GENE TECHNOLOGY BILL 2005

Committee

The Chairman of Committees (Hon George Cash) in the chair; Hon Kim Chance (Minister for Agriculture and Food) in charge of the bill.

Clauses 1 to 4 put and passed.

Clause 5: Nationally consistent scheme -

Hon MURRAY CRIDDLE: The minister can probably guess what I intend to ask him about; that is, the approaches of the federal and Western Australian governments. In which way does the minister foresee the management of those two approaches in Western Australia; and does Western Australia's approach override anything that the commonwealth government is doing?

Hon KIM CHANCE: I thank Hon Murray Criddle. No, this bill overrides nothing in the federal Gene Technology Act 2000. It has always been the intention of the commonwealth and the states jointly that the states would legislate in effectively the same terms as the commonwealth. The real purpose of this legislation, as with many other instances of uniform commonwealth and state legislation, is that the effect should be the same Australia-wide. However, the commonwealth's jurisdiction, being limited as it is to corporations, requires complementary state and territory legislation so that persons other than corporations can be brought under the jurisdiction of the law. Therefore, the legislation of the commonwealth, states and territories will have the same effect.

Hon BRUCE DONALDSON: I want to follow up on that matter. The report of the Standing Committee on Environment and Public Affairs at page 29 clearly states that if the Western Australian legislation differed from the commonwealth's uniform legislation, which was agreed to by all states and the commonwealth, at least six of the nine members of the Gene Technology Ministerial Council must agree to those differences. Therefore, the committee, in dealing with the subject of the use of gene technology or genetically modified organisms, was cognisant that the legislation being promulgated in this place did not differ too greatly; otherwise the minister would have trouble when he joined his colleagues at meetings of the ministerial council. That is why the committee was careful to go through that issue. It was quite clearly stated that marketing was the issue that was left to the states and that the Gene Technology Regulator's focus was on environmental and health issues, not marketing. The issue of marketing was left to the state, which gives it freedom to do what it has done with the Genetically Modified Crops Free Areas Act 2003, which covers that issue. Am I reading the legislation correctly?

Hon KIM CHANCE: Hon Bruce Donaldson is entirely correct, and that point is made at paragraph 3.4 of the terms of reference in the report.

Clause put and passed.

Clauses 6 to 195 put and passed.

New clause 38A -

Hon PAUL LLEWELLYN: I move -

Page 25, after line 23 - To insert the following new clause -

38A. Actions for damages

(1) If a person ("first person") -

(a) deals with a GMO in a manner that involves the release of the GMO into the environment; and

(b) because of the dealing another person ("second person") suffers loss or damage,

then -

(c) a licence holder in respect of the dealing is liable to compensate the second person for the amount of the second person's loss or damage; and

(d) the second person may recover that amount by action against the licence holder.

(2) If the loss or damage in an action under subsection (1) was caused by both -

(a) the first person dealing with a GMO in a manner that involves the release of the GMO into the environment; and

(b) an act or omission of the second person,

the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to the second person's contribution to causing the loss.

(3) For the purposes of subsection (2), the acts or omissions of a person who is responsible for another person include the acts of that other person.

(4) In this section -

"environmental loss or damage" means the costs of remedying or rectifying any damage to the environment incurred, or reasonably anticipated to be incurred, by any person with a right or duty to incur those costs.

"loss or damage" includes environmental loss or damage.

I will hark back to the nationally consistent scheme that we have just talked about. There is no issue with constitutional validity in adding this new clause to the Gene Technology Bill. In fact, the amendment is not inconsistent with the provisions of that bill as it stands. First, section 16 of the federal Gene Technology Act makes it clear that there is no intention to cover the field; that is, if the commonwealth and the states can operate concurrently without any conflict, they will. Secondly, the power of the commonwealth minister to designate the Western Australian act as a corresponding state law under section 12 of the commonwealth Gene Technology Act is irrelevant to whether the amendments would be effective. The corresponding state law provisions are solely for the purpose of wind-back notices under section 14 and do not affect the validity of the state act. In effect, it is possible to amend the Gene Technology Bill to insert a strict liability clause without compromising the effect of either the state legislation or the commonwealth legislation. For that reason the Greens (WA) have moved to add a new clause under which anyone who holds a licence to grow genetically modified plants will face liability. The proposed new clause will impose liability for loss or damage caused by certain dealings. However, the addition of this new clause does not mean that the Greens want to impose an obligation on all dealers. It will apply only to holders of a genetically modified organism licence. Under the scheme established by the Gene Technology Bill, GMO licences are required for high-risk dealings. Low-risk dealings such as standard procedures in medical research do not require a licence. I will provide some examples of the dealings that require licences, as listed on the Gene Technology Regulator's web site. These are generally the high-risk variety of dealings that will require a licence under the bill. Monsanto Australia Pty Ltd recently applied for commercial release of Roundup Ready cotton to be used "south of latitude 22° South in Australia". That GMO dealing can be licensed, and it is the very kind of dealing we are referring to in this liability clause. A second licence was issued on 2 June 2005 to Bayer Crop Science Pty Ltd for field trials of genetically modified herbicide tolerant and hybrid *Brassica juncea*, Indian mustard - a herbicide-tolerant and breeding system application. It represents a high-level dealing of genetically modified organisms.

