

*For Who's Benefit? -  
Evaluating Genetically Modified Organisms in Western Australia  
from a Different Perspective*  
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**Liability for Environmental Damage  
Caused by the Release of Genetically Modified Organisms**

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## **1 Introduction**

This paper explores who is liable for environmental damage caused by the release of GMOs into the open environment. Specifically it considers:

- ⊘ Is any liability prescribed by the *Gene Technology Act 2000* (Cth) (“Commonwealth Act”) if the release of GMOs causes loss of biodiversity?
- ⊘ Is any liability prescribed by State law if the release of GMOs causes loss of biodiversity?
- ⊘ Are GMO users liable at common law for any loss of biodiversity caused by their use of GMOs?
- ⊘ Are government GMO regulators liable at common law for any loss of biodiversity which is caused by the release of a GMO which that regulator approved?

The paper concludes that any person who releases GMOs without authorisation will be liable for some resultant damage to the environment. However, it is unlikely that any person will be liable (either at common law or pursuant to any State or Commonwealth legislation) for environmental damage caused by the authorised release of GMOs into the environment.

## **2 Liability for environmental damage under the *Gene Technology Act 2000* (Cth)**

It is an offence under the Commonwealth Act to intentionally release a GMO into the environment without a lawful authorisation such as a licence<sup>1</sup>. It is also an offence for a person who has a licence which permits the release of a GMO into the environment to breach a condition of that licence<sup>2</sup>. An offence will be an “aggravated offence” and attract a higher penalty if the unauthorised release causes significant damage to the environment<sup>3</sup>.

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<sup>1</sup> *Gene Technology Act* section 32

<sup>2</sup> *Gene Technology Act* section 34

<sup>3</sup> *Gene Technology Act* section 38

The Commonwealth Act does not, however, impose liability upon GMO licence holders for any damage caused to the environment or biodiversity as a result of an authorised release of a GMO. That is, if a person has a GMO licence and acts in accordance with that licence, the Act does not provide either:

- 1) that it is an offence to cause damage to the environment by an action pursuant to that licence; or
- 2) that the licence holder is liable for any damage caused to the environment as a result of an action pursuant to that licence.

The Act only imposes liability (by way of penalties for an offence) for an unauthorised release of GMOs into the environment.

A licence may include a condition requiring that the licence holder be adequately insured against any loss, damage, or injury that may be caused to human health, property or the environment by the licensed release<sup>4</sup>. However, such a condition does not create any liability for a licence holder beyond the licence holder's existing liabilities at common law. Therefore even if such a condition is imposed on a licence, the insurance will only be payable if the licence holder is found liable for causing environmental loss or damage pursuant to the common law.

### **3 Liability for offences under State legislation**

The *Environmental Protection Act Amendment Bill 2002* (WA) which is currently before Parliament ("EP Amendment Bill") proposes to amend the *Environmental Protection Act 1986* (WA) ("EP Act") in ways which may make it possible for GMO licence holders to be held liable for environmental damage caused by the release of GMOs into the environment. However, due to the restraints of constitutional law applying to the regulation of GMOs, it is arguable that the EP Amendment Bill applies to individuals but not to corporations. As corporations will probably be the vast majority of licence holders, this means that the provisions of the EP Amendment Bill will have a severely restricted application to GMO licence holders.

#### *3.1 Environmental Protection Act Amendment Bill 2002*

The EP Amendment Bill proposes to amend the EP Act so that it is an offence to cause "environmental harm". "Environmental harm" means any direct or indirect harm to the environment involving damage to native vegetation or alteration of the environment to its detriment or degradation<sup>5</sup>. It is possible that environmental harm may be caused by the licensed release of a GMO into the open environment. The EP Amendment Bill also seeks to insert provisions into the EP Act which will allow the Chief Executive Officer of the Department of Environmental Protection to order rehabilitation works or stop an

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<sup>4</sup> *Gene Technology Act* section 62 (3).

<sup>5</sup> Section 29 of the EP Amendment Bill, proposed section 3A of the EP Act

activity if environmental harm is being caused<sup>6</sup>. This means that it is possible that there will be some liability for environmental damage caused by GMOs by virtue of the “environmental harm” provisions in the EP Act. The Bill also proposes that prosecutions under the EP Act for causing serious environmental harm and for corporations causing material environmental harm may be brought at any time<sup>7</sup>. This means that actions may be brought to impose liability for environmental harm notwithstanding some environmental damage may take some time to be realised.

