appendix 2

Outcomes of Consultation: Submissions from Interested Persons

Section contents

3.9 International obligations and implications

Introduction

The issues raised by Interested Persons in response to two Warrant items dealing with international aspects of New Zealand's decisions on genetic modification have been combined into one section of this report. Several submitters included implications of the obligations under Warrant item (d) which calls for the identification of the applicable obligations, or referred to their response on one of the Warrant items when commenting on the other.

The Warrant under item (d) called for information and views on:

> the international legal obligations of New Zealand in relation to genetic modification, genetically modified organisms, and products

and Warrant item (l) called for information on:

> the international implications, in relation to both New Zealand's binding international obligations and New Zealand's foreign and trade policy, of any measures that New Zealand might take with regard to genetic modification, genetically modified organisms, and products, including the costs and risks associated with particular options

The request for information on these items recognises that New Zealand does not operate in isolation in considering the strategies and processes open to it in relation to genetic modification. Consideration must be given to the international agreements and arrangements New Zealand has entered into, the obligations that arise under those agreements, and the implications that flow from them.

Fifty-six submitters specifically addressed one or both of these Warrant items. Of these, 23 made substantial comments on New Zealand's international obligations. Seventeen submitters provided substantial comments on the international implications for those obligations (and for New Zealand's foreign and trade policies, as well as associated costs and risks) of measures that might be taken in respect of genetic modification in New Zealand. (This was the smallest number of substantial submissions made on any of the Warrant items.)

In terms of the sectoral focus of submitters who responded to the Warrant item on international obligations, 10 submitters were from the economic/production

sector. Eight submitters had the environment, health and cultural/ethics sectors as their sectoral focus; the remaining five were identified as from 'other' sectors.

The principal sectoral focus of most submitters who commented on the international implications of New Zealand's response to genetic modification was the economic/production sector. The other submitters came from the environment sector (two submitters) and other sectors (three submitters).

The majority of the submitters who made substantial comments on international issues were in favour of genetic modification. That stance was mostly 'strongly for'. In comparison, four and three submitters were identified as 'strongly against' under Warrant items (d) and (l) respectively.

The category most represented, in terms of submitter type, were industry networks/associations, with research organisations and other advocacy networks/associations running a very close second. Among the remaining submitter types, in relation to substantial comment on these two Warrant items, were two private companies, one Maori organisation, an organics group and an occupational/professional group.

The remaining submissions of the group of 56 also broadly followed the distribution of sectoral focus and submitter type of the more substantial submissions made on these topics.

Key themes

Several themes emerged as submitters addressed issues arising from New Zealand's international obligations and the implications for those obligations of any measures New Zealand that might take with regard to genetic modification.

First, submitters identified as relevant a range of international agreements, instruments and membership of organisations giving rise to:

- applicable international obligations

Then, the implications that submitters saw as flowing from those obligations are considered under the following themes:

- sovereignty/autonomy
- cultural and ethical implications
- opportunities and benefits of international agreements and cooperation
- compliance and compatibility with trading partners
- economic and commercial considerations
- New Zealand's international reputation and influence.

In responding to these Warrant items, some submitters identified obligations but were neutral as to implications. Submissions from Maori organisations tended to focus on obligations under United Nations declarations and their relationship with Treaty of Waitangi obligations. The remaining submissions expressed two notably distinct viewpoints. One group submitted that New Zealand's participation in the international arena on genetic modification issues was a hindrance or a threat to the country's sovereignty or autonomy (particularly in protecting our environment and culture) in determining the basis for regulating the use of genetic modification technology and products. The other group identified the risks that non-compliance with international treaties and agreements might pose to New Zealand's relationships and trade in the event of banning (or limiting access to) genetically modified products. This group also noted the benefits that accrue to New Zealand, economically and scientifically, from involvement in international fora, agreements and organisations.