The second part of the proposed new clause applies only to GMOs released into the environment. The proposed new clause does not refer to intentional release. Accidental release of material by a licence holder will also be covered. When a company indulges in the use of genetically modified organisms and intends to release them into the environment - we accept that, to some extent, that activity is already happening - the companies should be subject to full liability for any damage they might cause as a result of being involved in this industry. In other words, if the company is the beneficiary of gene technology and it causes unintended damage, the company should be liable. That is a fair and reasonable expectation.

Mr Chairman, should we deal with this amendment in sections?

The CHAIRMAN: If the committee requires it to be dealt with in sections, we can divide the amendment. Now that I have the member's attention, this is not the time for a wide-ranging, second reading speech on general issues. This is an opportunity for the member to explain the effect of the amendment.

Hon PAUL LLEWELLYN: I was coming to the precise nature of the amendment. Proposed clause 38A "Actions for damages", reads -

38A. Actions for damages

(1) If a person ("first person") -

(a) deals with a GMO in a manner that involves the release of the GMO into the environment; and

(b) because of the dealing another person ("second person") suffers loss or damage,

then -

(c) a licence holder in respect of the dealing is liable to compensate the second person for the amount of the second person's loss or damage; and

(d) the second person may recover that amount by action against the licence holder.

Nothing can be clearer than that proposed subclause. If a licence holder causes damage, clearly the person who suffers the damage is entitled to recover the cost of the damages without necessarily having proof of negligence. In other words, under the Gene Technology Bill licences will be issued with a series of conditions. Even if the licence holder complies with the conditions of the bill, but causes damage to a second party, the person who suffers the damages should be entitled to recover the losses. It continues -

(2) If the loss or damage in an action under subsection (1) was caused by both -

(a) the first person dealing with a GMO in a manner that involves the release of the GMO into the environment; and

(b) an act or omission of the second person,

the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to the second person's contribution to causing the loss.

In effect the provisions in this new clause are a fair and reasonable mechanism for recovery of loss.

Hon KIM CHANCE: That is on an act of omission by a third party.

HON PAUL LLEWELLYN: That is right; an act of omission of the second person.

Hon Kim Chance: Presumably that would hold if it was an act of commission; in other words, a deliberately malicious act by an unrelated third party.

Hon PAUL LLEWELLYN: No; it would be by an act of omission only.

Hon Kim Chance: I think the same will apply, but I am not sure.

Hon PAUL LLEWELLYN: Perhaps we can answer these questions and then have this discussion. It continues -

(3) For the purposes of subsection (2), the acts or omissions of a person who is responsible for another person include the acts of that other person.

(4) In this section -

"environmental loss or damage" means the costs of remedying or rectifying any damage to the environment incurred, or reasonably anticipated to be incurred, by any person with a right or duty to incur those costs.

"loss or damage" includes environmental loss or damage.

Hon BRUCE DONALDSON: The opposition will oppose proposed new clause 38A. The gene technology legislation is to enable a nationally consistent approach to gene technology. The genetically modified legislation will allow the state to determine whether the market will be affected. At some time in the future, the growers may lobby the Parliament to enact legislation to allow certain areas of this state to have genetically modified crops. The GM-free areas legislation that was passed by this Parliament took a gatekeeper approach to the whole issue of the growing of GM crops. Its main focus was canola. It was evident from the second reading debate, and Hon Kim Chance is aware of this, that triazine-tolerant canola is not appropriate. I understand that a number of countries are considering whether to ban triazine.

Hon Kim Chance: I think that Denmark already has.

