Office of the Associate Minister of Justice
Office of the Minister for the Environment

The Chair, Cabinet

Government Response to the Royal Commission on Genetic Modification: Legislative changes for New Organisms – Paper 5: Liability Issues for GM

Purpose

1. This paper seeks approval to amend the Hazardous Substances and New Organisms Act 1996 (HSNO):

- to enable individuals to seek compensation on the basis of strict civil liability for harm caused by activities involving new organisms that breach HSNO
- to enable civil penalties to be recovered by the State (rather than individuals) for certain breaches of HSNO relating to new organisms

Executive summary

2. This paper seeks decisions on civil liability options in the genetic modification (GM) context. It notes that existing liability rules will not always operate effectively to encourage precaution and provide compensation in relation to GM, but that this is not confined to GM and applies to a range of other activities also. Devising a liability regime solely on the basis of a GM/non-GM distinction would, therefore, not be sound in principle. The paper then outlines liability options that could be pursued in respect of the release of all new organisms, including genetically modified organisms (GMOs). These options range from retaining the status quo, amending HSNO, or making amendments that go beyond HSNO.

3. The preferred option is to amend HSNO to include a statutory strict civil liability rule for harm caused by non-complying activities and a civil penalty regime for breaches. This would strengthen incentives to comply with the regulatory regime but without any additional compliance costs for businesses. This strengthening of the regulatory regime, may be perceived by some, as a disincentive to innovation, accordingly care will need to be taken in explaining the proposed changes. If approved, then agreement is also sought to delegate the power to approve the detail of the amendments jointly to the Minister for the Environment, the Associate Minister of Justice and the Minister of Research, Science and Technology.

Background

4. In October and November 2001 Cabinet agreed to a response programme to the recommendations of the Royal Commission on Genetic Modification. This programme included consideration of the appropriateness of the current liability regime. *[CAB Min (01) 33/22, CAB Min (01) 34/13-16 refer]*

5. The Royal Commission recommended that, for the time being, there should be no change in the liability system in relation to genetic modification (GM). It suggested, given the difficulty of the issues involved, that the government might wish to refer the liability issues to the Law Commission for more intensive study.

6. The issues were referred to the Law Commission in February 2002 and its study paper, *Liability for Loss Resulting from the Development, Supply or Use of Genetically Modified Organisms*, was released publicly on 16 July 2002. Following the Commission's work, a number of outstanding matters remained to be addressed before decisions could be made on whether changes to the existing liability regime were called for.

7. A chapter on liability issues, seeking public comment, was included in the discussion paper, *Improving the Operation of the HSNO Act for New Organisms*, released by the Ministry for the Environment in September 2002. A brief summary of submissions is included in paragraphs 9 and 10.

8. In December 2002 a progress report to Cabinet Policy Committee noted that officials were preparing a paper outlining options relating to liability, and that substantive policy decisions would be sought from Cabinet by 31 January 2003 [CAB Min (02) 33/4-10 refers]. This paper seeks those substantive policy decisions.

Submissions

9. 938 submissions responded to the liability chapter of the HSNO discussion paper. Of these, 816 were form letters opposing the release of GM and supporting absolute liability for GM-related harm. Of the remaining submissions, many opposed GM (mainly individuals, those involved in the organics industry and environmental groups), some expressed conditional support for GM and others were supportive of GM (mainly research organisations, the agricultural and biotechnology industry and industry groups). A small number of submissions from Maori referred to liability.

10. Those submissions opposed to GM generally considered that GM organisms were unique and that existing liability rules are inadequate and should be extended, with the majority favouring absolute liability (that is, liability without fault and with no defences). Those submissions supportive of GM generally considered the current mix of regulatory mechanisms (if conditional release is adopted) and existing liability rules to be adequate and rejected any extension of liability rules. Many noted that difficulties in applying liability rules to GM also arise in other contexts. Submissions from Maori expressed concern about how to deal with liability issues, with some suggesting that liability rules and regulatory mechanisms be extended.

