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MEMORANDUM

TO: Organic Sector Forum

FROM: Chen Palmer New Zealand Public and Employment Law Specialists

DATE: 26 May 2014

SUBJECT: **GE crops in New Zealand: Legal issues**

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1 You have asked us to provide advice on the following two issues:

(a) Liability of farmers growing GE crops that contaminate other farms; and

(b) Ability of local authorities to regulate the use of GE crops through district rules in district plans.

2 Initially, these issues were to be discussed in a speech presented by Mai Chen at the Organic Sector Forum 2014 to be held in Taupo on June 16 2014. As the Forum has been cancelled, this memorandum provides a high-level summary of our advice on the above issues that would have formed the basis of our presentation.

PART A: LIABILITY FOR FARMERS GROWING GE CROPS THAT CONTAMINATE OTHER FARMS

STATUTORY LIABILITY

Hazardous Substances and New Organisms Act 1996 (HSNO Act)

Compliance orders – sections 104 to 108

3 The primary legislation controlling the trialling and release of GE crops in New Zealand is the Hazardous Substances and New Organisms Act 1996. This Act seeks "to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms."[1]

4 Section 104 of the HSNO Act provides that an enforcement officer may serve a person using GE crops with a compliance order. Section 104 provides as follows:

> **104 Scope of compliance order**
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> (1) A compliance order may be served on any person by an enforcement officer—
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> (a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer,—
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> (i) contravenes or is likely to contravene this Act, any regulations, or a control imposed by an approval under this Act; or
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> (ii) relates to any hazardous substance or new organism and is or is likely to be dangerous, to such an extent that it has or is likely to

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[1] Section 4, HSNO Act.

have an adverse effect on the health and safety of people or the environment; or

(b) requiring that person to do something that, in the opinion of the enforcement officer, is necessary to ensure that person complies with this Act, any regulations, controls imposed by an approval granted under this Act, or is necessary to avoid, remedy, or mitigate any actual or likely adverse effects on people or the environment resulting from any breach of any regulations or any controls imposed by an approval granted under this Act—

(i) caused by or on behalf of the person; or

(ii) relating to any land of which the person is the owner or occupier.

(2) A compliance order may be made subject to such conditions as are reasonable in the circumstances.

5 “New organism” includes a genetically modified organism.[2]

6 A person who receives a compliance order is required to comply with the order within the specified timeframe, and unless the order directs otherwise, pay all costs and expenses of complying with the order.[3]

7 Failure to comply with a compliance order issued under section 107 of the HSNO Act is a strict liability (subject to certain defences)[4] offence[5] for which a person is liable on conviction to a fine not exceeding $50,000. Where the offence is a continuing one, [6] the person is also liable to a further fine not exceeding $5,000 for every day or part of a day during which the offence has continued.[7]

Offences – sections 109 to 124

8 There are a number of other offences set out in section 109 of the HSNO Act. Other offences that might arise in respect of a farmer using GE crops that contaminate other land are as follows:

(a) Developing or field testing a new organism in contravention of the HSNO Act-[8] strict liability subject to certain defences; [9]

(b) Knowingly importing or releasing a new organism in contravention of the HSNO Act;[10]

(c) Knowingly, recklessly, or negligently manufacturing, importing, developing, using or disposing of any new organism where an approval is suspended under the HSNO Act; [11]

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2 Section 2A, HSNO Act.

3 Section 105, HSNO Act.

4 Section 117, HSNO Act.

5 Section 109(1)(f) , HSNO Act.

6 Continuing offence is defined in section 114(7) as the continued existence of anything, or the intermittent repetition of any actions, contrary to any provision of the HSNO Act.

7 Section 114(2) , HSNO Act.

8 Section 109(1)(b) , HSNO Act.

9 Section 117, HSNO Act.

10 Section 109(1)(c) , HSNO Act.

(d) Knowingly, recklessly, or negligently possesses or disposes of any new organism imported, manufactured, developed or released in contravention of the HSNO Act;[12]

(e) Failure to comply with any controls imposed by any approval granted under this Act or specified in any regulations, or any requirement to obtain a test certificate specified in any regulations[13] - strict liability subject to certain defences.[14]

9 Where an offence is committed by an employee of another person, that offence shall be treated as committed by that other person as well, whether or not it was done with that other person's knowledge or approval.[15] However, it will be a defence for that person to prove:

(a) That:

(i) they did not know, nor could reasonably be expected to have known, that the offence was to be or was bring committed; or

