

# Gene Ethics

60 Leicester St, Carlton 3053 Australia

Tel: 1300 133 868 or 03 9347 4500

Mob: 0449 769 066

Fax: 03 9341 8199

Email: [info@geneethics.org](mailto:info@geneethics.org)

WWW: <http://www.geneethics.org>

## **Submission to the WA Department of Agriculture and Food Review of the Genetically Modified Crops Free Areas Act 2003**

Prepared by Adam Breasley and Bob Phelps

### **Gene Ethics Vision**

Gene Ethics envisages a safer, more equitable and more sustainable GM-free society.

### **Gene Ethics Mission**

Gene Ethics is a non-profit educational network of citizens and kindred groups. We want the precautionary principle, scientific evidence and the law rigorously applied to all proposed uses of genetic manipulation (GM) technologies and their products. Gene Ethics generates and distributes accurate information and analysis on the ethical, environmental, social and economic impacts of GM. Our education programs critically assess GM for the public, policy-makers and interest groups.

## **Gene Ethics Submission**

### **Introduction**

Gene Ethics welcomes the opportunity to contribute to the review of the WA Genetically Modified Crops Free Areas Act 2003. We support the law as already enacted but also propose some amendments which would make the Act's provisions more effective, democratic and precautionary.

The WA Genetically Modified Crops Free Areas Act 2003 is an important piece of legislation, consistent with the national GM regulatory system. It gives the WA government control, for marketing purposes, over approvals for the growing of any new GM crops in different regions of WA. The government may also establish GM Free Areas for marketing purposes within the state, under the terms of the policy principle declared under Section 21 of the Commonwealth Gene Technology Act 2001 (as amended).

The 2003 Act is consistent with the federal Act and the national uniform regulatory system, established under a COAG agreement. Under the agreement, states and territories have the power to review GM licenses granted by the federal Office of Gene Technology Regulator (OGTR), for marketing purposes. To this end, they can declare where GM crops may or may not be planted, by declaring GM and/or GM Free Zones over all or part of their jurisdictions.

The state powers conferred by the WA Genetically Modified Crops Free Areas Act 2003 provide an essential review process as the OGTR does not consider any marketing issues when assessing applications for the granting of GM licences.

The 2003 Act uses a “gatekeeper” approach recommended by the Standing Committee on Environment and Public Affairs Inquiry (Report 8, 2003 p.145), following extensive public hearings and a fact-finding tour of North American GM crop growing regions.

### **Key recommendations**

The WA government must continue should continue to:

- support the national uniform system of GM regulation, agreed to by COAG;
- assess GM licences for their impact on non-GM markets, as no-one else does;
- exercise its powers to review commercial GM licences on marketing grounds;
- exercise its powers to establish GM and GM-free Zones over all or part of the state of WA;
- retain the ‘gatekeeper’ approach in the Act, to regulate GM licensing at the state level and facilitate the establishment of GM and non-GM Zones for marketing purposes, recommended by the 2003 Standing Committee on Environment and Public Affairs Inquiry report (Report 8, 2003, p.145).

New provisions in the Act should include:

- strict liability as a condition of exemptions granted under Section 6;
- full protection for the rights and aspirations of those who want to remain GM-free.

Other recommendations follow at the conclusion of relevant sections.

## **The gatekeeper approach**

The 2003 Act is based on the “gatekeeper” approach recommended by the 2003 Standing Committee on Environment and Public Affairs inquiry (Report 8, 2003 p.145) chaired by Dr Chrissy Sharp.

The “gatekeeper” approach provides appropriate review and regulatory checks on those wishing to grow GM crops. Its purpose is to allow the WA government to protect the state's key markets by preserving the identity of non-GM crops for marketing purposes. This is achieved by the WA government designating the whole of the state or selected areas as GM Free Zones, or as areas where specified GM crops may not be grown. This approach is consistent with the national regulatory system.