Liability rules

11. Under current law, persons suffering any harm caused by a GM activity or technology may be able to bring a claim to recover their loss under grounds including negligence, nuisance and breach of statutory duty. Liability rules do not provide compensation for every kind of harm; only personal injury, property damage and certain forms of economic loss. They are generally not capable of addressing harm that cannot be easily quantified or compensated in monetary terms. Therefore cultural, ethical and spiritual issues related to GM that arise are not ones that can be addressed by liability rules. They need to be addressed in other ways, such as through the regulatory process that applies to GM activities or industry management procedures.

12. Claims could potentially be brought against the users, suppliers or manufacturers of the relevant GMO or GM products, the person who obtained consent for the release or the directors and officers of companies engaged in such activities. A regulatory agency could also potentially be liable

in negligence or breach of statutory duty if it had not taken proper care when approving a GMO or GM product for release.

13. The main objectives of liability rules are to encourage precaution, provide compensation for harm and put right (or remediate) damage. Imposing an obligation on those engaging in an activity to pay for harm caused provides incentives to reduce the risk of harm, provided it is cheaper to do so than pay for the expected cost of the harm. The ability of a person harmed to claim damages by way of compensation underpins and reinforces the precaution objective. The incentives for a potential injurer to take precautions will be reduced if he or she is not likely to bear the full cost of the harm they cause.

14. For liability rules to work well, it is therefore important that persons suffering harm bring a claim to recover the cost of that harm and that the claim is likely to be successful, with the injurer meeting the costs of harm. The following table indicates when liability rules are likely to work well, and when they are not.

Liability rules will be effective where:	*Liability rules will be less effective where:*
The harm is to a few individuals	The damage is diffuse
It is easy to identify the injurer It is easy to establish causation	It is difficult to identify the injurer It is difficult to establish causation
The loss is easy to quantify	It is difficult to quantify the loss
The harm is foreseeable	The harm is not foreseeable
The injurer can pay for cost of harm	The injurer cannot pay the cost
There is no time lag between act and harm	There is a time lag between act and harm
The likely outcome of the claim is clear	The likely outcome of the claim is uncertain
Costs of pursuing the claim are modest	The costs of pursuing a claim are high

15. Certain GM activities that may potentially cause harm have been assessed against these indicators. Some non-GM activities that have parallels to GM activities have also been assessed against the indicators, as have other activities without a direct GM counterpart.

16. This assessment indicates that, within the range of GM activities, liability rules will be effective in some cases and will be less effective in others. They will tend to be less effective where, for example, harm is to many individuals or the environment, it is difficult to show causation and the injurer is not easy to identify. (Note the longer-term work on environmental harm mentioned in paragraph 32).

17. This result is the same for non-GM activities – liability rules will sometimes be effective and sometimes will not – for the same reasons that apply in the GM context. For this reason there does not appear to be a principled basis for devising a special liability regime solely on the basis of a GM/non-GM distinction.

Relationship of liability rules to the regulatory system

18. Liability rules in the GM context cannot be viewed in isolation. The regulatory framework also has an important role to play in governing the way injurers, and in some cases potential victims, behave. Where liability rules are unlikely to be effective for GM, the regulatory regime must be assessed to see whether it sufficiently encourages precaution and provides compensation. The question then becomes whether changing liability rules or the regulatory regime would provide any additional incentives to encourage appropriate precaution or enhance the provision of compensation.

19. Regulatory mechanisms that can be used to achieve the same objectives as liability rules, in particular encouraging precaution, include:

- prior licensing/authorisation schemes
- monitoring and inspection regimes
- criminal sanctions for breach of statutory requirements
- compulsory insurance
- statutory remediation and statutory compensation funds
- civil penalties for breach of statutory requirements

20. In New Zealand the primary regulatory context includes HSNO, the Food Act 1981, the Medicines Act 1981 and the Agricultural Compounds and Veterinary Medicines Act 1997. These statutes create an interlocking network of 'gate-keeping' agencies. Importers, developers or manufacturers of GMOs and GM products must provide information to enable the relevant regulatory authority to assess whether they should be approved for use in New Zealand. The pre-approval process is (or in the case of the HSNO, is proposed to be) supported by a range of post-approval conditions and controls, together with monitoring and inspection regimes, enforcement powers and criminal sanctions for breach.