The EP Amendment Bill also proposes to create a new tort known as “breach of notice”<sup>8</sup>. Specifically, the Bill proposes that any person bound by an environmental protection notice or a vegetation conservation notice who fails to comply with that notice, thereby causing damage to property which is not owned by that person, may be liable to the owner or occupier of the damaged land in respect of the damage. This tort could be used to impose liability on GMO licence holders who release GMOs into the environment and cause some environmental damage which is able to be quantified as damage to property.

### 3.2 *The constitutional basis of the regulation of GMOs*

Under the Commonwealth Constitution, the Commonwealth Parliament may only pass laws with respect to certain matters listed in the Constitution. This is reflected in the Commonwealth Act, which applies only to those matters falling within certain Commonwealth heads of power, such as the actions of corporations and matters involving interstate and overseas trade<sup>9</sup>. Any comprehensive regulation of GMOs therefore relies upon the gaps in the application of the Commonwealth Act being overcome by State laws. For example, all individuals who are not involved in interstate or overseas trade and commerce must be regulated under State laws such as the *Gene Technology Bill 2001* (WA) (“State GMO Bill”) which is currently before State parliament. The result of this is that some individuals may be subject to a different regulatory regime than corporations.

### 3.3 *Regulation of individuals - the State Bill and the State EP Act*

Section 5 of the EP Act provides that whenever a provision of the EP Act is inconsistent with a provision contained in another State law (such as the State GMO Bill), the provision of EP Act will prevail. In addition, clause 15 of the EP Amendment Bill provides that its provisions are in addition to, and not in substitution of, the requirement of any other laws of Western Australia. The result of these provisions is that in relation to GMO matters regulated by the State GMO Bill (for example, all GMO matters relating to individuals who are not involved in interstate or overseas trade and commerce) the provisions of both the State GMO Bill and the EP Act will apply. This means that any individual who releases a GMO into the environment (whether pursuant to a licence or

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<sup>6</sup> Section 45 of the EP Amendment Bill, proposed section 65 of the EP Act

<sup>7</sup> Section 131 of the EP Amendment Bill, proposed section 118 of the Act

<sup>8</sup> Section 52 of the EP Amendment Bill, proposed section 73B of the Act

<sup>9</sup> *Gene Technology Act 2000* section 13

not) and causes environmental damage will be able to be prosecuted under the EP Act for causing environmental harm<sup>10</sup>. They will also be liable for the tort of breach of notice.

### 3.4 Regulation of corporations – the Commonwealth Act and the State EP Act

As noted above, the Commonwealth Act and the State Bill are together intended to form a comprehensive code for the regulation of GMOs. However, as the Commonwealth Act specifies that it operates with respect to corporations and those involved in interstate trade or commerce<sup>11</sup>, a corporation and those involved in interstate or overseas trade and commerce could argue that it is regulated, at least in part, by the Commonwealth Act. If such an argument is accepted, issues of constitutional law become relevant.

It is a principle of constitutional law that a State law such as the EP Act is invalid if it is inconsistent with a Commonwealth law<sup>12</sup>. A State law can be inconsistent with a Commonwealth law for several reasons<sup>13</sup>, including:

- 1) If a Commonwealth law confers an immunity from liability under State law<sup>14</sup>;  
or
- 2) If the Commonwealth intends to completely, exhaustively or exclusively govern the particular conduct or matter to which its attention is directed<sup>15</sup>. In such an instance, the inconsistency results from the intention of the Commonwealth Parliament to cover the field<sup>16</sup>.

The general terms of the Commonwealth Act do not assist in the determination of whether the Commonwealth intends to 1) confer an immunity from prosecution under the State EP Act or 2) completely, exhaustively or exclusively govern a particular aspect of the licensing of the release of GMOs. While section 16 of the Commonwealth Act provides that it is not intended to exclude the operation of any State laws provided that the State law is capable of operating concurrently with the Commonwealth Act, there is no guidance as to which State laws are in fact able to operate concurrently. The Explanatory Memorandum to the Commonwealth Act also provides scant assistance. It states that:

“the intention of these provisions is to ensure that existing and future legislation (such as general environmental... legislation) continues to operate concurrently with the Bill provided it is capable of doing so. However, where State legislation is enacted that is inconsistent with the national scheme of regulation for GMOs, or effectively establishes a dual licensing system, there is capacity for such laws to be prescribed as not operating concurrently...”.