(ii) they took such steps as were reasonably practicable to prevent the commission of the offence; and

(b) That they took such steps as were reasonable in all the circumstance to remedy any effects of the act or omission giving rise to the offence.[16]

10 A person who commits one of the above-listed offences is liable on conviction to imprisonment for a term not exceeding 3 months, or a fine not exceeding $500,000. Where the offence is a continuing one, the person is also liable to a further fine not exceeding $50,000 for every day or part of a day during which the offence has continued.[17]

11 Where a person is convicted of an offence under the Act, the Court may instead of, or in addition to, imposing any fine or term of imprisonment, order:

(a) the person to mitigate or remedy (or pay the costs of doing so) any adverse effects on people or the environment caused by or on behalf of the person, or relating to any land of which the person is the owner or occupier;[18] and/or[19]

(b) the destruction of any new organism.[20]

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11 Section 109(1)(d)(i) , HSNO Act.

12 Section 109(1)(d)(ii) , HSNO Act.

13 Section 109(1)(e) , HSNO Act.

14 Section 117, HSNO Act.

15 Sections 115(1) and 124I, HSNO Act.

16 Section 115(3).

17 Section 114(1) , HSNO Act.

18 Section 114(5), HSNO Act.

19 Section 114(6A), HSNO Act provides that the Court may make an order under either or both of sections 114(5) and 114(6) against the same person in respect of the same offence.

20 Section 114(6), HSNO Act.

Pecuniary Penalties – sections 124B to 124F

12 The Ministry for Primary Industries (as the enforcement agency) may apply to the Court for a pecuniary penalty order against an organisation or individual for breaching the HSNO Act.[21]

13 The Court may make a pecuniary penalty order if it is satisfied (on the balance of probabilities)[22] that the person:

(a) developed, field tested, imported, or released a new organism in breach of the HSNO Act;

(b) possessed or disposed of any new organism imported, developed or released in breach of the HSNO Act; or

(c) failed to comply with any controls relating to a new organism imposed by any approval granted under the HSNO Act or specified in regulations made under the HSNO Act;[23] and

(d) that the person knew, or should reasonably have known, of the breach.[24]

14 The maximum pecuniary penalty that can be imposed on an individual by the Court is $500,000. In the case of a business, a company or other organisation, the maximum is the greater of either:

(a) $10 million; or

(b) three times the value of any commercial gain that results from the breach; or

(c) 10% of the turnover of the company involved (including any subsidiaries).[25]

15 Instead of, or in addition to, imposing a pecuniary penalty, the Court can also decide to make an order:

(a) requiring the person to mitigate or remedy (or to pay the costs of doing so) any adverse effects on people or the environment caused by or on behalf of the person or relating to any land that the person own or occupies[26]; and/or[27]

(b) requiring the destruction of the new organism involved in the breach[28].

Civil Liability – sections 124G and 124F

16 Section 124G of the HSNO Act provides that a person is liable (whether or not they intended the act, omission or breach, and whether or not they were taking reasonable care when the act, omission or breach occurred) for any loss or damage caused by any act or omission of the person while:

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[21] Section 124B(1), HSNO Act.

[22] Section 124E, HSNO Act.

[23] Section 124B(2), HSNO Act.

[24] Section 124B(3), HSNO Act.

[25] Section 124C(1) , HSNO Act.

[26] Section 124D(1) , HSNO Act.

[27] Section 124D(3), HSNO Act provides that the Court may make an order under either or both of sections 124D(1) and 124D(2) against the same person in respect of the same offence.

[28] Section 124D(2) , HSNO Act.

(a) Developing, field testing, importing or releasing a new organism in breach of the HSNO Act;

(b) Possessing or disposing of any new organism imported, developed, or released in breach of the HSNO Act; or

(c) Failing to comply with any controls relating to a new organism imposed by any approval granted under the HSNO Act or specified in any regulations made under the HSNO Act.

17 Defences available to a person facing a civil liability claim under section 124G of the HSNO Act are:

(a) the breach was necessary to save or protect life or health, prevent serious damage to property, or avoid potential or actual adverse effect on the environment and the conduct of the defendant was reasonable in the circumstances and the defendant took all reasonable steps to mitigate or the effects of the breach after it occurred; or

(b) the breach was outside the defendant's control (such as a natural disaster, mechanical failure or sabotage) and the event could not reasonably have been foreseen or provided against by the defendant, the defendant took all reasonable steps to mitigate or remedy the effects of the breach after the event occurred; or

(c) the defendant did not know, and could not reasonably have known, of the breach.

