RMA, whether you love it or hate it, the HSNO does exist, and does do some things. I think what the decision that we have before us is one what ought we be doing in our district plans under the RMA that is not currently covered by HSNO. The afternoon session - looking forward to and answering your questions in depth. That I would like to explore what is it that you would be hoping to achieve in a district plan under the RMA that is not currently being provided for by HSNO.

I want to conclude. There have been some assertions that very large corporations are beating a path to my door. Are pouring into my office day after day and lobbying. I can tell you that since the time I have been with MfE I don't recall a single large corporation beating a path to my door. My email address and telephone number is widely known to all of you (someone: *more subtle than that sir*) Russell: more subtle. They may be beating a path to a door but certainly not mine. I also experience no conflict of interest. My job is related only to HSNO, the control of hazardous substances and organisms. The funding that is supplied to Crown research institutes for undertaking its research is not my funding. My job is clear to me, is the policy aspects of HSNO. I have no interest in the funding issues surrounding any of the research going on. There are others that do, but it is not me, it is not MfE's job.

I might leave it there. My best valued added is to answer questions that other people have.

Glen Lauder: Thanks Russell. I think we might hold all questions to Russell till after lunch. The question that Russell posed is what should we be doing in the district plan that we are not doing under HSNO is an example of the kind of questions that you might be beginning to frame in your mind for the afternoon session. Start to think about what are the questions in your mind, given Simon's presentation, Royden's presentation, Russell's and now Libby's that you really want to see addressed this afternoon.

Libby Harrison: Thank you I just want to make a few statements to help out with this process. First of all I am probably in the unique position where I can actually tell you what is coming in front of ERMA, what types of applications we are seeing, and that there is no sign of any conditional releases or full releases of GMOs. We do a survey every year where we ask what people are doing in the coming year and forthcoming years and there is nothing in the pipeline at the moment. Now, as Simon says some of that is a bit crystal ball gazing, and something might hit me out of left field without knowing it,

but they would have to do a lot of work to even get an application in through the door. I would also like to say the Hazardous Substances and New Organisms Act, its not an easy Act to read, but it is an extremely comprehensive legislation, and arguably it is one of the strictest pieces of environmental legislation in the world, and I think that we need to remember it is environmental legislation. We have to remember that ERMA stands for Environmental Risk Management Authority, and it is ERMA's job to protect the environment and the health and safety of people. That is what the law says we must do. And I think if there is one message that I can get over to everybody today is that my job is constrained. I can only work in what the law tells me to do. I cannot go beyond the law. I cannot do less than the law requires me to do. I have to work under that piece of law. I don't write the policy - and John's been talking about campaigning to ERMA - I am afraid that it is Russell you need to campaign to because Parliament sets the law in place and then it is my job to implement it. Now to do this job of implementing this piece of environmental law, the government appoints eight decision makers. Now those decision makers are appointed by the Minister for the Environment. And we call them "The Authority" - and they have two jobs, they are like a board of governors for the organisation that I work for and they are also the people that make those decisions, and for us today I am going to focus on GMOs, because that's why we are here, but they make decisions on hazardous substances and all types of new organisms. Now they are not selected as being members of the New Zealand public. They are actually selected because they have technical specialism and also because they are specialists in making decisions. And they are based in Auckland, Wellington and Christchurch at the moment, but they are only allowed to sit on the Authority for a limited period of time, a maximum of five years then they have to move on. If there is time later on I can tell you more about who those people are and what their specialisms are.

Now I have 16 staff in my group and we all have some form of biology degree, ranging from straight forward degree, to PHD degrees and beyond. Now it is our job to talk to applicants and to make sure they have all the information they need to carry out a risk assessment. And if they do not have enough data on the NZ environment then we send them away saying their application is not good enough and that they have to come back after they have done the work. We are required to assess, not just risks to the environment and people's health as I have already mentioned, but we are also required to look at risks to the economy. Simon talked about the importance of the economy locally, but also nationally. The law requires that we do a risk assessment on the economic effects of any application. We are also required, as Russell might have mentioned, to look at society and communities. We need to do a risk assessment about the community and what effects an organism might have on its wellbeing. Also for Maori culture and values, and that is why it is so important that we have your input into decision making process. Russell mentioned that we go out and invite you to make submissions. I have a pile of forms with me today for people to fill in their names, contact details and types of applications they are interested in. So if want to get on our database so that we contact you whenever we get a GMO application for release then we have you in our system. The same for councils as well - I would like to invite you to make sure that your council is on our database to contact. Because in 2003 the law was changed so that by law we had to contact those local authorities that are interested in certain types of applications and make sure that we invite your submissions so that we know what your local thinking is.

Just a couple more things before I finish. I am not going to read it all out to you but there is one bit that I do want to mention because I think it is important to recognise that decision makers have what we call an environmental bottom line. Government or parliament when they set the law decided that there were certain things that we really had to protect, and the HSNO Act is there to protect them. And the decision makers, it states this in the Act, must decline an application for release of a new organism if it is likely to cause any adverse effects on native species, natural habitats, human health, New Zealand's inherent genetic diversity and it may cause disease or be a vector of disease. And it is that bottom line that I think has people talking internationally about the HSNO Act being one of the strictest environmental pieces of legislation.

Russell talked about risks and benefits, the decision makers must also decline an application if the risks outweigh the benefits. And we have talked a bit about precaution. The HSNO Act has written into it a precautionary approach. I do not think the RMA has that written into it. Under the HSNO Act the decision makers are required to take a precautionary approach in their decision-making.

I have one thing to hand out. This is a diagram that goes through the process of releasing a new organism into the environment. I am just handing that out before lunch so you can have a look at it. If you want to go into the actual details of the process of an application coming to ERMA and all the things we have to do before a decision is made, then we can refer to that diagram and help inform the discussion.

Glen Lauder: Thank you Libby.

Its nearly 12.30 so I will propose we take our lunch break shortly. If you don't see any light between these different perspectives, you were probably not listening. We clearly have a range of different views and even between Royden's and Simon's views, you, yourselves are balancing different perspectives and you can advise us one way or the other. So we definitely want to have a sense of 'ah, should we go this way or that, is this compelling or is this more compelling.' So the intention is the afternoon is to both open up and to sharpen in. So to be of service to that I would like you to take five minutes to sit and reflect on what you have heard but I suggest you do it reasonably quietly so that people can do some thinking. On one of the question or questions that you would really like to see us get into this afternoon. So I will give you a bell in four minutes and we will stop in five.

Lunch

Glen Lauder: This could be a very colourful afternoon. Some of these questions are great. I have checked with my client who is Jack McKerchar, and he would rather we sharpen up than be too nice with one another, so lets keep the conversation courteous but not cute.

I invite you to get into the spirit of that circle I drew with the different arrows, you do not need to argue with one another but you should feel free to give radically contrary perspectives. And after someone has answered a question, like if I ask Libby a question or Royden a question I am going to invite the rest of the panel to give a contrary view. Now when I invite them to give a contrary view I would like you to join with them in the spirit of the following; they are not prepared to give carefully prepared policy positions, they are going to offer contrary views so if I get Roydon to say something and Russell

can see a contrary view, I am going to invite Russell to give that contrary view, but acknowledge that there might be many things he agrees with Roydon on. The intention is just to create the space. So that we can actually begin to see the distance, and then at the end of the day it may be that today's workshop begins to ask questions that we have never asked before. And that may be very valuable. 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.