21. While the GM regulatory regime is geared to encouraging precaution, none of the relevant Acts provide for compensation for harm caused to private or public property. The HSNO Act, however, imposes a general duty on persons carrying out the regulated activity to avoid, remedy or mitigate certain adverse effects.

22. The overlay of the regulatory regime should therefore improve precaution where existing liability rules are unlikely to be effective. It is essential that those engaging or intending to engage in GM activities have sufficient incentives to comply with the regulatory regime. Monitoring and enforcement of the regulatory regime is therefore vital. Compliance should reduce the risk of harm and, therefore, the need for compensation or remediation. To the extent that harm may still occur, other options directed at compensation and remediation may also need to be considered.

Options for reform

Status quo

23. Retaining the status quo is consistent with the conclusion that there are no unique liability issues raised by GM. This position was supported by most submissions from agricultural and biotechnology groups and the research sector. The effectiveness of the regulatory regime to encourage an appropriate level of precaution becomes more critical if liability rules will not always be effective. Those who consider the risks of harm from GM are different are likely to see the retention of the status quo, without any change, as disregarding their concerns.

Strict or absolute liability for GM harm

24. Strict liability (liability without fault with defences available to the injurer) or absolute liability (no defences) for all GM harm was favoured by a large number of submissions from those concerned about the impact of GM. However, as identified above, there is no principled basis for adopting liability rules that depend on a GM/non-GM distinction.

25. We also do not support this option because it would be contrary to the government policy of proceeding with caution while preserving opportunities. Imposing the more stringent standard of

strict (or absolute) liability may deter activities that are socially beneficial and, consequently, stifle innovation and economic growth contrary to government policy. Since many other countries, in particular Australia, do not impose strict (or absolute) liability for GM activities, other things being equal, there would be strong incentives for GM innovation to take place abroad rather than in New Zealand, even where such innovations would benefit New Zealand if undertaken here.

Compulsory insurance, statutory compensation or remediation funds

26. These options are not favoured. Compulsory insurance is not a viable option, as information points to insurance for GM harm not currently being available. It is also not clear whether insurers will be able to adequately monitor precaution taken by insureds and reflect it in the terms of insurance, by pricing to reflect risk and precaution, or by denying cover where certain forms of precaution are not taken. If insurers cannot do this, the cost of insurance is driven up to prohibitive levels and fewer people engage in the activity, or insurance becomes unavailable.

27. Statutory compensation or remediation funds will not enhance the precaution objective. Such funds may reduce incentives for those who may be harmed to take precaution since they will be compensated regardless. They may also reduce incentives for potential injurers to take precaution if their liability is reduced or excluded, unless the fund takes over the victim's right to claim.

ERMA imposing insurance or a bond

28. Requiring the Environmental Risk Management Authority (ERMA) to consider imposing insurance or bond requirements, as a condition of approving release of a new organism to address liability concerns is not supported. Assessing when and how to use such discretion and the amount of any insurance or bond would, generally, be a highly speculative exercise. It would involve consideration of a range of difficult issues that ERMA may not be well placed to undertake. There is a risk that socially beneficial activities might be deterred and capital would be tied up when it could be put to more productive uses.

29. Moreover, given the uncertainties surrounding its use, such a power would very likely expose ERMA to increased applications for judicial review of its decisions by those who disagree with conditions imposed on them, or those who consider that ERMA should have imposed a bond or insurance and did not. This could have significant resourcing implications for ERMA and result in delays.

Procedural reforms

30. Longer term work, already underway or planned, on procedural reforms should facilitate individuals bringing claims for harm. Examples of possible procedural reforms include:

- contingency fee arrangements between lawyers and their clients
- amending the Limitation Act 1950 to suspend the commencement of the limitation period (normally 6 years) if a claimant can prove that harm, or a defendant's responsibility for it, was not reasonably discoverable until later

Environmental harm

31. Existing liability rules are not generally effective at encouraging precaution or providing compensation for environmental harm. This is primarily because there are often no identifiable individuals to bring proceedings and injurers may lack the means to pay. It is not obvious that changes to liability rules could address these concerns effectively.