Applicable international obligations

International instruments and obligations identified by submitters as applicable to genetic modification technology were:

- various United Nations (UN) declarations, charters, conventions, agreements and protocols, together with the agencies or organisations responsible for developing and setting standards and/or best practice
- World Trade Organization (WTO) and the agreements and decisions promulgated by the WTO
- bilateral agreements and arrangements entered into between New Zealand and Australia and the bodies that give them effect.

In this context it is worth noting that the Hazardous Substances and New Organisms (HSNO) Act requires the Environmental Risk Management Authority (ERMA) to consider New Zealand's international obligations when determining applications to import or release genetically modified organisms.

United Nations instruments and organisations

The Convention on Biological Diversity (CBD) and the Cartagena Protocol on Biosafety (Biosafety Protocol) were singled out as the most significant of the United Nations-sponsored instruments relevant to genetic modification and to which New Zealand is a party.

Submitters also noted as relevant obligations: the Universal Declaration of Human Rights; the Declaration of the Human Genome and Human Rights; the

International Covenant on Economic, Social and Cultural Rights; the Ottawa Charter (relating to health and health services); and the Draft Declaration of the Rights of Indigenous Peoples.

Submitters also noted the International Plant Protection Convention (IPPC), a specific agreement relating to plants under the aegis of the Food and Agriculture Organization of the United Nations (FAO), which has been in force (and ratified by New Zealand) since 1952.

Also under the UN umbrella is the Codex Alimentarius Commission, which was set up jointly between FAO and the World Health Organization (WHO) in the early 1960s. It sets food safety standards which are used internationally, particularly in relation to WTO agreements such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).

Other international instruments and organisations referred to were:

- World Intellectual Property Organization (WIPO)
- World Organisation for Animal Health (Office International des Épizooties (OIE)).

World Trade Organization agreements

Submitters' views on the WTO were sharply divided. Submitters from industry associations and networks expressed very clear views that compliance with WTO agreements such as the TBT Agreement, SPS Agreement and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was required for New Zealand's assured and competitive access to global markets. These submitters commented that only scientific evidence would be acceptable under these agreements for any restrictions or requirements on the import and export of genetically modified organisms and products by New Zealand.

Submitters from other sectors, such as consumer networks and other advocacy networks and associations, argued that WTO decisions had accepted that restrictions for environmental reasons were acceptable and could be upheld through any dispute process. Greenpeace New Zealand [IP82] provided a lengthy analysis to support this interpretation. It also noted that, in implementing any measures to protect the environment or public health and safety, it would be prudent for New Zealand to follow international agreements (particularly the Biosafety Protocol) and to carry out consultations with other states on the measures; in addition, it should ensure that measures were applied in a consistent and transparent fashion and that they complied with the allowable exceptions to

the general principles (such as "most-favoured-nation" and "national treatment") under the WTO Agreement.

Organic Product Exporters Group [IP53] also noted that both exports and imports must adhere to the same regime in order to avoid WTO action. The example given was that if New Zealand were to require labelling of all imported genetically modified organisms and products, then exporters would also have to adopt such labelling.

Trans-Tasman agreements

Submitters also noted the effects of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) between Australia and New Zealand.

Several submitters referred in some detail to the combined agreements, legislation and agencies set up by New Zealand and Australia to deal with food safety and labelling issues. These were generally dealt with under the heading of the Australia New Zealand Food Authority (ANZFA).

Other multilateral organisations and agreements

A few submitters also briefly referred to:

- International Union for the Protection of New Varieties of Plants (UPOV), established by the International Convention for the Protection of New Varieties of Plants
- Organisation for Economic Co-operation and Development (OECD)
- Asia-Pacific Economic Cooperation (APEC).

Submitters' views on the implications for New Zealand's international obligations and foreign and trade policy of measures that might be taken in relation to genetic modification, genetically modified organisms and products are discussed below.

