

The Chair  
Cabinet Policy Committee

## **Government Response to the Royal Commission on Genetic Modification: Legislative changes for New Organisms – Paper 8: Changes to more appropriately reflect the Treaty of Waitangi relationship under the HSNO Act**

### **Proposal**

1. In response to Cabinet direction [CAB Min (01) 34/16] this paper proposes options for amending the Hazardous Substances and New Organisms (HSNO) Act 1996, and its related operations, “so that it more appropriately reflects the Treaty of Waitangi relationship”.
2. The proposed changes have been developed in light of:
  - the report written by a Maori Reference Group, which was established by the Minister for the Environment at the invitation of Cabinet [Cab Min (01) 34/16 refers] to advise Ministers on how the HSNO Act could more appropriately reflect the Treaty of Waitangi relationship
  - consultation with Maori that took place on other aspects of the HSNO Act
  - the consultation carried out by the Royal Commission on Genetic Modification
  - decisions already taken by the government in response to the Royal Commission.

### **Executive summary**

3. This paper is the final element in the policy decisions required to complete an amendment Bill as part of the government's response to the Royal Commission on Genetic Modification.
4. The paper proposes options for amending the Hazardous Substances and New Organisms (HSNO) Act 1996, and its related operations, “so that it more appropriately reflects the Treaty of Waitangi relationship”.
5. These options consist of three components, which are:
  - a) the effective involvement of Maori in the preparation and consideration of applications
  - b) the need to ensure greater knowledge of Maori interests by all those involved in HSNO Act processes

- c) deciding on the legislative weighting given to Maori concerns in decision-making

## **Background**

6. In late 2001 the government responded to the report of the Royal Commission on Genetic Modification (RCGM). The government agreed with the overall approach recommended by the RCGM to proceed with caution while preserving opportunities provided by genetic modification (GM).

7. The RCGM report contained a number of recommendations regarding Maori issues, including the recommendation “*that section 8 of the HSNO Act be amended to provide that effect is to be given to the principles of the Treaty of Waitangi*”.

8. The government did not accept this recommendation. However, it agreed that the HSNO Act be amended so that it more appropriately reflects the Treaty of Waitangi relationship. To assist with this, Cabinet invited a group of Ministers to appoint a Maori Reference Group (MRG) to advise Ministers on addressing these issues [CAB Min (01) 34/16].

9. The Maori Reference Group was appointed in December 2002 and comprised Edward Ellison, Andrew Erueti, Dr Mere Roberts and Kaa Williams. The Group met regularly from December 2002 and presented its final report to the Minister for the Environment in March 2003 (Attachment One).

10. The Maori Reference Group Terms of Reference (Appendix One of the Maori Reference Group report) state that the intent of any proposed amendments should be to ensure that the HSNO Act meaningfully and constructively reflects the Treaty principles, and that Maori values are given adequate and transparent weighting within HSNO Act processes, particularly in the consideration of applications by the Environmental Risk Management Authority (the Authority) and their delegates.

## **Consultation on Treaty proposals**

11. There has been no specific consultation with Maori or the wider community by officials or the Maori Reference Group on proposals to more appropriately reflect the Treaty of Waitangi relationship.

12. Public consultation on the other proposed HSNO amendments took place late last year. This consultation included specific consultation with Maori. Six hui were held and records were taken of the discussions. Maori were also encouraged to make written submissions and a total of nine substantive submissions were received from Maori organisations. Although this consultation was not on the specific issues addressed in this paper, comments were made on the Treaty relationship at most hui and officials at these hui both described the government’s decision to form the Maori Reference Group and undertook to convey these views to the Group (which had not been formed when these hui took place).

13. As in the consultation with the wider community, mixed views were expressed by Maori. Many submissions expressed opposition to genetic modification. Maori submitters sought enhanced Maori membership on the Authority and a strengthening of

the obligations in law in respect of the Treaty. The Maori Reference Group was given copies of these submissions as part of its source material.

14. The public consultation at the time the proposals on legislative changes are considered by the Select Committee will provide an opportunity for Maori and the wider community to express views on this area.

## **Comment**

15. Maori concerns with respect to the Treaty relationship under the HSNO Act fall into three main areas; the effective involvement of Maori in the preparation and consideration of applications under the HSNO Act; the need to ensure greater knowledge of Maori interests by all those involved in HSNO Act processes; and the need for adequate consideration of Maori views in decision-making. These concerns closely relate to the following principles of the Treaty of Waitangi: the duty to act in good faith; the active protection of taonga (tangible and intangible); consultation and the duty to make informed decisions.

16. The government has already made decisions that go some way to address the concerns identified by Maori:

- Formation of a Bioethics Council: Toi te Taiaro [CAB Min (02) 32/3A], to provide independent advice to the government on biotechnological issues involving significant cultural, ethical and spiritual dimensions. Its terms of reference require the Bioethics Council to consult and engage with Maori about the issues it considers.
- Expansion of the grounds for ministerial call-in under the HSNO Act to include significant cultural, ethical and spiritual effects [CAB Min (03) 3/17].
- Establishment and continuation of research programmes to investigate environmental, social (including cultural) and economic impacts of genetic modification as recommended by the Royal Commission.
- Development of a biotechnology strategy to provide a coherent way forward for all aspects of biotechnology in New Zealand including effective ways of engaging the community, including Maori, around biotechnology developments.
- Agreement to give ERMA flexibility to place conditions on approvals for the release of new organisms.

17. A further consideration is the work that ERMA New Zealand has been undertaking over recent months to strengthen the engagement of Maori with the HSNO Act process. ERMA New Zealand now requires all IBSCs to have a mandated Maori representative on the decision-making committee. Requirements for increasing consultation with Maori for low risk development work have also been implemented. ERMA New Zealand has recently prepared HSNO education kits for use by hapu / iwi and a revised policy protocol on assessing cultural effects of HSNO applications. ERMA New Zealand advised by their Maori advisory committee, Nga Kaihoutu Tikanga Taiao (Nga Kaihoutu) is currently consulting on a discussion document outlining practical

measures to improve the consideration of Maori concerns in HSNO decision-making. For example, the discussion document includes proposals to produce guidelines for low risk applications of introduced organisms that are of the same family as any native species, to be declined or referred to the Authority if consultation produces a spiritually based objection.

### **Maori Reference Group recommendations**

18. The Maori Reference Group recommended five mechanisms for legislative and non-legislative change to improve the operation of the HSNO Act with respect to the Treaty relationship. Officials have considered these mechanisms for their contribution to addressing the three areas of concern referred to in paragraph 15 for consistency with the Treaty principles, as well as the government's overall policy direction for genetic modification of proceeding with caution and preserving opportunities. The fiscal implications of these recommendations are considered in the section on financial implications below.

***Mechanism 1: "Development of relationships between scientists, and support of iwi and hapu to facilitate pre-application discussion and resolution of differences, including undertaking a cultural impact assessment and/or mediation"***

19. The Maori Reference Group recommended that the government further encourage the development of relationships between interested iwi and hapu and scientists. It believes that this will lead to longer-term research opportunities and capacity building partnerships for both Maori and researchers. The report of the Maori Reference Group does not detail how the government can further facilitate relationship building but it does identify best practice examples of Crown Research Institutes (CRIs) and local Maori working together.

20. The Maori Reference Group recommended providing resources to iwi / hapu for pre-application discussions, developing cultural impact assessments, and to help identify the implications for tikanga and customary law of proposed applications. The Maori Reference Group considered that providing this assistance would both reduce potential conflict later in the process and also ensure that those making decisions under the HSNO Act have robust information to base their decisions on.

21. Furthermore the Maori Reference Group recommended that a mediation process be offered to enable affected parties to resolve outstanding issues prior to an application being submitted to the Authority or an IBSC.

### **Officials' response**

22. Mechanism 1 incorporates three issues:

- (i) Relationship building
- (ii) Use of cultural impact assessments
- (iii) Mediation.

23. Officials support the overall intent of Mechanism 1, which is aimed at ensuring a meaningful engagement between Maori and applicants. However, officials do not support all the elements of the Maori Reference Group recommendation.

### ***Relationship building***

24. Officials support the Maori Reference Group's recommendation to encourage relationship building between would-be applicants, the Authority and Maori, while noting that the relationship under discussion is wider than between Maori and scientists. It involves Maori and all would-be applicants to the Authority under the HSNO Act, including CRIs, universities, other research institutions, companies and individuals. They may be based in New Zealand or overseas.

25. There is a range of government initiatives currently underway which are broadly aligned with this objective, by research purchase agents and research providers (including those referred to by the Maori Reference Group), and by the Ministry of Research, Science and Technology. As a number of these initiatives began only recently the full effects are yet to be realised. However, officials still recommend that ERMA New Zealand should be further encouraged through the Statement of Intent to continue to facilitate long-term relationship building, pre-application discussions, and publication of best practice examples and guidelines.

### ***Cultural impact assessments***

26. Currently, at the pre-application stage ERMA helps applicants identify whether or not their applications may present risks to Maori. For example, applications involving genetic modification of native species or the use of human genes would be identified by ERMA as possibly presenting risks. Applications to the Authority that potentially present risks to Maori are not processed until full information is provided by the applicant on the nature of the risks and how the applicant has consulted with Maori to identify these risks. This information is primarily gained through consultation and may involve matters of cultural and spiritual concern as well as other matters relating to the application. It is likely that this information would cover the matters that the Maori Reference Group saw as comprising a cultural impact assessment but it would not involve a formal report. Additionally, there is an opportunity for Maori to present their concerns directly to the Authority if the application is publicly notified and hearings are held.

27. Officials support the Maori Reference Group's intention to help identify the potential Maori interests at an early stage of an application. The formal written report or "cultural impact assessment" described in the Maori Reference Group report may not always be the best mechanism to achieve this. Consequently, the use of a report should not be a mandatory requirement. However, if a report is written in order to clarify issues it could be useful to the decision-makers (the Authority or IBSC). Officials will work with ERMA New Zealand on this issue (see paragraph 29 below for next steps).