32. The Ministry for the Environment is developing a programme of longer-term work on environmental harm, including consideration of liability issues. As part of this work, consideration could be given to improving the process for taking class or representative actions so that such actions may more easily be initiated.

Preferred options

33. Some options for reform would strengthen incentives to comply with the HSNO regulatory regime, both for GMOs and other new organisms. They would assist in allaying public concerns about GM by encouraging greater compliance with HSNO (and therefore greater precaution) and would extend the availability of compensation without increasing compliance costs. The options are:

- strict civil liability for harm caused by an activity in breach of HSNO, and/or
- a civil penalty regime

34. Both options could be limited to breaches of HSNO in respect of new organisms[1] because of the risk that new organisms can proliferate into undesirable self-sustaining populations. Also the incentives to comply with HSNO are likely to be weaker for many new organisms (e.g. GMOs) because the risk of breaches being detected is lower. Furthermore, there are likely to be potentially greater commercial gains to be made from non-compliance with HSNO for new organisms than for hazardous substances. It would also be consistent with most of the other proposed amendments to HSNO.

35. It would be important for the breaches of HSNO to which these options apply to be "bright line rules", that is, rules that specifically prescribe what must be done so that it is clear whether they have been complied with. Compliance is the level of precaution needed to avoid liability. Care would be required in explaining how these options work (emphasizing their application to non-complying conduct) to avoid the possibility of overcautious behaviour.

36. If these options are adopted, longer-term consideration could be given to whether they should also be implemented in other related legislation such as the Biosecurity, Food and Medicine Acts, or extended to hazardous substances.

[1] The term 'new organism' refers to any organism not legally present in New Zealand before 29 July 1998. New organisms can include any new species of any animal, plant, fungus, bacterium or virus. The term also includes genetically modified organisms (GMOs).

Strict civil liability for harm caused by breaching activity

37. Although a general strict liability rule such as that discussed in paragraphs 24 and 25 would have significant disadvantages, there is scope to strengthen incentives to comply with HSNO. This could be done by imposing strict civil liability for harm caused by a non-complying activity (strict liability already applies to certain criminal offences in section 117 of HSNO). There are examples of such liability in other legislation such as the Commerce Act 1986.

38. The new statutory rule could provide that, if an activity breaches a statutory requirement for new organisms, the injurer would be strictly liable to anyone harmed by the activity. An injurer would be liable to compensate that person, without the need to prove negligence where, for example, he or she had failed to obtain a necessary approval, or to comply with conditions imposed on that approval. Proceedings could still be brought on grounds such as negligence or nuisance if harm was caused by a complying activity.

39. There would need to be defences to the new strict liability rule, such as where the breach of HSNO was inadvertent. For example, this might apply where the injurer did not know, and could not reasonably have known, that they needed an approval because of undetected GM contamination. Further work is required on the appropriate defences and the grounds on which strict liability should attach.

40. Such a rule imposes no new compliance costs on activities over and above those of the existing HSNO regime (or that proposed in the associated suite of papers). Application of the rule to inadvertent breaches could, over the long term, increase the cost of activities covered by HSNO, assuming a certain level of inadvertent breach would occur. This underlines the importance of appropriate defences for inadvertent breaches.

41. The benefits of enabling proceedings on the basis of strict civil liability are that it would:

- create strong incentives to comply with the regulatory regime, as full liability based on the amount of harm caused could result from failure to do so
- not deter authorised activities – so long as the injurer complies with the statutory requirements, he or she would not be exposed to the strict liability rule
- improve access to compensation for those harmed by non-complying activities
- have the potential to further facilitate remediation

42. This option would be more effective at encouraging compliance than the ordinary liability rules. However, it would not deal with situations where harm is diffuse and claims are unlikely. For a successful claim, it would still be necessary to identify the injurer and establish causation. The reform of procedural rules discussed in paragraph 30 would offer some assistance, as would the option of civil penalties discussed in paragraphs 44 - 55.