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<sup>10</sup> Note that licence holders may have a defence to causing environmental harm under the EP Act if they can show that the release was “in accordance” with their licence – proposed section 74B of the EP Act.

<sup>11</sup> *Gene Technology Act 2000* section 13

<sup>12</sup> Commonwealth Constitution section 109

<sup>13</sup> See generally *Halsbury's Laws of Australia* at 90 – Constitutional Law

<sup>14</sup> *Council of the Municipality of Botany v Federal Airports Corp* (1992) 175 CLR 453 at 464

<sup>15</sup> *Ex parte McLean* (1930) 43 CLR 472 per Dixon J at 483.

<sup>16</sup> *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489.

It is unlikely that the Commonwealth Act could be said to completely, exhaustively or exclusively govern the entire field of the regulation of GMOs. However, it is arguable that the Commonwealth Act does intend to completely, exhaustively or exclusively govern the circumstances in which licences can be issued, the assessment of whether a licence should be issued (including whether the licensed release will involve a risk to the environment) and therefore the enforcement of licences and imposition of liability for damages caused by activities under licences. It is therefore arguable that the Commonwealth Act covers the field in respect of any liability which may arise from the issue of a licence to release a GMO into the environment. If such an argument is accepted by the Courts, it would produce an unsatisfactory situation in which corporations and those involved in interstate or overseas trade and commerce, which may be presumed to be the vast majority of licence holders, are immune from EP Amendment Bill such as prosecution for environmental harm, but individuals are not so immune. It also means that the State provisions relating to rehabilitation orders and prescribing the tort of breach of notice may not be able to be applied to environmental damage caused by the licensed release of a GMO into the environment.

#### **4 Common law liability for damage caused by release of GMOs into the environment**

There have not yet been any cases in Australia which determine whether liability exists at common law for damage caused by the release of GMOs into the environment. Despite this, it is clear that there are currently three possible common law causes of action which may give rise to liability of a GMO licence holder for damage caused by the release of GMOs into the environment. Those causes of action are trespass, negligence and nuisance.

In summary, it is unlikely that licence holders would actually be found liable in common law for environmental damage caused by a licensed GMO release in many cases. In any event, even if a GMO licence holder were found liable, compensation would rarely be available as damage to the environment as such damage is inherently difficult to quantify. In particular, damages for loss of biodiversity inherently very difficult to quantify as the law has not yet developed a mechanism to place a monetary value on the loss of a species, let alone loss of species diversity.

##### *4.1 Trespass*

Trespass is committed if a person directly and intentionally causes some object to come into contact with land without the consent of the landowner<sup>17</sup>. For example, if a person deliberately plants GMO crops on another person's property without their consent and causes damage to that property, trespass will be made out. However, trespass is not made out if interference with property is merely a consequence of a person's act, rather than an intrinsic part of that act. For example, if GMOs which are being used on a GMO licensed property escape or blow onto another's property, it is unlikely that there has been a direct

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<sup>17</sup> For a general discussion of the law relating to trespass, see *Halsbury's Laws of Australia* at 415 - 330

interference with the affected land. The blowing of the GMOs onto the affected property is a consequence of GMO activity, but is not an intentional or direct part of it. It is therefore unlikely to be trespass.

Actions in trespass may only be brought by those who own land or have an interest in the land which is affected by the trespass. This means that unless a person owns or occupies a particular parcel of land which is affected by a GMO, that person cannot sue a GMO licence holder in trespass. Loss of biodiversity will rarely be confined to particular parcels of land, and it will be very difficult to show there has been a loss of biodiversity on one particular property. Even if a loss of biodiversity can be shown in respect of an individual property, it is not likely that such a loss would be sustained in the 6 year period in which claims for trespass must be brought<sup>18</sup>. Trespass will therefore rarely enable the recovery of costs for loss of biodiversity caused by the release of a GMO.

#### 4.2 Nuisance

Private nuisance is committed if a person's use of land unreasonably interferes with another person's ordinary and reasonable use of land<sup>19</sup>. Unlike trespass, the interference does not have to be direct and intentional – private nuisance is made out as long as the interference is a reasonably foreseeable consequence of a person's operations on their land. For example, if it is foreseeable that the release of a GMO on some land could unreasonably interfere with the use or enjoyment of other land, the GMO licence holder will be liable in nuisance if they do not take actions to prevent wind or water transporting GMO material off their land and onto other land.

