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appendix 2

Outcomes of Consultation: Submissions from Interested Persons

Section contents

3.12 Responsibilities under the Treaty of Waitangi

Introduction

Warrant item (g) invited representation on and investigation into:

> the Crown's responsibilities under the Treaty of Waitangi in relation to genetic modification, genetically modified organisms, and products

Responses to this item ranged from no commentary to full commentary.

Of the 107 Interested Persons, 31 made substantive comments in their submissions, 23 made cursory comments and 53 made no comment or stated that they took no position. In percentage terms, 50% of the submissions did not address this item. On the other hand, around 30% of the submissions (31 submitters) provided detailed commentary.

In terms of type of submitter, the majority of substantive comments came from industry or consumer associations and networks (16 submitters). Three Crown agencies, three private-sector companies, and six (of seven) Maori organisations also provided substantive comments, as did two religious groups.

This section deals first with the seven submissions from Maori organisations, and then the 48 submissions from non-Maori sources. Some of the submissions in this latter category drew on commentary from Maori witnesses.

Two preliminary points emerged from the submissions:

- For some submitters with concerns about genetic modification, the very Commission itself and its processes were a breach of the Treaty of Waitangi.
- In some submissions it appeared that the concepts of Treaty obligations (ie, as specified in the Warrant item) and Maori cultural issues were merged.

Key themes

Overall, the key themes in both Maori and non-Maori submissions included:

- role of the Treaty of Waitangi
- the Crown's duties under the Treaty
- tikanga principles and genetic modification
- participation in economic benefits.

In addition, the following topics attracted considerable comment, particularly in the Maori submissions, but are dealt with in detail in other sections of this report:

- protection of traditional ownership and knowledge of native flora and fauna
- international developments involving indigenous peoples and genetic modification issues
- changes to the regulatory framework.

Maori terms

Note that a glossary of the Maori terms used in this report is provided in the "Glossaries" section of this volume.

Submissions from Maori organisations

There were seven submissions from Maori organisations as Interested Persons, all of them containing reference to the Treaty of Waitangi. The organisations included two national representative bodies (New Zealand Maori Council and New Zealand Maori Congress), a national body representing Maori landowning authorities, Trust Boards and Runanga (Federation of Maori Authorities (FoMA)), claimants to the Waitangi Tribunal with an interest in intellectual property rights (WAI 262 claimants, Ngati Wai, Ngati Kuri, Te Rarawa), two tribal organisations (Te Runanga o Ngai Tahu and Muaupoko Co-operative Society) and an organisation representing views of a group of Maori women (Nga Wahine Tiaki o te Ao).

The comments ranged from the statement by Muaupoko Co-operative Society [IP57] that it would provide oral submissions on "partnership provisions and development — Treaty of Waitangi" to detailed commentary from New Zealand Maori Congress [IP103] on how the Crown should deal with proposals involving genetic modification techniques.

Role of the Treaty of Waitangi

Submitters identified the responsibilities of the Crown under the Treaty as a major issue. Views ranged from those who saw the obligation to honour the Treaty as an essential first step to those who saw a case-by-case consultation with Maori on genetic modification proposals as acceptable. Thus, some stated that constitutional change to honour the Treaty was required before anything else; others were prepared to consider a system of assessing genetic modification proposals

providing Maori participated in the assessment and decision-making processes.

Nga Wahine Tiaki o te Ao [IP64] described Crown processes, including the Commission, as operating in breach of the Treaty. This submitter indicated that the New Zealand Government must move towards constitutional change to honour the Treaty, and that, until this took place, all activities in relation to genetic modification should cease.

For New Zealand Maori Council [IP105], the "key element" in the attitude of Maori to genetics was Article the Second (Article 2) of the Treaty, which gives Maori exclusive rights to their taonga.

Te Runanga o Ngai Tahu [IP41] saw the Treaty of Waitangi, and its provisions, as a fundamental cornerstone to any consideration of genetic modification in New Zealand.