### ***Mediation***

28. Officials do not support this part of the Maori Reference Group recommendation proposing mediation at the pre-application stage. It is up to the discretion of applicants to decide how best to resolve issues that may arise in pre-application discussions. If major differences cannot be resolved at the pre-application stage then these views will be presented to the Authority or IBSC, which makes its decision based on all available information within the purpose and principles of the HSNO Act.

### ***Conclusion and next steps***

29. Officials propose that the Ministry for the Environment work with ERMA New Zealand to further develop the proposals supported above, including identifying resource requirements. This work will take into account the outcome of ERMA New Zealand's consultation on "Dealing with Maori Concerns and Perspectives in New Organism Decision-Making under the HSNO Act".

***Mechanism 2: "Establishment of a network of Maori IBSC representatives"***

30. The Maori Reference Group recommended establishing a network of Maori IBSC representatives to ensure information sharing between institutions and hapu/iwi. It further recommended that this network be facilitated by ERMA New Zealand and that it be extended to include (in addition to Nga Kaihautu) all Maori resource managers, Kaupapa Atawhai managers of the Department of Conservation, customary fisheries managers of the Ministry of Fisheries and other interested stakeholders in the primary sector industries (i.e. large Maori owned land, forestry and fishing corporations) who wish to participate in this network.

**Officials' response**

31. ERMA New Zealand has already begun to establish such a network of Maori IBSC representatives, although it is not yet comprehensive. Officials support the further development of this network but not the immediate extension of the network to include other interested Maori parties proposed by the Maori Reference Group. The initial need is to assist the Maori IBSC members to network and inform themselves about generic issues involving genetic modification so that they are able to make a more effective contribution to the IBSCs. Confidential information relating to specific applications will be protected. The network will be able to engage with other Maori networks as appropriate to assist in their work. Over time the network may evolve to include a wider membership. This network can perform a very important function in providing for better-informed decision-making. However, it must be recognised that there are costs involved. These costs need to be balanced against the benefits (including reduction in processing costs) of better-informed decision-making. Resources need to be made available to establish a broader network in order that these benefits can be fully realised.

32. Funding may be needed, for example the Maori Reference Group proposes holding an annual conference of the Maori network. As part of the further work already identified under Mechanism 1 officials will discuss with ERMA New Zealand what further support may be needed as this network develops.

***Mechanism 3: "Role and responsibilities of Nga Kaihautu Tikanga Taiao"***

33. The Maori Reference Group recommends amending the HSNO Act to require the Authority to establish Nga Kaihautu Tikanga Taiao (Nga Kaihautu). The Maori Reference Group also recommends that the role of Nga Kaihautu be broadened beyond its functions advising the Authority to include providing advice, support and education "at the front end of the process". The Group also recommended that the terms of reference be reviewed periodically (not less than every three years) in order to ensure that these are closely aligned with the views of iwi and hapu involved in HSNO Act processes, as well as with changes in ERMA New Zealand processes and methodology.

**Officials' response**

34. Currently, the role of Nga Kaihautu is to provide advice to the Authority on issues that may arise in taking into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga (sections 6(d) of the HSNO Act). It is also required to take into account the principles of the Treaty of Waitangi (section 8). The Authority sets the terms of reference and appoints the members of Nga Kaihautu. Nga Kaihautu appoints a chair from within their membership and the Authority confirms this.

35. The Maori Reference Group proposed that Nga Kaihautu engage with Maori who participate in the HSNO Act and assist ERMA New Zealand with policy and processes. The merit of this suggestion is that Nga Kaihautu comprises people with extensive knowledge and experience of the Treaty of Waitangi, tikanga and the HSNO Act, and is therefore able to add value in these areas. However, the policy-making and assistance of Maori functions are currently, and should continue to be, led by ERMA New Zealand staff with advice from Nga Kaihautu.

36. Officials support the recommendation of the Maori Reference Group to give Nga Kaihautu a statutory basis as an advisory body to the Authority to contribute to the quality of the Authority's policy and decision-making. Given the importance of Nga Kaihautu and the advice it provides, officials agree that its existence should be mandatory. Officials also agree with the Maori Reference Group that the terms of reference of Nga Kaihautu should be reviewed on a regular basis. Additionally, officials recommend that the Authority appoint the chairperson and members of Nga Kaihautu as. To allow flexibility and development over time, the detail of Nga Kaihautu's role and functions should be determined by the Authority and not totally prescribed by statute.

37. Officials do not support the Maori Reference Group recommendation that the role of Nga Kaihautu be extended beyond its current function as an advisory committee to the Authority to include providing advice, support and education "at the front end of the process". These functions are the responsibility of ERMA New Zealand.

#### ***Mechanism 4: "Consensus decision making by the Authority"***

38. The Maori Reference Group recommends that both the Authority and IBSCs be required to reach consensus decisions. This would ensure that minority views (including Maori) were not consistently over-ruled by the majority decision. If the Authority were unable to reach a consensus decision then a mediation process, would be implemented to resolve outstanding issues.

#### **Officials' response**

39. Officials do not support this recommendation. In practice many of the decisions made by The Authority and IBSCs will be made by consensus. However, there will be times when opinions will differ and no amount of discussion will enable consensus to be reached. The situation reflects both the complex technology and the wide range of perceptions about its use. The Authority was deliberately set up as a quasi-judicial expert body and it is inappropriate to prescribe its decision making process.

40. Consensus can be reached in setting controls to mitigate risks and the Authority has experience of setting controls that address Maori concerns. This is not however the same as consensus decision-making in circumstances where a yes / no decision is

required. A requirement for consensus decision-making could lead to situations where one party has an effective veto.

### ***Mechanism 5. Weighting of Treaty related considerations in the Act***

41. The Maori Reference Group recommends “*giving additional weighting to the views of Maori communities where they are able to prove their customary laws to the satisfaction of the Authority*”. To do this they recommend, in mechanism 5, amending sections 5 and 8 of the HSNO Act. In addition they also recommend changing section 16, the eligibility for appointment as a member of the Authority, “*to ensure membership includes a mix of relevant professional expertise as well as stakeholders / end uses with a sound knowledge and experience of Tikanga and the principles of the Treaty of Waitangi*”.

42. The Maori Reference Group proposals clearly represent a strengthening of the statements in the Act that relate to the principles of the Treaty of Waitangi and Maori interests. The changes would apply to the entire Act, i.e. applications relating to both hazardous substances and new organisms.

### ***Section 5 – Matters relevant to the purpose of the Act***

43. The Maori Reference Group recommends amending Part 2 – Purpose of Act, by elevating existing current section 6(d) of the Act to section 5. In addition, and as a separate recommendation, the Maori Reference Group recommends including the concept of kaitiakitanga, so section 5 would read:

- 5. Principles relevant to purpose of Act – All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, recognise and provide for the following principles:*
- (a) The safeguarding of the life-supporting capacity of air, water, soil, and ecosystems:*
  - (b) The maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural wellbeing and for the reasonably foreseeable needs of future generations:*
  - (c) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga:***
  - (d) Kaitiakitanga.***

(Maori Reference Group proposed text in bold italics.)

44. The section 5(c) change is intended to increase the weighting given to the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga when decisions are made under the Act. The Maori Reference Group notes that this change would bring the HSNO Act in line with the Resource Management Act 1991 (RMA), which requires that these matters be recognised and provided for.

45. The Maori Reference Group considers that the additional recommendation to include “kaitiakitanga” in the Act would also bring the HSNO Act in line with the RMA. Under the RMA, “particular regard” is given to kaitiakitanga – section 7(a). More fundamentally, the Group argues that it will incorporate into the HSNO Act one of the most important principles articulated by Maori in all submissions and hui relating to

genetic modification. The RMA defines kaitiakitanga as “*the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship*”. The Maori Reference Group considers that “*It is difficult to conceive of any circumstances in which iwi and hapu involved in the management of their resources can do so without involving the principles and practices of kaitiakitanga.*”

## **Officials Response**

46. To incorporate the current section 6(d) into section 5 would provide a significant strengthening compared to the current provision. It would meet the concerns of Maori who consider that the HSNO Act does not give due weight to Maori interests.

47. The RCGM explicitly rejected strengthening the current section 6(d) for the following reasons: “*It would be contrary to the spirit and principle of the Treaty were the spiritual and cultural values of either Treaty partner given pre-emptive standing. In our view, the appropriate framework for the consideration of applications under HSNO is that the spiritual and cultural values of all New Zealanders ought to be taken into account, as envisaged by section 5.*”

48. The Maori Reference Group disagreed with the conclusion of the RCGM on the grounds that the proposal would give these values the same status that they currently have under the Resource Management Act.

49. The purpose of the HSNO Act is 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. The purpose of the RMA is to promote the sustainable management of natural resources. Given its purpose, it is appropriate for the RMA to “*recognise and provide for*” the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. The HSNO Act focuses on making decisions on new organisms and hazardous substances applications. Once approved, the hazardous substance or new organism may be imported, released, manufactured or used, subject to conditions, anywhere in New Zealand. As a consequence the HSNO Act requires decision-making generic to New Zealand as a whole while the Resource Management Act principally deals with decisions on the effects on specific natural and physical resources and locations.

50. Introducing “kaitiakitanga” into the HSNO Act would explicitly recognise this concept. Currently it is implicitly recognised through both sections 5 and 8. If an explicit reference to kaitiakitanga were deemed necessary it could alternatively be listed in section 6 as a matter relevant to the purpose of the Act, which means it would be “taken into account”. It is unclear how the proposed addition would materially affect the decision-making process.

## **Section 8 – Treaty of Waitangi**

51. The Maori Reference Group also recommends amending section 8, the Treaty of Waitangi section, so that it reads, “*All persons exercising powers and functions under this Act shall give effect to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)*”. Currently, the requirement is to “take into account” the Treaty principles. The Maori Reference Group advise that this legislative change would provide a more robust and coherent approach to protecting the interests of Maori under the HSNO Act.