18 The amount of damages awarded is at the discretion of the Court. However, damages are usually intended to place the person harmed in the same position as if the wrong had not been suffered.

19 In bringing a claim under section 124G of the HSNO Act, a person who has suffered loss or damage as a result of a person's breach of the HSNO Act would need to prove, on the balance of probabilities, that the loss or damage they suffered resulted from a certain act or omission or breach of the HSNO Act carried out by the other person. They do not need to prove that the loss or damage occurred as a result of the other person's negligence, or that the breach was intentional.

Resource Management Act 1991

20 Farmers using GE crops could be liable for environmental damage caused by contamination to other farms under the Resource Management Act 1991 (**the RMA**).

21 Section 17(1) of the RMA provides that:

> Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with—
>
> (a) any of sections 10, 10A, 10B, and 20A; or
>
> (b) a national environmental standard, a rule, a resource consent, or a designation.

22 The duty set out in section 17(1) is not itself enforceable.[29] However, Part 12 of the RMA contains powers to issue enforcement notices and abatement notices requiring a person to:

[29] Section 17(2), RMA.

(a) cease or prohibit anything likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or

(b) do something that is necessary in order to avoid, remedy or mitigate any actual or likely adverse effect on the environment caused by that person.[30]

23 Failure to comply with an enforcement or abatement notice is an offence under section 338 of the RMA, for which:

(a) a natural person is liable on conviction to imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000, and

(b) a person other than a natural person, is liable on conviction to a fine not exceeding $600,000.[31]

24 Where the offence is a continuing one (defined as the continued existence of anything, or the intermittent repetition of any actions, contrary to any provision of the RMA),[32] the person convicted is also liable to a fine not exceeding $10,000 for every day or part of a day during which the offence continues.[33]

25 Liability under the RMA only applies where the contamination of other land by a farmer using GE crops results in an "adverse effect on the environment". Under the RMA, the term environment is defined very broadly and includes "(a) ecosystems and their constituent parts, including people and communities; (b) all natural and physical resources; (c) amenity values; and (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters." It was noted in the *Royal Commission on Genetic Modification* that these remedies are restricted to effects on the environment and do not extend to personal damage or loss suffered by an individual.[34]

CIVIL/COMMON LAW LIABILITY

26 The extent to which the common law torts of negligence, nuisance and the rule in *Rylands v Fletcher* may be applicable following the insertion of strict liability offences into the HSNO Act is yet to be determined.

27 At present there are no judicial decisions in New Zealand which have dealt with harm caused by new organisms or genetically modified organisms. However, a possible analogous situation is that in the Australian High Court decision in *Perre v Apand Property Ltd* [1999] HCA 36 (12 August 1999). There, the Court held a potato seed producer liable to a potato farmer for consequential loss because of a disease introduced to a nearby farm from infected seeds. A material factor in the Court's conclusion was the plaintiff's inability to protect themselves by contract or otherwise from the risk that the supplier placed them under, and the supplier's knowledge of this. The loss was not based on any physical contamination but the risk the plaintiff's potatoes may have been contaminated.

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[30] See section 314 and 322 of the RMA.

[31] Section 339(1), RMA.

[32] Section 339(6), RMA.

[33] Section 339(1A), RMA.

[34] *Royal Commission Report on Genetic Modification* 2001, Chapter 12: Liability Issues, paragraph 22.

28 The remedies available at common law will depend on the particular facts in question. Possible courses of action include negligence, nuisance and the rule in *Rylands and Fletcher*.

Negligence

29 Liability for the tort of negligence arises when a duty of care owed to another is breached and loss is caused to that person as a result of the breach. What amounts to negligence is a question of fact in each case, and the categories of negligence are not closed.

30 To succeed in a negligence action, a person must be able to establish that:

(a) The defendant owed them a **duty of care**. Here, the Court will consider whether there was sufficient proximity (relational or physical) between the defendant and the plaintiff, and whether it would be fair, just and reasonable to impose a duty of care on the defendant.

(b) The **duty of care was breached**. The Court will apply the reasonable person test (i.e. would a reasonable person have done the same in the same circumstances?).

(c) The other person's negligent acts **caused** the relevant harm.