Maori Congress [IP103] affirmed the Treaty and stated:

> Te Tiriti o Waitangi is the only starting point for any recommendations concerning the possible move to permitting genetic modification in Aotearoa/New Zealand.
>
> Te Tiriti o Waitangi as the Magna Carta remains within our country as a duly constituted agreement between two sovereign nations to advance the future of two peoples.

WAI 262 claimants [IP89] regarded the Treaty as the "only reason the Crown is entitled to assert any form of governance in this country", and added that it must be accorded primary attention by the Commission.

The Crown's duties under the Treaty

Maori Congress [IP103] referred to the following specific duties of the Crown under the Treaty:

- a duty of active protection of Maori interests to the fullest extent practicable
- a duty to consult Maori
- a duty of equity and redress.

A common element in the submissions was the Crown's failure to meet its obligation to acknowledge Maori rangatiratanga, particularly over Maori resources. The Congress also saw the "lack of equity in terms of allocation of research funding" as a breach of the Treaty.

Te Runanga o Ngai Tahu [IP41], representing Ngai Tahu whanui, also commented on the Crown's responsibility for active protection of Maori interests in "their use and management and relationship with the forests, lands, freshwater, and marine resources". In Te Runanga's view, if the Crown allowed genetic modification without respecting and "actively protecting" Maori interests it would be failing

to fulfil its obligations as expressed in Article 2 of the Treaty.

Some submitters noted that an aspect of the duty to consult is the question of informing the community about the topic that is the subject of the consultation. Federation of Maori Authorities (FoMA) [IP69] referred to "the low level of understanding" among the general public of issues surrounding genetic modification, but added that this was especially so among Maori and saw this as "an inadequacy that needs to be urgently addressed".

Te Runanga o Ngai Tahu [IP41] stated that time should have been taken for public education on issues surrounding genetic modification and that "resources should have been made available for iwi to inform themselves on the issues and to come together to korero on the issue and form a considered opinion". Te Runanga saw the fact that only seven Maori-related groups had obtained Interested Person status as testimony to the deficiency of the education process to date. Maori Congress [IP103] referred to the urgent need for a nationally focused education campaign with a view to honouring Treaty obligations.

FoMA [IP69] summarised the Crown's responsibilities under the Treaty as:

- providing for Maori participation in any regulatory body
- providing education for Maori on biotechnology issues
- protecting traditional knowledge of flora and fauna
- recognising the cultural and spiritual relationship between Maori and the land and taonga.

Tikanga principles and genetic modification

The submissions from Maori organisations indicated that the rules of behaviour embodied in tikanga were central to any consideration of genetic modification. There was a range of views about the impact of tikanga, from those who saw it as a complete bar to genetic modification in New Zealand to those who considered that genetic modification could be accommodated provided there was recognition of the cultural and spiritual relationship between Maori, the land and ancestral taonga.

All the Maori submissions referred to tikanga, and some specifically referred to the Maori world view (te taiao) as their framework for assessing genetic modification. Commentary on tikanga was presented in some submissions as an expression of rangatiratanga. Te Runanga o Ngai Tahu [IP41] indicated that legal recognition of rangatiratanga was crucial to allow other tikanga principles (kaitiakitanga) to be put into effect. For Maori Congress [IP103], rangatiratanga denoted the mana (or authority) "not only to possess what is yours but to control

and to manage it in accordance with your own ethical and moral behaviour".

Tikanga principles are the source of the Maori value system, and govern the Maori approach to managing environmental issues. It was a major concern for submitters that these principles would be disregarded in dealing with genetic modification issues.