Hon BRUCE DONALDSON: There we are. Triazine is a soil sterilant and it has a residual affect. However, a Liberty-linked chemical and Roundup herbicides are certainly not residual. Regardless of what Hon Paul Llewellyn says, this amendment would be inconsistent with the legislation. The legislation was set up to ensure that we took a nationally consistent approach to the release of gene technology into cereal growing, simply because we needed a system in which there was one Gene Technology Regulator in this country. As I said previously, Dr Sue Meek, a Western Australian, is the Gene Technology Regulator. The technology regulator's focus is entirely on the health and environment, not markets. Three fairly high-powered committees advise Dr Meek on that particular issue. We also have the Gene Technology Ministerial Council. The aim of that

council, which comprises state, commonwealth and territory ministers, is to ensure that that there is a nationally consistent pattern in the health environment across Australia. It does not mean that the states cannot control their own markets and the growing of GM crops. The national legislation does not prohibit a state doing that. The GM-free areas legislation was enacted simply to protect the state.

Dr Chrissy Sharp and Hon Jim Scott were prominent in ensuring that we adopted this gatekeeper approach. As with any debate in the community, we are now seeing a large number of farmers start to look at the bottom line of their cereal growing operations. The bottom line is becoming thinner. The evidence from those countries that allow the use of gene technology is that there have been significant advantages; for example, better production and higher yields of cereal production per hectare. That has become very evident, and later this year, perhaps in September, a number of seminars will be held in this state that will be attended by people from Canada and other organisations involved in gene technology. The participants will visit some of the major cereal growing areas in Western Australia.

A lot of people have changed their minds about the use of gene technology. Members know that in Western Australia we have been very fortunate to have good scientists involved in plant breeding. Monumental steps have been taken in the past few years and the state average for wheat has increased significantly. Of course, that does not allow for drought, frost, rust and everything else. In years gone by, if a farmer got seven, eight or nine bags per hectare, it was considered to be a good crop. These days, if a farmer does not get eight or nine bags per hectare, he will not survive, and certainly it will be considered a poor year. The cereal plant breeding has been to the forefront and the farmers have done an excellent job. A lot of work has been done in conventional plant breeding on a more saline-tolerant barley. As a result, some significant areas of land that is currently out of production could be brought back into production. It is a question of whether gene technology is quicker than conventional plant breeding. The question that arises is whether the use of gene technology is releasing something into the air that will wipe out everybody.

The CHAIRMAN: Order, members! I ask that there be less audible conversation.

Hon BRUCE DONALDSON: The opposition will oppose these new clauses, not because it is being pedantic, but it has considered the situation and the question is: how many more barriers will be constructed? As sure as I stand here there will be a change. The farmers will demand to use every modern technology possible. They now use modern technology in plant and machinery every day of the year. Today's plant and machinery is very different from what we used in 1963, and I refer to the king of the wheat fields - the old super 70 or 90.

Hon Kim Chance: I am battling to hear the member because my ears are still ringing from the king of the wheat fields.

Hon BRUCE DONALDSON: This is another barrier that we do not need. Protection is currently provided. I would hate to think that the non-commercial field trials should not continue in this area. The committee did not recommend that the non-commercial field trials should not continue. It is important that every opportunity be given to our agricultural industry to improve production per hectare and increase the bottom line.

I refer to some of the penalties that are proposed in another new clause. The penalty for killing a person would not be as heavy. The opposition opposes this new clause.

Hon MURRAY CRIDDLE: I agree with Hon Bruce Donaldson. I understand the committee report did not seek to stop those areas of non-commercial development. The whole of the farming industry needs the benefit of that knowledge for the longer term. That is my observation of some of these amendments, anyway, and I am sure that Hon Paul Llewellyn will explain the situation when he speaks. I did not speak in the second reading debate because I was otherwise occupied. However, the issue is that with rust, septoria and the dry, all those other things are the advantages that we may need in the future for our crops. Massive volumes of crops are being grown around the world using gene technology. My party is intending to have an interesting debate very shortly about the GMO industry. I look forward to that. I think we have to take all the emotion out of it. There are some very interesting environmental issues, but we need to understand the economic issues also. That does not apply only to this industry; it is happening also in the fishing industry and many other industries. If we want sustainability, industries must have the funding to continue, and this may be one of the mechanisms that we need in agriculture to allow these industries to carry on in the future. Therefore, stopping the advancement of technology through research and the like I think would be a threat to the industry.

Hon PAUL LLEWELLYN: I think I have been misunderstood by Hon Bruce Donaldson and Hon Murray Criddle on what we are trying to achieve. We are not trying to stop any non-commercial releases and experimentation with GMOs. Is it Hon Bruce Donaldson's understanding that this liability clause will stop them? What is his understanding of the clause? How will the provisions in this clause prevent those non-commercial releases and experimentation from going ahead?

