STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

INQUIRY INTO MECHANISMS FOR COMPENSATION FOR ECONOMIC LOSS TO FARMERS IN WESTERN AUSTRALIA CAUSED BY CONTAMINATION BY GENETICALLY MODIFIED MATERIAL

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
FRIDAY, 31 AUGUST 2018

SESSION ONE

Members

Hon Matthew Swinbourn (Chair)
Hon Colin Holt (Deputy Chair)
Hon Tim Clifford
Hon Samantha Rowe
Hon Dr Steve Thomas

Hearing commenced at 9.33 am

Dr ANNA BUNN
Senior Lecturer, Curtin University Law School, sworn and examined:

Mr MICHAEL DOUGLAS
Senior Lecturer, University of Western Australia Law School, sworn and examined:

The CHAIR: Good morning. I am Matthew Swinbourn. I am the Chair of the committee. Next to me is Alex Hickman, the advisory officer for the committee; further to the left is Colin Holt, who is the Deputy Chair; and at the end of the table is Tim Clifford. To my right is Samantha Rowe and to the far right—only literally, not figuratively—is Hon Dr Steve Thomas. On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or the affirmation.

[Witnesses took the affirmation.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have each of you read and understood that document?

The WITNESSES: Yes.

The CHAIR: These proceedings are being recorded by Hansard and broadcast on the internet. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to speak into them and not make any unnecessary noise around them. I remind you that your transcript will become a matter for the public record. If, for some reason, you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would either of you like to make an opening statement to the committee?

Dr BUNN: We do not have an opening statement.

The CHAIR: We received your submissions and we provided some questions to you in advance to give you an idea of the direction we would be going. We may not ask all these questions, and it is the case that other committee members will jump in when they feel it is necessary to ask question to satisfy themselves, but I will get stuck in with the first question. We note that your submission has focused on the legal issues regarding possible causes of action at common law for GM contamination and the challenges each cause of action presents. We also note your conclusion that in absence of legislative change farmers are not likely to obtain compensation under the common law. Some submitters have stated that a single case is not sufficient to draw a conclusion that common law remedies are inadequate to compensate GM farms. What is your view of this submission?

Dr BUNN: I think the first thing to note is that if a farmer in Western Australia if affected by GM contamination and experiences pure economic loss in circumstances that are factually similar to Marsh v Baxter, then that decision effectively does stand in the way of a farmer recovering

compensation. Obviously that being a Court of Appeal decision, courts at first instance are going to follow that decision. That is the first thing. Of course, if the facts are sufficiently distinguishable, then it is possible that a different outcome could be reached, but, nevertheless, it is our view that the common law is inadequate. So the main causes of action that a plaintiff affected by pure economic loss would pursue would be negligence and nuisance. In short, with negligence, the first thing a plaintiff has to do is to establish that they are owed a duty of care, and courts are reluctant to impose a duty of care where the harm is purely economic. One of the reasons for that reluctance is a concern of the law not to impose burdens on the legitimate pursuit of commercial interests. For that reason, we believe that it is going to be very difficult for a person to even get past the first hurdle of establishing a duty of care.

In terms of an action in nuisance, again, where there is pure economic loss, the courts really need to strike a balance between the plaintiff and the defendant. When doing this, there are a range of considerations that are taken into account and it really involves a value judgement. So, at best, the outcome is very unpredictable. Given that we believe that it is unlikely that a duty of care will be established in negligence and the unpredictability of a nuisance action and given that access to courts is costly at the best of times, we believe that the plaintiff, unless they have the clearest cut of cases and deep pockets, would be ill-advised to pursue a remedy through the courts.

The CHAIR: Is that because of the inherent problems with tort law generally in this state and the expense of our court system, or is this especially so for people who may wish to pursue the kinds of claims that were pursued in Marsh v Baxter?

Mr DOUGLAS: I would not say it is necessarily a problem with tort law. I would say that tort law is purposefully reluctant to impose liability for pure economic harm. To supplement the submissions made by Dr Bunn a moment ago, perhaps things would be different if there was a case in which it could be established scientifically that some physical damage had occurred. A key factual premise which underpins the first instance in Court of Appeal majority decisions in Marsh v Baxter was that there was no physical damage. Courts applying the law of torts take a very different view when there is physical damage; it could be much easier to establish liability. But so long as scientists take a position that mere presence of GM material does not cause damage, in the sense of a type detriment that is physical, I do not think that torts are going to be of assistance. I would not say that is a deficiency with the law of torts; I would say that is a purposeful policy approach which has been developed over hundreds of years.

[9.40 am]

Hon Dr STEVE THOMAS: If we accept that, then a mechanism to put in compensation for a presence would to some extent be flying in the face of that hundreds of years of precedent—be it political, governmental or administrative.

Dr BUNN: If I may, I think that the issue is really that the courts do not necessarily see it as their role to actually impose those burdens on business. That is not to say the legislature would not decide that that was something that could be done.

Mr DOUGLAS: An analogous example might be the policy decision underpinning the NDIS. The idea here being: there are some misfortunes in life which cannot be attributed to blame—just bad things happen. That is not to say that those persons who are unfortunate should not be compensated. I guess I affirm what Anna has just said, in that, just because the courts have not seen it as their role to impose, it does not mean that they would not, for example, be upset that the legislature did that. To the contrary, they would say that that is appropriate role of the legislature to supplement perceived deficiencies in the common law.

Hon Dr STEVE THOMAS: If there was a perceived deficiency in the basis of a physical presence—that is probably the easy example to use. If a landowner thought that the current legal precedent did not accommodate their case for compensation, is there still an ultimate potential High Court challenge, for example, to challenge the validity—I note that in Marsh v Baxter the High Court deemed not interfere, but in another circumstance, particularly if the proposition is that the legislation does not exist at the moment, is there not the potential for a body to go ultimately to the High Court to challenge that.