Nga Wahine Tiaki o te Ao [IP64] expressed the view that "Aotearoa is Maori land", and that any organism grown in New Zealand would be subject to tikanga Maori, which provided a collective basis from which to care properly for the environment and distribute resources. WAI 262 claimants [IP89] said that a central part of the claimants' case to the Waitangi Tribunal was the lack of recognition of Maori values and practices relating to genetic modification. The submission advocated that genetic modification be opposed "until tikanga Maori forms the basis of decision making of these issues" and that there should be no consent to technologies which further disrupted Maori and the Maori world view. Nga Wahine Tiaki o te Ao stated that based on ancestral traditions there should be no genetic modification in Aotearoa.

Tikanga principles

Submitters referred to the following concepts in their discussions of tikanga:

- whakapapa
- kaitiakitanga
- mauri
- mana
- atua
- ira tangata (the human element of life).

Whakapapa was generally described as the link between peoples and, in turn, other species. Kaitiakitanga was described by Te Runanga o Ngai Tahu [IP41] as the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori.

For Te Runanga o Ngai Tahu, the concepts of whakapapa and katiakitanga meant that humans were an integrated part of the natural order and had as much an obligation towards the earth and that upon it as they had towards parents, siblings and other members of the whanau. Te Runanga indicated that the Maori world view was that humans were part of nature, in contrast to the Judaeo-Christian view that "people are created in God's image".

WAI 262 claimants [IP89] noted that acknowledging the spiritual dimension of the universe and respecting the mauri of everything was fundamental to Maori.

Anxiety about the effect of genetic modification arose for submitters because using genetic modification was seen by most as 'playing God', with consequent implications for the exercise of responsibilities in accordance with tikanga. Te Runanga o Ngai Tahu [IP41] expressed abhorrence for those involved with genetic modification and saw it as an interference with the "blueprint of life". Moreover, Te Runanga considered the risk to Ngai Tahu spiritual and cultural beliefs and mental health far outweighed any possible benefits, for instance "supposed" health benefits.

Nga Wahine Tiaki o te Ao [IP64] stated the following:

> It is within the main principles of mauri, mana and w'akapapa that Maori raise their absolute disagreement regarding genetic engineering and modification. If these principles are damaged or tampered with in any way, thus upsetting the holistic world balance, so too will be the mauri, mana and w'akapapa of Maori and following generations.

The results would be to place the natural order of life itself under threat (WAI 262 claimants [IP89]). In addition, failure to meet kaitiaki obligations would diminish mana and thereby weaken safeguards against harm for individuals.

Some submitters stated that the mixing of human genes with those of other species was unacceptable (eg, Maori Congress [IP103]), or acceptable only in exceptional circumstances (FOMA [IP69]), but that overall a regulatory framework incorporating protections for tangata whenua could be considered.

Protection of traditional knowledge

Specific concerns about issues of patenting indigenous flora and fauna and the failure of the current legal system to provide protection for traditional knowledge and ownership of flora and fauna are dealt with in more detail in comment on Warrant item (f) (see "Intellectual property issues").

More generally, WAI 262 claimants [IP89] noted that the matauranga (or knowledge of living things, especially of native flora and fauna) accumulated by Maori is held by the whanau and hapu, which have kaitiaki responsibilities for that knowledge.

Maori Congress [IP103] observed that the Treaty of Waitangi "affirms" the rights of Maori as tangata whenua and their relationship with flora and fauna.

Economic benefits

Economic issues, including benefits, are dealt with elsewhere in this document, including in discussion on strategy (see "Strategic outcomes") and on Warrant item (j) (iii) on areas of public interest (see "Areas of public interest: economic matters"). However, in this commentary on Maori submissions on Treaty of

Waitangi issues, some submissions referred to Maori rights over the Maori genome and control of any developments based on it. Maori Congress [IP103] stated that rights to the genome included the capacity to receive benefits from its use and advance.

FoMA [IP69] noted that Maori authorities would benefit from genetic modification advances through improved productivity, product quality and, potentially, the development of new products. The possibility was that Maori in general would benefit from a position of greater economic self-sufficiency.