52. The RCGM stated, “*the principles (of the Treaty of Waitangi) should be incorporated in plain terms, and not left in the potentially token state of being ‘taken into account’. We would favour amendment of section 8 so that, on the precedent of the Conservation Act, it is clear that effect is to be given to the principles of the Treaty.*” The Maori Reference Group agreed with the RCGM and with their recommendation “*that section 8 of the HSNO Act be amended to provide that effect is to be given to the principles of the Treaty of Waitangi.*”

### **Officials’ response**

53. In responding to the report of the RCGM in late 2001 Ministry for the Environment sought the advice of the Crown Law Office on changes to Part 2 of the HSNO Act. The Crown Law Office also contributed to the preparation of this paper and its advice remains the same. The Crown Law Office advised that [withheld under Section 9 (2) (h) of the Official Information Act in order to maintain legal professional privilege].

54. Crown Law Office further added that [withheld under Section 9 (2) (h) of the Official Information Act in order to maintain legal professional privilege].

### ***Deciding on an appropriate weighting***

55. It is the Treaty principle of active protection of taonga (tangible and intangible) that justifies the presence of Maori interests in the decision-making framework. It requires that the impact of a decision on Maori interests must be carefully considered. It is the Treaty that warrants elevating the impact on Maori interests into matters that must be considered as a matter of law.

56. The Privy Council has made clear that the responsibility to protect taonga (including Maori cultural values), is not absolute or unqualified. “*While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.*”

57. Under the current HSNO Act framework, section 6(d) means that the impact on taonga must be taken into account. It is an accurate reflection of the constant obligation on the Crown to make sure that the effect of a particular decision on the relevant taonga is considered. It also enables the level of protection accorded to vary with the circumstances of each application on a case-by-case basis.

58. The decision-making framework as it stands in sections 4-8 is consistent with Treaty principles. Nonetheless, there is a question about whether the government might make changes to the relative weighting within the framework, given the concerns that have been raised by Maori. This needs to be seen in the light of the fact that the Crown delegates putting this obligation into practice to an independent decision-making body, the Environmental Risk Management Authority.

59. There are two key points to be considered when deciding on the recommendations contained within Mechanism 5 of the Maori Reference Group report.

60. Firstly, the proposed legislative changes do achieve the objective of strengthening the consideration given to Maori interests within the Treaty relationship.

61. Secondly, and against this first point, there are potential risks:

The recommendation to move section 6(d) to section 5 carries a risk of unintended consequences given the level of generality. By not providing clarity or guidance to those working with the Act, it is unclear what the changes would mean in practice. They are indirect in so far as they rely upon the courts to enforce or uphold the higher standard or weighting to be given to Maori perspectives and values, on a case-by-case basis. Officials consider that this strengthening compared to the current provision is likely to shift to the courts issues which ought to remain with the Authority as a specialist body (subject to the courts overall supervision of due process).

[withheld under Section 9 (2) (h) of the Official Information Act in order to maintain legal professional privilege].

The elevation of these issues could raise concerns from potential applicants that the compliance costs for making applications would increase.

62. These elements form the basis for considering whether or not to accept the Maori Reference Group recommendations and increase the weighting given to Maori interests in decision-making under the HSNO Act.

***Eligibility for appointment as a member of the Authority: “That section 16 be amended to ensure membership includes a mix of relevant professional expertise as well as stakeholders/end-users with sound knowledge and experience of tikanga and the principles of the Treaty of Waitangi”.***

63. Through this recommendation the Maori Reference Group is seeking a more representative Authority, representing wider community interests, albeit with relevant expertise and recognised standing in an area. The Maori Reference Group notes that the majority of Authority members come from a science background and “*Given the narrow extent of scientific education, this composition makes for difficulties when the ERMA Board is asked to deal (as it frequently is) with cultural issues and particularly those of an intangible or spiritual nature.*”

#### **Officials’ response**

64. The Authority is an expert body and given the complexity of issues it considers, it is important that this expertise basis remain intact. It is also important that it continues to act collectively. Experience with representative bodies suggests that members feel obliged to go no further than act in a way that advocates the interests that they are appointed to represent.

65. The Act already requires that the Minister ensure that the membership of the Authority includes a balanced mix of knowledge and experience. At present the membership includes people with knowledge of Treaty of Waitangi and tikanga Maori. Officials consider that explicit mention of the need for the Authority to include knowledge and experience of Treaty of Waitangi and tikanga Maori could be added to the Act in order to ensure this continues. In addition, it would be worth drawing to the attention of new Authority members, once appointed, the need for knowledge of Treaty of Waitangi and tikanga Maori.

66. The present mechanism also provides for appointments of additional members to decision-making panels to provide expertise relevant to particular applications. This has included people with specific Maori expertise.

## **Conclusion**

67. Officials consider that in providing for an appropriate means to reflect the Treaty of Waitangi in the HSNO Act decision-making framework there are three components. These are:

- a) The effective involvement of Maori in the preparation and consideration of applications, on the basis of a broadened understanding of the HSNO Act and the technologies it regulates.
- b) The need to ensure greater knowledge of Maori interests by all those involved in HSNO Act processes.
- c) Deciding on the legislative weighting given to Maori concerns in decision-making.

68. Statutory and non-statutory mechanisms are recommended addressing these three areas.

## **Timetable implications**

69. Cabinet has already made most of the decisions required to complete an amendment Bill. There may be elements of the decisions from this paper that need to be inserted into this bill. Accordingly decisions from this paper are needed urgently to minimise the risk of delaying the introduction of the bill.

## **Financial Implications**

70. The non-statutory recommendations contained in this paper may have financial implications. Officials propose that the Ministry for the Environment in cooperation with ERMA New Zealand and relevant government agencies report to Cabinet Policy Committee by 31 July 2003 on the resources to be provided by the Crown. This will allow funding needs to be considered in the context of other ERMA capability issues that may arise as a result of the current review of ERMA.

## **Human rights**

71. The proposals need to be assessed for compliance with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. This assessment will be possible once the detail of the proposals has been developed and, in particular, once implementing legislation has been drafted. Officials from various agencies responsible for this suite of papers will continue to work with officials from the Ministry of Justice in this regard and these matters will be reported as part of the presentation of a draft bill to Cabinet Legislation Committee.

## **Legislative implications**

72. Some of the proposals require amending the HSNO Act. Legislation will be binding on the Crown.

### **Regulatory impact and compliance cost statement**

73. The Regulatory Impact and Business Compliance Cost Statement attached complies with the requirements of Cabinet Office Circulars CO (98) 5 and CO (01) 2. Based on the information provided in the attached RIS/BCCS, the Business Compliance Costs Unit considers that the disclosure of information is adequate, and the level of analysis is appropriate given the likely impacts of the proposal.

### **Publicity**

74. I recommend that the Maori Reference Group report be made publicly available, and that the Maori Reference Group be thanked for its work and the considerable effort that went into producing the report and recommendations in such a timely fashion.

75. I recommend that announcement of these decisions be made by relevant senior government ministers as soon as practicable, and that these announcements be supported by a package of material for interested parties including this paper. In making these decisions reference should be made to other government decisions that are of interest to Maori.

76. The report of the Maori Reference Group could also be forwarded to the Select Committee considering the HSNO amendment bill.

### **Consultation**

77. The Ministry for the Environment consulted the following agencies in the preparation of this paper: Ministry of Agriculture and Forestry, Ministry of Economic Development, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Research Science and Technology, Te Puni Kokiri, and the Treasury. The Department of Prime Minister and Cabinet, Crown Law Office, and the Environmental Risk Management Authority were also consulted in the preparation of this paper.

### **Recommendations**

78. It is recommended that the Cabinet Policy Committee:

#### ***The effective involvement of Maori***

- a) **Invite** the Minister for the Environment, through the Statement of Intent, to encourage ERMA New Zealand to further facilitate relationship building between Maori and potential applicants.
- b) **Direct** officials, led by Ministry for the Environment (MfE), to work with ERMA New Zealand to further develop and co-ordinate initiatives aimed at improving the engagement of Maori early in the development of research programmes which may lead to applications (particularly new organisms applications) under the HSNO Act and report to the Minister for the Environment and the Minister of Research Science and Technology.

- c) **Note** the ERMA New Zealand has already begun to establish a network of Maori Institutional Biological Safety Committee (IBSC) representatives.
- d) **Direct** officials led by MfE to work with ERMA New Zealand to investigate and report to the Minister for the Environment on the support necessary to further develop the network in recommendation c) above.
- e) **Direct** MfE, in consultation with ERMA New Zealand and other relevant agencies, to report back to Cabinet Policy Committee on recommendations b) and d) including the funding implications of by 31 July 2003.

***Extending knowledge and experience of Maori values by those involved in decision-making***

**Nga Kaihoutu Tikanga Taiao**

- f) **Note** that at present Nga Kaihoutu Tikanga Taiao is an advisory committee appointed by, and at the discretion of, the Authority to contribute to the quality of the Authority's policy and decision-making from a Maori perspective. Nga Kaihoutu Tikanga Taiao appoints its own chairperson, which is confirmed by the Authority.
- g) **Agree** to amend the HSNO Act to give Nga Kaihoutu Tikanga Taiao a statutory basis as an advisory body to the Authority to contribute to the quality of the Authority's policy and decision-making from a Maori perspective, and that the Authority appoints the chair and members of Nga Kaihoutu Tikanga Taiao.
- h) **Agree** that the Authority should establish the terms of reference of Nga Kaihoutu Tikanga Taiao and review these on a regular basis.

**Members of the Authority**

- i) **Agree** to amend the HSNO Act to add knowledge of the Treaty of Waitangi and tikanga Maori to the knowledge and experience that the Minister considers when appointing members of the Authority.

***Increasing the weighting given to Maori perspectives and values in decision-making***

- j) **Note** that the decision-making framework in sections 4-8 of the HSNO Act is consistent with the Treaty principles, but that the relative weighting within the framework could be changed to strengthen the consideration given to Maori interests within the Treaty relationship.
- k) ***Either***
  - (i) **Agree** to amend section 5 of the HSNO Act to read:

*5. Principles relevant to purpose of Act – All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, recognise and provide for the following principles:*  
*(a) The safeguarding of the life-supporting capacity of air, water, soil, and*

*ecosystems:*

*(b) The maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural wellbeing and for the reasonably foreseeable needs of future generations:*

*(c) **The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga:***

*(d) **Kaitiakitanga.***

(new proposed text in bold italics.)