Mr DOUGLAS: To bring a case to the High Court, the High Court needs to grant special leave to appeal. My perspective on that is that the High Court generally would be conservative, and if the law is sufficiently clear, it will refrain from disturbing established principles. In my view, the principles surrounding this area are sufficiently clear. When was Perre v Apand?

Dr BUNN: It was 1999.

Mr DOUGLAS: Nearly 20 years ago, the High Court determined a case of similar factual matrix and since then, in my view, the common law has been relatively clear.

The CHAIR: Mr Douglas, can you just remind us what the factual matrix was in that case, again?

Mr DOUGLAS: It was about potato wilt.

Dr BUNN: There was a supply of potato seed made to a farmer in South Australia, I think, and the seed contained a bacteria—potato wilt—which meant that the potatoes grown from that seed could not be sold into Western Australia due to quarantine restrictions. But the real issue in the case was that the quarantine restrictions also meant that farmers, growers and processers within a 20-kilometre radius of the affected farm where also unable to supply their potatoes to Western Australia. The loss of those farms within the radius was not physical damage; it was pure economic loss.

Mr DOUGLAS: The point for present purposes is that within that case the High Court clarified the principles applicable to recovering damages for pure economic loss in negligence. My point is that in the last 20 years those principles have been quite stable and I do not see the High Court as having the appetite to revisit it.

The CHAIR: Can you just remind me what the outcome of that case was?

Dr BUNN: In Perre v Apand, a number of the plaintiffs, but all of them, were able to recover, and they did establish that there was a duty of care on the part of the seed supplier owed to them in respect of their pure economic loss.

The CHAIR: Some submitters have said that there should be strict liability generally within this area. Do you have a view on establishing strict liability for GM contamination?

Dr BUNN: I think that certainly strict liability has a place generally speaking. In terms of whether it is useful in establishing liability that firstly depends on whether you are talking about existing strict liability torts or the creation of a new statutory strict liability tort. The tort of nuisance is often categorised as a strict liability tort because the defendant does not necessarily escape liability by having shown that they have taken reasonable care. For that reason, negligence is strict liability; nevertheless, as I mentioned, there are a number of considerations and value judgements that go into determining whether someone is liable. Nuisance itself, albeit strict liability, perhaps is not particularly useful.

A statutory tort of strict liability could be created and the utility of that would really depend on how it was crafted and the purpose it was designed to serve. One option would be to create a strict liability tort which made it really very straightforward for a plaintiff to establish liability; for example, it may just be necessary for a plaintiff to show that their contamination, or their harm, is casually

related to, or linked back to, the defendant. If, though, the intention was to make so easy to establish liability, then it would be clearly whether a statutory tort would be the best mechanism, because, obviously, there are cost considerations whenever one has recourse to the courts. Of course, the risk of that is that it could disincentivise the uptake of GM—the distribution of GM. If that was an intended consequence, then that is fine, and, obviously, if it is not an intended consequence, it is not.

The other possibility is to create a statutory tort that is crafted somewhat differently; so, for example, one might have a tort where a plaintiff who could show that their harm is linked to the defendant there would be a presumption of liability on the part of the defendant, and then the burden of proof would shift to the defendant, and it would be for the defendant to show that they had acted reasonably.

Mr DOUGLAS: That is analogous is how defamation is handled.

Dr BUNN: It could be the case that legislation might even seek to determine what reasonable behaviour is. So, for example, it may be that provided you have not swathed your GM crop, provided you have a buffer zone of x metres, then you will be considered to have acted reasonably. It could work like that. That may go some way to recalibrating the balance between the plaintiff and the defendant, but, of course, again, whenever you have questions of reasonableness, there is always the possibility that it disincentivises the uptake of GM, on the one hand, and discourages people from going to court, on the other.

Mr DOUGLAS: Another point I would make is that if you are purporting to impose strict liability on GM farmers in circumstances where they are farming pursuant to a licence, which is granted pursuant to a statutory regime, that begs the question: if it is such a risky activity, why is it permissible at all? I say that in a value-neutral way; I do not have the scientific expertise to say it is a good idea or a bad idea. I am just saying that there is tension there, or almost an incoherence. In my view, it is either a good thing, you can do it and it is lawful, or it is not and you should not. Having these intermediate positions is going create uncertainty for everyone.

Hon Dr STEVE THOMAS: Given that in about 2005, the Parliament in Western Australia debated those particular issues—it was brought in by the then Labor government—I guess, in particular, in relation to strict liability. A debate was held over whether adventitious contamination—I love those words—should be set at zero, and it was rejected by the Parliament. Is that not a significant enough precedent to say that strict liability, which could have been instigated at that point, with the Gene Technology Act of that year, Parliament has given its intent and therefore strict liability has been rejected by the Parliament?

Mr DOUGLAS: Parliament being a voice for the people, standards change over time. In my view, Parliament would be justified in revisiting an issue which was settled nearly 20 years ago if there was an empirical basis for doing so. Again, I say that in a value-neutral way; I am not sure there is because I am not a scientist. But if the science has changed and if public expectations have changed since then, I think it could be justifiably revisited.