A person may commit a nuisance if they own and occupy land, if they occupy land, or if they adopt or continue a use of land. In addition, an owner of land who is not in occupation of land may also be liable in nuisance if they expressly or impliedly authorise the occupier to create the nuisance.

Only people who own or have an interest in land may bring an action in nuisance. That is, unless a person owns or occupies a particular parcel of land which is affected by a GMO, that person cannot sue a GMO licence holder in private nuisance. As noted above in respect of actions for trespass, loss of biodiversity will rarely be confined to particular parcels of land, and it will be very difficult to show there has been a loss of biodiversity on one particular property. Even if a loss of biodiversity can be shown in respect of an individual property, it is not likely that such a loss would be sustained in the 6 year period in which claims for nuisance must be brought<sup>20</sup>. Actions in nuisance will therefore rarely be useful to recover damages caused to the environment by the release of a GMO.

In addition to claims which may be brought in private nuisance, claims may be brought in public nuisance. "Public nuisance" is occasioned when a person commits a nuisance which endangers the health, property or comfort of the public generally or obstructs them

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<sup>18</sup> *Limitations Act 1935* (WA) section 38.

<sup>19</sup> For a general discussion of the law relating to nuisance, see *Halsbury's Laws of Australia* at 415 - 615

<sup>20</sup> *Limitations Act 1935* (WA) section 38.

in the exercise of their rights. Actions in public nuisance may only be brought by a person who suffers damage to an extent over and above that of the general public, or by the Attorney General. Actions in public nuisance therefore by no means provide a comprehensive or sufficient remedy for loss of biodiversity caused by the release of GMOs.

#### 4.2.1 *Defences to nuisance*

The defences which are available to actions in nuisance further restrict the efficacy of actions in nuisance to provide a remedy for environmental damage caused by release of a GMO. For example, it is a defence to nuisance if a person “comes to the nuisance”. Therefore, if a person commences activities next door to an existing GMO facility, that person will have “come to the nuisance” and the GMO facility will probably not be liable in nuisance if its activities impact on the new neighbour<sup>21</sup>.

Private nuisance is usually not made out if the affected land is used for a particularly sensitive purpose. Nuisance does not protect all possible uses of land – it protects only ordinary and reasonable uses of land. For example, if a GMO facility is operated next door to a property used for general rural activities and those general activities are affected by the release of the GMO, nuisance will be made out. However, if a GMO facility is operated next door to a property used to propagate and protect rare and exotic native species and those species are adversely affected by the release of the GMO, private nuisance may not be made out, as the affected land use is a particularly sensitive one.

Finally, it is also a defence to nuisance that a person has “statutory authority” to carry out that nuisance if the nuisance is an inevitable result of that authority. For example, if the damage caused to a neighbour’s property is an inevitable result of a licensed activity, the defence of “statutory authority” would apply and the damage will not be actionable in nuisance. However, if the damage is not inevitable, but merely a consequence of the way the licence holder decided to carry out its activities, the defence of “statutory authority” would not apply.

#### 4.3 *Negligence*

Negligence will be made out if a person can show the following<sup>22</sup>:

- 1) a GMO licence holder had duty of care to manage its activities in a manner which would not cause reasonably foreseeable damage to that person;
- 2) the GMO licence holder breached its duty; and
- 3) the breach of duty caused damage to the person.

##### 4.3.1 *Leading case - Perre v Apand*

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<sup>21</sup> Problems obviously arise if a person moves to a nuisance but does not know that the nuisance is there. For example, if the very fact that a GMO facility is operating is confidential, the new landowner has no way of knowing that they have “come to a nuisance”. In such cases, the Court may well refuse to allow the GMO licence holder to use the defence.

<sup>22</sup> For a general discussion of the law relating to negligence, see *Halsbury’s Laws of Australia* at 300.