Libby are you prepared to start?

Q: If HSNO is restrictive and ERMA balances the needs of all groups you listed when accessing risks, environmental health culture etc, how is it possible that there are already Crown initiated GE trial out there?

Libby Harrison: When I came to NZ I found the concept of a field trial being contained quite hard to imagine. I used to do environmental research in Europe and the US and I used to do a lot of field work and the idea of it being contained was quite hard for me to imagine, but under the HSNO Act the law describes field tests being containment approvals, and there are quite restrictive provisions written into the Act that requires decision makers to make sure that no genetic material can leave the trial site and that any genetic material must be destroyed at the end of that trial. And again in the law it writes that one mechanism for the destruction of genetic material is to allow it to rest in the soil and allow it to break down. So that would be my answer to that question.

Glen Lauder: Any responses - some of these are relatively yes/no type of questions, and some of them are more further reaching. Thank you Libby. I am going to rattle through them and if there are further questions:

Q: The tamarillo trial in Kerikeri. Is that being monitored? And has the genetic construct been broken down.

Libby Harrison: Now the tamarillo field trial is a very interesting one because it was set in place before the HSNO Act came into existence - so it predates my time in NZ and predates the HSNO Act. Now my understanding at the time was there was a lot of community concern about that test when it came to an end and about the monitoring of the soil. An agreement was reached between the approval holder, it was approved under a voluntary agreement that existed before the HSNO Act which was agreement about treatment of the soil and ... monitoring of the soil for any genetic constructs would not be possible.

Q: My understanding is that it is possible for GMO to go through the corn plant into the soil, and that there is some evidence that that has happened, and can re-enter a 'vehicle', or plant, in that soil the year after. The ... seems totally inadequate.

Libby Harrison: ERMA has not received any applications for GM corn. The GM corn you are referring to was an accidental introduction through seeds that were imported into the country and MAF did a very thorough risk assessment on the fields that had the corn grown in them and what those fields could be used for in the future. MAF would have looked into that at the time of putting protocols in place.

Q: ...huge gap here as there is a whole lot of stuff happening that is not going through HSNO, ERMA, the RMA and there could be ... coming for us and the councils that's outside the paradigms and boundaries. We already have a lot of contaminated sites, and when people plant corn on contaminated sites any corn can become contaminate so we already have a very serious problem.

Libby Harrison: I understand your concern and although the corn did not come through HSNO as no one applied to have it come into the country and it came in accidentally, MAF responded as quickly as they were able as soon as they found out about the corn and were able to manage it. Now you are right that people may want to go and grow corn on that same site again and that is where risk assessment is quite a difficult thing to communicate, because what MAF has to do and what we at ERMA do when people actively come to us with applications, is to assess those risks and how big they are, and how likely is it that the gene could go into the new corn that is grown, and if it is likely, then what would be the consequences of that. And that is all analysed and weighed up and discussed in quite some detail when making decisions about what is to be done with those fields. So it is not being done without some consideration.

Glen Lauder: Thanks Libby - more technical questions. I think it is time to give Russell a grilling, so here we go.

Q: Does MfE recognise and give validity to our concerns around our RMA responsibilities? Now you can answer this in any way you want.

Russell Harding: I can only say 'yes'. If MfE was not paying proper respect to the councils roles in respect to the RMA I could simply have written you a letter. Which said you have no role in this, we know what we are doing, stay out of this, trust us and everything will be okay. That is not the case. The point is that Dr Somerville has it exactly right. The RMA provides councils with an opportunity through their district plans for taking care of the land resources in your jurisdiction and MfE acknowledges that.

Glen Lauder: I have a series of follow up questions that will lead us into the potential role of the RMA. So I will be asking Royden and Simon and Russell. The next question:

Q: are you as MfE prepared to assist us with a working group in Northland, to identify the gaps under the RMA local authorities could address?

Russell: I don't know. I need to be very careful here because my area is actually very specifically HSNO. But let me say whether it is HSNO or RMA it is happy to assist councils. Now lets be very clear that our role is to assist. The decisions that are to be made under the HSNO Act are not ours. The MfE can assist you but can't, and wouldn't and shouldn't, be making those decisions for you.

Q: I asked if you would assist. You said yes. But its not you, therefore who is it and how do we approach them?

Russell: ... you approach through me, since I'm the public face here, and we put you in touch with the people who can actually come up here and help out. And that may be a combination - it may be me, HSNO, or someone else that is knowledgeable. I have a business card and can give it to you before the end of the day.

Q: Would MfE consider a policy development of declaring Northland being GE free. And I am going to ask that question of Royden and Russell, because you know that legislation and whether or not that kind of provision is possible.

Royden : I don't know the answer to that one.

Glen Lauder: Libby would you like to comment

Public: Please repeat the question:

Q: Would MfE consider a policy development of declaring or supporting a declaration of Northland being GE free, perhaps with a review in five to ten years.

Public: GE free or GMO free

Glen Lauder: we will read that as GMO Free

Libby: I cannot answer that question specifically although can't government do pretty much anything if they put their minds to it? That is my impression of what they do. You would probably also have to amend the HSNO Act, and that I can talk on. Even if Northland did manage to persuade the government to legislate to make Northland GMO free, my group/authority cannot refuse somebody coming to us with an application, because the law does not allow us to turn people away. So if they have an application to release a GMO in NZ the fact that Northland has managed to get the government to make itself GMO free would not constrain my implementation of the HSNO Act. So you would have to do both.

Q: Cr Alspach: Have you reconciled those answers with your statements earlier this morning that the HSNO legislation had to take into account the community aspirations, and your statement that ERMA has to take a risk averse position. Now it seems to me that you all mentioned this morning that there is so much science that you don't know about. That you don't have applicants pounding up to your door. Where is the harm of actually taking up John Law's suggestions that Northland has clearly expressed a community interest, by all the representations from local authorities and the people here today, that said we would like to be GMO free, risk averse, its not challenging any kind of economic development from the nation as a whole. Where is the harm in doing it. It is consistent with what you have told us this morning.

Much applause from the floor.

Glen Lauder: do you want to respond before Roydon answers the question.

Q: I want to ask a question which is totally related : Do we have to go through the government to do such a thing, or is there some way we can do it under the Local Government Act by agreement under our Long Term Council Community Plans that we are prohibiting ... a moratorium for 10 years, or does it have to go through an agency which means district plan changes. So I wonder whether the government has a hand in it. If we all do it, if it's a 10 year thing...

Glen Lauder: Simon, I am happy to hear from Royden. I would like us to make reference to the Crown Law opinions on the MfE website that operate so that we have covered all the ground during this.

Simon?