Submissions from other Interested Persons

Submissions from non-Maori organisations included, in some instances, comments from witnesses identified as Maori. For example, Carter Holt Harvey/Fletcher Challenge Forests [IP17], University of Auckland [IP16] and Royal Society of New Zealand [IP77b (social sciences)] included or referred to commentary from Maori witnesses. The commentary on the Treaty in such submissions was often more detailed than in submissions with no apparent, direct, Maori input.

As with the submissions from Maori organisations, the following themes emerged:

- role of the Treaty of Waitangi
- the Crown's duties under the Treaty
- tikanga principles
- participation in economic benefits.

In addition, there was comment on health benefits for Maori.

Role of the Treaty of Waitangi

Views on the role of the Treaty varied. Some submitters thought the Crown's role under the Treaty in this area was unclear. Others saw the Treaty as providing a "context", a "framework" or a "living document" with the views of the Treaty partners carrying equal weight (eg, Green Party of Aotearoa/New Zealand [IP83]). A few submitters took the view that it was premature for the Commission to address this item while there were legal proceedings still outstanding at the time of submission, for instance the WAI 262 Indigenous Flora and Fauna Claim or the appeal to the High Court against a decision of the Environmental Risk Management Authority (ERMA) on insertion of a human gene into cattle (New Zealand Life Sciences Network [IP24], Pacific Institute of Resource Management [IP84]).

New Zealand Wool Board [IP30] considered that the extent of the Crown's obligations under the Treaty was uncertain. From a "pragmatic point of view", the Board felt that it was vital for the Crown to act in good faith, on behalf of all New Zealanders, to help to secure national benefits from genetic modification. The Board was concerned that years might be spent attempting to incorporate the Treaty into a regulatory framework. It considered that this would be "self-defeating": "By the time we came up with a solution, others would have won the game."

Some submitters seemed to approach the Treaty as a specifically Maori issue. Life Sciences Network [IP24] commented that the "extent to which the Treaty of Waitangi grants Maori special rights other than for native flora and fauna is still unclear". New Zealand Dairy Board [IP67] suggested that, in taking into account Treaty principles, the "cultural beliefs of Maori" needed to be examined.

On the other hand, Hamilton City Council [IP20] expected that Government would consult Maori to determine if there were Treaty responsibilities relating to genetic modification. Interchurch Commission on Genetic Engineering [IP49] expressed support for a bicultural framework, and recognised the importance of the Treaty as a partnership. For AgResearch [IP13], the Treaty provided a "context" for its relationship with Maori.

The Crown's duties under the Treaty

Submissions from non-Maori sources referred to the following Crown duties under the Treaty:

- active protection
- acting in good faith
- consultation
- reasonableness
- mutual cooperation and trust
- obligations to promote wellbeing and health.

For Carter Holt Harvey/Fletcher Challenge Forests [IP17], the Crown's Treaty responsibilities were sufficiently "recorded" in the Hazardous Substances and New Organisms Act 1996 (HSNO Act). The Act required ERMA to take into account the principles of the Treaty, and the relationship of Maori with "their culture" and taonga.

ERMA itself [IP76] referred to a duty of "active protection", as well as to principles of consultation and acting in good faith. It saw the latter as well provided for in its

processes. On "active protection", ERMA believed that the principle should not be applied so as to be inconsistent with the government's right to govern under the Treaty.

Other submissions referred to duties or principles of reasonableness, mutual cooperation and trust, and to obligations to promote wellbeing and health. One submission in particular (Friends of the Earth (New Zealand) [IP78] in an accompanying witness brief) contained an extensive outline of principles developed from case law and Waitangi Tribunal reports. This submitter saw the concepts of sovereignty and governance as also relevant to genetic modification. Safe Food Campaign [IP86] summed up the relevant Crown responsibilities as meaning "relating issues about GM back to the principles of partnership, protection and participation".