Hon BRUCE DONALDSON: I know full well that the member is not trying to stop non-commercial field trials. The fact of life in Western Australia is that there is no use anyone growing GM crops or using gene technology unless it is under a licensed non-commercial trial. The Greens are referring to the release of GMOs into the environment. New clause 38A(1)(a) is interesting. What will be released into the environment? I would be more concerned about the effect on soil degradation from the use of triazine. I would use Roundup or a Liberty herbicide any day, rather than triazine. I saw the results of triazine on my farm and other farms. I notice that Hon Kim Chance, the minister, is nodding his head because he would have seen the same results. The chemicals we had to use to grow a crop of lupins worried the life out of me. The member is talking about a licence holder. Does the member mean for the non-commercial field trials or is he presupposing that under this new clause licences will be issued by the government at the end of the moratorium period? As I said in the second reading debate, there is an area in Western Australia which is quite conducive to commercial plantings of canola; namely, the Esperance region. There is a significant buffer between the rest of the agricultural area and that south eastern agricultural area in Western Australia. A number of people in that area are starting to put up their hands. At present, they cannot do anything unless there is a change of heart by the Parliament. However, the member should believe me when I say that the producers will be the ones who will demand that the government look at the gatekeeper approach and consider an area such as the Esperance area; that is, if the Esperance farmers want it. That is a fact of life. There may be a handful now and that may cause a division of views in that area, I do not know. Who knows whether, in five years, the farmers in that area will put up their hands and ask the government to allow them to make the area a GM area. I have seen some of the results that have come out of Canada. Those results will be circulated in Western Australia at a number of seminars and forums in September that will be attended by some growers from Canada. They will tell the story about GM farming.

As I said, I am not being pedantic. I think there are enough checks and balances at present under the existing legislation, which counter any concerns that the member may have. By introducing this new clause, the member is setting up another barrier that the Parliament will have to dismantle at some stage in the future with another piece of legislation.

Hon PAUL LLEWELLYN: I think we are talking at cross-purposes. I would like to unpack the issue that we have put on the table. The Greens in this proposal are not suggesting that they are or are not opposed to the use of GM technology. We are saying that, if a person chooses to use GM technology and if he gets a licence for that and pursues that activity, he should be liable for any damage that he causes. I have followed the logic that certain farmers would like to expand their productivity and may believe that expanding their productivity through GM technology is the way of the future. That is true. However, there are also equivalent markets for non-GM products, and those markets will be at risk from the activities of people who use GM technology. It is fine if people chose to use GM technology for their crops, as long as they accept liability for any damage caused to the crops of people in non-GM areas. We are suggesting that alongside the licences - not in addition to - there be statutory and regulatory provisions governing how people execute GM trials or grow GM crops. Is it not reasonable that a person who chooses to go down the GM pathway and who subsequently causes damage to the crops of another person whose prior agricultural activity was based on a market advantage of being GM free, should be liable for any damage to the GM-free crop, especially when there is tangible measurable damage to his market opportunities?

Hon BRUCE DONALDSON: I think Hon Paul Llewellyn might be just ahead of his time. Under the gatekeeper approach - under the existing free areas legislation - legislation will need to be enacted to make part of this state available to grow GM crops.

Hon Kim Chance: No, just an order.

Hon BRUCE DONALDSON: I imagine that at that stage people will look seriously at liabilities that may arise from that area. When we talk about genetically modified organisms, we are also talking about insulin, are we not? Are we also talking about cheeses? Genetically modified organisms already come in many forms, not only crops.

Hon Kim Chance: I sometimes wonder about some members of Parliament, without mentioning any names.

Hon BRUCE DONALDSON: That is right. Who knows? We might all be genetically altered in some form. When genetically modified organisms are let loose on the environment, are we talking only about crops or about the wider use of GMOs in gene technology? Insulin is a very good example. Do we tell diabetics that they cannot have it? For argument's sake, who would be liable for the use of insulin if something went wrong? Would there be the opportunity for people to mount a legal action for millions of dollars of compensation? If Hon Paul Llewellyn were to hold his amendments off for a time, when the gatekeeper approach by audit comes into play, we may be able to enact some legislation that might answer his concerns. However, at the moment, quite frankly, the proposed amendments mean nothing. I am not sure whether the ministerial council dealing with gene technology would view it very favourably. I do not think the council ever envisaged acceding to

amendments such as this. We mentioned in the report that the liability issue had not been discussed, but we did not go down that path for a very good reason. Our state government had ticked off on that agreement, so we were not about to see a situation in which the ministerial council wanted a uniform approach -

Hon Kim Chance: It was not part of your terms of reference anyway.

Hon BRUCE DONALDSON: That is exactly right. We did not go too far down that path because we were very conscious at all times of the agreement that had been signed. Six out of nine ministers needed to agree to any amendments. Had the Parliament looked at being radical, it could have got stuck into that uniform legislation bill and changed it dramatically. The legislation would have got only as far as Canberra and then it would have come back again. I think we are jumping the gun with new clauses such as this.