Sovereignty and autonomy

Several submitters, including Sustainable Futures Trust [IP51] and Royal Forest and Bird Protection Society, Nelson/Tasman Branch [IP43], made very clear and succinct statements to the effect that any international obligations that hindered or prevented the New Zealand Government protecting the interests of its citizens had to be renegotiated or reassessed.

Submitters raised concerns that membership of bodies such as WTO obligated New Zealand to compromise or to accept processes and products that were contrary to the ethical, spiritual and cultural values of New Zealanders. The

general sentiment expressed was that New Zealand's autonomy or sovereignty in respect of decisions about genetic modification must take precedence over any international obligations.

Submissions by Maori groups also raised the concern that New Zealand's membership of such agreements and organisations and the paramountcy given to the associated obligations represented a threat to their "sovereignty" over their traditional resources and knowledge. Te Runanga o Ngai Tahu [IP41] particularly argued that these agreements reinforced a belief that all property was available to ownership and exploitation by individuals (including individual corporations), whereas Te Runanga believed that the biodiversity of New Zealand should belong to all New Zealanders and any agreements that undermined that were not in the best interests of New Zealand.

Nelson GE Free Awareness Group [IP100] submitted that New Zealand should reclaim food standards and labelling issues from the domain of the bilateral arrangements with Australia because the current arrangements were a compromise and detrimental to New Zealand's sovereignty.

Submitters who commented on this issue also noted that entering into or giving effect to binding international agreements should not occur without full public disclosure and proper time allowed for submissions.

Golden Bay Organic Employment and Education Trust [IP104] submitted that all New Zealand's current international arrangements and membership of organisations should be publicly reviewed to determine democratically whether these were acceptable and not destructive to New Zealand's national interests such as public health and the environment.

Opportunities and benefits of international agreements and cooperation

Submitters from health and research organisations very clearly stated that limitations or avoidance of the use of genetic modification technology or products would have serious implications for research and for access to medicines and medical treatments in New Zealand.

Lysosomal Diseases New Zealand [IP99] raised the point that for New Zealand to deny patients access to medicines and therapies involving genetic modification would be in breach of instruments such as the Ottawa Charter and UN conventions and declarations on human rights and health to which New Zealand is a signatory. It would also cause potential stress and harm to patients and their families.

Other submissions under this heading stressed the importance to medical and scientific communities of participating in current developments, including genetic modification research and therapies. If access to genetic modification technology were limited, New Zealand's doctors' and scientists' skills and contributions would diminish and their reputations (both domestic and international) would suffer.

New Zealand Organisation for Rare Diseases [IP98] submitted that it would not be tolerated if the result of regulation of genetically modified organisms or products in New Zealand was to deny individuals the right to obtain or use genetically modified medicines, which were available and accepted overseas.

Crop and Food Research [IP4] commented on an aspect of the interaction with the international research or knowledge community that benefited New Zealand. It estimated that New Zealand contributed 0.13% toward the total global investment in research. However, we shared access to the total pool of knowledge and used a far greater portion than that produced. New Zealand's investment in crop and animal breeding programmes gave reciprocal access to international programmes, which had been important in maintaining and improving the genetic diversity of New Zealand's crop species. From this perspective, the submission noted, it was important to remain a member in good standing in the international community and comply with any legal obligations that entailed.

Compliance and compatibility with trading partners

Submitters from industry networks and associations, research organisations and private companies noted that New Zealand was highly dependent on access to global markets for its exports. Any attempts to restrict genetically modified imports would bring retaliation in the form of litigation or disputes under the WTO and restricted or no access for New Zealand goods.

These submitters raised the issue that if New Zealand sought to restrict the entry of genetically modified organisms and genetically modified products it must comply with the WTO agreements (TBT, SPS and TRIPS Agreements), which required that such restrictions be:

- scientifically justified
- based on risk assessment
- no more restrictive than necessary
- non-discriminatory
- not a disguised trade barrier.