A duty to consult was upheld by most submissions that commented on the Crown's duties under the Treaty. Some submitters outlined the processes they adopted to consult Maori (AgResearch [IP13], Carter Holt Harvey/Fletcher Challenge Forests [IP17]). In an accompanying witness brief, Carter Holt Harvey/Fletcher Challenge Forests described a process of identifying tangata whenua, consulting, and ultimately relying on ERMA for decisions. New Zealand Transgenic Animal Researchers [IP45], adopting views expressed in a witness brief on behalf of University of Auckland [IP16], noted that it was important that the Commission process consult those Maori who might be adversely affected by loss of genetic modification methodologies and therapies.

Some submitters believed the duty to consult conferred on Maori a "special right" to consultation on genetic modification issues relating to native flora and fauna (but not to imported species). Sciences Network [IP24] took this view, saying that the right was in return for the right of governance to be exercised by the Crown. For Association of Crown Research Institutes (ACRI) [IP22], Article 2 of the Treaty implicitly recognised Maori responsibilities to protect native flora and fauna. However, the Association went on to say in relation to Article the third (Article 3) of the Treaty:

> In a pluralistic society, the core spiritual values arise from societal debate and consensus. Maori concerns of this nature have the right to be expressed through their rights as citizens, but there is no greater right for Maori in this respect than any other citizen group. "Some citizens are not more equal than others."

Other submitters were concerned that views expressed through consultation should actually be heard. Interchurch Commission [IP49] stated that:

> The Crown has a responsibility to give real expression to treaty principles through establishing a new process whereby Maori views in relation to genetic modification,

> genetically modified organisms and products can be treated with greater respect than has thus far been the case. … The extent to which Maori spiritual concerns in relation to GE are genuinely heard will indicate the depth of our commitment as a nation, to the Treaty upon which our nation is founded.

Safe Food Campaign [IP86] stressed the need for consultation that did not merely ignore Maori perspectives once they were gathered and did not "marginalise" Maori views. Reference was made to New Zealand's signing of the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) without consultation with Maori. This was seen as contrary to the Treaty.

For Wool Board [IP30], Meat New Zealand [IP31] and Meat Industry Association of New Zealand (MIA) [IP32], the Crown's obligation was to act on behalf of all New Zealanders to secure national benefits.

Tikanga principles

Some submissions made comments about specified principles of tikanga, notably kaitiakitanga and whakapapa.

Others spoke of Maori spiritual beliefs. Interchurch Commission [IP49] saw Maori as guardians of indigenous spirituality and stated that the Treaty "enables us all to adopt a more holistic approach to issues of genetic modification".

AgResearch [IP13] referred to ERMA's conclusion that there was no practical mechanism to avoid the effects of genetic modification research on spiritual beliefs unless the work was carried out offshore, and commented that this was "neither desirable nor practical". By way of a solution, Wool Board [IP30] suggested the same "utilitarian ethical framework" used to consider values and ethics of genetic modification be used for Treaty issues. Royal Society [IP77a (biological sciences)] noted Maori concern about cultural traditions including whakapapa and matauranga Maori, and referred to "no-go zones" for genetic experimentation in relation to matters such as the transfer of genes between species.

Organic Product Exporters Group [IP53] referred to the compatibility of kaitiakitanga and organic forms of production. ACRI [IP22] saw biodiversity responsibilities as overlapping with kaitiakitanga, which was defined by Life Sciences Network [IP24] as "stewardship". Kaitiakitanga was further described by Life Sciences Network as a "right of citizenship". The Network observed that katiakitanga could have more than one interpretation, and that the relevant status of tikanga principles was debated amongst Maori.

On tikanga generally and whakapapa in particular, Parliamentary Commissioner

for the Environment [IP70] referred to experience with Maori consultation on possum control measures, and recommended that the issues and concerns expressed there be explored as part of a strategic response to genetic modification. The Commissioner noted that "the need to protect whakapapa, its tapu and its integrity, was fundamental to the unanimous rejection of genetic modification of native plant species as a way of delivering a biocontrol to possums".