Hon KIM CHANCE: Obviously, any member can speak at any time, but I thought it appropriate to stand at this stage because the basic arguments have now been made. Before I deal with that, slightly in contravention of the standing orders I will refer to recommendation 13 of the report, which clearly requires me to make a statement on the relationship between the federal Gene Technology Act and the Environmental Protection Act. I will do that in the context of the third reading.

I have enjoyed the debate. I am really glad that Hon Paul Llewellyn has raised this issue, because this is a debate that had to occur. I will not be advising the government to support the amendments for a range of reasons, which I will give now, but notwithstanding that, it was appropriate to have this debate in the context of this bill. I think we have achieved quite a lot in understanding the liability issues. This matter arose by way of interjection when Hon Paul Llewellyn was making his second reading contribution: strict liability is not a complex but a very deep concept in law. Probably only one member of this house, or perhaps two, but probably only one member present, actually understands the concept of strict liability, and that is Hon George Cash, who is not available to contribute to the debate while he is in the chamber with a different persona. The matter is complex, but I will try as best I can to cover the issue from a layman's point of view. Hon Paul Llewellyn's argument on whether the chamber would be entitled to insert such provisions in the bill is fundamentally correct. I do not have any argument in law about that. The state is able to legislate for strict liability within the context of this bill. There is absolutely no doubt about that. It applies to the issue of strict liability and/or compulsory insurance, which arises in proposed new section 38B. However, the question the chamber must consider is whether we should consider liability issues at all, either strict liability or liability issues of any description, within the legislation that is dealing with an existing national scheme. We must also understand exactly what strict liability means. If members will tolerate my layman's description of the term, it means that in this case the proponent would always remain liable for damage caused by its products regardless of the actions or possible malicious actions, either by omission or commission, of others who are unrelated to the proponent.

Hon Paul Llewellyn's amendments set out to modify that effect by providing those provisions within, what I might call, the mitigation clauses. The mitigation clauses are quite superficial and limited. I will read them in the way I understand them, and I will not be using the exact words: if we call the first person the GM user and the second person the non-GM user, if the GM user deals with the GMO in a manner that involves the release of the GMO into the environment and, because of the dealer being another person - that is the non-GM user - suffering loss or damage, the licence holder in respect of the dealing is liable to compensate the non-GM user for the amount of the second person's loss or damage. That is the classical strict liability scenario. The non-GM user may recover that amount by action against the licence holder. We then get into the mitigation part. If the loss or damage in an action under that proposed subsection was caused by both the GM user dealing with the GMO in a manner that involves the release of the GMO - in other words there was negligence on the part of the GM user - and also an act that involves omission or commission of the non-GM user, in my reading the amount or loss of damage is to be reduced to that extent. In other words, liability rests with the affected party as well. I will not go through that again. There is a genuine attempt there to mitigate the harsh edges of strict liability.

I used the word "superficial" earlier. This is a great attempt, because it does attempt to apportion loss, which is probably a matter that would be dealt with in the court in any case, but I cannot see, as much as I have tried to read it into the amendment, where the contribution of an unrelated third person might rest, or even the GM farmer, but that would be getting too complicated. Just to take the unrelated third party, a non-GM user delivers seed to a seed cleaner - an unrelated third party. The seed cleaner by its negligence, but by an honest mistake, then unloads the cleaned seed of the GM producer back into the truck of the non-GM user. The non-GM user rolls in to the seed cleaner with a load of non-GM seed and as a result of the negligence of the seed cleaning company takes delivery of a load of somebody else's seed, which tragically turns out to be GM seed. In that example the second person does not exist. The liability rests with the third person. The third person is not referred to in the proposed amendment, therefore the licensee of the GM construct - Bayer, Monsanto, whoever, or their agent in Australia - has no means of offsetting the weight of legal responsibility that would fall on it as a result of the innocent, but still negligent, actions of a person entirely unrelated to Bayer, Monsanto or their agents.

Hon Paul Llewellyn: Are you saying the seed cleaner is an innocent party?

Hon KIM CHANCE: He is an unrelated third party who made an innocent mistake. He is negligent, and would be found in any court to be negligent. He would probably be judged in a court of law to have caused damage and would have damages awarded against him. However, it was an innocent act, not a malicious act.

Hon Paul Llewellyn: You would have a causation test that would limit the liability of the third party.