The leading case in respect of negligence caused by activities on land which cause damage to other land is *Perre v Apand Pty Ltd*<sup>23</sup>. In that case, Apand Pty Ltd supplied diseased potato seeds to potato growers in South Australia (the Sparnons). As a result, the Sparnons produced a potato crop which was infected with bacterial wilt. The Perres carried on business growing and processing potatoes on properties within a 20 km radius of the Sparnons' property. The Perres ordinarily exported the bulk of the potatoes they grew each year to Western Australia. Western Australia, however, prohibited the entry of potatoes which had been grown, harvested, cleaned or packed within 20 km of a known outbreak of bacterial wilt occurring in the previous five years. Therefore even though the Perre's crops were not infected with bacterial wilt, the Perres were unable to export their crops to Western Australia and suffered significant financial losses as a consequence of the outbreak of bacterial wilt on the Sparnons' property.

The High Court found that Apand Pty Ltd was liable for the Perres' losses in negligence because:

1. Apand Pty Ltd appreciated the consequences of the spread of disease by contaminated seed;
2. At the time of supplying seed to the Sparnons, Apand Pty Ltd knew or ought to have known that the Perres grew and processed potatoes within 20 km of the Sparnons' property and Apand Pty Ltd knew of the special requirements of Western Australia with respect to importation of potatoes;
3. Apand Pty Ltd knew or ought to have known that the Perres exported potatoes to Western Australia; and
4. The Perres had no way of appreciating the existence of the risk to which they were exposed by the conduct of Apand Pty Ltd and had no way of protecting themselves against that risk.

Solely on the basis of *Apand Pty Ltd v Perre*, it appears that a GMO licence holder would be found liable in negligence for damage caused by the release of GMOs into the environment. However, this is not the case, because the licensing process for GMOs effectively denies a person the opportunity to prove that the GMO licence holder was aware of the specific risks associated with the release of the GMO which have in fact materialised.

#### 4.3.2 Application of *Perre v Apand* to licensed GMO release

The Commonwealth Act provides that the Regulator must not issue a licence unless the Regulator is satisfied that any risks posed by the activities proposed to be authorised by the licence are able to be managed in such a way as to protect the health and safety of people and the environment<sup>24</sup>. To determine whether to issue a licence, the Act provides that the Regulator must prepare a risk assessment and a risk management plan which specifically considers the protection of the health and safety of people and the

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<sup>23</sup> (1999) 198 CLR 180

<sup>24</sup> *Gene Technology Act* section 56

environment<sup>25</sup>. There are also provisions in the Act for monitoring GMO licence activities<sup>26</sup>, and it is a condition of all licences that if the licensee becomes aware of any unintended effects, it must inform the Regulator of those effects<sup>27</sup>. The Act therefore sets up a comprehensive regime for the identification and assessment of the risks of a licensed GMO activity, and a licence cannot be granted unless the Regulator is satisfied that the risks will not eventuate. Yet in order to prove negligence, a person must prove that the GMO licence holder was aware of the specific risks which have in fact materialised. Therefore, in order to find a licence holder liable in negligence, a Court would have to find that the risks were not assessed properly by the Regulator. The Courts would be reluctant to replace the assessment of the risks of a GMO activity by the “expert” Regulator with the Court's own assessment of the risks. It therefore appears that if a person acts lawfully under their licence, it will be difficult to show that a license holder has breached its duty of care by releasing GMOs into the environment.

If, however, a licence holder breaches a condition of its licence and causes damage by virtue of that breach, it will probably be quite easy to show that the licence holder was negligent. This is because the licence process specifically identifies the risks associated with the licensed activity and mandates ways to manage those risks. It is therefore unlikely that a Court would find that such risks were not foreseeable or preventable. Accordingly, damages in negligence would probably be payable for any loss suffered by a person due to a breach of a GMO licence condition.

#### 4.3.3 Who can bring an action in negligence?

The only people who can bring an action in negligence are those whom it is reasonably foreseeable would suffer damage by a breach of duty. For example, neighbouring landowners or occupiers whose crops are affected by the release of a GMO into the environment may bring an action for damage suffered. Such landowners may also bring an action if the crops themselves do not suffer but the market does not accept the crop because it has been grown near a GMO facility: see *Perre v Apand Pty Ltd*. However, it will be difficult to bring an action in negligence based on damage to biodiversity or the environment generally. The difficulty arises for two main reasons:

- ∓ Damage to the environment or biodiversity is inherently very difficult to quantify – the law has not yet developed a mechanism to place a monetary value on the loss of a species, let alone loss of species diversity.
- ∓ In negligence cases, the Court may decide that “policy reasons” should limit a person’s liability. Such policy reasons include that a person should not be subjected to a liability to an indeterminate class for indeterminate amounts (per Kirby J in *Perre v Apand*<sup>28</sup>). In respect of GMOs, the Court would probably decline to find a duty of care was owed to most members of the community to prevent environmental damage as the community is an “indeterminate class of people”. A member of the community will always be a member of an “indeterminate class of people” unless it was

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<sup>25</sup> *Gene Technology Act* Part 5 Division 4

<sup>26</sup> *Gene Technology Act* section 64

<sup>27</sup> *Gene Technology Act* section 65

<sup>28</sup> paragraph 298

foreseeable that that particular member of the community would suffer particular damage.

#### 4.3.4 *Defence to negligence*

A GMO licence holder's liability in negligence will be limited if they can show that a person who suffered damage contributed to their own damage in some way. For example, if GMOs are washed onto a neighbouring property by reason of the fact that that neighbour altered the path of a watercourse on their land, the neighbour's damages will be limited by their own contributory negligence. It is also a defence to negligence if a person voluntarily assumes the risk of an activity. For example, if a GMO licence holder warns a prospective purchaser that the land they are buying is next to GMO land, and the purchaser later tries to sue the licence holder for damages suffered because their land is next to GMO land, it is likely that the purchaser will not be able to recover any damages, as they will have voluntarily assumed the risk they complain of.

## 5 **Liability of Regulator under common law**

Just as it is unlikely that a licence holder would be liable at common law for any environmental damage caused by the licensed release of GMOs, it is unlikely that the Regulator would be liable at common law for any environmental damage which results from an activity which the Regulator authorised.

### 5.1 *Liability of statutory authorities generally*

It has generally been accepted in Australia that common law damages are not available for non negligent and non intentional wrongful administrative decisions: *Dunlop v Woollahra Council*<sup>29</sup>. A wrongful administrative decision is incapable, by itself, of supporting a claim for damages. Therefore if a person suffers damage by reason only of the Regulator issuing a licence to a person in circumstances where that person should not have been issued with a licence (for example, because the person had previously been convicted of an offence against the Commonwealth Act<sup>30</sup>, or because the Regulator uses incorrect information about the proposed GMO activity) that person cannot, without more, obtain any damages for any of the consequences of the person's wrongful decision. A person suffering damage due to a wrongful administrative decision must bear that damage unless the circumstances of the wrongful decision fall within an established head of liability for which damages is a remedy, such as misfeasance in a public office, breach of statutory duty, or negligence.

### 5.2 *Misfeasance of public office*

Misfeasance in a public office is concerned with deliberate or intentional acts of misconduct and depends upon proof of improper motive or targeted malice: *Northern*

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<sup>29</sup> (1982) AC 158 at 169

<sup>30</sup> section 58 *Gene Technology Act 2000* (Cth)

*Territory v Mengel*<sup>31</sup>. Such matters are notoriously difficult to prove. As a general rule, provided that some parts of the Regulator’s decisions are made honestly, the Regulator’s entire decision will be protected from claims of misfeasance.

### 5.3 Breach of statutory duty

The tort of breach of statutory duty depends upon establishing that a statutory duty has been breached. For example, the Regulator has a duty not to issue a licence unless the Regulator is satisfied that any risks posed by the activities proposed to be authorised by the licence are able to be managed in such a way as to protect the health and safety of people and the environment<sup>32</sup>. As noted above in section 4.3.2, the Courts would be reluctant to replace the assessment of the expert Regulator with their own in this respect, and it will therefore be quite difficult to make out a breach of statutory duty. In any event, this tort often intersects with negligence, and by far the greatest number of claims against any statutory authority will be in negligence.

### 5.4 Negligence

The general rule as to negligence of statutory authorities for their wrongful decisions is stated in *Pyrenees Shire Council v Day*<sup>33</sup>: a statutory authority who enters into the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care. If the statutory authority in the exercise of its statutory power could by reasonable precaution prevent an injury, and it is likely that an injury will be occasioned by the exercise of statutory power, damages in negligence may be recovered. In the case of GMOs, it is arguable that the Regulator in exercising its statutory power to issue licences has a duty of care to ensure that the licensed activities do not cause unacceptable harm to the environment.