[9.50 am]

Dr BUNN: I was going to say that the other thing is that we have to be careful of what we mean by strict liability, because there is a tendency to think of it as absolute liability. As I have said, it is not necessarily absolute liability; it could just be a shifting of the burden of proof of what is reasonable. That is maybe something that is —

Hon Dr STEVE THOMAS: In 2005 or 2006—I think it was 2005. My memory is not as good as it used to be. I think if that legislation went through at that point, when the Parliament rejected a zero-contamination scenario, if that was revisited, and in effect a zero-contamination scenario was put

in place by a new Parliament, or reflected upon with a set of recommendations that says "compensation" in it, would that open the state up for liability for the intervening years, where we now say that zero contamination is the standard, but for 15 years it was not, and if there has been contamination, even at the 0.11 per cent adventitious level, what sort of liability would the state face under those circumstances?

Dr BUNN: I am not sure that they would be retrospective.

Mr DOUGLAS: If you wanted to do that, you would draft transitional provisions to take care of it; for example, there is a grace period when any inadvertent contamination that occurs in this time does not result in liability. You could legislate your immunity effectively; I am not saying that is a good idea, and you might have some constitutional fights, which, again, would be beyond my expertise, but, nonetheless, I do not see that as being fatal to that course of action if that is what you are interested in doing.

The CHAIR: Can I just bring you back to Perre v Apand to test it. Do you think there is any applicable factual scenarios where GM incursion may occur within the context of that case? Is Perre v Apand applicable to factual scenarios where GM incursion may occur? For instance, where a seed supplier supplies seed that has GM where the farmer is non-GM.

Mr DOUGLAS: It is applicable in the sense that we all operate as individuals and businesses within the context of the law. Perre v Apand, rather than seeing it for its precise factual background, you should see it as almost setting out the same as a section of a statute. That is essentially how common law system operates. The principle derived from there is that you can sue someone in negligence for pure economic loss and be successful in certain kinds of cases. That general principle will apply to future GM farmers. There are numerous difficulties for non-GM farmers purporting to rely on that principle. Apart from existence of the duty of care, non-GM farmers will also struggle to show that there was a breach of duty if one did exist.

Dr BUNN: I just wonder, Chair, whether you are perhaps looking to see if there are other factorial scenarios which may result in liability. I think one we have already touched on is that if harm was considered physical, it would be easier to establish a duty of care for the purpose of a negligence action. That is not to say that negligence action would necessarily succeed, but that that hurdle would be, sort of, easier to overcome.

Mr DOUGLAS: In an example, in Marsh v Baxter, nothing on the Marshes' farm was able to cross-pollinate with the canola. So, for example, an organic farmer farming organic canola, which I understand would never happen, but if that did happen, maybe it could go differently because the GM traits could then be transferred to the organic plant.

Dr BUNN: An argument, I think, could even be made—Marsh v Baxter does not preclude an argument being made—that, for example, where GM seed is planted on an organic farm and intermingles in the soil, that constitutes physical damage. I am not saying it is successful, and it is all rather complex, but an argument could be made. As Michael said, where you have a gene trait transference, I think you have got a better argument it is showing that that is physical damage. But these are sort of complex things. But if you could show physical damage, I think you would have an easier time. Also, I think if a defendant had breached licence conditions under which they operated—so, if a farmer growing GM had breached a provision of the grower agreement possibly regarding not discussing their cropping intentions with their organic neighbour —

Mr DOUGLAS: Or no buffer zone.

Dr BUNN: — or no buffer zone, then that kind of thing potentially could result in a different outcome.

Mr DOUGLAS: Another factor which could make things a bit different is in Marsh v Baxter, the first instance judge was quite critical of the way that the organic certifiers applied the contract with the organic farmers. If the organic contract or the contract on the other side was different and perhaps a little bit more tolerant of incursion of GM material and if it was applied in a different way, a court might take a different view on whether the economic loss was caused by the GM farmer's conduct.

Dr BUNN: I think that really the issue for the contract was not as to the level of tolerance, but that there was certainly a view, although no final—the court did not determine whether the contract had been breached. It was not their role to do that, but I think there was a view that the contract had been misapplied.

Mr DOUGLAS: I remember a line from Justice Kenneth Martin. He referred to idiosyncratic contractual arrangements between the organic farmers and the organic certifying body. The implication in that language was that a factor which contributed to this whole problem was not just about what the GM farmers are doing; it was about the organic farmers and their relationship with their certifying body.

The CHAIR: Does a tortfeasor not take their —

Mr DOUGLAS: Take it as they find them.

The CHAIR: — as they find them.

Mr DOUGLAS: Economic loss might be an exception to that principle. Generally, yes, certainly in respect of physical damage. You have probably all heard about the eggshell skull rule and things like that. When it comes to economic loss, courts take a conscious policy decision, which is sometimes described as a general exclusionary principle, whereby they will not impose liability for economic loss caused without intention to harm. It is different if you are hurting someone economically deliberately to hurt them and you are acting in an unlawful way. That could be tortious. But when you are just carrying on your business and you are causing other people damage, that is what McDonald's does to Hungry Jack's. If causing economic loss was a tort, then no-one could ever carry on business.

The CHAIR: Yes, but that presumes that two farmers are competing with each other.

Mr DOUGLAS: That is a good point.

Dr BUNN: The other issue, though, with the duty of care in a negligence action is that generally because of these policy reasons that Michael has been talking about, a plaintiff really has to establish that they were vulnerable, and that means that they were unable to self-protect. Coming back to what you were saying, I think there is a view that if a farmer could have taken steps to protect themselves against the harm and failed to do so, then a duty of care will not be imposed. For example, again in Marsh v Baxter, there was discussion about various options that the Marshes could have taken. For example, I think there was discussion of planting trees or doing various other things or maybe even just simply removing the material from the property. So, for that reason, the Marshes were not, by the majority, considered to be vulnerable and that is another reason not to impose a duty of care.