43. The inclusion in HSNO of a strict civil liability rule for breaching activities would be a relatively simple legislative amendment. However, given the time constraints on introducing a HSNO Amendment Bill, we recommend that authority to approve the final detail of the statutory strict civil liability rule by the end of February 2003 be delegated jointly to the Minister for the Environment, the Associate Minister of Justice and the Minister of Research, Science and Technology. Development of this advice has already begun so as to allow decisions on the detail to be made in sufficient time to meet the overall timetable for the HSNO Amendment Bill.

Civil penalties for breaches of HSNO

44. The other option would be to amend HSNO to enable the State (rather than individuals) to recover civil penalties from injurers for certain breaches. Although this option and strict civil liability might both potentially apply to the same conduct, the enforcement policy adopted for civil penalties could minimise any undesirable consequences.

45. Civil penalties would not be dependent on harm. The advantage of this is that there is no need to wait until harm occurs before bringing proceedings, or to prove a causal link between an activity and any harm. Furthermore, proof of negligence would not be necessary (though the court could take the degree of culpability into account when determining the appropriate level of penalty).

46. Although criminal penalties already attach to certain breaches of HSNO, criminal sanctions are not always effective for corporate defendants, which are less affected by the damage to their reputation. Moreover, criminal law is concerned with punishment and denunciation of wrongdoers and their conduct. If the aim is to create optimal incentives to comply with the regulatory regime, and, through that, the taking of precautions, a civil penalty regime for certain breaches could play a crucial role.

47. The rationale for establishing a civil penalty regime in other statutes appears to be the potentially significant gains that can be made by commercial entities through non compliance and, in most cases, the likelihood of diffuse harm where no one individual has any incentive to bring proceedings. These reasons seem equally applicable to HSNO.

48. Dual regimes (in other words, civil penalties and criminal sanctions within the same legislation) are found in a range of legislation in Australia, including the Trade Practices Act 1974. Although not particularly common, there are examples in New Zealand such as the Commerce Act 1986 and the Fisheries Act 1996. In some instances the civil penalty and criminal regimes relate to the same conduct (parallel regimes), while in others they deal with different conduct (separate regimes).

49. For HSNO, where there is already a well-established framework of offences and criminal sanctions, it would be undesirable to rework the offence provisions, which having separate regimes would require. Any civil penalty regime would need to be implemented as a parallel regime with the criminal sanctions. However, if a person is potentially liable to both a civil penalty and a criminal sanction, it is important that any amendment avoids the prospect of double punishment.

50. The regime will need to be designed to avoid breaching the New Zealand Bill of Rights Act 1990. Further work is required to address matters such as which breaches of HSNO would attract the civil or criminal regimes; whether civil or criminal procedural protections should apply; and how best to avoid the prospect of double punishment.

51. The appropriate level and type of penalty for particular breaches needs to be resolved. Equivalent maximum penalties for corporates to those in the Commerce Act (up to $10,000,000, or 3 times the commercial gain, or 10% of annual turnover) could be considered for the most serious breaches of HSNO, along with clean up costs.

52. It is important to ensure people are not discouraged from voluntarily disclosing breaches. This could be achieved through the enforcement policy adopted and by allowing the court to take into account mitigating factors (eg the injurer voluntarily coming forward and taking immediate steps to remedy any harm) in setting the penalty.

53. One or more enforcement agencies must be designated to bring civil penalty proceedings. Which agency/agencies should be involved will need to be determined in conjunction with decisions about other enforcement responsibilities (see *Paper 4: Conditional release and enforcement*).

54. A civil penalty regime would impose no new compliance costs on activities over the existing HSNO regime (changed as proposed in the associated suite of papers). The breaches to which the regime applies, the enforcement policy and the mitigating factors considered by the court will minimise the impact on those who inadvertently breach HSNO or who otherwise act in good faith.

55. Although this option involves further work, all endeavours will be made to put in place the relevant amendments to HSNO prior to the constraint period ending. However, should this not be possible and implementation is delayed, the strict civil liability rule will, of itself, assist to strengthen incentives to comply with HSNO. It is recommended that authority to approve by the end of February 2003 the final detail of proposed amendments to implement a parallel civil penalty regime or, if the issues prove difficult to resolve in time, to defer implementation be delegated jointly to the Minister for the Environment, the Associate Minister of Justice and the Minister of Research, Science and Technology. Decisions on the detail, or deferral, if appropriate, will be made in sufficient time to meet the overall time timetable for the HSNO Amendment Bill.

