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Attention: Ben Lee

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LEGAL LIABILITY FOR CLEANUP OF ILLEGAL USE OR INTRODUCTION OF GMOS

Introduction and summary

1. Northland Regional Council (**Council**) is deliberating on submissions on the Proposed Regional Plan for Northland (**Proposed Regional Plan**). One of the key issues is whether or not the Proposed Regional Plan should include objectives, policies and rules that regulate the use or release of genetically modified organisms (**GMOs**) in the coastal marine area.
2. To assist with the Council's deliberations, you have asked us to provide a legal opinion on the following question:

Would the inclusion of provisions in the Regional Plan to regulate GMOs increase Council's legal liability to clean-up or otherwise address the illegal use or introduction of a GMO in the coastal marine area.
3. In summary:
 - a. Including provisions in the Proposed Regional Plan to regulate GMOs will require the Council to observe and enforce the observance of those provisions. Given the Council's discretion regarding enforcement matters and the difficulty establishing a claim against the Council, it is unlikely that the Council would be held liable if it failed to enforce the GMO provisions.
 - b. There is potential liability for misfeasance in public office if the Council was not enforcing observance of the GMO provisions. However, establishing misfeasance in public office has a very high threshold and we consider this is highly unlikely to occur, provided that the Council's enforcement and conflict of interest procedures are followed.
 - c. The RMA does not impose an obligation on the Council to clean-up or otherwise remediate an adverse effect caused by another person's illegal actions. Liability rests with the person who illegally used or introduced the GMO.
 - d. In our opinion, including provisions in the Proposed Regional Plan to regulate GMOs will not increase the Council's legal liability to clean-up or otherwise address the illegal use or introduction of GMOs in the coastal marine area.

Background

4. The question of liability associated with the use or release of GMOs is a complex issue that has been under examination since the early 2000s. In 2001, the Royal Commission on Genetic Modification considered the issue in detail, but suggested that the Law Commission undertake a more intensive study.¹
5. In 2002, the Law Commission released its report on liability for loss associated with GMOs.² The Law Commission identified the particular difficulties with liability for loss from GMOs, including the potentially catastrophic levels of harm, the potential for irreversible damage, that negative effects will likely manifest in the long term and difficulties establishing causation and proving the extent of damage.³
6. The Law Commission report identified that New Zealand's existing legal liability framework provides a range of avenues for managing liability (this includes the ability for private individuals or companies to sue others for negligence or nuisance, or for public organisations to undertake enforcement under the Hazardous Substances and New Organisms Act 1996, Biosecurity Act 1993 or Resource Management Act 1991 (RMA)). However, the report recommended that alternatives be investigated, including creating a new strict liability tort or new public law duties, requiring insurance or a bond and creating a compensation fund.⁴ None of these alternatives have been implemented.
7. In 2004, Crown Law prepared a legal opinion for the Ministry for the Environment on the potential legal liability for local authorities, if they include provisions in plans regulating GMOs.⁵ Although it was prepared in the context of the Far North District Council's proposed district plan (rather than a regional coastal plan), the conclusions are relevant:
 - a. There is no obligation on councils to include rules in plans. Therefore if a council does not include rules to control GMOs, it would not be liable for any environmental damage arising from a GMO.
 - b. A council has an obligation to enforce the rules in its plans. If a GMO operator complies with those rules, but causes adverse effects that are not controlled by the rules, the council cannot be held liable for any resulting damage.
 - c. Parliament did not intend a council to be liable for any damage that occurs outside of compliance with its rules – to do so would lead to unlimited liability for the council.

Advice

8. Having regard to the question in paragraph 2 and the background above, we consider that there are two key questions relevant to answering the question asked by the Council:

¹ Royal Commission on Genetic Modification *Report of the Royal Commission on Genetic Modification* (Wellington, 2001), at [84].

² Law Commission *Liability for Loss Resulting from the Development, Supply, or Use of Genetically Modified Organisms* (Wellington, 2002).