The CHAIR: In his case, as I understand it, he was farming in an organic manner before his neighbour decided to farm in a GM manner. So he was going about his lawful business, seeking his commercial opportunities. His neighbour decides to change his farming practices, yet you are saying that the court said he was the one who had to adopt the mechanisms in which to limit the impact of his neighbour's changed practices on him.

[10.00 am]

Dr BUNN: I think the dissenting judgement, the minority judgement, of President McClure was very interesting in exactly that respect. It was her view certainly that those arrangements were in place before GM was grown on the neighbouring land. It was also her view that a person should only need to take reasonable steps of self-protection. One might question, for example, whether it is reasonable to grow trees sufficient to screen GM swathes within however many months it takes to grow them from seed. I think there is definitely an argument there.

Mr DOUGLAS: Another factor which impacted the court's decision at each level was the nature of locality. So, with reference to the private nuisance tort, whether there will be an unreasonable interference with another person's use and enjoyment of land depends in part on the character of that land. The court had regard not just to the relationship between one neighbour versus another; it had regard to the area—Kojonup more broadly, what is the sort of farming that went on there. Correct me if I am misremembering, Anna, but my understanding was the judge said something like lots of conventional non-organic farming happens in Kojonup; it is not like an organic centre. That was one of the factors which impacted why there was no liability.

Hon Dr STEVE THOMAS: Just progressing on from that a little bit, and I think the liability is one part, in the 1990s and early 2000s, there was a significant debate on, effectively, we call it the right to farm. You might be a bit young for it, both of you —

Dr BUNN: Good save!

Hon Dr STEVE THOMAS: You may have read about the right to farm debate. At that point, that was really focused, I guess, around, for example, the Manjimup region and the Margaret River wine region and both spray drift and smoke actually mostly coming off state government land. Was there a legal precedent set at that point in your view that normal or reasonable farming activities that crossed the boundary did not represent an actionable outcome? The debate at the time was that if the spray drift is required to control X, Y and Z or the burn-off was required to reduce fuel loads, therefore. There have been a couple of court cases, particularly with the fire load. I cannot remember the name of the vineyards that did actually and were unsuccessful as well, because it was what the court's considered to be normal activity. Does that have an impact or create a precedent if the state or a region has decided that growing GM canola, in this case, is a normal activity? Does that precedent have an impact on —

Dr BUNN: I think one thing, though, is that it would certainly be impossible to claim in negligence or nuisance that the mere growing of GM that had been licensed was actionable. But the point is that it may be that swathing or all those activities associated with the growing and the harvesting of it are treated differently. For nuisance, though, is a defence if the activity is authorised by statute. That could come into play; for example, in the smoke taint cases, if it is considered that it is prescribed burning and the nuisance is effectively authorised by statute, there is no liability in that sense.

Mr DOUGLAS: In my view, the more prevalent GM farming is in the state, the harder and harder it will become for anyone to obtain compensation as a result of damage caused by GM farming, at least at common law. Although the advent of GM farming in the state is relatively recent, this kind of problem is very, very old. The earliest nuisance cases predated environmental protection legislation. It was the Industrial Revolution in England, people were polluting and courts developed principles basically like, "Well, if you live in an industrial area, there's going to be smell and noise and you can't really whinge" and that general vibe has been transposed —

The CHAIR: Is that not the thing—you can only whinge, you just do not have an actionable course of action.

Mr DOUGLAS: Yes, pardon me. Forgive my imprecise language, Chair. The point being here, the more GM farmers there are around you, the more courts are likely to see GM farming and associated activities as being reasonable. In particular, Anna has brought up swathing a couple of times. This is something I encourage the committee—I am sure you are—to seek the advice of agronomists and people like that because, as I understand it, GM farming and swathing as a means of harvest will tend to go together in that the whole reason you grow GM is so you can use Roundup and the whole reason you swath is to minimise weed incursion. If there is another case like this, it might be a similar sort of thing and the question again might come up. There might be a fight over harvesting methods, it is not just about the mere growing of GM material.

Hon Dr STEVE THOMAS: Was that not a critical part of the Baxter–Marsh case?

Mr DOUGLAS: Definitely, yes.

The CHAIR: We have got a lot of questions. I think we have only got to about three of them so far!

Are there any other possible causes of action other than nuisance and negligence that you have identified that might be viable for a farmer to pursue? For example, one commentator has proposed a cause of action called induced nuisance whereby producers of GMO seeds could be held liable for the inducement of its licensees to engage in activities that result in GMO contamination, and another commentator has referred to possible actions under the Competition and Consumer Act 2010.

Dr BUNN: In terms of induced nuisance, our understanding of that is that it is simply about expanding the range of possible defendants so rather than just simply looking to a neighbour, a neighbouring farmer, you would sue, say, Monsanto, but it does depend, I believe, on there being a nuisance in the first place.

Mr DOUGLAS: It is not a distinct cause of action, is it?

Dr BUNN: No. It is not a distinct cause of action. It is just about expanding the defendant and certainly that is a possibility. I mean, one would want very deep pockets in order to consider that, maybe a class action, but the point is that there would still need to be a nuisance in the first place and, as we have seen, that is not necessarily going to be the case because there are all those various considerations that come into play.

Mr DOUGLAS: That would be a silly idea in my view. I would advise a client, "Save your money, it would be unlikely to succeed".

The CHAIR: What about actions under the Competition and Consumer Act?

Dr BUNN: Obviously, there is a possibility to sue for misleading or deceptive conduct or misleading representations which are made in the course of trade or commerce. If one was to buy, for example, seed labelled as GM-free and found out that it was not actually GM-free, a cause of action would exist under the CCA. It is unlikely though to protect farmers who are suffering from pure economic losses as a result of incursion because it is unlikely that that would be considered conduct occurring in trade or commerce.