**Or**

(ii) **Agree** not to amend section 5 of the HSNO Act.

l) **Either**

(i) **Agree** to amend section 8 of the HSNO Act to read:

*All persons exercising powers and functions under this Act **shall give effect to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).***

(new proposed text in bold italics.)

**Or**

(ii) **Agree** not to amend section 8 of the HSNO Act.

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## **Publicity**

- m) **Agree** that these decisions be announced as soon as practicable and that this paper and the Maori Reference Group report be made public at that time.
- n) **Agree** that the Maori Reference Group report be provided to the Select Committee considering the HSNO amendment bill.

Hon Marian L Hobbs  
**Minister for the Environment**

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# Annex 1

## Regulatory impact statement

### Nature and magnitude of the problem and need for Government action

In late 2001, in response to the report of the Royal Commission on Genetic Modification, the government agreed to amend the HSNO Act so that it more appropriately reflects the Treaty of Waitangi relationship [CAB Min(01) 34/16].

The Environmental Risk Management Authority (ERMA) or an Institutional Biological Safety Committee (IBSC) under delegation from ERMA make decisions on applications for approvals of new organisms under the Hazardous Substances and New Organisms Act 1996 (HSNO Act). ERMA experience indicates that they receive approximately 40 new organisms applications in a "normal" year, of which about 5 might be for genetically modified organisms. This is in addition to the approximately 120 applications for development of genetically modified organisms processed by IBSCs under the low risk regulations.

The Royal Commission on Genetic Modification reported that Maori have concerns about how their views are taken into consideration in the decision-making process both in terms of the way in which information is obtained and the weight given to it. Maori also raised concerns that the HSNO Act does not appropriately reflect the Treaty of Waitangi.

Applicants are required to consult with Maori well before an application is lodged with the IBSC or ERMA. In particular, applicants that wish to use genetic modification processes of native species or the use of human genes are required to consult with Maori and to provide information on the potential effects on Maori. Both Maori and applicants have expressed concerns about the practical operation of this consultation at present.

Applicants report difficulties in knowing with whom they should consult. This is reported to cause delays and additional costs to study programmes. In some cases it is reported that research proposals have been set aside.

Maori are hampered by a lack of time and resources. The issues are important to Maori and there is a desire to contribute. Maori note that the issues they raise will often have a distinct basis in Maori culture. There is a risk that if their views are not heard and considered carefully, the effects on Maori could be considerable.

### Public policy objectives

The overall objective is to ensure that the HSNO Act operates to more appropriately reflect the Treaty of Waitangi relationship, in particular, to ensure:

- a) effective involvement of Maori in the preparation and consideration of applications, on the basis of a broadened understanding of the HSNO Act and the technologies it regulates
- b) greater knowledge of Maori interests by all those involved in HSNO Act processes
- c) appropriate legislative weighting is given to Maori concerns in decision-making

## **Feasible options (regulatory and non-regulatory) for achieving objectives and the net benefits of the proposal**

### **Status Quo**

ERMA, at the pre-application stage, helps applicants identify whether or not their applications may present risks to Maori. For example, all applications involving genetic modification of native species or the use of human genes would be identified by ERMA as possibly presenting risks. Applications that may present risks to Maori are not accepted by ERMA unless the applicant provides full information on the nature of those risks. Information is gathered during consultation between applicants and Maori. Additionally there is an opportunity for Maori views to be aired if the application is publicly notified and hearings are held. Nga Kaihautu Tikanga Taiao, the ERMA Maori advisory committee, advises ERMA on decision-making processes from a Maori perspective.

ERMA provides assistance, through statements on policies and procedures, to applicants so that they can take into account Maori perspectives. In addition, ERMA has established a network of Maori IBSC representatives, although it is not yet fully comprehensive. IBSCs, all of which are required to have at least one Maori member, make decisions on some low risk applications.

### **Regulatory and Non-regulatory Measures:**

Both regulatory and non-regulatory means are identified to achieve these policy objectives.

**Objective 1:** Ensuring the effective involvement of Maori in the decision-making process could be achieved by non-regulatory means:

- Encouraging ERMA, through non-statutory means such as the Statement of Intent from the Minister for the Environment, to continue with its work on establishing a national network of IBSC-Maori representatives, using existing structures.
- Encouraging pre-application discussions between Maori and applicants (particularly research institutions where much GM work is initiated) by directing officials led by the Ministry for the Environment to work with ERMA to develop and co-ordinate initiatives aimed at improving the engagement of Maori early in the development of work which may lead to applications (particularly new organisms applications) under the HSNO Act.

These proposals directly address some of the problems identified for Maori and for applicants. Benefits over the status quo would be a more structured system for Maori involvement in decision-making and more robust Maori input at an earlier stage in the process. The outcome should be applications that more appropriately address Maori concerns and more informed decision-making. Through time, Maori would become better informed about the HSNO Act and the technologies it regulates and potential applicants, IBSCs and ERMA would become better informed of Maori concerns. The result would be better-informed decision-making.

Fulfilling this objective will result in additional costs to the government, Maori and potential applicants. These costs have not been quantified. There would be financial costs to ERMA, in building-on and maintaining networks and their lines of communication,

and in relationship building between would-be applicants and iwi/hapu. Over time, these costs should reduce as communication systems are refined and relations improved. It is anticipated that the additional attention given to the “front end” of the process should result in a more streamlined assessment by the decision-maker (ERMA or an IBSC). There will also be costs to Maori. These come in two parts. First there is a cost in building up knowledge and expertise in the relevant issues. Second there is an ongoing cost in Maori being expected to contribute their time and expertise. While the first cost may be expected to diminish as knowledge of the science becomes more widespread, the second will not. Finally, there would be costs to potential applicants who make a greater effort to engage with iwi/hapu in the pre-application stage. As noted above, however, the additional attention given at the front end of the process should result in a more streamlined assessment.

**Objective 2:** Ensuring greater knowledge of Maori interests by all those involved in HSNO Act processes could be achieved by the non-regulatory mechanisms discussed above (Objective 1) and also through amending the Act to add knowledge of the Treaty of Waitangi and tikanga Maori to the expertise to be considered by the Minister when appointing members to ERMA. In addition, there would be statutory provision for Nga Kaihautu Tikanga Taiao, which is currently formed at the discretion of ERMA. ERMA would appoint the chairperson of Nga Kaihautu Tikanga Taiao as well as the members of the committee. ERMA would also review the terms of reference of Nga Kaihautu Tikanga Taiao on a regular basis.

There are no costs identified with this proposal and the benefits should be a surety that there will always be members of ERMA with knowledge of tikanga Maori. A mandatory requirement for Nga Kaihautu Tikanga Taiao will mean that this advisory committee will have more visibility and its involvement in the process will be more transparent. These proposals would address both of the problems identified for Maori and for applicants.

**Objective 3:** There are two options to deciding on the legislative weighting to give to Maori concerns in decision-making:

- Either, changing Part II of the HSNO Act to strengthen the Treaty statement and the statement about considering Maori values (i.e. changing section 8 to “*All persons exercising powers and functions ... shall **give effect to the principles of the Treaty of Waitangi***” and the inclusion of additional matters into section 5 the principles relevant to the Act), such that section 5 would include ;  
(c) *The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga;*  
(d) *Kaitiakitanga.*
- Or, keeping the status quo (i.e. to keep section 8 as “*All persons exercising powers and functions ... shall **take into account the principles of the Treaty of Waitangi***” and not including the additional matters proposed for section 5).

If the weighting of Part 2 of the HSNO Act is strengthened it would represent a significant change to the Act. It is difficult to anticipate what the outcome would be for potential applicants and for ERMA and IBSCs as the decision-makers. As with any change in law there is a risk that decisions made on an approval would be subject to appeal or judicial review. If such appeals are taken they will serve to establish precedents and provide greater certainty to all parties concerned about what was expected and

required. The additional compliance costs associated with this uncertainty are unquantifiable but taken over all applications would not be expected to be large. If the weighting is not changed then these costs will not accrue.

These proposals to change the weighting directly address only the first objective identified above for government action, i.e. to ensure that Maori views are taken into consideration in the decision-making process both in terms of the way in which information is obtained and the weight given to them. The proposals clearly address the most significant issue for Maori. If changes are not made it may be perceived that Maori input does not affect the decision-making in a meaningful way.

### **Consultative programme undertaken**

There was no specific or targeted public consultation on the matters addressed in this paper. A Maori Reference Group was formed to advise Ministers on amending the HSNO Act to more appropriately reflect the Treaty relationship. This paper draws on the advice of the Maori Reference Group and submissions from a public consultation with Maori and the wider community on the discussion paper “Improving the Operation of the HSNO Act for New Organisms: Including Proposals in Response to Recommendations of the Royal Commission on Genetic Modification” However the discussion document specifically excluded the proposals being considered in this paper. Nonetheless the application of Treaty principles was raised at hui, the concerns recorded and passed to the Maori Reference Group. It needs to be clear that this cannot be regarded as adequate consultation on the specific topic of this paper.

The Ministry for the Environment consulted the following agencies in the preparation of this paper: Ministry of Agriculture and Forestry, Ministry of Economic Development, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Research Science and Technology, Te Puni Kokiri, and the Treasury. The Department of Prime Minister and Cabinet, Crown Law Office, and the Environmental Risk Management Authority were also consulted in the preparation of this paper.

### **Business Compliance Cost Statement**

ERMA operates on a cost recovery basis so that potential applicants may incur an increase in compliance costs if greater attention is required to prepare applications, and to build and maintain relationships. The compliance costs would relate to both time and resources that may be required to ensure a robust application is prepared. There will also be one-off costs associated with identifying and understanding any new requirements, and ongoing costs associated with responding to new requirements. Ensuring sound and constant relationships with iwi / hapu may also require buying in specialist services, and training or employing new staff. These costs would relate to the possibility of more extensive information being required of applications. The increase in costs is difficult to quantify but, considering experience of the operation of the Resource Management Act 1991, which has similar provisions, it may not be large.