A statutory body such as the Regulator is not, however, liable in negligence for pure “policy” decisions. It is only liable for “operational” acts or omissions or for policy decisions in the operational process. In *Sutherland Shire Council v Heyman*<sup>34</sup> Mason J at 469 stated that:

*“The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care.”*

Matters of policy include how many inspectors, with what expert qualifications, it should recruit, how often inspections are to be made and what tests are to be carried out by a

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<sup>31</sup> (1995) 185 CLR 307

<sup>32</sup> section 56 *Gene Technology Act 2000* (Cth)

<sup>33</sup> (1998) 192 CLR 330

<sup>34</sup> (1985) 157 CLR 424

statutory agency: *Anns v Merton London Borough Council*<sup>35</sup>. It is therefore unlikely that many of the Regulator's decisions, such as not to inspect a premises even when that inspection could have alerted it to a problem, could form the basis of a common law claim in negligence. However, it is arguable that a Regulator's decision to grant a licence to a person who was patently unsuitable to be granted a licence is an "operational" decision for which the Regulator may be liable. Unfortunately, the distinction between policy and operational decisions is often blurred. It is not possible to definitively categorise decisions in any meaningful way based on whether they are a policy or operational decision, and it is therefore difficult to state conclusively when and in what circumstances the Regulator may be liable in negligence for its wrongful decisions.

### 5.5 *Who can bring an action in negligence?*

As with negligence of GMO licence holders, the only people who can bring an action in negligence are those whom it is reasonably foreseeable would suffer damage by a breach of duty, such as neighbouring landowners or occupiers whose crops or markets are affected by the release of a GMO. However, it will be difficult to bring an action in negligence based on environmental damage because 1) damage to the environment or biodiversity is difficult to quantify and 2) the Court would probably decline to find a duty of care was owed based on its policy that a person should not be liable in negligence to an "indeterminate class of people".

### 5.6 *Ex gratia payments*

The Commonwealth Ombudsman has the power to investigate complaints of defective administration and to recommend ex gratia payments as a remedy for the Regulator's wrongful administrative decisions<sup>36</sup>. To obtain such a payment, the Ombudsman must recommend that the Regulator make an ex gratia payment – but the Regulator must ultimately decide whether or not to accept the recommendation and make the payment. It is therefore unlikely that ex gratia payments would provide any appropriate or comprehensive system to impose liability upon the Regulator for loss of biodiversity caused by a licensed release of GMOs.

## **6 Access to information required to determine whether to commence an action**

Finally, note that it may often be difficult to obtain any of the information which is required to determine whether a licence holder or Regulator is liable in common law. The Regulator must maintain a Record about GMO dealings<sup>37</sup>. This Record must contain details about licences, notifiable low risk dealings, matters on the GMO Register, GMO products. However, the Regulator has the power to declare information which would normally be on the Register "confidential commercial information" under the Act. It is an offence for any person to release such information<sup>38</sup> and the information is exempt for

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<sup>35</sup> [1978] AC 728

<sup>36</sup> *Ombudsman Act 1976* (Cth)

<sup>37</sup> *Gene Technology Act 2000* section 138

<sup>38</sup> *Gene Technology Act 2000* section 187

the *Freedom of Information Act 1982 (Cth)*<sup>39</sup>. If all relevant information is declared confidential commercial information, it will not be available to the general public and people will not be able to access such information to determine whether they have a cause of action in respect of environmental damage or not.

## **7 Conclusion**

One of the potential costs of the development and use of GMOs in WA is that any release of GMOs into the open environment may result in some environmental damage. This paper concludes that:

- ∄ No liability is prescribed by the Commonwealth Act if the licensed release of GMOs causes environmental damage.
- ∄ The provisions of State laws if the release of GMOs causes environmental damage will probably apply to individuals who are not involved in interstate or overseas trade and commerce, but it is arguable that those provisions will not apply to all other entities.
- ∄ GMO users are unlikely to be liable at common law for any environmental damage caused by licensed use of GMOs.
- ∄ The Regulator is unlikely to be liable at common law for any environmental damage which is caused by the release of a GMO which the Regulator approved.

Reform of common law, as well as State and Commonwealth legislation, is therefore necessary if any real liability is to be imposed upon licence holders or the Regulator for biodiversity loss caused by the release of GMOs into the environment.

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<sup>39</sup> section 38, schedule 3