Mr DOUGLAS: There is another cause of action worth considering, or a bundle of them rather, and these are described as the economic torts. Some commentators will even call negligence an economic tort when it applies to pure economic loss, but the tort in particular, in England it is described as the "unlawful means" tort. In short, it is intentionally causing another person economic harm by engaging in some unlawful act. The key here though is that the exclusionary principle that I described before is likely to apply. It is going to be a hard hurdle to get over. Unless you had some militant anti-organic person who was deliberately farming to stuff up their neighbour, it is unlikely to succeed. It is a potential. I just flag the unlawful means tort as a potential cause of action. It is

related to the old tort of interference with contractual relations. But I would not say it is a particularly strong cause of action.

The CHAIR: Is it an element of that malice?

Mr DOUGLAS: Yes, basically. There was a 2018 case the of Supreme Court of the United Kingdom. It is called Khrapunov where Lord Sumption gave a modern formulation of the tort and said that when the predominant purpose of an action is to injure your neighbour, that is the sort of case that might be actionable. But for the most part, when a person is acting lawfully, even if they have knowledge that what they do could harm another, provided that it is lawful tort law is unlikely to assist.

Hon SAMANTHA ROWE: It would be very hard to prove, too, would it not, that a non-GM farmer was set up specifically to see the failure of their neighbour?

Mr DOUGLAS: It is a very unusual case. I commend the committee to a case I have been working in my side gig at a firm within the last month and a decision of Justice Kenneth Martin who considered interference with contractual relations. That case gives some insight into the difficulty of establishing the elements for that kind of tort. One of the parties is ISPT Proprietary Limited and the case relates to the development in Forrest Place at the moment. It is a rare, very rare, case; these torts do not come up very often.

The CHAIR: The next question you may wish to take on notice, and I think you might have had some notice of it before but we did not get a written submission from you. The question is quite detailed. I will go through it and you can let me know if you're prepared to answer it or take it on notice. If instating further research into alternative mechanisms for compensation is required, you recommended that the Law Reform Commission of WA consider statutory reforms, including amendments to the Civil Liability Act 2002, which could provide affected farmers with compensation. What we are asking is whether you can provide further information on what type of statutory reforms you believe would be appropriate, including details of the possible amendments to the Civil Liability Act, and what obstacles might need to be overcome in relation to actions at common law. I note you referred to a statutory concept of genetic damage. You can take that on notice if you wish or you can answer it and provide some additional information to the committee as well, because it is quite technical, I suppose, in some respects.

Mr DOUGLAS: My position on this matter is that the formulation of any reform depends on premises which need to be considered by expertise that is beyond me; that is, I am not a scientist and I do not have an expert understanding of the harm, if any, caused by the movement of GM material. I guess we can discuss what a tort would look like if you assume this massive list of assumptions—if you assume it is harmful, if you assume it is a bad idea, blah, blah, blah. If you are intent on creating a tort, I can be like, "All right, this is how you should do it". But I do not feel comfortable in assuming all those things to be honest. How about yourself, Anna?

Dr BUNN: I think that one option would be to define in legislation what is meant by "what constitutes physical damage". That could be one way, thereby making it easier for a plaintiff to establish because someone could effectively deem the adventitious presence of GM material on non-GM land is physical damage. That is one option. Another option might be as I discussed earlier, a form of strict liability where the onus of proof is reversed. I think the point that we are making is that —

The CHAIR: When you say "reverse the onus of proof", are you meaning like a rebuttable presumption?

Dr BUNN: So that there would be a presumption where you can point to causation. There would be a presumption that whoever has caused your contamination is liable and they would have the job

of proving otherwise. I might say though that the problem with all these mechanisms whether they are in common law or statute is that they are not going to provide compensation for a person who is not able to establish the cause of contamination. I think that is a broader concern, perhaps; as GM becomes more widespread, there will be people, if we go down this route of sort of a statutory tort or whatever, who are left out because they cannot actually point to a cause.

The CHAIR: A fault.

Dr BUNN: A defender. So they will not be able to point to a defendant and thereby will not be able to claim it through tort. That is something that needs broader consideration as well and, obviously, if a compensation scheme were to be introduced, that would overcome those problems, assuming it was a no-fault thing.

Mr DOUGLAS: A related difficulty—pardon me, sir—is that if you were to enact a statutory tort, it would still only be available to those with the means to pursue it in a court, and apart from the payment of court fees, realistically, if you want any hope of success in these sorts of things, you are going to need to pay expensive lawyers so it will be an extremely cashed-up or extremely brave organic farmer willing to pursue this all the way through.

The CHAIR: But this is a problem with tort law generally though, is it not? It is not a specific problem for farmers in these circumstances.

Mr DOUGLAS: No. And that is why you see a lot of tort academics preferring to get rid of torts and to impose compensation schemes!

Dr BUNN: Not me!

Mr DOUGLAS: Not me either, because I find it all very fun. Luntz and Hambly, for example, one of the leading text books on torts in Australia, the first chapter is essentially, "Why we should get rid of torts".

The CHAIR: Yes. That has been in there for a while, as I recall.

Mr DOUGLAS: Yes, it has; no-one listens to them.

Hon COLIN HOLT: Can I get clarification because I am not a lawyer? One of the challenges is proving physical damage when a GM incursion happens and your suggested solution is to redefine the law that says "This is what physical damage could be when an incursion occurs from GM". Have I got that right so far?

Mr DOUGLAS: That is one solution, yes.