³ Law Commission *Liability for Loss Resulting from the Development, Supply, or Use of Genetically Modified Organisms* (Wellington, 2002), at [144].

⁴ Law Commission *Liability for Loss Resulting from the Development, Supply, or Use of Genetically Modified Organisms* (Wellington, 2002), section 10: Conclusions.

⁵ Crown Law *Advice on potential for council liability arising from rules controlling GMOs* (2004).

- a. What are the Council's obligations associated with provisions regulating GMOs and do those obligations change the Council's liability?
 - b. If environmental harm is caused in breach of the provisions regulating GMOs, what is the Council's liability for clean-up?
9. We address these in turn below.

Council's obligations associated with provisions in the Proposed Regional Plan

10. On this first issue, we generally agree with the conclusions in the Crown Law opinion noted above. However, we provide further analysis regarding the Council's obligations and potential liability below.
11. If the Council includes provisions in the Proposed Regional Plan that regulate GMOs in the coastal marine area, it must comply with various obligations under the RMA.⁶ In the context of this advice, the critical obligation is that the Council must observe the Proposed Regional Plan and, to the extent of its authority, enforce the observance of the Proposed Regional Plan.⁷
12. This obligation empowers the Council to use the RMA's enforcement tools to compel compliance, including issuing abatement notices, seeking enforcement orders or initiating prosecutions. Non-statutory methods are also available, such as negotiation, persuasion or seeking other legal relief (such as an injunction or declaration from the High Court).
13. On its face, the obligation to enforce observance with the Proposed Regional Plan could be read as creating potential liability for the Council, should it fail to enforce the Proposed Regional Plan and a person suffers loss (for example, a claim of breach of statutory duty or negligence). However, like Crown Law, we consider that it is unlikely that any legal liability will arise:
 - a. Case law confirms that local authorities have a broad discretion to determine how they enforce the observance of their plans and that the courts are unlikely to interfere, other than in exceptional circumstances.⁸ This means it is unlikely that the courts would be willing to examine the decision-making process of a council when it determines how it will enforce observance of its plan.
 - b. Case law also confirms that an action for breach of statutory duty is generally not available in the context of the RMA.⁹ There are other ways to ensure that local authorities implement their enforcement powers, including seeking an enforcement order from the Environment Court that a council take action or seeking judicial review and an order of mandamus (though such methods are subject to (a) above).
 - c. It is highly unlikely that a claim for negligence would succeed other than in exceptional circumstances. To bring a successful negligence claim, an affected person would need to demonstrate (among other things) that a council owed him or her a duty of care when undertaking its enforcement

⁶ For example, the obligation under section 35 of the RMA to gather information, monitor and report on the efficiency and effectiveness of those provisions.

⁷ Resource Management Act 1991, section 84.

⁸ *Inta v Avery Brothers Ltd* [2018] NZEnvC 36, citing *Manukau Shopping Centre Merchants Association v Manukau City Council* HC Auckland CP2721/88, 1 December 1988.

⁹ *Daisley v Whangarei District Council* [2018] NZHC 2211; *Mawhinney v Auckland Council* [2013] NZHC 159.

functions. This requires a sufficiently close relationship, which has been described as:¹⁰

...a relationship of such a nature that the defendant may be said to be under an obligation to be mindful of a plaintiff's legitimate interest in conducting his or her affairs.

We consider that it would be very difficult to demonstrate such a relationship in relation to a council's enforcement obligations. We are not aware of any cases where a council has been found to owe a duty of care in relation to a Council exercising enforcement functions. Whether a duty of care exists also requires assessment of public policy considerations and (as noted in the Crown Law opinion) public policy grounds weigh against there being a duty in respect of enforcement obligations.