Simon Terry: Back in 2003 when government elected not to amend HSNO ... what are the broad means ... looking at the local community plan and another looking at bylaws and a third major one was looking at the RMA. The LTCCP community plan is not particularly binding, so it would not provide a solution in respect of the surety that was being sought or address issues of liability for example. You would not have a mechanism to obtain bonds from an applicant. The respective bylaws, there was much greater risk of challenge in court and the RMA is the principal land instrument that is addressed specifically to planned activities. So for that reason it was quickly focussed in on as the mechanism, and that is part of that earlier discussion that was not covered in so much detail.

Glen Lauder: just to clarify that, Royden can you confirm that the reason that the LTCCP does not provide a mechanism is that it is a planning instrument that only binds the councils activities. Is that correct?

Royden Somerville: The community plan is a statement of aspiration and also covers sustainable development under the LGAct, whereas the RMA deals with the sustainable development of the natural resources/land. Natural physical resources as well. So the beauty of the RMA is that you can develop a long-term policy like the plan as a result of community participation that can be tested through the Environment Court, in other words if the community has two opposing views and there was a lot of resistance to an objective or policy or rule, or whatever, then there is a democratic mechanism to have that addressed in a complete inquiry at a level of the Environment Court and points of law can then go on to the various other places. Whereas the community plan, the only way you can deal with the plan if you are challenging it or disagreeing with it is through judicial review, and that is a nightmare, and only through a point of law.

The advantage of the RMA is that it is an Act that is used with other Acts. I don't see this as being local government or ERMA, I see it as ERMA and local government walking alongside each other to sustainably manage the land resources of the district. And the RMA entitles you to do that. And as I tried to point out there are lots of examples. This morning Libby mentioned the precautionary approach that was in ERMA, HSNO Legislation. There is also the Fisheries legislation, you have to get a fisheries permit as well as getting a resource consent for a marine thing, or whatever. So there are several ways of doing it. I don't think it is difficult to walk together but the difference between ERMA's approach which is to a large extent an administrative approach, and no appeals to an Environment Court for instance, the difference perhaps is when you are dealing with resource management or the district plan you are setting policies for the whole district. Where I suspect when you are dealing with a site specific application sometimes there are different values involved. I know ERMA/HSNO talk about community values for example, but you are assessing the risks of doing something at that site as well as looking at the wider area. But a resource management plan can set in policies what the values are for the whole district.

Glen Lauder: I am just going to endeavour to, and I am open to challenge from anyone at any time, I'm not the expert on this, but I am going to try to anchor in where we are getting to. So it sounds like advice that we wouldn't seek progress through an LTCCP or community plan for a number of reasons.

Q: Isn't the issue if all the Northland Councils put something in their LTCCPs what weight would ERMA give to that aspiration. And so the unknown is that we don't know if ERMA would take that

aspiration, whether it would be given enough weight or application. It is not about whether a district intends to regulate, but about the weight that ERMA would give to that collective aspiration.

Royden Somerville: When you are dealing with an application there are so many relevant aspirations that ERMA has to look at. One of the mandatory considerations is the community aspiration. So that is a mandatory thing. If it is in everybody's community plan then I think that would give a great advantage. But it is not a caveat. It is something you would have to consider. If you have included it in your LTCCP and you do a section 32 analysis for your district plan that's very powerful because the community has said what its policy should be when it comes to that. So that should help when it comes to the resource management plan.

Libby Harrison: Royden is absolutely right about that. If it was in the district plan as well it would not be a snooker. It would be another part of the information that has to be analysed and taken into account. It would be taken into account seriously, but it may not be sufficient to result in a decline. It is very difficult talking about these things because it is very hypothetical at the moment. It would depend very much what the application was for and how widespread it might be. But the HSNO Act is very prescriptive, as Royden has described it, and there are things we take into account and things like society and community values, things like Maori, culture and traditions are an important part of that. But they feed into the whole mixture. And the mixed glues feed around the benefits of a particular application and the benefits will also be benefits to the whole community, and benefits to Maori and benefits not just to the applicant. So all of that mixture of information has to go into the analysis and I like the analogy that Royden made of walking together. The HSNO Act will still be there and I will still have to implement the law whatever you decide to do locally. That is what the law says, and it will have to continue. That process will continue walking side by side whatever you decide to do locally.

Cr Underwood: Its worth pointing out that because of the hierarchy, the territorial local government cant make a regulation or law contrary to regional and further up to central. So central law has the priority.

Someone: That is correct under the Resource Management Act. ... But when it comes to what we are talking about, there are virtually two permitting procedures, if you had something in your plan that would allow you to address it, that would be one set of procedures. It is a bit like the building consent as well as the resource management consent. They are under different pieces of legislation for the different ... on the same land. So it would raise interesting questions about which one would you apply for first. But you would have to get them both. It just means that the local authority would be involved in one of those processes and controls it. ERMA is involved in the other.

Q: With these points ... I am at two minds as to what that process is. Cost benefit analysis ... as a process, a mechanism for considering ... recommendation obviously entirely rested on the outcome on the assumptions we had made This becomes relevant when you think what kind of weight do you get in your consideration, what kind of weight do you get culturally, for Maori and other people. You attribute to this process - its all statistical at the minute. It is obviously an analytical pragmatically procedure. I would like to know a little more about it.

Libby Harrison: You are absolutely right. It is a form of cost benefit analysis. No one of those factors takes any greater weight over any of the others and the challenge for the decision makers is not

having 'apples and apples' to compare. So there have been processes developed internationally, not just in NZ, on how to carry out this kind of risk cost benefit analysis. If you are interested in the detail and I can help provide more of the detail around. It comes down ... being very clear about what the assumptions are, and one of the challenges we have in my group is that often, now this is not about GMOs because we have not had any GMO applications for release - the most ERMA has are for insect biological control agents. That's the one we most typically get - is the applicant a little ambitious about what the success of their biological control agent will be. We have one going through the process at the moment for broom biological control, and we don't take the applicant's assumptions at face value, we test them out and tend to bring them back into some form of reality about how successful they are likely to be. So you are very right there, the assumptions are very important. The risks are analysed firstly based on what the effects might be. The effects might be an adverse effect, it might be a beneficial effect, and really casting our minds as broadly as possible as to what those adverse effects and beneficial effects might be. And then analysing the effects based on what is the likelihood these effects may eventuate. What is the probability of that effect happening. Then what is the magnitude of the effect. How big is it going to be. Is it going to have a huge impact on us or a small impact on us. These are the simple building blocks of doing a risk assessment. Now the area of new organisms and biological control agents. You can actually do some research and test whether the biological agent is just going to feed on broom or is it going to feed on lots of other native species as well. Quite often you do not have that type of data and you have to really go and research the literature and find out that information in order to come to a decision. We make available through the website or me a lot of the technical guidance or information on how to go about that - so if you want more information please get in touch with me. We also make available all of the applications that come to ERMA, they are available through our website or you can sign up on our interested parties list. My Group writes what we call an evaluation report, where they gather all that information together, information from the applicant, information that they have gathered themselves, testing out that information, testing out the assumptions and then information from submitters. All of that is analysed in the evaluation report - it can get a big report after a while. I have read the evaluation report for the Broom biological control agents this week, it is 200 pages of information which did not include the application which was probably another 300 - 400 pages. So there is a lot of information to take on board and understand.