The Gatekeeper approach gives WA effective control over decisions about the appropriateness of each new GM crop for each region of the state, regardless of whether the GM crop in question has been licensed by the OGTR for commercial or experimental release. This conforms with the uniform federal regulatory system established by the Gene Technology Act 2001 and agreed to by COAG. This Commonwealth law and the COAG agreement give states the power to legislate for designated GM Free Zones over all or part of their jurisdictions for marketing purposes and to preserve the identity of non-GM crops or areas for marketing purposes. States must retain the power to consider marketing issues as the federal government and OGTR do not consider marketing issues when licensing GM crops.

The “gatekeeper” approach in the 2003 Act enabled the Genetically Modified Crops Free Areas Order 2004 which made WA a GM Free Area for the purpose of preserving the identity of non-GM crops for marketing purposes. It designated the whole of WA an area where GM crops may not be grown. Without the gatekeeper provisions in the Act, WA would have no effective control over the growing of GM crops in WA so that any unconditional and unrestricted GM crop licence issued by the OGTR (such as that for GM canola) would leave the state powerless to regulate the crop for growing outside any designated GM Free Areas in the state.

The 2003 Act gives the minister control over decisions regarding each new GM crop proposed for commercial release and separately, for each region of WA regardless of whether the GM crop has been licensed by the OGTR. For instance, GM cotton approved for the Kimberley could not be grown in the Pilbarra region without a separate ministerial decision. This gatekeeper approach, recommended by the Standing Committee Inquiry report and enacted by the parliament provides important review of GM crops proposed for cultivation in WA, to protect non-GM markets and producers. WA's government should not give up these important powers.

### **Keep the gatekeeper approach :**

WA ‘gatekeeper’ approach was recommended by the 2003 Standing Committee on Environment and Public Affairs Inquiry report following extensive hearings and data collection in North America (Report 8, 2003, p.145) and enacted by the parliament;

- it gives the WA state government effective control and review over each separate decision on whether to approve each new GM crop and in each region of WA, powers should be retained;

- even if a crop has been licensed by the OGTR, the Act's "gatekeeper" provisions mean the WA government retains control over decisions on whether the crop can be grown in WA and in which regions it may or may not be grown, on marketing grounds, mandated by Commonwealth law;
- without the the precautionary gatekeeper provisions in the 2003 Act, any crop approved by the OGTR for general and unconditional release would be automatically approved anywhere in WA where a GM Free Area was not designated, so state government would forfeit its powers over whether or not a new GM crop could be grown in WA.

**Liability issues are within the scope of the present review, as they are specifically legislated for under the 2003 Act in Sections 5-17 of the Act.**

Exemptions may be granted for growing GM crops in WA under Section 6 of the Act. Section 5, 7, 8, 9,10, and 17 of the Act have important liability provisions for offences arising from: growing unauthorized GM crops in WA (Section 5); for breach of exemption conditions (Section 7); and for growing GM crops in WA where exemptions are granted by the Minister under Section 6 of the Act. Section 10 includes provisions for compensation for damage caused to others by growing GM crops, including where GM crops have contaminated crops on neighbouring farms or caused any other damage, where offences were committed in contravention of the Act. Thus liability issues ought not to be said to lie outside the scope of the present review. Section 8 of the Act provides for destruction of GM crops under certain circumstances. **Strict liability should particularly continue to apply to any breach of exemption conditions that apply to growing GM crops under Section 6 of the Act.**

### **GM Free Zones (a.k.a Areas, Regions) in Australia and worldwide**

Many shires and municipal councils around Australia have chosen to to declare themselves GM-free Zones, reflecting an international trend. Local communities, farmers, producers and regions around the world are declaring their areas and their produce GM-free. The GM-free Regions movement is particularly strong in the EU, attracting the support of European MPs and some EU governments. <http://www.gmo-free-regions.org/>

The whole of Switzerland has been declared GM-free by a national referendum. GM-free Areas can also be found in the USA. A register of GM-free local councils, farms and other businesses in Australia, including in WA, is on the Gene Ethics website: <http://www.geneethics.org>. Over the past decade, more than 100 Australian local councils have declared themselves GM-free and many are now renewing their commitment to GM-free principles in food services, land use and primary production.