31 The Court will only find a person responsible for the damage of consequences that were reasonably foreseeable.

32 In the context of organic farming and GE crops, there are several possible difficulties to establishing whether the standard of care owed by the defendant (a GE farmer) to the plaintiff (an organic or non-organic farmer) extended to preventing the transmission of GE material to neighbouring farms.

(a) The standard of care in all cases of negligence is that of the reasonable person. If the relevant contaminated farm is organic, the Court may take the view that a reasonable person should not be expected to take precautions to protect an organic farm which has a heightened level of sensitivity. The Court may consider that the responsibility to protect an organic farm from contamination falls to the organic farmer who will reap the benefits of the organic status of the farm produce. Evidence that the relevant harm arose *because* the farm was organic (i.e. the harm was to the organic nature of the crops and would not have harmed 'normal' crops) may suggest that the standard of care required by the plaintiff was not that of a reasonable person.

(b) The harm must have been foreseeable by the defendant. Whether the harm was foreseeable will depend on the defendant's knowledge. If the plaintiff was an organic farmer, the Court will consider whether the GE farmer was aware that the neighbouring farm was organic.

(c) An organic or non-organic farmer must be able to show that there were reasonable measures the GE farmer could have taken to prevent the harm. The Court will consider what a reasonable person would have done in the GE farmer's position.

Nuisance

33 The tort of private nuisance arises where there is an unreasonable interference with a person's right to the use or enjoyment of an interest in land. The classic case of private nuisance involves a defendant using his or her land in such a way that something dangerous or offensive is emitted continuously or intermittently from his land onto the

neighbouring land of the plaintiff, where it causes physical damage to the land, or interferes with the use and enjoyment of the land.

34 Where the tort of nuisance arises, a plaintiff can apply to the Court for an injunction to put a stop to the nuisance (where the nuisance is ongoing), and an award of damages for past interference.

35 For a successful claim of nuisance there must be damage, and the damage must result from an activity or a state of affairs which is actionable as nuisance.

36 When considering a claim of nuisance, the Court will need to strike a balance between the competing rights of neighbouring land owners or occupiers to each use and enjoy their land. The legal standard for addressing this conflict is that of unreasonableness. An interference with a person's use and enjoyment of land becomes "unreasonable" and constitutes an actionable nuisance when it exceeds what an ordinary person in the plaintiff's position can reasonably be expected to tolerate.

37 Whether a person's use and enjoyment of land is unreasonable such that an actionable nuisance arises from that use will depend on the following:

(a) The general locality of the land;

(b) Whether either property has any 'abnormal sensitivities';

(c) The time of day, duration, and intensity of the interference;

(d) The social value of the defendant's activity; and

(e) Whether there was any malicious motive on the part of the defendant to cause harm to the plaintiff.

38 Nuisance is generally a continuing wrong, consisting of an activity or state of affairs on the defendant's land which causes or threatens to cause, ongoing interference, either continuous or recurring, with the use and enjoyment of the plaintiff's land.

39 A key obstacle to establishing a claim in nuisance as a result of a neighbouring farmer's use of GE crops is to prove that the GE farmer's use of the land was unreasonable in the circumstances. On the one hand, organic farming might be treated as rendering the land 'abnormally sensitive' to contamination. On the other hand, the growing of GE crops could be considered an 'unnatural' or 'abnormal' use of the land. Relevant here would be how the use of GE crops are regulated at law (i.e. is it legal to grow GE crops? Is this an area specifically designated for the growing of GE crops?), and whether the farmer complied with the relevant laws and regulations.

40 Where there is a single instance of escape of something harmful which is unlikely to be repeated, and the only claim is for damage for past harm suffered, the appropriate claim is not in nuisance, but in either negligence (where the requirements for a negligence claim are made out) or under the strict liability rule in *Rylands v Fletcher*.

Rylands v Fletcher

41 The rule from *Rylands v Fletcher*[35] holds an occupier of land strictly liable for damage caused by an isolated escape of something harmful that was brought on to or accumulated on the defendant's land in the course of a non-natural use of that land.

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[35] (1865) 3 H & C 774; 159 ER 737 (Ex), (1886) LR 1 Ex 265 (Ex Ch), (1868) LR 3 HL 330 (HL).