Glen Lauder: Thank you Libby. I will have to take a bit of judgement on how we guide the discussion by bringing these questions forward. What I suggest we do, there are two or three more questions that relate to ERMA and HSNO that we might ask now, and then we might come back to Simon and Royden.

Libby, these are pretty straight questions and fit in with what you just said.

Q. How can a spray incident with a short damage life be compared with a contamination from GMOs that are irreversible?; and a related question

Q. How does the HSNO Act get around the fact that biotechnology is a relatively new technique and its risks are not properly assessed yet?

Libby Harrison: I used to work on the environmental effects of pesticides so I am not sure whether I would always consider a spray incident as being something to have a short timeframe. I am not sure whether I would compare those things

(public - Mark Farnsworth talked about those things)

Libby Harrison: Yes, Mark talked about the liability there, not about risk assessment.

Public: I was asking that question. How do you compare those two incidents.

Libby Harrison: okay, well I would not compare them, in my work of doing risk assessments. You are right, they are different. I am loathe to use the term case by case as it has become a nasty phrase, but we do have to, by virtue of how we do our work as it comes to us. Now the HSNO Act covers pesticides under its hazardous substances part of the legislation, so pesticides have to have their risks assessed in a very similar way as to new organisms have to have their risks assessed and they are done on a case by case basis, depending on what they are. So that would be my answer to that question.

Q: ... common law ...

Glen Lauder: I will come back to what you did say when we look at liability and compensation.

Libby Harrison: And the second question, how does the HSNO Act get around the fact that biotechnology is a relatively new technique and its risks are not properly assessed yet? That's a really very good question. It's an important part of why I am not popular with applicants either, because I require that they provide all of the information we need to do a risk assessment. And if somebody wanted to release a GMO in NZ they would need to satisfy the requirements of the HSNO Act by supplying all that information that was needed in order to do that risk assessment. It is why I know there are none coming too, because people need to do that research here in NZ. They need to start in the laboratory, then do field tests, then they might be able to get some fairly controlled conditional release to do some more, and that is not happening. They would not be able to satisfy the requirements of the HSNO Act without that happening. That was a good question.

Glen Lauder: These questions are directed to Royden and Simon, but I would be interested to hear Libby, who has some background in MfE and Russell responding as well. So I will ask Royden both questions, and Simon.

Q: Is a 10 year moratorium under all district plans in Northland possible. Would this mean prohibited for 10 years?

Q: Are there any limitation inherent in the RMA that prevent the application of "precautionary" approach in designing the district plan to prevent GMO introductions to a district?

Royden Somerville: Firstly, there is jurisdiction to control land use activity by a range of methods, starting from controlled activity where you tick boxes, it is performance standards, not a notified procedure. Restricted discretionary, which may be notified - probably not. Discretionary which enables notification and the purpose of the Act [RMA], the sustainable natural purpose to be considered. Non-complying where you have established your policies in your plan and something is noncomplying then the effects have to be minor. Or prohibited. So there is the ability to do it in the Act.

The issue, however, is whether you can show that your land use in your district - which land is allowed to be used unless controlled, under the RMA. You have to show, therefore, that the control is therefore appropriate to promote the purpose of the Act. So you would have to show that you have a policy of prohibition. In other words show that the precautionary approach is strong and that the community and the plan do not want to see GMOs in this area for the life of the plan. You would have to show that this is on under the Act and you would need a very robust study to do that because as they found out in the Coromandel they did not have a robust study, the objectives and policies, and the courts threw it out. As I have said they allowed it in the Tasman district in certain areas, in the coastal region. Legally it is on, its possible. Whether it would happen would depend on the strength of the study and you could probably expect it to go to the Environment Court. But you can expect any change, any review, anything, to go to the Environment Court on anything. So the transaction costs might be the same, as far as time.

The other issue you raised was under the plan change. If you did that, had a more effective moratorium for the life of the plan, and you could limit that for 5 years, 6 years whatever - it does not need to be for the whole life of the plan, you can do whatever, its your plan - and this is hypothetical, but then an applicant came along and had managed to convince Libby's team that the risks were acceptable, then they would have to seek a plan change [under the RMA], if they wanted to do it in this area. And they would have to do the Section 32 analysis to show why the plan should be changed to where they could do it, it's the ultimate precautionary approach because you put the onus onto them to show the risks are acceptable in terms of the general environment. Now the one advantage having these in the district plan, the policies objectives and so forth, one real advantage is that under the HSNO legislation that Libby has alluded to, one of the principles of the legislation, and this is a mandatory consideration, everybody involved in an approval process must recognise and provide for the maintenance and the enhancement of the capacity of people and communities to provide for their own economic and social wellbeing for the foreseeable future, for the means of future generations. So if you have a district plan that expresses those aspirations, whether it is total control, part control, whatever, that makes it a lot easier for an authority at national level looking at a local level. There are a lot of advantages of walking together and having a tandem process because each process can feed off the other. I am only speaking of risk management here because there is some uncertainty. I am not talking about risk assessment. You have controls and you wanted to put a condition on to do with the technical side of it, you may well contract that out, the applicant would pay for it. It would not be something your council offices would need to do, specifically.

Q: If the applicant had to carry out Section 32 analysis later, do the councils have to carry out the Section 32 analysis to bring that in to the local government ...

Royden Somerville: Before that goes into the district plan review, anything that concerns the policy, review or objection and isn't there now you have to do a Section 32 Analysis. The council does. Whether it is council-initiated or whether by private plan change.

Q: I will rephrase it then. If it was only in the LTCCP is that going to be adequate to carry that out for 10 years.

Royden Somerville: No, an analysis cannot put a moratorium on land use, only the Resource Management Act.

Glen Lauder: those people who have a copy of the diagram might wish to have a look at it and those people at the back can share it around and look over shoulders, so we can be looking at common information.

Q: What extent is the public ...

Libby Harrison: the notification process is, we put a notification in the four major newspapers: Auckland, Wellington, Christchurch, and Dunedin which directs people to come and contact us or look at our website. If you sign up on our interested parties list, we will automatically contact you and let you know about any publicly notified applications. That is what my responsibility is under the HSNO Act.

Q: Do you know of any landowners ...

Libby Harrison: not from ERMA, however my advice to the applicant, before they even make their application to ERMA, would be to make sure they have talked to any affected parties in their community, and that should be part of the important information that comes to us. In the same way as the HSNO Act requires that information is provided on Maori culture and values, and we help guide applicants on how to do consultation with Maori. The fact that the Act requires information on the effects on societies and communities, the only way you can do that if for the applicant to go and talk to those people.

Q: So in terms of the district plan, those ...

Libby Harrison: We do not have to do that under the HSNO Act.

Glen Lauder: A couple of more technical questions, this is to Libby or Russell.

Q: Why is contamination not a baseline consideration when considering applications?

Libby Harrison: Contamination or - do you remember earlier I was talking about a risk assessment and something that could cause an adverse effect, well contamination would be considered an adverse effect. So if an organism, like a GMO was going to cause an adverse effect to soil, water or some form of land use then that would need to be identified and that risk would need to be assessed. So essentially it is a bottom line of that part of the work we do.