There was a divergence of views about the extent of the Crown's responsibilities in relation to whakapapa. Life Sciences Network [IP24] saw Government's obligation to provide for the economic and social wellbeing of Maori as predominating over an obligation "which may or may not exist" concerning the impacts on a "claimed" whakapapa relationship with plants and animals. On the other hand, Pacific Institute of Resource Management [IP84] commented that the Crown was under an obligation to respect the intellectual and property rights that flowed from the Treaty, and to pay attention to mauri and whakapapa. In a similar vein, Friends of the Earth [IP78] in an accompanying witness brief saw Maori rights to preserve their taonga, including whakapapa and mana, as a "high priority".

Physicians and Scientists for Responsible Genetics New Zealand [IP107] stated that:

> … the Crown has a duty to do much more than simply consult with Maori on these issues in the manner we have observed to date. In particular we wish to see force given to Maori concerns of Mauri, Wairua and Whakapapa as a duty of partnership under the Treaty.

Participation in economic benefits

Several submissions identified economic and development issues as a major Treaty component. Life Sciences Network [IP24] stated that the Treaty was intended to enhance Maori development and should be read in that context. ACRI [IP22] was optimistic that, "with a stronger economic base", more Maori would cautiously embrace new genetic modification opportunities. Submissions from the primary production sector stressed Maori involvement in that sector and the economic benefits for all — Maori and non-Maori — that could flow from the adoption of genetic modification techniques in the primary production sector.

Meat New Zealand [IP31] expressly stated that:

> Key to the Crown's Treaty obligations is the need to promote economic opportunity for all New Zealand citizens, including Maori.

For Meat New Zealand, this followed from Article the first (Article 1) of the Treaty, which required the Crown to promote the wellbeing of all people and, in

particular, to "seek enhanced economic prosperity at all levels". It was said that this should not be at the expense of the environment or any "interest group". The submission went on to observe that many Maori believed that the potential economic benefits of genetic modification were considerable enough to warrant their use, and noted that many Maori worked in biologically based production sectors that would benefit from application of the new gene technology. New Zealand Game Industry Board [IP33] expressed similar views.

MIA [IP32] stated that it was a large employer and significant contributor to the economy and thus to the wellbeing of all New Zealanders, including tangata whenua. The Association commented that it could only maintain this if it had access to the technology required:

> Providing for the flexibility that we believe is required with gene technology will assist the Crown in meeting those aspects of its Treaty responsibilities that rely on a strong economy.

Wool Board [IP30] was concerned about delays in adopting new technologies, and suggested that "waiting around" and not being involved in such technologies, including genetic modification, was "tantamount to giving away everyone's birthright".

Health benefits

A particular theme of some submissions concerned medical research and benefits for Maori. Transgenic Animal Users [IP45] commented that there must be a balance between Maori rights under the Treaty with "the integral part that GM animals play in modern medical research".

In an accompanying witness brief, University of Auckland [IP16] stated that the Treaty guaranteed Maori retention of their taonga including health, while also guaranteeing the "ordinary" rights of New Zealand citizens. The witness brief went on to observe that diseases such as diabetes and hepatitis B were of major concern for Maori and stated that:

> Therapy of these diseases is currently underpinned by genetic modification, genetically modified organisms and their products. Loss of these methods and techniques would result in a significant down grading of medical care for Maori, thereby preventing the Crown from carrying out its responsibilities under the Treaty.

Haemophilia Foundation of New Zealand [IP48] recorded that there was a 50% greater incidence of haemophilia amongst Maori than amongst Pakeha, and that the therapy for this was underpinned by genetic typing. Similarly the Foundation saw any loss of genetic modification techniques in this area as affecting the Crown's responsibilities under the Treaty.