Federated Farmers of New Zealand [IP34] also pointed out the tension for New Zealand in that producers needed access to other markets but they also required protection from any biosecurity risks that might arise from imports or development in New Zealand. The Federation was of the view that the existing processes under the HSNO Act as carried out by ERMA complied with the requirements of the WTO agreements.

The main theme of these submitters was succinctly stated by Biotenz [IP25]:

> It would be inappropriate for New Zealand to opt out of international obligations. Opting out would do more damage to New Zealand's economy and international relations than good. There would be no environmental benefit.

Economic, trade and commercial considerations

Several submitters pointed to the value of the exports that New Zealand produces. Submitters noted that the New Zealand economy relied heavily on the ability to export food and other agricultural products:

- "Horticulture contributes in the vicinity of $2 billion per year in export earnings to the New Zealand economy" (New Zealand Vegetable and Potato Growers' Federation/New Zealand Fruitgrowers' Federation/New Zealand Berryfruit Growers' Federation [IP75]).
- The New Zealand dairy industry supplied "20% of total exports" (New Zealand Dairy Board [IP67]).

Cultural implications

Maori views

There were four submissions from Maori organisations (Te Runanga o Ngai Tahu [IP41], Nga Wahine Tiaki o te Ao [IP64], WAI 262 claimants, Ngati Wai, Ngati Kuri, Te Rarawa [IP69] and Maori Congress [IP103]) which discussed one or both of Warrant items (d) and (l).

Nga Wahine Tiaki o te Ao [IP64] and Maori Congress [IP103] referred to the UN's 1993 Draft Declaration on the Rights of Indigenous Peoples, and specifically Article 29, which states:

> Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.
>
> They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources,

> seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Nga Wahine Tiaki o te Ao described the Draft Declaration as imposing an obligation on Government to honour this international legal obligation and enact the special measures that would heed the call of Maori "which is a clear and resounding NO to GM and GMO in Aotearoa". Maori Congress also said the Draft Declaration was an important consideration, but noted that the Declaration had not yet been ratified by New Zealand and, even after ratification, although signatories were expected to comply, there were no legal sanctions for failure to do so.

Submitters also referred to the CBD and the obligations under it that, as a signatory and ratifying party, New Zealand was required to observe. WAI 262 claimants [IP89] noted that evidence presented to the Waitangi Tribunal by international experts in cultural and biological diversity was relevant and important to the Commission in carrying out its task. The evidence could be summarised as "cultural diversity is the key to biological diversity": that is, that indigenous and traditional communities were repositories of important aspects of biodiversity and they also provided "the essential ingredient to a complete understanding of the consequences" of genetic modification.

Maori Congress [IP103] submitted that the CBD, and Article 8(j) in particular, was concerned with the shared role of indigenous peoples and signatories in the regulation of traditional resources, knowledge and processes and of rights to their use. The Congress also argued that the Article required, at the very least, that there be some form of joint ownership by states and the indigenous people over these resources, in order to give effect to the CBD's aims of respecting, preserving and maintaining them.

All Maori submitters forcefully submitted the right of Maori to manage, preserve and protect their peoples' knowledge, resources, innovations and practices. They claimed that these rights were reinforced by the international legal obligations of Government and must be respected and protected by any government measures in respect of genetic modification.

Other views

Friends of the Earth (New Zealand) [IP78] submitted that Government had duties to Maori under the CBD to provide for sustainable development of flora and fauna as part of biodiversity. Friends of the Earth also submitted that Maori are entitled to special assistance under Article 19 of the CBD (quite apart from the Treaty of Waitangi) to preserve and protect their rights to indigenous resources

and processes. The submission also noted that the CBD and the 1992 Rio Declaration on Environment and Development stated the right of all persons to a healthy environment consistent with the right to develop these resources; because corporates and researchers in genetic modification could not guarantee environmental safety, New Zealand could find its ability to comply with the Convention compromised, presumably if New Zealand allowed environmental release of genetically modified organisms and products.