Libby Harrison: The word contamination is not actually used in the law. I guess contamination could be seen as being subjective. It depends on a lot of things, that's why I have talked about it being an adverse effect. I talked about effects on native species and natural habitats, so these are more ecological ecosystem types of things rather than you have contaminated that thing.

Q. No, sorry. Why I was trying to raise it was that the public, as in most people here in the back of the room, have brought up, over and over again, is if it comes ... so I am really talking about contamination and who do they have to notify. It is not written as clear as ...

Libby Harrison: One of the really important parts of the decision that has to be made is whether or not you might affect something else that is going on in the neighbourhood. It's so difficult when you are

speaking in the hypothetical - say you wanted to start growing cotton and nobody else is growing cotton in Northland, managing the contamination of the land around your cotton field would be easier to imagine than if you wanted to grow feijoa or oranges or genetically modified oranges. Do you see what I mean? So that is why I said case by case is an important part of it and when we don't have any cases in front of us it is all very hypothetical. Your concern about contamination, or the other way people talk about it - is co-existence possible - can crops co-exist with each other without causing any problems, is a really important part of the decision that has to be made, and it will be part of what the authority has to look into.

Glen Lauder: One last technical question relating to ERMA before we move on to the RMA more clearly.

Q: Is there any way we can control possible risks from non land use applications e.g. medicine and food.

Libby Harrison: ERMA definitely manages the risks associated with any GMO medicine, so if a company wants to use a GMO vaccine, the famous one that is in existence is the cholera vaccine called oracle burner - which is a GMO vaccine that is used in other parts of the world, it isn't used in NZ because there is no approval for its use. That would be something that we would regulate. We would have to put controls or conditions on how it was to be used and we would have to take into consideration all those things that I have listed about managing the effects on environment and human health.

Libby Harrison: Now with food, food is a very interesting question, because here again we have different Acts of law working in parallel with each other. If the food was a live genetically modified organism, say a GM tomato. So people wanted to grow GM tomatoes - they are viable, you can take the seeds from the tomatoes and grow them.

Can you take corn as the example instead of tomatoes...

Libby: sure so if someone wanted to bring GM corn and grow corn in NZ we would have to give approval to that but also the NZ Food Safety Authority (NZFSA) would have to give approval to the safe consumption of corn as human food.

Q: But what about if it is not corn that has come in to be grown but corn that has come in to eat. Corn in Mexico where the whole of the country is contaminated because they are buying it to eat.

If somebody wanted to bring corn in to eat and it was viable corn they would have to get approval under the HSNO Act through ERMA to do that, and they would have to get approval through the NZFSA because it was food for human consumption. So there would be a dual permitting process going on.

Q: Would you still be involved in that process?

Libby Harrison: Yes we would, but if it was corn that was not viable, that you couldn't grow, maybe it has been cooked or radiated or something has happened to it, then it would only be the NZFSA under the Food Act - it would not come to ERMA.

Peter Nutall :

Q: Are you confident that under a national umbrella that keeps Northland from actual and potential adversity ...

Libby Harrison: That is a very big question.

Libby Harrison: I would say yes, it is a very stringent piece of legislation. It is very all encompassing. Risk is not about 100% protection. You cant say there is zero risk. It does not make logical sense.

Q: Can one insure against it?

Libby Harrison: I'm not working in the insurance industry.

Glen Lauder: This is great, that we are willing to stretch ourselves. So Peter's question was:

Q: How confident are we that, as the holder of the national umbrella ... has full confidence that Northland is protected from actual border potentials; do we have a national umbrella that has no holes in it, or do we have a national umbrella that has holes in it.

Russell Harding: I think Libby was right. There are no cast iron guarantees in life. What we can say about the national umbrella is that it is the very best umbrella that we can construct. I think HSNO is regarded really favourably around the world as being a model of this type of legislation for actually affording the kinds of protection you are looking for.

Peter ... that wasn't the question. I am asking does the umbrella have any holes in it.

Russell Harding: It is the best umbrella that we can make. It may be there are some things you could add, but it is the best umbrella that we can construct. Northland is not picked out relative to the rest of the country under HSNO. The level of protection that is afforded is the same as everybody and the rigorous analysis that goes into determining that protection will be as rigorous.

Q: Can I ask the lawyer and the district council ... what is the government doing in that area... Can we do something... We have looked at the field trials...

Glen Lauder: Simon and Royden

Simon Terry: I think the characterisation of HSNO is a very strict protection, is broadly correct in a sense. But you have to take two very important cuts on that. One is HSNO is very strict in the sense that it requires every organism to go through a process. Each is individually assessed. There is a wide scope of things you have to consider. All of these are true and make it world-leading. On the other hand, liability clauses are very inferior compared to other jurisdictions, particularly Germany, Norway, Austria and Denmark. There are areas where it could be improved and I am getting mixed messages from Russell to whether there are gaps or there aren't gaps. The letter Russell mentioned that he had written to the Northland Regional Council was in response to direct questions about where the gaps were identified by John [Kyte] in the report, what did the Ministry have to say about these gaps. The Ministry did not, at that stage, list any view, either way, in whether the gaps were there or not. And the concluding line of the letter was that "... it would be difficult for councils to identify issues associated with GMOs not adequately addressed by HSNO and ERMA." So I am unclear what Russell is actually saying, whether there are gaps or whether the umbrella is as good as it gets. The

analysis is that there are gaps. The law is good, but not ideal given the possibilities. Would it not be advisable to plug those gaps. Is central government willing, is local government able to. That is the sort of sequence of events that has driven the whole debate for three years now.

The kind of gaps that I mentioned are the ones that are most apparent in a sense of the liability, the precaution. Libby mentioned the government requires ERMA to take a precautionary approach. Now what the law says is that ERMA shall take into account the need for caution. Now when that went to the High Court on what that meant, the Judge ruled quite clearly that it did not require ERMA to take the precautionary principle. In other words, precaution was an option. It doesn't mean ERMA won't do it, and Libby is quite an advocate of precaution. What it is, is about legal guarantees and bottom lines. If people want a particular approach taken, if they want surety that it is taken, the Act does not provide for that. That is one of the deficiencies. Another one, in looking at what you can do to get a better Act. We have the RMA ... If a decision is made under HSNO other than on points of law, i.e. points of process, it cannot be appealed to the High Court or the Environment Court. And the Environment Court if it goes through a hearing and parties are very concerned, you can take it off to court and make a legal challenge on the substance of the question, about whether or not the evidence was appropriately weighed. And there is this question of cross benefit. Who does the weighing and how. You can appeal to the court under the RMA. You don't get a chance under HSNO. Under HSNO the Minister can call in the application. ERMA can make a very good set of recommendations and ultimately the Minister has the final say, and that is it. Now there is a whole series of things because this area is so contentious. People take strong views as to what are the risks. This leads back to the philosophy about whether or not local communities are the best decision makers for local effects. Different communities may have different views and that can supplement the national decision making procedure. This is the big question that is on the table. How you cover those gaps. Do you cover them nationally, whether the government is willing to go that far, or whether you deal with it locally.