The business parties directly affected will be potential applicants under the HSNO Act, in particular parties undertaking genetic modification work. These include:

- Biotechnology industry involved in making applications under the HSNO Act conducting genetic modification research on low risk GMOs
- 9 Crown Research Institutes

- Pharmaceutical and animal health companies
- Primary production industry groups involved in genetic modification research (only about four private companies appear to be currently involved in such work in New Zealand, with staff numbers ranging from about 10 to 200 researchers), and
- 8 Universities

ERMA will advise interested parties of any legislative changes, and their impacts, by means of seminars, information sheets, web-publishing and individual attention.

In terms of managing the information requirements at the time of application ERMA already provides significant support to applicants and this will apply to applicants who may be required to provide additional information about Maori interests. Support is in the form of documentation such as application guides including outlining information requirements and technical guides on risk assessment. All of these initiatives serve to educate and inform applicants so that compliance costs in preparing applications are minimised.

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# Attachment 1: Report of the Maori Reference Group

Hutia o te rito o te harakeke  
Kei whea te komako e Pa

Mau e kii mai ki au  
He aha te mea pai?

Maaku e kii atu ki a koe  
He Tangata, he Tangata, te mea pai

Our group was appointed by the Minister for the Environment and requested to “advise Ministers on amendments to the Hazardous Substances and New Organisms Act 1996 (HSNO Act) to better reflect the Treaty relationship between Maori and the Crown. In particular our group was requested to ensure that the HSNO Act meaningfully and constructively reflects the Treaty principles, and that Maori values are given adequate and transparent weighting within HSNO Act processes” (the full Terms of Reference are attached in Appendix one).

In approaching our task of suggesting changes to HSNO that reflect Treaty of Waitangi principles we have endeavoured, in the short time available to us to identify what we consider to be the "Maori interests" that require protection under HSNO (we first convened as a group on December 17 and were asked to provide a report by mid February). Our approach is summarized as follows:

*To develop a Treaty-based framework aimed at empowering iwi and hapu to engage directly with the Crown partner and its processes at all possible levels, in order to discharge their responsibilities and rights of tino rangatiratanga and kaitiakitanga over their taonga.*

We have identified the following issues that we have addressed through our recommendations:

1. The need for greater involvement/more opportunities for involvement of Maori in the HSNO application and decision-making processes;
2. The need for greater weighting to and emphasis on Maori customary law in decisions made under HSNO
3. Reflection in the HSNO Act of the concept of “kaitiakitanga”
4. The fact that the existing “Treaty clause” is what we would describe as ‘low octane’ in that it has little legal effect. As a result it fails to give Maori the assurances they need that their status as Treaty partners will be reflected in the operation and decisions under the Act;
5. The need for the ERMA Board to include not only scientists but rather a mix of relevant professional expertise, including stakeholders/end-users with sound knowledge and experience of Tikanga and the principles of the Treaty of Waitangi.

6. The need for the status of Nga Kaihautu Tikanga Taiao to be strengthened and their role more clearly defined.

In addressing these issues and recommending amendments to the HSNO Act we have been guided by the approach taken in recent legislation such as the Public Health and Disability Act 2000 and the Local Government Act 2002. That approach is evidence of a shift away from the use of only a generic Treaty clause towards an insertion of a series of practical legislative provisions aimed at addressing Maori interests affected by the legislation. It is expected that this approach will provide greater certainty for Maori and those required to comply with the Act.

We emphasise, however, that we have deviated from that approach in one important respect. In both the Public Health and Disability Act and the Local Government Act, the relevant ‘Treaty clause’ is of the ‘low octane variety’ (in that, again it has little or no legal effect). Rather, we support the Royal Commission recommendation 11.1 that *section 8 of the HSNO be amended to require all those exercising powers under the Act to give effect to the principles of the Treaty of Waitangi*. This is discussed in further detail later in our report. We believe this is an essential safety measure in the event that we, and others involved in this drafting process have not identified and/or provided for all of the Maori interests that require protection under HSNO.

We also concur with the Royal Commission on Genetic Modification in recommending that recognition of the Treaty principles should be incorporated in plain terms and not left in the potentially token state of being ‘taken into account’.

<b>Executive Summary of Recommendations and Comment:</b>
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**Section A – Proposed changes to the HSNO Act 1996**

- That section 8 be amended to provide “that effect is to be given to the principles of the Treaty of Waitangi.”
- That section 5 be amended to include existing section 6(d) which will become 5(c)
- That section 5 be further amended to include a new section 5(d) “kaitiakitanga”
- That section 16 be amended to ensure membership includes a mix of relevant professional expertise as well as stakeholders/end-users with sound knowledge and experience of Tikanga and the principles of the Treaty of Waitangi.

**Section B – Mechanisms for implementing recommended changes to the HSNO Act 1996**

- **Mechanism 1.** Development of relationships between scientists and Maori and support for iwi and hapu to facilitate pre-application discussion and

resolution of differences, including undertaking a Cultural Impact Assessment (CIA) and/or mediation.

**We recommend** that the Government should further encourage the development of good relationships between affected iwi and hapu and scientists. We believe this will lead to longer-term research opportunities and capacity-building partnerships for both Maori and scientists.

**We also recommend** that further assistance is provided to iwi or hapu to allow them to engage with these issues at this stage of the process and that iwi or hapu are supported to undertake a cultural impact assessment of projects coming under the HSNO Act.

**We further recommend** that a mediation process be established/offered to enable affected parties to resolve outstanding issues prior to the application being submitted to the Environmental Risk Management Authority (ERMA) or Institutional Biological Safety Committee (IBSC).

- **Mechanism 2:** Establishment of a network of Maori IBSC representatives

**We recommend** establishing a network of Maori IBSC representatives to ensure information sharing between institutions, and iwi and hapu. (This suggestion has already been made by Nga Kaihautu Tikanga Taiao – the Maori advisory committee to ERMA).

**We further recommend** that this network be facilitated by ERMA and that it be extended to include (in addition to Nga Kaihautu) all Maori resource managers, Kaupapa Atawhai managers of the Department of Conservation, customary fisheries managers of the Ministry of Fisheries and other interested stakeholders in the primary sector industries (i.e. large Maori-owned land, forestry and fishing corporations) who wish to participate in this network.

- **Mechanism 3.** Role and responsibilities of Nga Kaihautu Tikanga Taiao

**We recommend** amending the HSNO Act and associated Methodology to *require* the ERMA Board to establish Nga Kaihautu as of right (Nga Kaihautu is currently established at the discretion of the ERMA Board).

**In addition, we recommend** that the terms of reference of Nga Kaihautu be reviewed periodically (not less than every three years) in order to ensure that these are closely aligned with the views of iwi and hapu involved in HSNO processes, as well as with changes in ERMA processes and Methodology.

- **Mechanism 4:** Consensus decision making by the Authority

**We recommend** that the ERMA Board and IBSC's be required to reach consensus decisions. This would ensure that minority views (including Maori) were not consistently over-ruled by the majority decision. If the ERMA Board was unable to reach a consensus decision then a mediation process, similar to that provided under mechanism 1, would be implemented to resolve outstanding issues.

- **Mechanism 5. Weighting:**

**We recommend** giving additional weighting to the views of Maori communities where they are able to prove their customary laws to the satisfaction of the Authority.

There are several possible ways this might be achieved:

- the views of a Maori community could be given absolute weight [i.e. a right of veto]
- the Maori view could be given "a reasonable degree of preference" (see for example, the Ngai Tahu Whale-Watching case)
- it could be presumed that the community view would be upheld unless there was evidence to clearly show the benefits to be gained by proceeding with the research.

We have recommended amending section 6(d) of the HSNO Act to become a new section 5(c) as we consider this will provide for the matters outlined in this section to be given appropriate status and consideration.

### **Structure of the Report**

We have divided our report into two sections.

- Section A relates to proposed changes to the existing sections of the HSNO Act 1996.
- Section B relates to additional legislative amendments and other practical options for improving the operation of the Act.

### **Section A – Proposed changes to the HSNO Act 1996**

We are aware of the current trend in legislation such as the New Zealand Public Health and Disability Act 2000 and the Local Government Act 2002 of providing for Maori interests by including a variety of practical measures throughout the legislation, rather than stand-alone high-level "Treaty" clauses. We emphasize that we have deviated from the approach adopted in those Acts in one important respect. In both the Acts, the relevant Treaty clause has, we consider, little or no legal effect. For this reason we support the Royal Commission on Genetic Modification Recommendation 11.1 that section 8 of HSNO Act be amended so that it provides that those exercising powers under the Act must "*give effect to*" the principles of the Treaty of Waitangi. We believe this amendment would encourage the creation of Treaty partnerships between research institutions and iwi and hapu along the lines of those being developed by the Bay of Plenty conservancy of the Department of Conservation. In that example, seven iwi have signed Charters of Partnership with the Department in a practical expression of "giving effect" to section 4 of the Conservation Act.

We also expect that this amendment to the Act will function as a more effective "safety net" for interests we have failed to identify or foresee and will also support the additional non-statutory mechanisms we have recommended. Given the limited time within which we have been required to identify these issues, it is quite possible that we have overlooked an important "Maori interest". Also given that HSNO

relates to a new and rapidly developing area of science, we cannot be certain of the issues that will arise in the future. The 1987 Lands case is a good example of the benefit of a "safety-net" clause that "gives effect" to Treaty principles in the event that the legislation has failed to adequately address Maori interests. For this reason, we believe that Maori interests in HSNO are best protected by a Treaty clause expressing a strongly-worded obligation (i.e. "shall give effect to") allied with mechanisms (suggested in Section B) which provide practical means with which to address Maori interests under this legislation.

### **Recommendation:**

- **That section 8 be amended to provide "that effect is to be given to the principles of the Treaty of Waitangi."**

We have considered other amendments to the HSNO Act that have been suggested by both the Ministry for the Environment and by Nga Kaihautu among others. In supporting these changes we note that, together with the proposed change to S.8, they provide a more robust and coherent approach to protecting the interests of Maori under HSNO.

- **That section 5 be amended to include existing section 6(d) which will become 5(c)**

The intention of this proposed amendment is to increase the weighting given to these issues when decisions are made under the Act. We consider that this will better reflect the principles of the Treaty by ensuring Maori values are given appropriate consideration in the implementation of the Act.