Royal Society of New Zealand [IP77b (social sciences)] in its submission also stated the view that threats to New Zealand's unique biological diversity might also threaten its national and cultural identity.

Ethical considerations of international obligations

Several submitters raised ethical considerations when discussing New Zealand's international obligations and their implications in relation to genetic modification.

Royal Society [IP77b (social sciences)] pointed out that, although signatories to international agreements such as those under the WTO could not set standards or regulations to protect their domestic industries, a number of developed countries had been adopting the "precautionary principle" in relation to environmental and food safety risks of imports, while many developing countries did not have effective regulatory mechanisms to ensure or prove their products met international standards. Because of contradictions in the WTO approach to the genetically modified food debate, attempts to harmonise trade and product safety rules had actually consolidated and legitimised centuries-old trade barriers "between the First and Third Worlds". The Society went on to submit that New Zealand had obligations under the CBD to protect biodiversity and the values of tangata whenua. It pointed out that intellectual property rights, which were inherent in the development of biotechnology, might have the effect of hindering sustainable development in less developed countries and could also threaten biological diversity.

Submissions from Public Questions Committee (Methodist, Presbyterian, Churches of Christ, Quaker) [IP93], Interchurch Commission on Genetic Engineering [IP49], Pacific Institute of Resource Management [IP84] and New Zealand National Commission for UNESCO [IP90] echoed these concerns. These submitters stated it was important that decision-makers remember that New Zealand's international obligations extended beyond free trade agreements, to sustainable development, maintaining biodiversity, respect and protection for

indigenous communities' knowledge and practices, and a commitment to equitable sharing of the benefits of sustainable development. They further commented that all and any claims for the benefits of genetically modified organisms and genetically modified products and medicines had to be open to full and careful public scrutiny.

Environmental protection

Several submitters referred to the Convention on Biological Diversity and its first protocol (the Biosafety Protocol) as the most significant of the relevant international instruments relating to environmental issues and genetic modification. They all noted that the "precautionary approach" was the essential principle or feature of the CBD and the Protocol.

Greenpeace [IP82] submitted that the principle was triggered in cases where there was potential for serious or irreversible harm. Policy-makers were not required to prove to a level of scientific certainty that the threat of serious or irreversible harm would be realised: rather, they needed to show that, on the basis of current scientific understanding, the identification of the threat was justified. Greenpeace also submitted that the Biosafety Protocol was the last agreement in time ("lex posterior" in legal terms) and the most specific instrument addressing genetically modified organisms and living modified organisms (LMOs). According to legal principles, "generalia specialibus non derogant" (ie, the general does not override the specific). Therefore, the parties to the Protocol intended that it, as the latest and most specific agreement dealing with genetically modified organisms, should prevail over a more general instrument such as the SPS Agreement dealing with general sanitary and phytosanitary issues.

Other submitters such as organic producers, consumer networks and other environmental groups were also of this view that the Biosafety Protocol would allow the invocation of the precautionary approach to permit restraints on the import, development or release of genetically modified organisms in New Zealand.

Green Party of Aotearoa/New Zealand [IP83] submitted that the Biosafety Protocol did not override, nor was overridden by, WTO trade rules. Its submission argued that the WTO required non-discriminatory practices: for example, a country could not ban imports of Bt corn when its own farmers grew it. Green Party was of the view that, in the event that a ban on genetically modified organisms were taken under dispute to the WTO, the trade discrimination or barriers issues would have to be balanced against the right to protect consumers

and the environment from possible risk, taking into account the precautionary principle. It submitted that the WTO was "in a state of flux" over the approach it should take on trade restrictions based on genetic modification concerns.