It sounds as though there is a strong risk assessment, procedural code put in place by ERMA at a national level. And that is an administrative process. Along side that you could have a process which is exactly the same as every other land use process of the RMA, but there is a right of appeal to a judiciary maker if something goes wrong. So that is the distinguishing factors between the two processes. You talk about umbrella, you could have for the benefit of both. They are not contradictory, they are complementary.

Glen Lauder: I would like to put a bit of focus for the moment on liability because there are a number of questions that relate to liability and I can see that I am not yet clear on this. I might ask the questions in sequence so I can get the panel to respond.

Q: If ERMA and HSNO approve the use of a GM product and this later becomes known as a risk and contaminant to the environment what is their extent of liability to repair the damage to the environment and the communities affected;

And as a corollary to that:

Q: If communities are not fully protected then how does the extent of liabilities need to be strengthened.

Libby Harrison: If the decision makers, or the Authority, approved the GMO and then something went wrong, then we would work closely with MAF (again its all very hypothetical this) but that would be the extent to which we would work with somebody who has a responsibility for managing organisms in the environment. For me that question triggered something I believed ever since I started working with ERMA, which is the onus of responsibility on the decision makers is huge. We need them to get it right, don't we? And part of my job is to make sure that the best advice is given to the Authority to help them get it right. If the Authority had been negligent in any way in their decision making then there would be a comeback on them, but that is not about cleaning up the environment, that is the responsibility of MAF, in my view.

Simon Terry: Libby is right. MAF would assess the question of whether or not it did a cleanup, but as mentioned earlier, MAF have a certain budget and then have to go for extra money from the government. Some days it says yes, that's worth cleaning up, and some days it says no. you do not get accountability back to the person who is actually undertaking the activity. And that is really what is so important in terms of creating incentives. What you really want to do is to have that person undertaking that activity thinking am I going to have to come up with the 'dosh' to make amends if something goes wrong. It makes them think ahead as a warning sign to come out early and say, we should just calm this one down, we are not actually sure what is going on here. This is a standard incentives problem, especially with something like this. You want these people to be thinking very hard about the risks. ERMA can do the absolute best job that it can within its competencies, with the information it is given and still miss things. This is the history of environmental regulation. It is the history of DDT, fluorocarbons, x-ray you name it. The people who created them were not reckless. They were no less experienced scientists than Libby, who is a very good scientist. They did not know. They in a sense could not know. Either the questions were not asked, or the research was not done thoroughly enough, or it was one of those things that took twenty years to emerge. That was the nature of understanding science and environmental regulation. What you are wanting to do is to say to people when they are first considering - do I improve my agricultural activity or do I improve my forestry by trying a GM organism, and I carry these risks and I carry these costs and benefits to it, or do I try another route that has less risk, it might not be a GM. There is a spectrum of biotechnology opportunities out there. GM is only one way to the gate. You can use a lot of advanced genomic science simply to use e.g market breeding, you watch what is happening to individual genes as they breed to get an improvement and faster selection, normal hybridisation, normal breeding is sped up by the use of these genes. These are the opportunities you want people to think about. you don't want to think they all cost the same, when some of them could cost more down the track.

Glen Lauder: because our time is getting quite short, your questions are great, and your answers just need to be a little more succinct so that we can rattle through them. That is good, Simon. I am not criticising.

Q: The process for field trials has to seek commercial function. Can you go through all this process without a field trial?

Libby Harrison: Yes

A47

Q: This is something I am trying to get my head around because there will be a call in our community to come up with some conditions to GMO applications. I am starting to get the feeling that if council puts on conditions and then something goes wrong, then in fact they are now party to the risk. Is that right or wrong?

It is not right

No way

Royden Somerville: The council at the moment when it grants a resource consent for anything has the responsibility to follow the statute. If it is negligent or does something really bad, then somebody will challenge it - by judicial review. But the chances of getting damages from the council is negligible, and that is why you have insurance. You would not get insurance if it was not like this. There have been about three cases where councils has been sued, in the High Court, ... there is a whole lot of local body law for council responsibility. This would not be outside those accepted principles. So there is always a risk you might be sued. It is no greater risk than any other resource consent to deal with.

Q: ...

Royden Somerville: You would have to think seriously about a bond. Its like a ...

A: ...you are talking about GE escapes into the environment and somebody comes along and sues the applicant. Because it's a risk assessment thing. There are too many unknowns.

Glen Lauder: Royden, can I just come back to you.

Q: How great would be the exposure of the council to action, but the question was more fundamental, it was

Q: If the council did not take action under the RMA it would not be involved in a conversation.

Royden: Yes, Sorry, that's right too. If the council did not do anything, that is a political question. That is not a legal question. If the council did not do anything central government to deal with this only, then it will be ballot-boxed. Not illegal.

Q: ...in most cases would fall with the council and not anyone else. Would that be fair to say?

Royden Somerville: When this is mentioned it is usually twenty years later and there is nobody around. It is then usually the local people who have to have it cleaned up.

There is no one to enforce and enforcement order against. It would be up to the councils.

Libby Harrison: I just want to say something about liability. It is not to do with my job working for ERMA or the HSNO Act, it just something I want to inform the people here about. I am not saying it is right or it is wrong, it is just a piece of information. A lot of research has gone into whether liability is any use for managing GMOs and the Royal Commission on GM looked into it and the Law Commission has looked into it and the Ministry of Justice has done some work on it, and there was a public consultation on it at the time the HSNO Act was amended when the moratorium was coming to an end, and the Select Committee of Parliament looked into it, and they decided that they wanted to change the HSNO

Act to strengthen the civil liabilities within the Act. So that is what Simon has been talking about. If you break the law, then you are going to get a really big smack and it is \$10M or more for that for corporations. A lot of research has gone into liability so I thought it was important to mention that. I am no expert on liability. The other piece of information is that very recently Australia has looked into whether they should introduce extended liability as part as their gene technology regulations and the Australian government has also decided not to make any changes to their legislation for liability. So it is just some information to put into the mixture.

Simon? I support that, and the liability in the Act deals with breaches of conditions and things like that. The precautionary approach to risk management is to a large extent looking at the unknowns well out to the next generation whenever something might go wrong and both the RMA and the HSNO Act both deal with generational equity. And there is not a reasoning process because how can you say one generation should be paid over another. There is no philosophy or process for that. So it is a value judgement and at the end of the day the questions whether local values are as important as national values. But on liability the common law usually eventually catches up, because if you do not legislate eventually the courts will catch up and work out negligence whatever and it is usually a long, expensive process and the costs usually fall on individuals.

Libby is actually right, that Australia has gone that route, but the only odd ones out in terms of the countries who have reviewed this in detail... Austria, Switzerland, Germany, Norway, Denmark have all said we do not think it is fair that gene contamination in particular should have innocent parties paying, and they have gone the other way to New Zealand.

Russell Harding: I believe the initial question that was asked was

Q: What was the liability of a council be if it imposed conditions in a resource consent. Those conditions were complied with but harm still occurred. Roydon answered that question well?