- **That section 5 be further amended to include a new section 5(d) "kaitiakitanga"**

Inclusion of 'kaitiakitanga' in the Act will bring it in line with the Resource Management Act 1991. More importantly it will incorporate into the HSNO Act one of the most important principles articulated by Maori in all submissions and hui relating to genetic modification. A number of applications to the ERMA and its delegated IBSCs are handled by iwi and hapu resource managers or kaitiaki, whose primary function is to ensure the protection and well-being of Papatuanuku and Tangaroa. It is difficult to conceive of any circumstances in which iwi and hapu involved in the management of their resources can do so without invoking the principles and practices of kaitiakitanga. Inclusion of this principle in the Act will provide tangible recognition of their role and responsibilities under HSNO.

- **That section 16 be amended to ensure membership includes a mix of relevant professional expertise as well as stakeholders/end-users with sound knowledge and experience of Tikanga and the principles of the Treaty of Waitangi.**

We also considered making this a requirement for appointment but on balance we have concluded that such changes should be incremental rather than enforced.

We make this recommendation on the basis that among the key concerns of Maori expressed in submissions to the Royal Commission were relating to process issues. One of these concerns was the composition of the ERMA Board. There was strong

expression of the need for this group to be more representative of the wider community, albeit with relevant expertise and recognised standing in each area. While it is commendable that it now includes two members who are Maori, a significant majority are professional scientists. Given the narrow extent of scientific education, this composition makes for difficulties when the ERMA Board is asked to deal (as it frequently is) with cultural issues and particularly those of an intangible or spiritual nature. While acknowledging the need for scientific expertise to be included in the decision-making process, we are not convinced that this necessitates scientists making up a majority on the ERMA Board to the exclusion of stakeholders in those primary sector industries which are the main end-users of genetic modification (GM technology).

## **Section B – The ERMA process and recommended practical provisions**

We acknowledge that a key area of concern for Maori is the ERMA decision-making process, particularly with respect to applications involving genetically modified organisms (GMOs). There is a widely held view amongst Maori that at present the ERMA Board does not adequately consider and address Maori concerns when making a determination under HSNO.

To assist in addressing this concern we recommend encouraging Maori communities to establish amongst themselves the nature of their customary law and the implications of genetic modification and other issues dealt with by the HSNO Act on their tikanga. We appreciate the difficulty of this task, however we believe it is essential that each community of interest commit to this endeavour prior to the next step of engaging with the applicant, and the HSNO Act processes. This step will involve cross-cultural exchange between two different knowledge systems, each of which lacks the language and concepts of the other. For this reason, and for the principles of the Treaty to be given effect, this exchange of views must be based upon informed understandings on both sides of their own and each other's views.

### **Giving effect to the principles of the Treaty of Waitangi**

The following is an outline of various mechanisms designed to help all stakeholders in HSNO Act processes to address the Maori interests we have identified consistent with the principles of the Treaty of Waitangi.

### **Mechanisms for implementation of sections 6(d) and 8 of the HSNO Act**

We have identified the critical "decision-making" stages in the decision-making processes. Our proposed mechanisms are designed to ensure Maori are involved in an appropriate and meaningful way at each stage of this process. We have also placed deliberate emphasis on engagement and resolution at the pre-application stage.

Before detailing these mechanisms, it is necessary to understand the process. There are two main routes through which an application under the HSNO Act can be approved:

### **Low-Risk Applications**

The most common process for approval is for “low-risk” applications that are decided by Institutional Biological Safety Committees (IBSC’s under delegated authority from ERMA.

### **Non-Low-Risk Applications**

The other process involves a minority of applications of a “non-low risk” and usually higher-profile nature (as well as those “low-risk” ones from institutions that do not have their own IBSC, or where the applicants chooses to go direct to the ERMA). These applications are determined by the independently-appointed ERMA Board (currently eight members, two of whom are Maori). Advice on these applications, determined by the Maori Senior Policy Analyst to ERMA to be of relevance to Maori, is also provided to the ERMA Board from an independently appointed Maori advisory committee (Nga Kaihautu Tikanga Taiao) with expertise in tikanga and areas of relevance to HSNO

### **Pre-Application**

- **Mechanism 1. Development of relationships between scientists and *iwi and hapu* to facilitate pre-application discussion and resolution of differences, and the use of Cultural Impact Assessments (CIAs) and/or mediation**

We are aware that ERMA is engaged in the process of encouraging applicants to consult with relevant Maori communities (e.g. the local tangata whenua in the area in which the research institution is located) well before an application is lodged with the IBSC or ERMA.

**We recommend** that the Government should further encourage the development of relationships between affected iwi and hapu and scientists. We believe this will lead to longer-term research opportunities and capacity-building partnerships for both Maori and scientists.

We are aware that Ngai Tahu is actively engaged in progressing such relationships by way of Memorandums of Understanding and would encourage other iwi and hapu to consider this option. Facilitation of relationship building by the Maori Senior Policy Analyst (SPA) within the ERMA, as well as by members Nga Kaihautu is also to be encouraged and where necessary, further resourced. This includes assistance with consultation with the relevant Maori communities and provision of advice on HSNO and the ERMA processes.

Progress is already being made in this area. This includes those research organisations e.g. in Palmerston North, Otago and Auckland which are facilitating a kanohi ki te kanohi relationship between the scientists in each institution and local tangata whenua. Developed primarily to enable informed consultation on applications to the IBSC, these relationships may also involve applications direct to ERMA (e.g. the GMO sheep and cattle applications).

An excellent example of this developing relationship is that between HortResearch/Landcare at Mt Albert, Auckland, and representatives of local tangata whenua. The latter “consultative committee” currently comprises mandated resource

manager representatives of Ngati Whatua, Tainui, Ngati Paoa, Hauraki and Ngai Tai. Some time (e.g. six weeks) prior to an application being forwarded for approval to their IBSC, (which will in Tamaki Makaurau include two mandated Maori representatives) the scientists involved meet with this consultative committee to discuss any issues of concern. The aim of the meeting and any subsequent discussion prior to the lodging of the application is to seek to address the cultural concerns of tangata whenua. This "front-loading" of the process deliberately seeks to place the responsibility on iwi and hapu to define their concerns, communicate them directly with the scientist concerned, and then seek an outcome acceptable to both parties. By the same token it requires scientists to engage directly with tangata whenua kanohi ki te kanohi, and thereby begin to understand the world view that underpins their cultural beliefs. An important part of the relationship that is being pioneered at Mt. Albert Research Centre is the educational initiatives undertaken by both parties. Some of the scientists have enrolled in Maori language classes, while the Maori resource managers are learning about the language and practice of genetic science through workshops provided by HortResearch/Landcare.

We emphasise the latter point given the unequal relationship in terms of the resources available to the Institutions compared to the Maori resource managers (some of whom are unpaid). We believe institutions need to recognise that they have a role to play, at least initially, in educational workshops and that they need to provide resource for this. Ngai Tahu require such relationships to be formalised at the Institution and iwi and hapu level by way of a Memorandum Of Understanding. In addition to containing an undertaking by both parties to make the process work, this also addresses resourcing issues e.g. the provision of paid personnel to facilitate the pre-application process and educational workshops to ensure the technical upskilling of iwi and hapu representatives.

Placing emphasis on facilitating and empowering communication between applicants and iwi and hapu at the pre-application stage will not only increase the opportunity to address any outstanding concerns of the research proposal, but it will also encourage relevant Maori communities to form a consensus on the nature of their customary law and the relationship between those laws and the issues raised by HSNO. In this way it gives tangible expression to the principles of tino rangatiratanga and kaitiakitanga. In time it is also hoped that the relationships and processes developed at this, the "flax roots" level, will in turn lead to greater acceptance of this evidence by the ERMA.

**We also recommend** that further assistance is provided to iwi or hapu to allow them to engage with these issues at this early stage of the process and that iwi or hapu are supported to undertake a cultural impact assessment (CIA) (conducted by a person or persons acceptable to the hapu or iwi).

Many iwi and hapu currently conduct CIAs under the Resource Management Act 1991 to identify the potential impacts of a proposed activity requiring resource consent. Such CIAs seek to identify and explain the nature and severity of the adverse impact. Subsequent dialogue with the developer is then undertaken with a view to avoiding, remedying or mitigating the impact. (This might result in the proposed development being sited some distance away from the waahi tapu. In the case of transit NZ and Ngati Naho, the Hamilton /Auckland highway was moved and

cantilevered so that it did not adversely impact on the taniwha lair at Meremere.). Such win-win outcomes are more easily achieved where one is dealing with observable, tangible issues (a waahi tapu, a taniwha habitat). A major difficulty we have identified with HSNO has been attempting to identify and evaluate the nature of intangible, spiritual effects and how these might be avoided, remedied or mitigated.

We recommend that more assistance be provided at this stage to iwi and hapu to identify issues and to discuss the implications for tikanga and customary law of proposed applications. We believe providing assistance at this stage will both reduce conflict later in the process and also ensure that those making decisions under the HSNO Act have robust information to base their decisions on.

Where the application is being made to ERMA this consultative process might be assisted or facilitated by the Maori Senior Policy Analyst of ERMA. It is also considered worth exploring the role of Nga Kaihautu members at this stage of the process. Both the Maori Senior Policy Analyst and Nga Kaihautu members have in-depth knowledge and experience of the ERMA process that would be of value to iwi and hapu as they grapple with these issues.

- **Mechanism 2. Establishment of a network of Maori IBSC representatives**

Maori involvement in the decision-making processes of IBSCs has been greatly enhanced by a recent ERMA requirement that all 19 IBSCs have one or more mandated Maori representatives (unless they can produce a good reason why they should not). This is an important move given that 70% or more of all applications under HSNO are dealt with by IBSCs. However, we recommend that more needs to be done to promote best practice amongst IBSC's, including the Maori members of these Committees. We therefore support the recommendation of Nga Kaihautu that a network of Maori IBSC representatives be established to ensure information-sharing between institutions, areas and iwi and hapu. We further recommend that this network be facilitated by the ERMA and that it be extended to include (in addition to Nga Kaihautu) all Maori resource managers, Kaupapa Atawhai managers of the Department of Conservation, customary fisheries managers of the Ministry of Fisheries and other interested stakeholders in the primary sector industries (i.e. large Maori-owned land, forestry and fishing corporations) who may wish to participate in this process.