Hon COLIN HOLT: My question then becomes, there are quite a number of things that happen on a farm between neighbours—some physical, potentially, some not. Have there been issues around proving that physical damage in other farming practices needed an adjustment of the law to define what "damage" means or is it just kind of left to the law of torts to run its course?

Mr DOUGLAS: The common law does have a definition of what "damage" is. I think I should clarify that. It is not that the law is uncertain—it is certain, but it is definitively excluding this. We are saying that if you want this kind of activity to be captured as a form of damage, you are going to have to change the law because courts have said, "This is what damage is and mere GM contamination does not fit".

Dr BUNN: May I just say though that the law has a concept of damage as detriment, but I think what we are talking about is really physical damage and I am not aware of any precedents; there may be, but I am not aware of any. There are examples where legislation does not necessarily define "damages" but, for example, defines what "contamination" is so there is precedent for that. But

I am not aware of any cases—that is not to say that there are not any—where there has been a deeming of physical damage.

Hon COLIN HOLT: GM has had a focus in the spotlight because of the Marsh v Baxter case, but farmers have existed next to each other for a century and a half in Australia. How have they managed to get by without the suggested changes?

Dr BUNN: Yes. I mean, I suppose that one of the issues though is that GM is relatively new and that presents particular difficulties for biodynamic and organic farmers.

Hon COLIN HOLT: Some of our special breeds are all new and, you know, genetic material in a special breed is well guarded. That sort of stuff happens, too. We get incursions of livestock and rams and all sorts of stuff!

The CHAIR: I note that you also refer to the no-fault compensation scheme analogous to that funded by car registrations to compensate motor vehicle accident victims. If there was to be a compensation scheme such as this, what features do you think it should have?

Mr DOUGLAS: I think this is a question best posed to an economist but, broadly speaking, if you are talking about the legal, moral and political aspects, it makes sense that those creating the risk should bear the brunt of the burden. If it was the law according to Michael, Monsanto could pay.

The CHAIR: One of the issues we have identified through your evidence here and we are aware of is the issue of finding fault and so obviously those third party compensation schemes are about no-fault–type systems. Is this not a core issue with this kind of scenario here? That we have issue about two people who are both engaging in a lawful activity without any intent to cause harm to each other—and it might not just be two people; it might be the person over here—and somehow there is an incursion and there could be economic loss or other losses and those sorts of things. I suppose if we were to go down this kind of path of a statutory compensation scheme, is it even fair to say that Monsanto should be paying the bill if what we are talking about is a no-fault system based around the concept that it is really about —

Dr BUNN: Well, that is a question I would prefer not to necessarily answer, but I think you also do have to think about where your funding is going to come from. Obviously, taxpayer is one, probably a very unpopular option, but there does need to be a funding base. My understanding of no-fault compensation schemes, which is pretty minimal, is that there often is a problem that the actual pot is potentially too small for the number of claims. Equally, if there are not enough claims, then you have a pot of money that is sitting there doing nothing and wasted. That is always a problem with compensation schemes. I think any scheme would obviously need to very carefully define what constituted contamination and also very clearly what compensation was for. Is it merely the loss of profits, for example, for not being able to sell ferti-organic produce, is it clean-up costs? I note that the farming principles attached to the questions suggest that compensation might be recoverable for loss of value of land so, you know, you would have to draw a very clear line.

Mr DOUGLAS: I think that although Monsanto is obviously a causally significant entity in this question, on the other side so are their organic certifiers. A legitimate argument could be made that Monsanto chips in, the organic certifiers chip in because it is a zero-sum game to preserve both sides and everyone should chip in to an extent. I really think this is a question best posed to economists, not to lawyers, not even to farming specialists. I think we need to focus on what is the most efficient way to ensure that this zero-sum game does not cause too much harm.

The CHAIR: Some commentators identified potential constitutional issues with any Western Australian legislation providing for compensation. I think you already noted that you are not a constitutional expert.

Mr DOUGLAS: I reckon this is one for the SSO.

The CHAIR: We may go down that path. Are you willing to comment on constitutional issues? Are you in a position to do that?

Dr BUNN: I can give a very preliminary view but it is only very preliminary.

The CHAIR: If you could.

Dr BUNN: One of the questions, I think, related to that was about excise and whether a levy —

The CHAIR: Yes. I can read the question out for you. A levy on GM crops by hectare or quantity of GMC may be invalid as imposing an excise duty, which is within the exclusive power of the commonwealth under section 90 of the Constitution.

Dr BUNN: Stressing that this is a very preliminary view, my understanding is that obviously if it is considered an excise, it is something that the state cannot impose, but it is more likely to be deemed an excise if it is going into general revenue, but if you did have like a bespoke fund so that the money was earmarked for one particular purpose, it would possibly be seen as a charge. I think regardless of what it is called, courts look at the effect of the levy. My answer, very preliminary there, is it is not necessarily treated as an excise.

The CHAIR: Do you have a view about any direct or indirect inconsistency between any state or Western Australian legislation providing compensation for farmers and the Gene Technology Act?

Dr BUNN: Again, I think the fundamental question really is whether a compensation scheme would necessarily contradict the Gene Technology Act. Obviously, the specifics we cannot really comment on.

The CHAIR: That act does not provide for any compensation.

Dr BUNN: No. And again, I am not across all the detail because that is pretty complex, but it tends to, I believe, prohibit GM dealings unless they are licensed or exempt or whatever. I do not see that a compensation scheme really crosses into that area. It is not really regulating dealings with GM at all, it is just about loss arising from them.

Mr DOUGLAS: I might disagree with you on that, but I caveat it in saying that this is one of the hardest areas of law. People can spend a 40-year career and still common law wrong. It is worth spending money and getting the best possible common law advice.

Dr BUNN: Of course, if there is an inconsistency, the commonwealth law will prevail.