Russell Harding: Crown Law in giving its opinion looked at two instances. One of them was what would happen if a consent were given and conditions were applied and those conditions were not complied with. And I think Crown Law was clear on that case, and liability would fall on the operator who did not comply. The other issue that Crown Law pointed though, and Roydon please correct me if I get this wrong, was that if a council adopted a rule into its district plan, the extent of its liability would be to the extent of the rule and that it was not enforced. So that if some harm occurred which would not have occurred has a rule been implemented or enforced, then there is some liability.

Firstly, if you have a policy in a district plan it is purely a policy. So a risk management policy could be proportionately a policy or risk management objective, its not a rule, and to be fair to Crown Law they did not get into these kind of distinctions - so if you have a policy you are left not to pursue it so there is no real comeback. If you have a rule and you don't apply the rule, somebody comes along with the application and you say you are going to ignore the rule, of course there is a liability, you have breached your statutory duties. And that would apply with any rule.

Roydon Somerville: The Crown Law also protectsany chance of prosecution.

Russell Harding: Yes, this is not a prosecution or any matter, it's more when dollars change hands.

Glen Lauder: I would like some response from the panel. In preparation for the meeting I read a series of Crown Law opinions on the MfE website, which I would like to draw councillors attention to. After reading them I sensed a real conservatism in the Crown Law regarding the use of the RMA. I am neither way on this subject, but if you would like to take the opportunity to respond to that because council and others might like to read those and it would be helpful if we had a response.

Royden Somerville: There was absolutely no disagreement between my opinions and Crown Law. None whatsoever. We both came to the conclusion that you have one code of procedure, the HSNO one, you have another code of procedure both could be utilised. The issue is whether that is sufficient and whether the objectives of the legislation is so close, why would you have two systems. And that issue ... dealing with risk and perceived risk, the community does want an input into the regulatory side. I am not saying whether that is right or wrong, that is a community thing. There is an advantage to that happening because ERMA can also discern the community view to some extent. So the Crown Law opinions and my opinions are a legal analysis of statutes, the court cases, and we both came to the view that if a community wants to use the RMA it can do so. However, it must satisfy the obligations to show that the regulatory system put in place for the land use is appropriate and promotes the purpose of the RMA and there is also a provision that says there is uncertainty of the risks of not doing anything, that they take this into account. That is the Section 32 analysis I keep working on. I really do think those opinions go to the first point, whether those two Acts could work together, technically they can. If it is going to happen and they are going to work together, in fact, it needs some horsepower into how that is done so it doesn't become a legal debacle - it becomes a way of serving the environment.

Q: Do you have any suggestions about how that horsepower might be brought to bear?

Royden Somerville: This is a very good start and it is absolutely essential that there is a very robust consultative programme with your LTCCP.

Q: ... no reason why councils collectively in Northland can't use the RMA as further protection for us. The question is then, why don't we do that. It goes back to the earlier question, is that national umbrella sufficient. I suspect for me, and for a large number of people present, is that national umbrella felt sufficient when we had a moratorium. With the lack of a moratorium it no longer felt sufficient and what is in place currently doesn't do enough to protect me. Our councils, and councils in this area are prepared to stand up, fill that gap and use ... to give us surety that we haven't had since the moratorium.

...

Eryn Shields: I support what was said, by saying I would really like the notes from this meeting to go to the Far North District Council, because there are two things they seem most concerned about - one was liability and two was this conflict with central government. And that really puts it in a nutshell. The two can work together and I would really like to see those notes go to Far North District Council.

...

Q: To Royden: If the ERMA framework was perfect, which implies the possibility that the applications to be given approval, would you be happy with that situation?

Royden Somerville: A thought for Councillors, if this came through the District plan change, you need to consider what activity status to give that plan change - whether it be controlled, limited, discretionary, non complying or prohibited.

Q: Question to the audience, what activity status do you want?

Glen Lauder: Can I just turn that round, do you mind. ... Would you reverse that question and put it to the applicants, as to whether they have the crystal ball, and perhaps put the question to them to even up the score because it is a bit unfair, and the crystal ball is so cloudy.

Eryn Shields: Of course, and I have a comment on that in a moment.

So will you as councillors, and something I would say to my elected members back at Waitakere, is that if my council resolved in its wisdom to accord discretionary activity status to land uses that have been given approval by ERMA, and the imperfect framework that appears to exist. Now if we went through a plan change and our council said well its discretionary, or non complying, I would imagine that similar commentators from Waitakere City who would have made submissions would probably take us to the Environment Court seeking prohibited activity status. And we would also potentially get appeals from the 'ghostly' corporates, the unknown bad buys in the piece saying withdraw this plan change. So what I will say to my councillors is that if we go with something like discretionary, then it is political and we are meat in the middle. I think the thing is from our point of view, the issue that our councillors will need to face is whether they start with prohibited or whether they start with another lesser discretionary status. I am sorry that none of my councillors are here to speak - I am not the official voice of Waitakere City.

We are going a long way further than we wanted at this particular stage. It may be that the council work out that they go as far as committing to a Section 32, and a Section 32 might throw up but a prohibited is just not on. Because it is a Section 32 that would have to survive any challenges to the Environment Court and one of the reasons for it not being on maybe is because ERMA has covered that base and we want to be dealing with other things. I am not trying to pre-empt it, I am trying to get to the end point before you do the actual analysis. I am not trying to give Simon a lot more work, but that is the ...

Someone: Our councillors will probably want to hear from the pro GE lobby so my council can make that decision when they are fully informed.

Someone: We have certainly come across a sticky wicket when we have made an appeal to the Environment Court on the district plan. Talk to the Federated Farmers. They seem to be a force in the background it seems.

Someone: ... A liability clause would make a lot of difference because otherwise the applications would end right here.

Glen Lauder: Coming back to the RMA because we have had quite a good opportunity today to hear what ERMA and HSNO are about, and Royden and Simon have done some very thorough work around the RMA.

Someone: ...

Q: Would the applicant have any case in law to say that he has followed due processes... On a national approach, why then is local government regulated?

Royden Somerville: Crown Law and myself are totally adamant, totally in accord on this, that we have two statutory rights, and you are entitled to exercise them, you cannot be penalised for this, or you can't say that it is not fair. The same with the, dare I say it again, you still have to get your mining permit even though it is a land use and it has similar conditions. You still have to get it even though you get a resource consent. Or vice versa.

There is a really good point here, which one do you apply for first? Probably do them both at the same time.

Peter King: That very process, we have heard that Councillors are in the box seat. We regulate through the RMA, and we might put in that we feel stronger, in the plan, and we have heard from Libby that under Section 53 of the HSNO Act that we can make submissions on behalf of our community through there process, therefore we are in the box seat. We can say to the applicant, even if you get your application approved by ERMA we are going to stop you at the next hurdle. Now how kosher is that?

Royden Somerville: That's fair enough. That happens for instance, say you want to put in a marine farm, you usually get your resource consent sorted before you go for your fisheries permit. Because the specialist body wants to make sure that the general community or environmental issues at a local level are okay.

Someone: that is not a good example because the RMA process has quite changed now.

Royden Somerville: Yes, but the RMA is the resource management process ... Alongside the RMA is also the Fisheries Act. That is the position because I was involved right from the start.

...