**The Act under review should be strengthened, to reflect the rights and aspirations for the future of those communities that choose to remain GM-free.**

Gene Ethics considers the 2003 Act needs to be strengthened in a number of ways to fully protect designated GM Free Areas and to recognise the rights of WA persons to remain and/or be designated GM-free. Strict liability provisions should particularly apply to applicants for exemptions under Section 6.

### **Biodiversity**

Which instrumentality is responsible for regulating GM crops for biodiversity protection is ambiguous. The Australian Government's Biotechnology Regulatory Matrix shows state

governments as 'key environmental regulator' for GM crops. However, State reviews have taken the view that the OGTR and other Commonwealth bodies are responsible for environmental assessments and that states have no role. Though it may be outside the scope of the present review, questions remain over who is responsible for assessing potential biodiversity loss caused by GMOs and who would be ultimately liable for damages. Australia refuses to sign the **Cartagena Protocol on Biosafety**, despite our obligations as a party to the Convention on Biological Diversity. One hundred and fifty six other countries are signatories to the Protocol.

### **Designating GM Free Areas under Section 4 and granting exemptions under Section 6.**

Section 4 of the Act empowers the state minister power for designating GM Free Areas in WA, including the whole of the state. Thus, in 2004 the Minister designated the whole of WA as an area in which GM crops must not be cultivated (GM Crops Free Areas Order 2004). Subsequent ministerial decisions have granted further exemptions under Section 6, notably approval for GM cotton in the Ord River area and commercial trials of GM canola. Section 6 of the Act empowers the Minister to grant exemptions for growing GM crops subject to specific conditions which are subject to a Ministerial order published in the Gazette. That GM cotton is approved in the Ord does not mean it is approved for growing in other areas. Under the Act, growing elsewhere would require separate Ministerial approvals of further exemptions for each region. This approach allows for the growing of GM crops in WA under specific conditions and for facilitating the preservation of designated GM-free Areas.

### **Gene Ethics strongly supports this gatekeeper approach.**

It is unclear if there are other decision-making processes available under Section 4 of the Act, to establish GM-free Areas, other than Ministerial discretion. For example, it is not clear under the Act how a decision-making body for making orders for designated GM Free areas would be constituted and how decisions to designate GM Free Areas would be reached.

Those communities that seek to remain GM-free should also be recognised by the Act. But Section 6, under which the Minister may issue exemptions for growing GM Free Crops, only recognises the applicants for exemptions. Under Section 4 there should be comparable recognition of those seeking to continue growing non-GM crops or to declare their local communities GM-free. The rights and aspirations of people seeking to remain GM-free are not recognised by the Act and they are not enabled to participate in decision-making processes.

The decision-making processes and makeup of the decision-making body for deciding designated GM Free Areas under Section 4, and for enabling exemptions under Section 6, ought to be clearly defined and elaborated. Members of the interested public and public interest advocates should be included.

No process of application is defined in the Act for a local or regional council or a community to apply for the declaration of a designated GM-free Area. Nor are the decision-making processes and the composition of the decision-making body specified when granting exemptions under Section 6.

## **Recommendations for Section 4 designating GM Free Areas in WA.**

Gene Ethics recommends that:

- Section 4 be amended to enable achievement of the GM-free aspirations of shires and municipalities, local communities, individual farmers, farmers organisations or other relevant persons or groups;
- the Act should recognise and uphold the rights of people with GM-free aspirations to participate in decision-making and their rights to remain GM-free and to be designated GM-free;
- the right to remain GM-free should be protected under the Act, including the right to remain free of contamination from GM crops when exemptions are granted under Section 6.

## **Granting exemptions under Section 6.**

Section 6 for granting exemptions needs to be amended to specify decision-making processes and how the decision-making body for granting exemptions is constituted. The Minister's decision-making process should be more rigorously specified, and should be open to community participation, when applications for exemptions under Section 6 of the Act are considered.

To ensure the Act is not contravened, Section 6 should include provisions to ensure public access to all information regarding exemptions granted, the exemption conditions, and information on decision making processes. In the public domain should be, crop identity, crop growing location, conditions on the exemption, and other relevant information. Strict compliance could then be monitored and the Act may be properly, transparently and publicly monitored and to promote public accountability.

