Court Wary about Reference to Genetically Modified Organisms in Regional Policy Statement

Genetically modified organisms are controlled under the Hazardous Substances and New Organisms Act 1996 (HSNO). However, a number of councils are currently considering inclusion of provisions within policy statements and plans under the Resource Management Act to regulate activities involving genetically modified organisms (GMOs).

The Environment Court has considered this issue for the first time in *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council*. That case concerned the Proposed Bay of Plenty Regional Policy Statement (RPS) and the inclusion of a statement referring to a 'precautionary approach' to be taken to genetically modified organisms in the region. The statement was contained in a statement of background issues and was not part of the objectives, policies, rules or methods.

NZ Forest Research Institute argued that mechanisms in HSNO are, and are intended to be, a self-contained and exclusive method of managing the benefits and risks of GMOs. It considered it inevitable that if the disputed provision remained in the RPS, territorial authorities would believe that they were required to provide for the management of GMOs in district plans in order to meet the requirement to give effect to the RPS. That outcome would duplicate the HSNO processes and enable those who were opposed to GMOs to pursue resource-consuming litigation before councils and Courts which it considered to be ill equipped to deal with the scientific issues involved.

The Environment Court noted that although the RMA identified the management of hazardous substances as a Council function and incorporated the HSNO definition of hazardous substances, the RMA contained no reference to GMOs. Similarly, the HSNO Act identified that compliance with the RMA and HSNO was required in respect of hazardous substances, but there was no such statement for GMOs. The Court stated that the complete absence of GMOs in the RMA might be thought to be deliberate and lead to the conclusion that the RMA had no place in GMO management. However, as this was not argued, and as the parties generally agreed that the RMA might have jurisdiction over GMOs, the appeal was decided on that basis.

The Court concluded that there might be a statement in the RPS about a precautionary approach to GMO management which was not seen as directive but flagged GMOs as an issue which might require consideration in a future plan change or RPS revision.

Importantly, because the statement did not form part of the objective, policy and rule/method framework of the RPS it was not subject to the section 32 RMA requirement to assess whether the provisions are the most appropriate in achieving sustainable management.

The issue of whether councils do in fact have the powers to control GMOs in plans under the RMA, and if so whether such rules are likely to be justified in terms of section 32 RMA, is to be tested in:

- The Proposed Northland Regional Policy Statement - which includes a policy requiring a precautionary approach and directs that regional and district councils should apply the policy in respect of plans and resource consents, but should not attempt to address the liability regime for potential harm from GMOs. Those provisions have been appealed to the Environment Court by Federated Farmers.

- The Proposed Hastings District Plan - which sets discretionary activity status for field trials and prohibits release of GMOs. Submissions have closed and notification for further submissions is expected in April 2014.

- The Auckland Council Unitary Plan – which proposed objectives, policies and rules for GMOs. Submissions close on 28 February 2014. The Council has used the same section 32 analysis used for the Northland Regional Policy Statement.

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