Hon KIM CHANCE: Exactly. I am not trying to confuse the issue here. All I am suggesting is that the concept of strict liability, as Hon George Cash pointed out during the second reading debate, is a profound issue and one that needs to be dealt with extremely carefully. Having said that, and notwithstanding all those risks, I am happy to keep the concept of strict liability on the table. I just want to be sure that if and when we adopt the concept of strict liability, we have chased every one of these rabbits down every one of these burrows.

Hon Helen Morton: There are a lot of rabbits around today.

Hon KIM CHANCE: There are lots of rabbits out there! It must be rabbit day. Hon Paul Llewellyn is quite right, we could include strict liability in this bill, but I argue that we should not. He is also right in saying that the Western Australian government's submission to the review of the commonwealth act included the issue of strict liability, but it did so in the context of the national scheme, not one state adopting the system. It certainly did not advocate that the concept of strict liability should be adopted without a profound legal framework around it that can cater for issues such as unrelated third parties or actions of the GM user, rather than the actions of the GM licensee.

The review committee noted that the law of torts is a matter for the states. I agree with the Greens' submission to that committee that there is no constitutional barrier to provisions such as these being included in the state bill. However, it is our view that it would be far more appropriate, and perhaps more effective, if a relevant state law were enacted as part of a national system and in accordance with the spirit as well as the letter of the gene technology agreement, which, as Hon Bruce Donaldson has said, is designed to operate equally between the commonwealth and the states.

The government is taking, and will continue to take, all necessary action to ensure that no loss occurs as a result of GMOs in this state, both during the current moratorium on GM crops and when or if the moratorium comes to an end in whole or in part. To do this we are using, as Hon Bruce Donaldson also said, the Genetically Modified Crops Free Areas Act, and if necessary we can make amendments to other legislation. So far I am very happy with the success that that legislation has had with this task. I certainly do not back away from my view that the possibility of imposing some form of strict liability could, and possibly even should, be considered, but I do not think this is the right place to do it. I think there is time to consider the issue fully. Indeed, it requires very full consideration, without rushing. My confidence in putting that view comes from the fact that I think we have been successful with our model that prevention is better than cure. Although I think there are some concerns about how common law can cope with issues relating to the unintended presence of GM material - I have frequently expressed views on that point - so far the common law deficiencies have yet to emerge. I believe they are there; they just have not come out of the shadows and bitten us yet. In part that is because we have not taken the step of adopting the technology. That is a future risk, perhaps.

The review of the commonwealth act also made a number of points that Hon Paul Llewellyn has not mentioned but may have. Generally, they support the government's position in opposing the amendments in this form and at this time. The committee that reviewed the commonwealth act noted -

Hon Paul Llewellyn: Are you referring to this statutory review?

Hon KIM CHANCE: Yes, insofar as I can see it is the document the member is holding. The review committee noted that no other product in Australia has attracted a strict liability presumption. Let us consider that for a while. Lucas Heights nuclear facility in suburban Sydney operates without strict liability provisions. GM Holden, Ford Australia, and ICI, the manufacturer of cyanide, all operate without the provisions of strict liability legislation.

Hon Bruce Donaldson: If I were recommending that a young person go into law, I would suggest he enter this field.

Hon KIM CHANCE: It could be a growth area!

Hon Bruce Donaldson: It would be one of the wealthiest parts of the law profession if one were dealing with this area.

Hon KIM CHANCE: Incidentally, Rothmans and Philip Morris do not operate under strict liability provisions either. To give a product a strict liability presumption -

Hon Paul Llewellyn: Are you quoting from the report?

Hon KIM CHANCE: The review committee noted that no other product in Australia has attracted a strict liability.

Hon Paul Llewellyn: What about defective products under the Trade Practices Act?

Hon KIM CHANCE: Defective products are another issue, and I will come to that.

Hon Paul Llewellyn: For example, strict liability applies if you sell a defective product to a consumer. Are you talking about situations other than that?

Hon KIM CHANCE: A product that is not on its face defective can be given the status of a super-hazardous good. I have made the point that Lucas Heights operates without that presumption, so even the waste product of the Lucas Heights reactor is not regarded by the legislature as a super-hazardous good. I do not say that it should not be considered as a concept or even that it might not prove to be advisable at some stage, because it may well be. However, Hon Paul Llewellyn has said that the strict liability right of action proposed is similar to provisions in the commonwealth Trade Practices Act concerning defective products. While some may wish to draw an analogy between a genetically modified organism and a defective product, to do so is, on its face, misleading and perhaps even an oversimplification of a very complicated issue.