Section 6 exemptions should only be granted under conditions of strict liability on the applicant for damages or loss caused to others for Section 5 or Section 7 offences or any other damages which may be inflicted on others through growing of the GM crop. Strict liability under these conditions should be made a key condition of granting exemptions under Section 6.

Under Section 6 (2) 'An exemption may be granted subject to specific conditions' and under Section 6 (5) 'An exemption may be included in an order designating an area under Section 4'. How the rights and responsibilities of those granted exemption will interact in practice with the protection and maintenance of designated GM-free Areas should be explicit.

## **Recommendations for Section 6:**

- all the information regarding exemptions granted (including crop location, identity of crop, exemption conditions) should be required to be publicly available;
- there should be scope for people to participate fully in decision-making for the granting Section 6 exemptions.
- publication of exemption orders in the Gazette should include all information - specific conditions of the exemption and how these may be breached, so the exemptions can be properly, transparently and accountably monitored for contravention of the Act and to ensure that the Act is being strictly adhered to;

- if the applicant for an exemption cannot be held strictly liable for damages or loss to others from their GM crops (which may, for example, pollute the areas designated under Section 4) then the exemption should be refused;
- strict liability should be a key condition for granting exemptions under Section 6.
- the Act defines 'field trials' but not 'commercial trials'. 'Commercial trials' must be defined.

### **Offences under Section 5 and Section 7 and liability for damages under Section 10.**

Section 5 makes it an offence to grow unauthorised GM crops in WA in designated GM Free Areas established under Section 4. The whole of WA is now designated a GM Free Area subject to a number of exemptions under Section 6. The penalty for knowingly or recklessly committing an offence under Section 5 is \$200,000. Similarly, for the offence of breaching exemption conditions, Section 7 sets a penalty of \$200,000. Also, under Section 8, the offending GM food may be destroyed, including neighbouring crops which may have been contaminated. Section 9 provides for compensation if the CEO determines that a crop was destroyed unfairly. Section 10 adds legal liability to pay compensation for any loss or damages which occurred to others from growing unauthorised GM crops under Section 5, or from breaching exemption conditions (Section 7). Section 10 also provides for liability for compensation to the non-GM neighbour in the event that a neighbouring crop is contaminated and made genetically modified and thus needs to be destroyed as well as legal liability for the offender for any other damages or loss which may occur as a result of an offence under the Act.

Thus, we assert that liability issues do not lie outside the scope of this review of the Act. Legal liability issues, for offences under the Act and the powers of state authorities to enforce the Act, make up most of the Act's provisions.

A number of legal grey areas remain in the Act. For instance, how the growing of exempted GM crops is to be managed under the Act particularly with regard to any offences which may occur under Section 5 and Section 7 from the growing of GM crops when the grower has been granted a Section 6 exemption by the Minister, or when the GM crop contamination originates outside of the country (say in seed for sowing) or from a state or territory other than WA. Clarification is also needed of how the rights and responsibilities of those granted exemption will interact in practice with the protection and maintenance of designated GM Free Areas, and those who have a stake in them.

These are not hypothetical issues. For example, GM canola was found growing around ports in Japan, despite Japan not growing GM canola. Similarly, GM maize genes were found to be widely contaminating vitally important maize landraces in Mexico, despite Mexico at the time having a ban on GM maize. In Hawaii, contamination by GM papaya is now rampant, despite buffer zones being in place and being. Seed discarded when papaya are consumed appears to have created the contamination. Growing non-GM or organic papaya in Hawaii is now financially and physically very difficult, if not impossible. In Victoria, the proponents of GM canola argued that they would be able to strictly segregate the crop but Graincorp has announced after only one season that GM and non-GM canola will be co-mingled in silos. Segregation does not work and the burden of added costs for testing and management have been unfairly off-loaded onto non-GM growers who still attempt to preserve their non-GM or organic status.