We see this group as part of an expanding pool of increasingly informed Maori engaged in HSNO/ERMA processes. By virtue of being close to the "flax roots" these persons will in turn be able to pass on information to their people, and in the process facilitate more informed decision-making by iwi and hapu. We also recommend that this Maori network be resourced to hold an annual conference at which issues of importance can be discussed and debated.

We note that this is in part a policy recommendation to ERMA, but we foresee that decision makers at both the IBSC level and on the ERMA Board might wish to make use of the database that will accompany the setting up of this network (and which should include a collation of all decisions made by each IBSC in each locality) to inform their decision-making on specific applications.

We also note that this group should not be seen as a substitute or alternative to the advice provided by Nga Kaihauutu to the ERMA Board. Rather we see it as a complimentary pool of expertise, which may come to play an increasingly important role in the issue of national consultation with iwi and hapu. We believe national consultation will become increasingly necessary in cases involving the release of a GMO or new organism, as well as for some hazardous substances.

### **Maori participation in ERMA Decision-Making Processes**

- **Mechanism 3. Role and responsibilities of Nga Kaihauutu Tikanga Taiao**

**We recommend** that the wording of existing clause 6, of the Roles and Responsibilities listed in the current ERMA Methodology be changed to read:

*"The Authority will appoint a Maori advisory committee called Nga Kaihauutu Tikanga Taiao to provide advice to the ERMA and to the Authority on applications, appropriate policies, processes and other matters pertaining to the Act as determined in its Terms of Reference. "*

We understand that the current Terms of Reference of Nga Kaihauutu specify it is to provide expert advice on the ERMA Board's decision-making processes, particularly sections 6(d) and 8.

We have noted the reluctance of Nga Kaihauutu to establish themselves as judge and jury on the values, beliefs and tikanga as expressed by individual iwi and hapu. We accept that this runs contrary to the accepted norms of tikanga Maori. However, Nga Kaihauutu is more than willing to provide support and assistance to iwi and hapu, if it is required, to help them make robust and informed decisions for themselves. (As has been mentioned, this process might also benefit from advice provided by recognised experts both scientific and Maori, from a Cultural Impact Assessment and /or from mediation).

We understand that Nga Kaihauutu are also keen to undertake a review of their current role and responsibilities. We support this review, with the suggestion that their function might be more appropriately aligned to the mechanisms suggested here i.e. to help educate, and to provide support and advice at the "front-end" of the process. While we understand Nga Kaihauutu currently have an educational role, we suggest that this could be more focussed on both pre-application advice by individual members in their area and on more regular meetings with the "Maori network" of IBSC members, and its wider iwi and hapu members. In addition we suggest that the focus by Nga Kaihauutu within ERMA be on ensuring the effectiveness of "best practice" processes including that of appropriate auditing or monitoring of each stage in the IBSC and ERMA processes in which Maori interests are involved.

We further recommend that the terms of reference of Nga Kaihauutu be reviewed periodically (not less than every three years) in order to ensure that these are closely

aligned with the views of iwi and hapu involved in HSNO processes, as well as with changes in ERMA processes and Methodology.

- **Mechanism 4. Consensus Decision Making by ERMA and IBSC's**

**We recommend** that the ERMA and IBSC's be required to reach consensus decisions. We are concerned that currently there is no requirement on either the ERMA Board or the IBSC's to reach consensus decisions and as a result any minority view on those decision-making bodies may easily be over-ruled by the majority view. We consider this to be of particular concern regarding Maori issues, as the number of Maori on either the ERMA or the IBSC's is always in a significant minority.

Requiring consensus decisions would ensure that minority views (including Maori) were not consistently over-ruled by the majority. If the ERMA Board or IBSC was unable to reach a consensus decision, then a mediation process would be implemented to resolve outstanding issues.

- **Mechanism 5. Providing for Maori values:**

We identified two issues in providing for Maori values through the HSNO Act.

- Proving the nature and extent of Maori values requiring protection
- Once proven, ensuring adequate consideration is given to those values, consistent with the Treaty of Waitangi.

***Proving the nature and extent of Maori values***

We note that an important issue raised by the ERMA Board's *Bleakley* decisions is that of proving the nature of certain Maori customary concepts. In that case it was recognised that the reference to taonga in section 6(d) of HSNO included the concepts of whakapapa and mauri. However, as with any statutory reference to a Maori concept, the concepts have to be proved by evidence before they can be accepted and applied by any Tribunal (such as ERMA).

In the *Bleakley* decision, the ERMA Board questioned the evidence of representatives of Ngati Wairere concerning the nature of that community's customary law on whakapapa and mauri. The ERMA Board questioned the extent to which, in fact and on a head-count basis, genetic modification was regarded as contrary to Ngati Wairere beliefs, given advances in knowledge and modern technology. The ERMA Board also questioned, more strongly, whether breaching Ngati Wairere's tribal customary law could lead to the harm claimed (physical harm such as ill health i.e. Mate Maori):

*"the majority have questions as to whether the interpretation of their traditional beliefs advanced by Ngati Wairere is widely held given that those beliefs would have developed well before human-kind had any appreciation of the evolution of species by genetic mutation and selection, or of the role, function and separability of genes, and the proteins they code for, or for the*

*scientific possibility of transposing gene sequences between species. Matters of belief of course can only be determined by the people who hold them".*

The ERMA Board seems to be suggesting that representatives of Ngati Wairere are advancing an "outmoded" traditional perspective and that there has been no debate within the wider Ngati Wairere community as to whether this traditional custom could accommodate, or adapt to, a new set of circumstances – namely, the new science of genetic modification.

We note that, in the *Bleakley* decision, the ERMA Board – as a guide for Maori communities – formulated a case in support of the science of transgenic transfer based on traditional conceptions of mauri and whakapapa.

We note that it is well established that Maori customary law is dynamic and can adapt to new circumstances. There are countless examples of Maori custom adapting to the changes brought about by English settlement. One such example is the shift in relative weighting accorded to mana and aroha following the introduction of Christianity in Maori society. There is evidence that tribal leaders, after the introduction of Christianity, rejected take raupatu and allowed former conquered slaves to sell land to the Crown. Keeping slaves was considered to be something practised "in Satan's time" before the coming of the gospel.<sup>1</sup>

That flexibility came from the way in which custom was framed – that is, Maori customary law was traditionally communicated by word-of-mouth and debated, applied, and enforced by relatively small communities of kin. Obviously, in times of great stress such as war or famine, chiefs made executive decisions but otherwise, they were in effect the mouthpieces of the people they led. In this way, any rule adopted reflected the prevailing views and values of the kinship community. In addition the debate was subject to traditional checks and balances of open debate where everyone could express their views and question the opinion of others.

Clearly, then, the customary law of a Maori community may well accommodate or adapt to the new science of genetic modification. But of course, as suggested by the ERMA Board in the above quote, that is a decision for that Maori community to make. The problem with the *Bleakley* decisions was wider discussion had not taken place. There were in fact conflicting views within Ngati Wairere and related communities as to whether the proposed field trial was in fact an affront to that community's customary law. In our view, that led the ERMA Board to express doubts about whether the customary law of Ngati Wairere on whakapapa and mauri had in fact been proved.

It is clear that the ERMA Board "considered" the views advanced by Ngati Wairere representatives – they are compelled to by section 6(d) of HSNO - but it is also equally clear that the ERMA Board did not place great weight on that evidence, given their doubts about whether that evidence reflected the view of the community as a whole.

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<sup>1</sup> "In Satan's time": Christianity, land alienation and customary law in 19thc New Zealand", R Boast, *Spectrum*, 1998

We think that should send a clear signal to Maori communities that there is a pressing need to reach a consensus on their approach to GM. Unless there is common agreement within a community that genetic modification is inconsistent with their customary laws, the ERMA Board is likely to place little weight on any objections to an application. We think it is imperative then, that Maori communities be encouraged to settle this question amongst themselves through open community debate. We would expect that discussion would be guided by the community's traditional customary law as expressed by tribal pukenga, and even the advice of scientists. But we do not consider that the debate should be limited to dissecting traditional customary law in the manner adopted by the ERMA Board in the *Bleakley* case. Instead there should also be consideration of the community's prevailing views and opinions on the meaning of whakapapa and mauri.

We accept that this will not be an easy task. There will obviously be a range of opinions within Maori communities, as there are within the NZ community as a whole. Also, more than 150 years of European settlement, loss of land and modern urbanisation has taken its toll on Maori tribal groupings and traditional decision-making processes. The modern treaty settlement process has caused considerable tension between communities over issues of group representation and overlapping tribal boundaries. But settling this issue internally would, we expect, overcome the proof-of-custom issues raised by the *Bleakley* case.

To encourage this discussion we recommend that:

- (A) Maori communities have access to a mediation process to enable them to resolve any mandating issues (we note currently the Maori Land Court offers such a service); and
- (B) Maori communities have access to reasonable funds to enable them to hold hui to discuss the nature of their customary laws and the relationship between those laws and the issues that arise under HSNO.
- (C) Maori communities have access to information and advice (including scientific advice) about the HSNO Act, particularly in relation to GMOs.

***Ensuring adequate consideration is given to proven Maori values***

Once iwi and hapu have proven their tikanga and customary law to the appropriate degree the onus then falls back upon ERMA to ensure that these matters are given appropriate consideration (weighting).

We note that a key area of concern for Maori is the ERMA decision-making process, particularly with respect to applications involving genetic modification. There is a widely-held view among Maori that the ERMA Board does not adequately consider and address Maori concerns when making a decision. These matters are referred to in section 6:

Section 6 Matters relevant to the purpose of the Act –

*All persons exercising functions, powers, and duties under this Act, shall to achieve the purpose of this Act, take into account the following matters:..*

*(d) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga.*

There are several possibilities giving these issues more appropriate consideration:

- Give the views of a Maori community absolute weight [i.e. a right of veto]
- Provide that the community's view should be given "a reasonable degree of preference" (see for example, the Ngai Tahu Whale Watching case)
- Provide that there is a presumption that the community view will be upheld unless it is displaced by clear evidence of the benefits to be gained by proceeding with the research

We also note the recent decision in the *Bleakley* case where Justice McGechan stated in his decision:

*“the obligation in section 6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision – to weigh it up along with other factors – with the ability to give it considerable, moderate, little, or no weight at all as in the end in all the circumstances seem appropriate”*

We do not consider that this gives appropriate weight to the importance of the values outlined in the existing section 6(d), and as a result does not reflect the Treaty relationship between the Maori and the Crown. We are also concerned that, based on this precedent, any future consideration of section 6(d) matters will result in similar outcomes.