Timetable implications

56. All timetable implications associated with this paper, have been outlined in *Paper 1: Overview*.

Financial implications

57. A civil penalty regime may have financial implications for the chosen enforcement agency because of the cost of bringing recovery proceedings, although civil penalties recovered and paid into the consolidated fund will offset this cost. After additional work on the detail of the regime is complete, it will be clear whether the enforcement agency can absorb this cost within its existing baselines or further funding should be sought as part of the 2004 budget round.

Human rights

58. All human right implications associated with this paper, have been outlined in *Paper 1: Overview*.

Legislative implications

59. All legal implications associated with this paper, have been outlined in *Paper 1: Overview*.

Regulatory impact and compliance cost statement

60. A Regulatory Impact Statement is attached to this paper (Annex 1) and complies with the requirements of Cabinet Office Circular CO (98) 5. A Business Compliance Cost Statement has not been prepared, as the proposals do not have compliance cost implications for business.

Gender implications

61. There are no gender implications associated with this paper.

Disability perspective

62. There are no disability perspective implications associated with this paper.

Publicity

63. All publicity implications associated with this paper, have been outlined in *Paper 1: Overview.*

Consultation

64. Details of the consultation for this suite of papers have been outlined in *Paper 1: Overview.*

Recommendations

65. It is recommended that Ministers:

a) **Note** that:

   (i) existing liability rules will not always operate effectively to encourage precaution and provide compensation in relation to GM but that this is not confined to GM and applies to a range of other activities
   (ii) consequently devising a liability regime solely on the basis of a GM/non-GM distinction would not be sound in principle

b) **Agree** that, to strengthen incentives to comply with the regime, HSNO should be amended in relation to new organisms, to include a strict civil liability rule for harm caused by non-complying activities and a civil penalty regime for breaches.

c) **Agree** that, the power to approve the detail of the amendments for strict civil liability by the end of February 2003 is delegated jointly to the Minister for the Environment, the Associate Minister of Justice and the Minister of Research, Science and Technology.

d) **Agree** that the power to approve the detail and timing of the amendments for a civil penalty regime by the end of February 2003 is delegated jointly to the Minister for the Environment, the Associate Minister of Justice and the Minister of Research, Science and Technology.

Hon Lianne Dalziel
Associate Minister of Justice

Hon Marian Hobbs
Minister for the Environment

Annex 1

Regulatory Impact Statement

The nature and magnitude of the problem and the need for government action

In 2002 the Hazardous Substances and New Organisms Act 1996 (HSNO) was amended to provide a constraint period for genetically modified organisms (GMOs). This was to allow further consideration of issues relating to the possible release of GMOs in New Zealand, given strong concern in certain sectors of the community about such release. One issue requiring consideration was the extent to which the regulatory regime in HSNO, and existing liability rules, operate effectively if harm were to occur from a GM activity.

There are a number of possible reasons why existing liability rules may not be effective in encouraging precaution or providing compensation in relation to harm that may potentially be caused by new organisms (including GMOs):

- the potential for harm to a large number of people, or to the environment generally, rather than to a limited number of identifiable plaintiffs
- difficulties in identifying the person responsible for the harm
- difficulties in showing that harm to the plaintiff was reasonably foreseeable
- difficulties in showing that the plaintiff's loss was caused by the relevant new organism
- difficulties in quantifying losses
- the potential for significant time lags between the activity and harm caused by it
- the likely cost and complexity of litigating liability issues

Analysis of the effectiveness of liability rules in different situations has suggested there is nothing unique about the likely effectiveness of current liability rules in the GM context to warrant a special liability regime for GM activities. Nor is there any reason to expect that the costs and benefits of the liability regime are materially different in the GM context.

Liability rules may be less effective in certain situations, such as where there the harm is to many individuals or the environment. At that point, the regulatory regime, such as HSNO, has an important role in encouraging precaution and it is important that there are strong incentives to comply with the regulatory regime.