14. In our opinion, liability for failing to enforce observance of the Proposed Regional Plan is only likely to arise in a case of misfeasance in public office. This requires either a deliberate and dishonest abuse of a decision-making power with the intention of harming someone, or intentionally acting outside statutory powers knowing that it would cause harm. For example, in the context of the GMO provisions, this would require a Council officer to knowingly not take enforcement action against an illegal GMO release, with the intent that it harms another person (for example, a competing aquaculture operator). The extreme nature of this example demonstrates the unlikelihood of such liability arising. In any event, we consider this risk can be mitigated by ensuring that the Council's usual enforcement and conflict of interest procedures are followed.

Liability for clean-up

15. As noted above, by including provisions regulating GMOs in the Proposed Regional Plan, the Council will be subject to obligations regarding monitoring and enforcement of those provisions. The Council is also given access to powers to enforce those provisions, including the power to issue abatement notices, seek enforcement orders or initiate prosecution. The power to seek enforcement orders from the Environment Court provide a useful tool for obtaining orders that the person who breached the provisions:
- a. take any action that is necessary to ensure compliance with the plan or to avoid, remedy or mitigate any actual or likely adverse effect on the environment;¹¹
 - b. remedy or mitigate any adverse effect on the environment caused by that person;¹² or
 - c. pay money or reimburse any other person for the costs and expense incurred in avoiding, remedying or mitigating any adverse effect.¹³
16. However, given the nature of potential effects from the release of GMOs (which may not be discovered for many years) there is real risk that the person who illegally used or released GMOs cannot be pursued (for example, in the case of a company it may have been wound up or liquidated). The RMA provides that an order can be sought requiring the owner or occupier of land to do something that is necessary to avoid,

¹⁰ *Monticello Holdings Ltd v Selwyn District Council* [2015] NZHC 1674, at [49].

¹¹ Resource Management Act 1991, s 314(1)(b).

¹² Resource Management Act 1991, s 314(1)(c).

¹³ Resource Management Act 1991, s 314(1)(d).

remedy or mitigate an adverse effect, even if he or she did not cause it.¹⁴ However, in our experience that provision is not frequently used, would be of limited use in the coastal marine area (which is generally not owned by anyone and only occupied to a limited extent) and may be ineffective in the context of a wide-spread effect from a GMO.

17. Importantly, the RMA does not impose an obligation on local authorities to remediate adverse effects caused by another person's illegal actions. At law, if the person who caused the harm cannot be pursued, the harm is "socialised" and is borne by the public.¹⁵
18. In our opinion, the Council including provisions in the Proposed Regional Plan regulating GMOs does not increase the Council's legal liability to clean-up adverse effects caused by the illegal use of GMOs in the coastal marine area.
19. For completeness, we consider that if provisions are included in the Proposed Regional Plan regulating GMOs and adverse effects arise from the illegal use of GMOs, the general public is likely to expect that the Council will play a significant role in any remediation effort in so far as it relates to the coastal marine area. While this will not amount to legal liability, this has the potential to result in reputational harm to the Council.

Conclusion

20. In our opinion, including provisions in the Proposed Regional Plan to regulate GMOs will not increase the Council's legal liability to clean-up or otherwise address the illegal use or introduction of GMOs in the coastal marine area. In particular:
 - a. While including provisions regulating GMOs will impose an obligation to enforce observance of those provisions, we do not consider that obligation will result in increased legal liability for the Council, provided that it continues to follow its usual enforcement and conflict of interest procedures.
 - b. The RMA does not impose an obligation on the Council to remediate adverse effects caused by another persons' illegal actions. Including provisions regulating GMOs will not increase the Council's legal liability to clean-up illegal use or introduction of GMOs in the coastal marine area.
21. Please contact us if you require further information or would like to discuss this.

Yours faithfully
Wynn Williams



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¹⁴ *Auckland Council v Lau* [2016] NZEnvC 103.

¹⁵ This risk was acknowledged by the Law Commission in *Liability for Loss Resulting from the Development, Supply, or Use of Genetically Modified Organisms*, at [70].