Greenpeace [IP82] noted that recent decisions under Article XX of the General Agreement on Tariffs and Trade (GATT) (delivered by the WTO's Appellate Bodies on restrictions imposed for environmental reasons) explicitly stated that: "Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements."[1]

New Zealand's international reputation and relations

Some submitters raised concerns about the effect on New Zealand's international reputation and credibility as an innovative and knowledgeable member of the international community if genetic modification were banned or restricted in this country.

Although Dairy Board [IP67] did not specifically identify the CBD, it did submit that New Zealand must not jeopardise its credibility and reputation by breaching either the spirit or the letter of international obligations and creating unjustifiable barriers to trade. The Board noted that its experience with international trade regulation led it to believe that some trading partners might well be using genetic modification concerns tactically to disadvantage New Zealand in bilateral trade negotiations or by invoking WTO dispute procedures. The Board believed that New Zealand was well placed to set an example on the achievement of compliance with international obligations while protecting the country's interests.

New Zealand Grocery Marketers Association [IP54] noted that, although New Zealand was presently a non-ratifying party to the Biosafety Protocol and therefore not bound by it, application of the Protocol required that New Zealand did not do anything to defeat its aims and purposes. However, the association felt that the quarantine issues associated with the trans-boundary movement of living modified organisms and genetically modified organisms were provided for under Ministry of Agriculture and Forestry (MAF), ERMA and ANZFA regulation, so

[1] 20 May 1996. *Gasoline Appellate Report*, AB-1996-1, WT/DS2/9: 30. (Available through WTO Document Dissemination Facility at http://www.wto.org/)

the Protocol would have little effect on the current arrangements, "almost to the point of being unnecessary".

Further to the debate on the precedence of international instruments (see above, "Environmental protection"), New Zealand Arable-Food Industry Council [IP56] submitted that the Biosafety Protocol did not supersede the WTO SPS Agreement, although the Council did accept that the Protocol implicitly endorsed the precautionary approach, and that governments might justify trade restrictions on the basis of risk assertions, "even where there is no credible evidence that a risk exists".

The Council took the view that, under the rules of the SPS Agreement, if the precautionary principle were invoked to justify restrictions in the absence of scientific evidence this could be only a temporary measure. The Council submitted that if the New Zealand Government imposed such restrictions, the onus would be on it to find the evidence necessary to make a science-based judgment. It also submitted that Government should base its risk assessment of genetic modification on probable, not hypothetical, risks, and oppose international protocols or agreements that "violate scientific principles".

Vegetable and Potato Growers' Federation/Fruitgrowers' Federation/Berryfruit Growers' Federation [IP75] noted in the joint submission that Article XX of GATT was an important exception to the WTO agreements. (Article XX states that GATT should not be construed to prevent the adoption or enforcement of measures necessary to protect human, animal or plant life or health, or of measures relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production.) Given this provision, the Federations believed that New Zealand had an ability to argue against the importation of genetically modified products, just as another member country might for New Zealand exports. The Federations urged that New Zealand should be conscious of decisions or influences by trading partners arising from New Zealand's stance on genetic modification that might limit New Zealand exports.

Several other submitters from industry sectors focused on the WTO and UN standards bodies, such as the Codex Alimentarius, and did not mention the CBD and its Biosafety Protocol or, if they did identify them in their recitals of the relevant agreements, did not discuss in any detail the implications in relation to these instruments of New Zealand's approach to genetic modification.

Dairy Board [IP67] submitted that an influential though small country such as New Zealand could add to, and take important information from, the collective knowledge of the international organisations responsible for genetic modification.

The access to the expertise in science and risk management was important to New Zealand, and its effective utilisation required New Zealand companies and individuals, as well as government, to develop and maintain international contacts and alliances.

The Board noted that New Zealand also had acknowledged expertise and positions in certain international fora (eg, the chair of Codex Committee for Milk and Milk Products) and the Board's submission was that these positions and alliances might be endangered by adoption of a position in relation to genetic modification that cut New Zealand out of the international community.