: There they have gone further. They have got regional councils involved in major issues where before it was just that came under the fisheries permit. So that's the movement that has been spoken about. It may be a bad analogy, in fact it goes further than what we are suggesting here. I do think that the whole issue of the fact you might have to get two permits, which was your point, is something that happens often. It happens in your jurisdiction with buildings.

Q: RMA and the way they impact on the district plan. It seems to me that the likely point of problems in changes to the district plan is in the category you use to apply, whether it is discretionary, or whatever, because the Section 32 actually comes in very strongly to the point in which you make your review to the district plan. It is there that anybody that has any intention to apply for a GMO permit is going to make their objections heard. They would want to prohibit the restrictions being so difficult that it is not worth their while proceeding with it. So it is at that point that councils are going to be ...

Royden Somerville: That's right. The first time there is public input will be at that time. You would need to have a consultation and everything in a state where the communities had that debate because that will probably go to the Environment Court because they usually do.

Q Glen Lauder: This is without the intention of swaying the debate. When I read the Crown Law debate that Royden and Simon mentioned, they describe council as being a creature of statute, is there any way in which the way ahead that you are mapping, stretching the RMA beyond what you sense is its intent. Is this an innovative use of the RMA that makes use of a positive difference, or does it stretch the RMA. Do you see it as solidly in the intent of the RMA?

Simon Terry: That is very easy to answer because the HSNO legislation that governs the GMOs was broken off from the RMA at the time it was being originally devised, and specifically in 1992 the MfE recommended that although HSNO would set conditions, it said specifically that local authorities should have the power to set stricter controls under other Acts. In the HSNO Act at the moment is a section that says for hazardous substances a council can as of right restrict the limits on hazardous substances within this region. The same implicitly implies, as Royden has described, to any organisms. That was the idea. The RMA was very much developed on the basis that local communities would have responsibilities and would have input. This is entirely consistent with the thrust. The current government has got less comfortable with that, and I put it to you that there is a real tension for government to be a major investor in biotechnology opportunities and be the regulator in this regard. Communities have to assess how that balance of risk is being handled and what their balance of risk is. The cover of this report that I had the graphic for, is two strands of DNA with government running on one and communities running on the other. These are natural partners. They will always be working together. Government is talking about having local communities actually do more of the enforcement work, to actually check on how things are going. Central government will always be the repository of scientific expertise because it makes no sense for councils to hold that expertise. But for the moment local government does not have powers vested in it to protect itself financially, for example, and to give citizens the kind of input that they have told select committees that they want. There is a spectrum of opportunities before you, ranging from very little intervention, to okay you can come in the door, but you have to pay these extra fees ... right through to prohibition. That can be chosen. That is the debate.

Glen Lauder: Royden, do you want to comment?

Q: Whether or not the approach that we were discussing in utilising the RMA as a complement to HSNO ...

Royden Somerville: The RMA provides for land use controls for effects from land use activities, the RMA looks at potential effects, future effects, similar definition to ERMA. The RMA is an Act which provides its own code of procedure. I don't think there is any question that it is a land use activity Act. It would be the same as if somebody was seeking permission to build a building for a tannery or something on a piece of land. The community may want an input and look at the control. I don't think there is a problem with that. Where there is an issue, though, is on your cost benefit efficiency thing, whether you put in a rule to deal with GMOs and land use activities, whether that restriction is

furthering sustainable management in an efficient way or whether you are better to leave it to the ERMA controls. It is a simple question but if the community says to the local body politicians, we want this community to have a policy on this in our district plan on land use, then there is the ability to examine that, but you do have to have a robust Section 32 analysis because when it is challenged, as inevitably it will be, the Environment Court will look at that test, that cost benefit analysis, just in the way that ERMA does its risk benefit analysis on the GMO stuff. It is whether the rule is necessary, not what the activity is or not.

Glen Lauder: I am going to ask councillors to take this opportunity to ask any questions. You may have had all your questions answered but it is another opportunity.

Cr Alspach: I hear what you say about HSNO and RMA walking hand in hand, step by step, which means basically central government and local government should actually join hands. It may be that is the way it has to be explored. But practically after twenty year of experience with central government and how they actually deal with local government, why should we trust them. Every time Central Government comes up with a problem they bring it back to Local Government. And I can go further. Just off the top of my head, DDT, Dog Control Act, they do not listen to us. Now that is probably not an excuse to not try one more time but please understand why certain councils feel like this.

Cr Tiller: The argument today has been why should we. I want to hear why shouldn't we?

Glen Lauder: That is the question that I hoped I posed right at the beginning, and that is the meeting today is to decide whether or not this land use activity is one you do not want in your plan...

Q: ... does not stop us from saying we have a series of problems that have to be addressed. We want one more time to sort this out to our satisfaction ... without expressing some very strong views. So if I was personally trying to look at it as a cost benefit in Section 32 the fact is that Simon is no longer impartial and you are going to have to employ another expert to get the other

Cr Loeffering: My interpretation of his assessment is quite different so I want to voice it: what Mark is saying is a third way, is to go back and lobby the government to change HSNO. Am I correct? I interpret what we have heard today, because I asked for a commitment here and I have been given one that the Ministry, and through this gentlemen here who is going to give me his business card, is prepared to work with us in parallel as we explore our responsibilities under RMA, they will help us, they have acknowledged there are gaps and they are prepared to work with us as we move forward with both actions taking place in parallel. It is not just lobbying government to change the HSNO Act. It is addressing the RMA issues alongside those people who can talk to us regarding the HSNO side of things. So that is my interpretation of what we have said today.

Cr Alspach: if you say you are just going to lobby government, you are saying you are going to do nothing.

Simon Terry: A quick comment to Mark [Farnsworth] whether my position is partial or impartial, we were engaged to do some serious analysis, to go away and come back with information. It was on the basis of that information that we presented a whole spectrum of options. That's analysis. We are paid to actually come up with answers. And that is the position we have been putting forward here. John Kyle, the joint author to this study, had not been involved in this issue before, has been involved in

every word. ... I think you can take it that it is the kind of analysis you will get when that question is cracked.

I suspect going back to Central Government for a purely lobbying role where you expect to change the Act, I would invite people to scrutinise the record quite carefully first attempts that have been made in that regard and answers that have been received, to see to what extent those extra effort will be approved.

Someone: Mark, it seems from your remarks that your views have not changed at all since you came in here. What I want is for councils to act on this, not stand woolly about lobbying about it, but to get on and do something. I just want to make that clear.

Glen Lauder: Well, I want to make sure that none of the councillors who might have a burning question that has not been answered.

Thank you. I would like to acknowledge the members of the public as well as the audience for the extraordinary listening opportunity today. It is a pretty hot topic, you have listened really carefully. It has been fascinating to me facilitating to have that level of courtesies - so thank you.

Peter King, Mayor: Ladies and gentlemen. Thank you for your patience, for a lot of intelligent questions and on your behalf I would like to thank the four people, and for Glen for chairing the meeting. It has been a productive and informative day. It has given us as councillors a lot to think about and I am sure that it has perhaps given us some direction on our next step, so in that regard, thank you very much to everybody, in particular those who came to talk to us today.

Thank you very much

End