The CHAIR: But you would confident that the State-Solicitor's office will give a definitive correct answer.

Mr DOUGLAS: They would give a better answer than me, that is for sure!

Dr BUNN: It is difficult with that. I mean, you cannot do that, obviously, without the details of what the proposed legislation would be. There is no point even starting.

The CHAIR: What I take from what you are both saying is that this is not a black-and-white answer in these areas and it will very much depend on the nature of what was proposed.

Dr BUNN: The stock-standard lawyer answer is, yes!

Mr DOUGLAS: As legal academics, our job is to kind of write on grey things and, for me personally, that is the whole reason I wrote on this a few years ago; it is so messy and so complicated that you are more likely to get published if you write about it. This is one of the most complex areas.

The CHAIR: For sure. But all jokes aside, from that point of view the positions have presented by other submitters as being certain that section 90 of the Constitution and section 109 will present an insurmountable problem for any compensation.

Dr BUNN: I do not agree that you can be so clear-cut about it.

Mr DOUGLAS: Unless that submitter is Anne Twomey or George Williams, I would disagree with them anyway.

The CHAIR: And people disagree with Anne and George all the time in any event.

The committee would welcome your commentary on the following views, which have been expressed in some submissions to this inquiry. Firstly, a number of farmers who made submissions to this inquiry state they grow GM and non-GM canola side by side successfully without any issues with contamination. In any compensatory scheme, should it be accept accessible to a farmer who is choosing to grow GM and non-GM next to each other? Is there precedent for that kind of thing happening?

Mr DOUGLAS: A general comment; litigation is voluntary. There is a lot of damage in society that could be actionable in the sense that a person could sue on it, but people make a deal, they just say to their neighbour, "That was no good, don't do that again". They get over it. People do deals. Litigation is the worst-case scenario for any kind of dispute. In the vast majority of cases that get brought in court do not end up in a judgment but get settled. The Supreme Court of Western Australia website has statistics on that. I would say just because GM and non-GM has been grown next to each other, does not mean there have not been disputes. That is something which you might —

The CHAIR: This is a scenario where the farmer is doing the same thing —

Mr DOUGLAS: In two spots.

The CHAIR: — and, in that instance, if there is an incursion, well, that farmer would be responsible and in a fault system, you cannot sue yourself, clearly.

Mr DOUGLAS: Exactly.

The CHAIR: But in a no-fault system, the question would be: should it be accessible to them?

Mr DOUGLAS: Perhaps not, but again, I think that is question best put to economists. I note also there is a few different distinctions to draw; there is GM versus non-GM and then within non-GM you have got organic versus conventional and then probably many other models that I am un familiar with. A question might be: is this compensation scheme directed towards everyone who is non-GM or is it just towards a subset of that? For example, at the moment organic farming is all the rage. What if there is some—I do not know—religious crop in 20 years where if your canola is purple, then you get a premium on it.

The CHAIR: Or your barley was black.

Mr DOUGLAS: Yes. Exactly. And then the question will be posed in 20 years' time: should this niche, which has economic value, be protected by a statute from the Parliament of Western Australia? For me, it is a question that should depend on economics. I note that the president's judgment in the Marsh and Baxter Court of Appeal, she noted that whatever the vary of organic farming, whatever your scientific position on it, it is a huge economic industry for the state. I think that should be at the front of the legislature's mind when considering what to do.

The CHAIR: All right, thanks for that.

The committee has received evidence from some submitters that a zero tolerance for organic standards is unreasonable and is driving confrontation. I might actually just leave that question because I am sure that is not quite within your areas of expertise. I think we will come back to this one. We may have already covered it to some degree. Some submitters have stated that there has not been a single legitimate instance in Australia of non-GM or organic growing suffering a pure

economic loss directly resulting from the unintended presence of approved GM and that no shipments of grain have been rejected by exports markets due to the unintended presence of GM canola. They have also stated that any compensation scheme is nothing but a solution looking for a problem. What is your position regarding these statement?

Mr DOUGLAS: I would be interested to see what evidence they have for that view. I do not have any empirical evidence to verify what they have said but, similarly, just because you have not heard that something has happened does not mean it has not happened. That is something hopefully someone has done a study on.

Dr BUNN: Clearly, this submitter does not view the economic loss in Marsh and Baxter as legitimate. That is obviously their view. Also I would say in relation to the rejection of shipments, I am sure that is not to say that perhaps shipments have been rejected before they have gone to export. I would imagine there would be sorting and loading —

Mr DOUGLAS: It might be self-regulation.

Dr BUNN: — at places where the inspections take place. It could be that the shipments have actually been rejected but just not once they leave Australia.

Hon COLIN HOLT: I suspect it is more to do with tolerance levels than anything else because there is a .09 tolerance level in export canola so when incursion happens, it is less than that when you mix all the grain up together.

Dr BUNN: I think the other thing is that at the moment the market for GM canola is less than conventional canola, but over time if that grows, I think, and we have touched on this, but the instances of loss may indeed grow with it.

The CHAIR: We have talked about GM incursion on farms, but a complaint that we have often heard is that organic farmers do not control their weeds, which they deny and we note that they deny that, and that therefore there is uncontrolled weeds which affect farmers on the other side of the fence. They have suggested that in such situations, they should also be entitled to compensation, Now would it be fair to say that the principles that you talked about could apply back the other way if we changed the definitions of “damage” and those sort things?