The review committee also noted the inequities that could result from a blanket imposition of liability on the licence holder. Such a liability would drastically reduce the incentive for the person actually dealing with the GMO - this is a matter of real concern, because that is the farmer - to do so in an appropriately careful manner. I will go through that again. Such a liability would drastically reduce the incentive for the GMO farmer to act in an appropriately careful manner. If somebody else is looking after liability issues, would I be as careful as I would be if I knew the liability lay on my shoulders? I do not think so. A farmer could go so far - nobody would suggest for a moment that he would - as to deliberately distribute genetically modified seed across a non-GM neighbour's property. Under those provisions, the licence holder would be liable, not the farmer. That is a malicious act, and it may give rise to action in tort, but under the strict liability provisions the licensee would be responsible.

Hon Paul Llewellyn: Are you saying that a mischievous third party could maliciously distribute GM seed onto another property, but the licence holder would be liable?

Hon KIM CHANCE: Under the strict liability provisions, the licence holder would be liable.

Hon Paul Llewellyn: He would be insured against that, if he could find an insurer to cover it.

Hon KIM CHANCE: Perhaps he could if Hon Bruce Donaldson had yet another son. He has one in the legal profession working on strict liability and needs another working on strict liability insurance.

Hon Bruce Donaldson: I could make a fortune.

Hon KIM CHANCE: He could retire early!

The proposed amendments include provisions to take account of contributing actions or omissions of the person who suffers loss, but not the person who deals with the GMO. That highlights once again that as much as we might wish for a simple solution to the issues that have been raised, there are no such simple solutions. This sounds as though I am having a go at Hon Paul Llewellyn, but I am not, because he has brought forward a number of the issues that will be central to the question of resolving liability. He has brought forward central, core issues, and they are entirely appropriate for this discussion. However, I think it is a discussion that needs to take place in its own context and needs to be far broader. I would want a committee of the Legislative Council to have a thorough look at this issue before we proceeded to legislate.

I know that I have taken a long time but I have worked through the issues and the reasons I do not want to support proposed new clauses 38A and 38B, although the second proposed new clause is not yet before the committee. However, I am happy that we have been able to have this discussion and I hope this can be the beginning of the next stage of the debate on GM technology in agriculture in this state; that is, the correction and identification of issues that revolve around the legal framework relating to the technology.

Hon PAUL LLEWELLYN: Quite a number of issues have been raised in the debate on this amendment, but the first one I want to deal with is Hon Bruce Donaldson's proposition that this proposal is irresponsible towards, for example, insulin users. I draw the attention of the honourable member to the second part of the proposed new clause, which relates to the insulin scenario, in which someone takes insulin and is damaged for some reason. I am not saying that that will happen but it is a hypothetical scenario raised by the member. The proposed new clause provides that there will be some apportioning of loss or blame in that the amount of loss is to be reduced to such an extent - which may be nil - as the court thinks fit, having regard to the second person's contribution to the loss. If a person knowingly involved himself with insulin use and chose to do so, this provision will apply. I am not sure that this is a good example, but I am suggesting that this is not a flippant

proposition. The proposition is intended to deal with a very significant public interest issue. By introducing this amendment the Greens do not intend to obstruct, for example, the use of insulin or the creation of insulin through gene technology; in fact, very far from it. We are saying that if a person chooses to profit from and deal in genetically modified organisms, that person should also be liable for any damage that might arise out of that activity. That is a simple matter, but the damages should be assigned and calculated fairly.

We are trying to clarify that this is not a mischievous process. We are not mischievously introducing a piece of legislation. The government itself has said that it is desirable that we should seriously consider strict liability and consider how it could be implemented effectively. The Leader of the House himself has said that it would not be inconsistent, if we wanted to, to include it in this legislation, and he would be happy to refer it to a committee for further consideration. Perhaps that is the right thing to do at this point, but I will not do it quite yet.

I know that the Greens are sometimes accused of being too far behind, in caves and on horses, and sometimes of being too far ahead of ourselves. It is very hard to locate ourselves in the reality of today. Yesterday, in another debate in this place, we were accused of wanting to go back in time, and now Hon Bruce Donaldson says we are ahead of ourselves. In fact, the Greens (WA) are right here in this place putting on the table straightforward, well-thought-out, reasonable propositions to resolve what is clearly a major public interest issue on the use of technology, about which a significant proportion of people have concerns. The industry that profits from the use of this technology should put its money and security where its mouth is and take full responsibility if it believes its technology will not cause damage; like nicotine has caused damage through smoking and thalidomide through side effects. If the industry believes its technology is safe enough to be released into the environment, it should equally be able to say that it will be fully liable for it. It would then find itself an insurance company to underwrite that risk. This legislation is all about risk. We did not intend to clear the wheatbelt and cause salinity; we just did. We did not intend to burn coal until the atmosphere changed. We do not intend to grow a canola crop that is harmful to the environment. I am not being dramatic about this issue, but if there are unintended consequences of an action, the beneficiaries of that action should be liable.