42 The defendants in *Rylands v Fletcher* were mill owners who hired independent contractors to construct a reservoir on their land. In the course of the work, the contractors came upon some disused mine shafts which they know must lead to old workings. In fact, the shafts led to mines leased to the plaintiff. When the reservoir was filled the water burst into the old shafts and flooded the plaintiff's mines. The contractors were clearly negligent in failing to seal off the shafts, but the defendants had no knowledge of the shafts and were found not to have been personally negligent. Nevertheless, the defendants were held liable for the damage suffered by the plaintiff.

43 In *Rylands v Fletcher*, Blackburn J stated the general proposition as follows:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps if the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

44 The *Rylands v Fletcher* rule applies where the use of the land was not natural, in which case the defendant will be liable notwithstanding that he or she exercised all reasonable care and skill to prevent the escape occurring. However, the rule is essentially an aspect of the law of nuisance, and the scope of liability, as in nuisance, is limited to damage of a type which the defendant should reasonably have foreseen.[36]

45 A possible obstacle to establishing a claim under the rule of *Rylands v Fletcher* for the contamination of organic crops by neighbouring GE crops may include establishing that the defendant brought onto his/her land something harmful, or "likely to do mischief". This will be a fact intensive inquiry and will require some judgment on the scientific evidence on the effect of GE crops. The state of the law surrounding GE crops will again be relevant, as will whether the GE crops presented a risk of harm to all crops or just organic crops.

46 A further possible obstacle to a successful claim is the need to show that the harm was foreseeable. This may be difficult if the defendant was unaware of the organic farm (for example, if it was not neighbouring).

PART B: ABILITY OF LOCAL AUTHORITIES TO REGULATE THE USE OF GE CROPS THROUGH DISTRICT RULES IN DISTRICT PLANS

Issue

47 Several District Councils around the country have inserted provisions into their Proposed District Plans to control GMOs.

(a) In 2003, the Northern Councils (Auckland Council, Far North District Council, Kaipara District Council and Whangarei District Council) set up an Inter-Council Working Party (ICWP) to respond to community concerns in the Northland region relating to GMOs. Since being established, each Council has committed to effecting Plan Changes to their respective District / Unitary Plans to manage outdoor activities involving GMOs. The Whangarei District Council, for example, has developed a proposed Plan Change (plan change 131) which would see the

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[36] *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53 (CA and HL). See also *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324 (CA)

Council "adopt a precautionary approach by *prohibiting* release of a GMO and by making field trials of a GMO a *discretionary* activity."[37]

(b) The Proposed Hastings District Plan has taken a similar approach. It makes field trialling of GMOs a *discretionary* activity (under Rule HS6), and the release of GMOs as a *prohibited* activity (under Rule HS7).[38]

Relevant law

48 Pursuant to the Resource Management Act 1991 (the RMA) the District Councils have jurisdiction under the RMA to control the introduction of GE crops in their districts by way of rules in district plans.[39] Section 31 of the RMA states:

> **31 Functions of territorial authorities under this Act**
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> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
>
> (i) the avoidance or mitigation of natural hazards; and
>
> (ii) *the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and*
>
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

49 The HSNO Act does not as a matter of law preclude the Councils from making such rules. However, there are several reasons why this position is uncertain.

50 A recent decision of the Environment Court *NZ Forest Research Institute Ltd v The Bay of Plenty Regional Council* [2013] NZEnvC 298 has cast doubt on the view that Councils have the power to control GMOs under the RMA.

51 In this case, the NZ Forest Research Institute Ltd (Scion) challenged the validity of a passage in the Proposed Regional Policy Statement (RPS) of the Bay of Plenty Regional Council. The relevant passage promoted the precautionary approach in relation to the release, control and use of GMOs. The Council's intent was to flag the issue for consideration rather than prescribe a regulatory response. Scion appealed on grounds that the regulation of GMOs falls under the HSNO Act exclusively. It sought the omission of any passage that purported to relate to the management of GMOs in the RPS.

52 The Court ultimately upheld the right of the Council to place wording in its RPS in favour of a precautionary approach. It put forward a rewording of the passage, however, which it saw as delinking the issue of GMO to language in the RPS which might be seen as directive. Scion did not accept the revised wording.

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[37] Draft Proposed Plan Change to the District / Unitary Plan – Managing Risks Associated with Outdoor Use of Genetically Modified Organisms, Draft Section 32 Report, January 2013.

[38] In support of these rules, it states that "In the case of the Hastings District, the production and export of premium produce is a significant contributor to the economy. The maintenance of a clean green image, free of GMO influences, is critical in attracting maximum values for high quality produce in certain markets. The release of GMOs would not be compatible with these export industries".