Statement of the public policy objective

The objective is to ensure that liability rules, in combination with regulatory mechanisms, encourage an appropriate level of precaution in respect of GM activities while preserving opportunities. Related objectives of liability rules are to provide compensation for those who are harmed and to provide for remediation of damage where appropriate.

Statement of feasible options that may constitute viable means for achieving the desired objectives and net benefits of the options

A number of options have been identified. These are categorised as follows:

(1) Retaining the status quo;

(2) Extending existing liability rules by:

- (a) imposing strict or absolute liability for all GM harm
- (b) enabling individuals to seek compensation for harm from activities in breach of HSNO on the basis of strict civil liability
- (c) requiring compulsory insurance, statutory compensation or remediation funds

(3) Including new regulatory mechanisms in HSNO to encourage precaution or provide compensation or both:

- (a) enabling civil pecuniary penalties to be recovered by the State (rather than individuals) for breach of HSNO, irrespective of harm
- (b) providing ERMA with the discretion to impose insurance or a bond

Option 1 – Retaining the status quo

This option would involve no change to existing liability rules (under which a person harmed may be able to seek compensation on grounds such as negligence or nuisance) or to the regulatory regime. This would have no regulatory impact and would be consistent with the conclusion that there are no unique liability issues raised by GM activities and that a GM specific liability regime is not justified in principle. However, retaining the status quo might be seen as disregarding the concerns of those who consider that the risks of harm from GM are different.

Option 2 - Extend existing liability rules

a) Strict or absolute liability for all harm caused by GM

Strict liability (liability without fault but with defences) or absolute liability (liability without fault and no defences) for all harm caused by GM activities is favoured by those who are concerned about the impact of GM. They wish to ensure that all those harmed are compensated and to avoid the costs of harm being borne by society rather than those whose activity caused the harm. However, imposing this more stringent standard of strict liability may deter activities that are socially beneficial, and consequently stifle innovation and economic growth contrary to government policy. Further, since many other countries, in particular Australia, do not impose strict liability for GM activities, there would be strong incentives for GM innovation to take place abroad rather than in New Zealand. The concerns about strict liability apply even more acutely to absolute liability. It is therefore recommended that this option be not pursued.

b) Statutory strict civil liability for harm caused by breaching activity

A new statutory rule could provide that, if an activity breaches HSNO (eg. failure to obtain a necessary approval, or to comply with conditions imposed on that approval) the person concerned would be strictly liable to any person harmed by the activity. Benefits of this option would be:

- stronger incentives to comply with regulatory regimes;

- authorised activities would not be deterred as strict liability would not apply if statutory requirements had been complied with (unlike a general strict liability rule);
- access to compensation improved for those harmed by non-complying activities;
- remediation could be facilitated;
- no new costs would be imposed over and above the existing HSNO regime;
- it could be put in place as part of the HSNO amendments prior to the moratorium ending.

The main disadvantage of this option is that it would not deal with situations where harm is diffuse and claims are unlikely. However, the option of enabling civil penalties to be pursued by the State (option (3) (a) below) would assist this type of situation and strict civil liability for a breaching activity could be combined with the civil penalty option.

c) Other options - compulsory insurance, statutory compensation or remediation funds

Options with greater focus on compensation include compulsory insurance (requiring third party insurance as a precondition for engaging in an activity) and statutory compensation or remediation funds (run by government and funded from general tax revenue, or levies on relevant sector or potential injurers etc.). However, these statutory funds do not generally achieve precaution. Further, compulsory insurance is unlikely to be a viable option as insurance for GM harm does not seem to be currently available and insurers may not be able to adequately monitor precaution and reflect it in the terms of insurance (e.g. by reflecting risk and precaution in prices/premiums, or by denying cover where certain forms of precaution are not taken). It is recommended that this option not be pursued.