Mr DOUGLAS: In short, yes. A point to note about the common law generally is that historically courts treat actions differently to the way they treat emissions and so on one view, there is a difference between positively deciding to grow GM material and positively deciding to swath versus weeds happen to pop up in your crop. However, a counterargument to that, and a counterargument which I am persuaded by, is that the weeds pop up against the backdrop of positive action; that is, if you positively decide to farm organic, that means you are not using products that can limit weed, the likelihood of weeds growing. And therefore, by positively deciding to grow organic, perhaps you are exposing your neighbours to a risk. I think there is certainly an argument to be made there. Whether the risks are comparable is another question and that probably depends on evidence.

Dr BUNN: I think again it comes back to the fact that organic farmers in particular are particularly vulnerable to the presence of GM material in a way which perhaps conventional farmers are not.

Hon COLIN HOLT: Only because of accreditation.

Dr BUNN: But that does not mean that they are not vulnerable. That comes back to the argument about —

Hon COLIN HOLT: But that is one of the reasons is because of their accreditation levels.

Dr BUNN: That is right; that is absolutely the case.

The CHAIR: Mr Douglas, I am sure you might probably fall back on the economists here but I will ask the question anyway. Some submitters have stated that the introduction of a compensation scheme would stifle agriculture innovation. I note that in some countries where compensation schemes have been established, such as Denmark, there is yet to be any commercial cultivation of GM crops. Do you have a view about the possibility of compensatory schemes stifling agriculture innovation? Dr Bunn, I think you might be best placed to answer this one.

Dr BUNN: I do think that it is possible but I think it also depends on who is funding the scheme.

Mr DOUGLAS: And what you call innovation.

Dr BUNN: Yes. I believe there are a number of compensation schemes in place, including in Denmark. I am not sure whether the reason that there has been no commercial consultation in Denmark is because of the existence of the scheme. If that is the case, that would obviously be really instructive here. I understand there are various compensation schemes and I am not sure that they necessarily stifle innovation. It really just depends on how it is set up.

Mr DOUGLAS: To talk about the Marsh and Baxter example, the reason why Mr Baxter grew GM crops was he acted on the advice of an agronomist, an agricultural consultant. If I was that person and there was a risk that by recommending a client grow GM that that client could be exposed to potential civil liability, to save my own skin I am not going to recommend they do that because then they could come and sue me and then my insurance premiums would go up. I think taking that very small sample size and that an anecdote, I would say you have less recommendations for GM uptake in the event of a compensation schemes enactment.

The CHAIR: Okay. This is a good question for lawyers. Submitters have raised the prospect of a compensation scheme giving rise to false claims to access compensation. What is your view on that?

Mr DOUGLAS: There are bludgers in every crevice of society so no doubt, but does that mean you should throw out the baby? I do not know.

The CHAIR: So it would be fair to say that false claims would be no more unique in these circumstances than they would be anywhere else?

Mr DOUGLAS: Any scheme by which someone can get money off the government will be abused to some extent. I am sure you could set up controls to have auditing processes and things. I do not think that should be fatal to a scheme.

The CHAIR: I am trying to push through here because we are running out of time. A number of submitters expressed support for the principles of farmer protection legislation as a way forward in providing compensation for GM contamination. What is your view on these principles?

Mr DOUGLAS: Do they define what contamination is? I do not think they do. That is a brief comment on the principles. They are inadequate in that they do not define what contamination is. I think that goes to the heart of the problem, subject to this inquiry.

Dr BUNN: I believe also that the principles talk about compensation being paid for an indefinite period of time so as long as the impact is being felt and, obviously that is a real issue for any scheme because of the limit in funds.

The CHAIR: This comes back to the economics of any compensation, particularly when there is an open-ended possibility of bankrupting the scheme and being completely impractical for that purpose.

Mr DOUGLAS: You could think of an organic contract that said, “If there is GM presence on this land, it cannot be used for organic farming for 10 years.” Does that farmer then get 10 years’ worth of compensation? That seems unreasonable.

The CHAIR: Would you agree with the proposition that the farmer protection legislation is essentially designed to push GM out of the Western Australian agricultural sector?

Mr DOUGLAS: Can you say the question again, sorry, Chair.

The CHAIR: I asked if you agreed with the proposition that its real intention would be to push GM farmers out of Western Australian farm production. I mean, we are talking about no end to compensation—lack of definitions.

Mr DOUGLAS: The intention is whatever you want it to be. That could be the effect of such a scheme. I am not sure if I would say it is the intention of the scheme. It may cause that, and if it is causing that with knowledge, then I guess you could say maybe that is an intent.

Dr BUNN: That is exactly right. I think we have to be really careful about what the purpose of any scheme is, and also unintended consequences. If the intention is to push GM out, maybe this scheme would go a fair way towards that because of the fact that there is no definition of contamination. That is not to say the compensation scheme could not be crafted differently to have the effect of promoting co-existence.

Hon COLIN HOLT: And some of that compensation is set by an accreditation body, and what is that and who makes those rules?

The CHAIR: The last question relates to insurance and multi-peril crop insurances. Are either of you familiar with those, before I proceed with the question, because I am just conscious of the time?

Dr BUNN: Only that I note a comment from Martin Baxter that was in a note—I do not know if this is factually true—delivered by the Marshes to Baxter before GM was grown. It refers to the fact that most policies of insurance have a specific exclusion denying a policyholder from cover to claim from GM contamination. I do not know if that is actually the case but if it is, I am not aware of any specific products.

The CHAIR: We have the insurance people coming to see us after you—in fact, they are next—so it might be a question for them. Would either of you like to make a closing statement?

The WITNESSES: No, thank you.

The CHAIR: Thank you very much. I think we have all found your contribution very enlightening and very frank, and we appreciate that. Thank you for attending today. A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate those corrections on the transcript. If you want to provide additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence.

Hearing concluded at 10.37 am

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