



## Farmer's liability and GM crops

Legal liability is an important part of the genetically modified (GM) cropping debate. Issues arise for those wishing to grow GM and those who want to remain GM free. This fact sheet provides an impartial overview of the issues that may affect either group. Please note, this fact sheet is not intended to be definitive legal advice on the subject.

All Australian states and territories have legislation to regulate GM cropping. However, most jurisdictions – except Queensland and the Northern Territory – have imposed moratoria on GM crops. No legislation addresses the liability of either GM or GM free farmers. Liability, which remains a civil issue, may arise at all stages of production – planting, harvesting, distribution and sale.

### Planting and harvesting

Liability may occur in a number of situations, the most likely being the spread of GM seed and pollen from a GM farmer's land to a non-GM farmer's land. This may lead to civil actions on several fronts.

#### Negligence

If the unintended presence of GM seed or pollen causes loss to another party, a GM farmer may face negligence actions if all of the following are met:

- failure to observe a duty of care to manage activities to avoid reasonably foreseeable damage to another person, and
- a breach of duty by the GM farmer, and
- damage sustained as a result of that breach.

GM farmers have a legal duty of care to manage their crops. A breach of this duty could result from failing to adhere to 'good practice' in GM crop cultivation (such as keeping buffer zones between GM crops and the plantings of non-GM neighbours).

#### Private nuisance

The tort of nuisance protects the use and enjoyment of property. Denial of use and enjoyment relates not only to actions that cause physical damage to a property (such as killing grass or trees) but also to those that prevent landowners from using their property as they wish.

Private nuisance is important because the spread of GM seed or pollen to a non-GM neighbour could compromise the latter's non-GM or organic status. If this is ruled to be against the use and enjoyment of property, the GM farmer may be liable not only

for any loss of profits of the non-GM farmer but may also have to ‘clean up’ the neighbour’s property to return it to a GM-free state.

The predominant farming activities in an area will be important in determining whether a nuisance action is likely to succeed. If there is a number of GM farmers, GM cropping may be classified as ‘reasonable use’ of the land. This may make it harder for non-GM farmers to successfully sue GM farmers for nuisance.

## Trespass to land

Trespass to land involves the direct interference with the possession of another’s land. There are circumstances where a farmer engaged in GM cropping may be liable – for example, continuing to harvest a GM crop where it is obvious that GM material is going onto a neighbour’s property.

## Intellectual Property (IP) rights

Pollen and seed drift may lead to GM crop spread on a neighbour’s land. If the GM crop is patented (and many are) this may result in the neighbour being held liable for patent infringement. This is most likely in cases where the neighbour has taken active steps to encourage the growth of ‘volunteer’ plants. However, with patent infringement not generally dependent on proof of knowledge, the concern arises that even a completely innocent neighbour could be held liable for patent infringement. In Canada a farmer was found liable for patent infringement when GM crops were discovered growing on his land. In this case it was held that the farmer had taken active steps to cultivate the GM variety. The Supreme Court of Canada indicated that courts should be slow to impose liability on farmers unaware of the presence of GM varieties.

## Distribution and sale

### Contract

A GM-free farmer may sell crops to distributors or consumers on the basis that the crop is GM-free. If this undertaking is in the form of a condition or a warranty, the farmer may be liable for breach of contract if it is later discovered the crop has traces of GM products.

## Trade practices

Commonwealth and state legislation prohibits misleading and deceptive conduct in trade and commerce. Conduct does not always have to be intentional to be misleading and deceptive. Non-GM farmers must be careful their claims to the GM-free status of their crops are accurate.

## Summary of general liability issues

Potential liability will vary depending on whether farmers are GM or GM-free (the table below lists some possible issues).

GM farmers	GM-free farmers
trespass to land	IP rights
nuisance	trade practices
IP rights	

## Legislative requirements

GM crops normally require a licence before they can be grown, and farmers must grow all crops in accordance with the licence. Licences are issued by the Gene Technology Regulator under the *Gene Technology Act 2000* (Cth) and equivalent state acts. Where moratoria exist under state legislation, farmers must seek exemption to grow proscribed crops. A farmer who grows GM crops without a licence or an exemption faces a fine. Liability for unintentional GM contamination (eg. canola contamination) is also outside the ambit of the legislation.

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