We therefore recommend that the existing section 6(d) be amended to become a new section 5(c) which would accord these matters higher status and require those exercising functions, powers and duties under the Act to “*recognise and provide for*” these matters. Section 5 would then state

### **Section 5**

#### ***Principles Relevant to the purpose of Act —***

*All persons exercising functions, powers, and duties under this Act, shall to achieve the purpose of this Act, **recognise and provide** for the following principles:*

*(c) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga*

We acknowledge the Royal Commission considered such a change and decided against making this recommendation as it considered this would provide Maori with a right of veto over applications. We respectfully do not agree with the Royal Commission and note that this recommended amendment, while significantly increasing their status and weighting under the HSNO Act would give these values the same status they **currently** have under section 6(e) of the RMA. We further note that the existing higher status accorded to these matters in the RMA has not resulted in any applications being ‘vetoed’ by Maori.

This recommendation is also consistent with the Ngai Tahu submission to the Royal Commission and was stated by Ngai Tahu as the only iwi granted “interested-person” status by the Royal Commission.

### **Other issues:**

#### **1. The Restricted Period**

**We support the continuation of the period of restraint on GMOs for release for the following reasons:**

(1). Maori still require more time to become better informed about the HSNO Act in general, and of the risks and benefits of GMOs in particular. We are aware of an increasing number of well-informed Maori resource managers but this network needs to be enabled to spread more widely.

(2). We are unaware of any pending GMO release applications. Our understanding is that there are still many years of research to be done on existing GMOs. In the absence of any acute pressure for release we recommend that the principle of *kia tupato* be adhered to.

(3). Scientific uncertainty still surrounds issues such as horizontal gene transfer through pollen and soil. Until the scientific community has conducted research sufficient to assure the public that release of GM organisms is safe, we recommend that the moratorium on GM crops in particular be maintained.

#### **2. Conditional release**

**We recommend that for the new category of "conditional release" iwi and hapu be informed well in advance so that appropriate measures for monitoring of cultural, in addition to scientific, effects can be included as part of the conditions for release.**

#### **National consultation for applications involving conditional or full release:**

We note that currently ERMA does not appear to have a robust process for engaging iwi and hapu in consultation on a national scale. We envisage that the development of the aforementioned IBSC and Maori resource manager network will go a long way towards assisting this process.

**We recommend that ERMA be required to work with the IBSC representatives and hapu/iwi resource managers to develop a robust process for consultation on a national scale.**

### **3. Wai 262**

We support the Royal Commission recommendation 10.6 that "all parties concerned work to resolve the Wai 262 and Wai 740 claims ...as soon as possible"

### **4. Rapid Assessment process by CEO**

We have not had sufficient time to consider this process whereby a small minority of applications are dealt with directly by the CEO of ERMA. We therefore recommend that Nga Kaihautu be asked to examine this process and to provide advice to the ERMA Board concerning any changes that might be required to ensure that Maori interests are adequately protected.

Heoi ano mo tenei wa

Edward Ellison  
Erueti

Andrew

Mere Roberts  
Williams

Kaa

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## APPENDIX 1

### Maori Reference Group Terms of Reference:

The Minister for the Environment has appointed the Maori Reference Group (MRG) to advise Ministers on amendments to the Hazardous Substances and New Organisms Act 1996 (HSNO Act) to better reflect the Treaty relationship between Maori and the Crown.

The intent of the proposed amendments are to ensure that the HSNO Act meaningfully and constructively reflects the Treaty principles, and that Maori values are given adequate and transparent weighting within HSNO Act processes, particularly in the consideration of applications by the Environmental Risk Management Authority. The government intends to have proposed amendments enacted before the period of restraint on genetically modified organism field trials expires in October 2003.

Members of the MRG will be engaged to work closely with officials from the Ministry for the Environment, and other relevant agencies, to advise on the proposed amendments. These proposed amendments are part of a wider package of amendments being progressed as part of the Crown's response to the recommendations of the Royal Commission on Genetic Modification, including other proposed amendments to the HSNO Act, and the establishment of Toi Te Taiao, the Bioethics Council.

The MRG will need to take into account other related issues, including the Wai 262 claim and the development of the Bioethics Council only in so far as they impact on the HSNO Act and the proposed amendments.

In addition to the advice from the MRG, Ministers will also receive advice from officials and through public consultation on the proposed amendments. The advice provided by the MRG, in conjunction with other advice Ministers receive, will assist Ministers in developing the final amendments.

The MRG will also be required to provide advice to Ministers on both the extent of consultation required with iwi, hapu, and whanau about the proposed amendments, and effective methods for undertaking that consultation.

The Group will engage with officials, Ministers, and if necessary, the Parliamentary Maori Caucus on an as required basis and will continue until the proposed amendments have been introduced to the House of Representatives.

*Background Information on the MRG members*

**Kaa Williams, Ngati Manunui, Ngai Tuhoe**

Kaa is a Teacher and has taught for over 40 years. She currently lectures in Maori language at Auckland University. She is also a member of IRI, an Auckland University based research institute dedicated to quality outcomes for Maori and Indigenous people.

Kaa is also involved with the Tuhoe Education Authority set up in 1998 that reports to the Ministry of Education. She has also published for Learning Media in 1993 and 1998

***Dr Mere Roberts, Ngati Apakura, Ngati Hikairo***

Mere is an Environmental Scientist at the University of Auckland with teaching and research interests in matauranga. During her 31 years at the University she has been closely involved in Treaty issues and in providing support for Maori students in medicine and Science. Mere is in her second term as a member of Nga Kaihau Tikanga Taiao, (the Maori advisory committee to the ERMA).

**Edward Ellison, Ngai Tahu**

Edward is Dunedin based, with extensive experience of resource management issues relevant to Maori. He is the Deputy Chair of Te Runanga o Ngai Tahu. Among his many other responsibilities he is a member of the University of Otago Council, and of the Conservation Authority.

**Andrew Erueti, Nga Ruahine-rangi, Ngati Ruanui, Ati hau-nui-a-paparangi.**

Andrew is a law lecturer at the Victoria University of Wellington, who teaches Maori Land Law, Maori Customary law, Indigenous Peoples and the law, Commercial law, and Sales and Sales Finance Law. Andrew is currently on sabbatical leave in South America.

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**APPENDIX 2**

**TABLE 1. Summary of Proposed Amendments to the HSNO Act**

<b>Current Section</b>	<b>Proposed Amendment</b>
<p><b>Section 5</b></p> <p><b>Principles Relevant to the purpose of Act</b></p> <p>All persons exercising functions, powers, and duties under this Act, shall to achieve the purpose of this Act, recognise and provide for the following principles:</p> <ul style="list-style-type: none"> <li>a) the safeguarding of the life supporting capacity of the water soil and ecosystems;</li> <li>b) the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural well-being and for the reasonably foreseeable needs fo future generations</li> </ul>	<p><b>Section 5</b></p> <p><b>Principles Relevant to the purpose of Act</b></p> <p>All persons exercising functions, powers, and duties under this Act, shall to achieve the purpose of this Act, recognise and provide for the following principles:</p> <ul style="list-style-type: none"> <li>(a) the safeguarding of the life supporting capacity of the water soil and ecosystems;</li> <li>(b) the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural well-being and for the reasonably foreseeable needs fo future generations</li> <li>(c) <b>the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga [currently section 6(d)]</b></li> </ul>
<p><b>Section 6</b></p> <p><b>Matters relevant to the purpose of the Act</b></p> <p>All persons exercising functions, powers, and duties under this Act, shall to achieve the purpose of this Act, take into account the following matters:</p> <ul style="list-style-type: none"> <li>a) the sustainability of all native and</li> </ul>	<p><b>Section 6</b></p> <p><b>Matters relevant to the purpose of the Act</b></p> <p>All persons exercising functions, powers, and duties under this Act, shall to achieve the purpose of this Act, take into account the following matters:</p> <ul style="list-style-type: none"> <li>a) the sustainability of all native and</li> </ul>

<p>valued introduced flora and fauna;</p> <p>b) the intrinsic value of ecosystems;</p> <p>c) Public Health;</p> <p>d) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga</p>	<p>valued introduced flora and fauna;</p> <p>b) the intrinsic value of ecosystems;</p> <p>c) Public Health;</p> <p>d) <del>the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga</del> (moved to section 5)</p> <p>New d) <b>kaitiakitanga</b></p>
<p><b>Section 8</b></p> <p><b>Treaty of Waitangi</b></p> <p>All persons exercising powers and functions under this Act shall <b>take into account</b> the principles of the Treaty of Waitangi</p>	<p><b>Section 8</b></p> <p><b><u>Treaty of Waitangi</u></b></p> <p>All persons exercising functions and powers under this Act <del>shall take into account</del> shall <b>give effect to</b> the principles of the Treaty of Waitangi.</p>
<p>Section 16 – Eligibility for appointment as member of the Authority</p> <p>When considering whether a person is suitable to be appointed as a member of the Authority, the Minister shall ensure that the membership includes a balanced mix of knowledge and experience in matters likely to come before the Authority.</p>	<p>We recommend that section 16 be amended to ensure membership includes a mix of relevant professional expertise as well as stakeholders/end-users with sound knowledge and experience of Tikanga and the principles of the Treaty of Waitangi.</p>

**TABLE 2. Proposed amendments to the METHODOLOGY**

<p><b>Clause 6 of the Methodology:</b> <b>Nga Kaihautu Tikanga Taiao.</b></p>	<p>That clause 6 of the methodology be amended to require the Authority to establish an advisory committee called Nga Kaihautu Tikanga Taiao to advise on issues impacting on Maori.</p>
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