I understand why the government would want to say, "Not tonight or this afternoon, Josephine; we have a headache and cannot take this right now." However, now is the time to act when there is a moratorium in place. The Greens supported the moratorium. We do not oppose experimentation with genetically modified organisms; we have said that it needs to be done responsibly. In that case, we have not opposed the licensing procedure under the Gene Technology Bill. We do not oppose the bill, as it is better to have it than to have nothing. We are living on the same planet, not in the future, not in the past, but right now. The risks, liabilities and responsibilities for this legislation rest with Parliament. If we let gene technology roll on, we will be morally liable for allowing these decisions to take place which will put the community at risk. I am not taking the moral high ground; that is the logical analysis of the consequences of the use of breakneck-speed technologies. We are not opposed to technology. Biotechnology will be a way of the future. Gene technology of some sort may well be a way of the future; it is already part of our current reality. We are not opposed to those technologies, but we want them located squarely where they should be located. That is what the Gene Technology Bill is about - risk management and the management of liabilities. We are in this place now dealing with the issue, not somewhere else. Every day Monsanto and other operators in the marketplace are racing ahead with new products and inventions, and releasing them into the environment with no liability for the consequences. We are not saying that those products are not causing some good. We are not saying that there is no apparent good coming out of gene technology, otherwise Monsanto and others would not be producing them and people would not be buying them. It was the same with thalidomide; something good was intended to come out of those drugs. It is the same with nicotine; people get relief putting it into their mouths.

The CHAIRMAN: The question is that the words proposed to be inserted be inserted. I make the point that there has been fairly wide-ranging debate between the lead speakers on this issue. Shortly I will be required to put the question to determine whether or not the Committee of the Whole agrees to the proposed amendment. I raise that issue so that members do not digress too far. We are talking about the impact or otherwise of an action for damages. I make the point that the chamber will make up its own mind and to continue talking for hour after hour is not the way we debate an amendment to a bill. If a member wishes to pursue a matter, having counted on both hands the likely result, there are other avenues to pursue in this house.

Hon BRUCE DONALDSON: I just want to say to Hon Paul Llewellyn that I realise his good intent in raising this issue. I think the amendment is in the wrong form to discuss this very complex legal issue. The other side of the issue is the reason the opposition opposes the amendment. The federal uniform legislation established the Office of the Gene Technology Regulator. Before the issue of any approval for a licence to use gene technology, the regulator is responsible for ensuring that the health of people and the environment are not at risk. The regulator must take advice from a number of committees before a licence is issued. If something went wrong, it could be said that the regulator was at fault by approving the licence. However, that is not the case. If I recall

correctly, the regulator is covered under the act. The substance of Hon Paul Llewellyn's amendment should not be debated in relation to this bill. I believe it is a matter for debate at another time if the Parliament wants to debate that liability. The amendment moved by the member is so far ranging that we would need to set aside three to four days in this house to debate it. We would also need some very good legal advice on all the pitfalls that we might encounter in developing such legislation, whether it be by way of amendment to the Gene Technology Bill or by separate legislation on liability. That is the reason the opposition opposes the amendment; it does not believe that this is the right context in which it should be raised. In this case Hon Paul Llewellyn has unpacked his amendment very well and is ahead of the game.

New clause put and a division taken with the following result -

Ayes (2)

Hon Paul Llewellyn	Hon Giz Watson *(Teller)*

Noes (28)

Hon Ken Baston	Hon Bruce Donaldson	Hon Nigel Hallett	Hon Louise Pratt
Hon Matt Benson-Lidholm	Hon Kate Doust	Hon Ray Halligan	Hon Ljiljanna Ravlich
Hon George Cash	Hon Sue Ellery	Hon Barry House	Hon Margaret Rowe
Hon Vincent Catania	Hon Donna Faragher	Hon Robyn McSweeney	Hon Barbara Scott
Hon Kim Chance	Hon Anthony Fels	Hon Sheila Mills	Hon Sally Talbot
Hon Peter Collier	Hon Jon Ford	Hon Norman Moore	Hon Ken Travers
Hon Murray Criddle	Hon Graham Giffard	Hon Helen Morton	Hon Ed Dermer *(Teller)*

New clause thus negatived.

The CHAIRMAN: I notice that new clause 38B appears to be contingent on new clause 38A; therefore, I presume the member will not propose to move it.

Hon PAUL LLEWELLYN: I would not waste the time of the committee by moving an obsolete clause.

Title put and passed.