[39] This is the advice given to the Northern Councils by Dr Roydon Sommerville QC. This opinion is available online.

53 Importantly for our purposes, the Court reflected on whether Councils have jurisdiction under the RMA to control GMOs in their region/district. It stated that:[40]

> "…the inclusion of hazardous substances in both pieces of legislation, and the complete absence of genetically modified organisms in the RMA, might be thought of some significance*, perhaps leading to the conclusion that the omission is deliberate, and thus the RMA has no place in the management of GMOs.* However, this was not argued before us, as it appeared that the parties generally agreed the RMA could have jurisdiction over genetically modified organisms. We are content to decide this appeal on that basis."

54 In coming to its decision, the Court explicitly noted that "the Council did not, and does not seek to, set out on the type and course of GMO control shown in the examples from Hastings and Northland drawn to our attention". Whether GMOS can be lawfully managed through the RMA, by classifying GMO activity as discretionary or prohibited activities, is left in an uncertain position by this decision.

55 Further, any provisions to control GMOs (i.e. by making their trialling/release a discretionary or prohibited activity) must meet the statutory tests in the RMA. Section 32 requires an assessment of whether the provisions are the most appropriate way to achieve the purpose of the Act, having assessed their efficiency and effectiveness. The existence of an independent statutory regime under the HSNO Act which comprehensively controls the development, field testing and release of GMOs may make it difficult for a Council to prove that their provisions meet the s 32 regime if challenged in Court.[41]

56 Finally, the current Government has indicated that it prefers a consistent nation-wide policy for controlling the trialling and release of GMOs. A *Resource Management Summary of Reform Proposals 2013* released in August last year makes the government's intention clear. It stated:

> "The explicit function for councils to control hazardous substances and the ability for councils to control new organisms (GMOs) through the RMA will be removed. This is considered to be best managed under the Hazardous Substances and New Organisms Act 1996 and by the Environmental Protection Authority…The removal of the ability for councils to control GMOs will mean council plans cannot be used to control new organisms and GMOs. A national level approach to managing GMOs ensures consistency throughout New Zealand and given the technical complexity of assessing GMO applications ensures that one agency (the EPA) is adequately resourced to provide this service."

57 Amy Adams, Minister of the Environment, has confirmed this position earlier this year, stating that: "It is useful for us to be very clear to say, look, the RMA is not the vehicle by which you replicate things that have always been, and should be, controlled at a national level."[42]

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40 *NZ Forest Research Institute Ltd v The Bay of Plenty Regional Council* [2013] NZEnvC 298 at [15] (emphasis added).

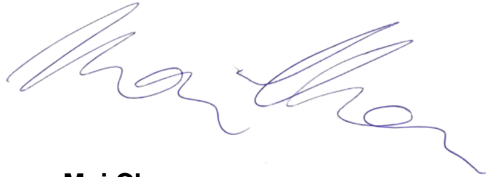
41 This issue is more fully canvassed in a legal opinion prepared for Federated Farmers by Anderson Lloyd Lawyers (available online). The opinion considered the requirements of the RMA insofar as they relate to the possible control of GMOs by the Hastings DC and Auckland Council. The author took the view that the provisions in the Auckland and Hastings proposed plans "are likely to be found to be unreasonable and unnecessary to meet the statutory purpose of the RMA." Advice to Federated Farmers of NZ (Ltd) by Mark Christensen for Anderson Lloyd Lawyers.

42 See http://www.3news.co.nz/Is-New-Zealand-really-GE-free/tabid/817/articleID/333802/Default.aspx.

58 It is unlikely that a Bill encapsulating the proposals set out in the August consultation document will be presented to Parliament before the election, given that there are only 18 sitting days left. However, a National-led government following the election may pose the greatest barrier to Councils trying to control GMOs under the RMA.

CONCLUSION

59 The law surrounding the trialling and release of GE crops in New Zealand is in a state of flux. The statutory scheme may be subject to change in the next year (i.e. by changes to the RMA), and the extent to which the common law torts of negligence and nuisance (including the *Rylands v Fletcher* rule) may be applicable is yet to be determined.[43]



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[43] A case has been brought in South West Australia by an organic farmer for damages sustained as a result of GE crops blowing onto his property and contaminating his organic crops. The claim (in negligence and nuisance) was brought against his neighbour who grew the GE crops. The Supreme Court decision (to be delivered by Judge Kenneth Martin) is expected to be released shortly.