## **Recommendations for Section 5 and Section 7.**

- Sections 5 and 7 which describe offences for growing unauthorized GM crops in WA or for breaching exemption conditions need to also clearly state what happens when:
  - GM contamination originates outside of the country;
  - GM contamination originates outside of the state;
  - GM contamination originates from GM crops grown legally in WA under licence, where the applicant has been granted a Section 6 exemption;
  - Loss of market or other damage occurs to non-GM growers or those wishing to remain GM Free, as a result of GM crops granted exemptions grown in WA;
  - Unauthorized or exempt GM crops are found on non-GM farms or areas designated GM-free.
- Designated GM Free Areas must be fully protected and kept GM-free by monitoring and enforcement of the Act.

## **Section 10 orders a court may make on conviction.**

Section 10 of the GM Free Areas Act 2003 gives the orders a court may make on conviction, including under Section 10(2) and Section 10(3) compensation for damages in the event of a GM crop contaminating a neighbouring crop and/or causing any other damages to others. Thus, contamination and segregation issues are also within the scope of the present review.

## **Recommendations for Section 5-10 for offences and liability under the Act.**

Liability provisions in the Act should be kept and even strengthened. Strict liability applied to exemptions would pre-empt any confusion and should be written into Section 6. Provisions that should be kept and/or strengthened include: Section 10 liability provisions for damages caused by growing unauthorised GM crops and offences for growing unauthorized GM crops (Section 5) and offences of breaching exemption conditions (Section 7).

## **Concluding summary:**

This Act is robust and appropriate for the challenges of deploying GM organisms in WA environments. Its gatekeeper approach and control over activities in each region of WA and for each new GM crop are justified and appropriate.

The Act contains important liability provisions for damages caused by growing unauthorised GM crops in WA or for breach of exemption conditions where a Minister has granted an exemption. However, the decision making process for designating GM Free Areas under Section 4 and for granting exemptions under Section 6 need to be elaborated and clarified.

Section 4 should be amended to recognise the aspirations and participation in decision-making by applicants for designated GM Free Areas. The Act should recognise and spell out processes for the participation of those who aspire to remain GM-free.

Section 4 should be amended to recognise the aspiration and right of local shires, cities and local communities, or other specified class of persons (e.g. individual farms or farming co-operatives) who want to designate themselves GM Free Areas and/or to remain GM Free.

The Act as it stands gives recognition to the applicants (persons, specified class of persons etc) for GM crop exemptions but does not recognise the rights and aspirations and

participation in decision-making of those wishing to remain GM-free. The Act should be amended to qualify the Minister's sole decision-making role by being open, transparent and participatory to input from local communities, local government and farmers who wish to stay GM Free.

Liability provisions under Section 10 are strong for offences under Section 5 and Section 7 and should be kept and even strengthened. The Act needs to expand on how these provisions apply to GM crops grown outside the state or the country if they contaminate WA or GM Free Areas designated under Section 4 of the Act. The Act needs to specify what happens in the case of damages or loss caused by GM crops which are approved or granted exemptions under the Act.

Decision-making processes for granting exemptions under Section 6, including all information on the conditions by which the exemption may be breached, information about the identity and specific modification of GM crop to be grown and growing locations, must be publicly available. This is necessary so that the Act may be properly enforced and to protect the interests of other sections of the community.

If an applicant for exemption cannot guarantee they will be strictly liable for damages or loss caused to others as a result of their growing the GM crop, then they should not be granted an exemption. Strict liability provisions should be made a key condition for exemptions under Section 6.

Areas designated under Section 4 of the Act as GM Free Areas need to be protected. If applicants for GM exemptions under Section 6 cannot provide guarantee that they will accept strict liability for any contamination of the other designated areas, they should not be granted an exemption. If this condition were breached, it should be an offence under Section 7.

The processes of day to day monitoring of adherence to the Act need to be specified. The excessive decision making power which the Act now gives the Minister, to decide GM Free Areas and exemptions is open to abuse and bias. We recommend that the Act be amended so an independent body is established to oversee and arbitrate the decisions made under the Act and to implement those decisions.