Option 3 - Including new regulatory mechanisms in HSNO

a) Civil penalties

This option would require amendment to HSNO to enable civil penalties to be recovered by the State (rather than individuals) for breach of HSNO, irrespective of harm. Benefits of this option would be:

- no need to show harm and, therefore, no need to show that the activity caused the harm
- proof of negligence is not necessary (though the court could take the degree of culpability into account when determining the level of penalty)
- it would encourage greater compliance with the regulatory regime, and therefore precaution, from potential injurers
- it would cover situations where harm resulting from a breach might be diffuse, and where, therefore, claims are unlikely to be brought by individuals
- civil penalties would be more effective for corporates than relying on current criminal sanctions
- it would impose no new costs over the existing HSNO regime
- it could be put in place as part of the HSNO amendments prior to the moratorium ending, with identified Ministers being given the delegated power to make decisions on matters of detail, or, if this were not possible, could be implemented on a longer time frame

Civil penalties for breaches of statutory requirements are not particularly common in New Zealand, although they are present in some statutes such as the Commerce Act. Such an option would need to be designed to ensure that HSNO avoids the prospects of double punishment and complies with the

New Zealand Bill of Rights Act and that people would not be discouraged from coming forward to voluntarily disclose breaches[2].

b) ERMA discretion to impose insurance or a bond

Some submissions on the HSNO discussion paper suggested giving the Environmental Risk Management Agency (ERMA) the discretion to impose insurance or a bond as a condition of approving release. However, ERMA may not be well placed to exercise the discretion about when and how to impose insurance/bond. Further, the inappropriate use of such discretion might deter socially beneficial activities and tie up capital that could otherwise be used in a more productive way. It might also lead to an increase in judicial review actions against ERMA in respect of its decision making, which would be costly and likely to result in delays. It is recommended that this option not be pursued.

Summary

As indicated above, some options have been considered but rejected. Those which are considered to be feasible and which would have no compliance cost implications for business are:

- retain the status-quo (option 1)
- introduce a statutory strict civil liability rule for harm caused by an activity in breach of HSNO in relation to new organisms (option 2 (b))
- impose a civil pecuniary penalty regime for certain breaches of HSNO relating to new organisms (option 3 (a))
- introduce both a statutory strict civil liability rule and a civil penalty regime (ie combination of options 2 (b) and 3 (a))

Consultation

The Ministries of Economic Development, Health, Labour, Foreign Affairs and Trade, Agriculture and Forestry, as well as the Ministry of Research, Science and Technology, Treasury, Te Puni Kokiri, the Department of Prime Minister and Cabinet, the Department of Conservation, the Environmental Risk Management Authority and the New Zealand Food Safety Authority have been consulted on the options outlined in this paper and concur with the contents of the paper.

A chapter on liability issues, seeking public comment, was included in the discussion paper, *Improving the Operation of the HSNO Act for New Organisms*, released by the Ministry for the Environment in September 2002. 938 submissions were received. Of these, 816 were form letters opposing the release of GM and supporting absolute liability for GM-related harm. Of the remaining submissions, many opposed GM (mainly individuals, those involved in the organics industry and environmental groups), some expressed conditional support for GM and others were supportive of GM (mainly research organisations, the agricultural and biotechnology industry and industry groups). A small number of submissions from Maori referred to liability.

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[2] The latter could be achieved through the enforcement policy adopted and by allowing the court to take into account mitigating factors (e.g. the injurer voluntarily coming forward and taking immediate steps to remedy any harm) in setting penalty.

Those submissions opposed to GM generally considered that GM organisms were unique and that existing liability rules are inadequate and should be extended, with the majority favouring absolute liability (that is, liability without fault and with no defenses). As noted above, the general application of strict liability to GM would be likely to stifle socially beneficial activities and force GM innovation overseas. However, the proposal for strict civil liability for activities in breach of HSNO and a civil penalty regime would assist to address concerns by strengthening incentives to comply with HSNO and increase access to compensation.

Those submissions supportive of GM generally considered the current mix of regulatory mechanisms (if conditional release is adopted) and existing liability rules to be adequate. Many noted that difficulties in applying liability rules to GM also arise in other contexts. The strict civil liability for breaching activities and civil penalty regime by strengthening incentives to comply with HSNO are not inconsistent with the views of many of these submissions.