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
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SESSION FOUR

Members

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

Hearing commenced at 1.15 pm

Mr JEREMY TAGER
Campaigner, Friends of the Earth, sworn and examined:

The CHAIR: Thank you, Mr Tager, for being with us today. My name is Hon Matthew Swinbourn, I am the Chair of the committee. 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.

[Witness took the affirmation.]

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

Mr TAGER: Yes, I have.

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. We have already had issues with the technology, but if you can ensure that you can speak as clearly as you can so that we can continue to pick you up on the recording. 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 you like to make an opening statement to the committee, Mr Tager?

Mr TAGER: Yes, a very brief one. I actually want to alert the committee to something that is happening now with GM that will have significant implications for issues of compensation and also protection of non-GM farmers. There is a global push going on to not regulate a second generation of GM techniques collectively known as gene editing techniques or new plant breeding techniques. Now, the Office of the Gene Technology Regulator has recommended that these techniques not be regulated and not be considered as GMOs. The significance of that is enormous, because there is a fair bit of peer-reviewed literature that is showing that these new techniques are not as precise and safe as being claimed. They have a number of off-target effects and should be assessed as GMO. As recently as this month, the EU's highest court declared that for purposes of European regulation, these new techniques are GMO and must be regulated as such. The implications in Australia if it is not regulated here, not considered GMO, is that there will be no labelling and no traceability. That means that farmers buying seed will not know whether these new techniques have been used in producing that seed and will not be able to trace contamination at all. That will have potentially disastrous impacts on exports of food because for zero tolerance countries like EU and frequently China, that means that if you cannot provide traceability and cannot provide evidence that your food products are GM-free, you are likely to see a ceasing of shipments and perhaps a ceasing of exports into those areas that have zero tolerance. The best way for that to be stopped is for states like WA to actually reject the non-regulation of these techniques, because otherwise if you have a compensation scheme for farmers it will not work anymore, there will be much bigger implications afoot and compensation will become very difficult. Thank you.

The CHAIR: Thank you. We have provided you with a list of questions in advance, and we intend to work our way through that list as we go. There may be additional questions asked by other members of the committee as new lines of inquiry might arise. Our first question is: we refer you to page 2 of your submission. Do you believe that it is possible to mandate an effective buffer zone between GM and non-GM crops that would remove the risk of any GM contamination; and, if so, what distance would such a buffer need to be?

Mr TAGER: I guess the brief answer is that it really depends on the crop. Crops like canola—the contamination risk is enormous and the distances the seeds can travel are very large. I note that the seed purity rules, which included assessment of distances that are appropriate for maintaining seed purity, might be one of the ways to look at distances that are appropriate for segregation, although in my view the only way to segregate canola is to have large areas dedicated to GM and non-GM and large buffer zones in between. I understand the impracticalities of that in terms of the realities of farmers who make choices about growing GM, based on the farm they are on, not a farm where they do not live and do not farm. But I am not sure of any other way to achieve full segregation without that kind of measure.

The CHAIR: But do you have an idea about the possible distances that would be required?

Mr TAGER: Of the distances that would be required?

The CHAIR: Yes, for the buffers, because I think we have been referred to distances of five metres as what was previously advised as a buffer between a GM and a non-GM crop for canola.

[1.20 pm]

Mr TAGER: Well, in my view the five-metre buffer zone was always intended to result in contamination, and the industry knew it perfectly well, but the distance those seeds can travel is enormous. Anyway, I do not know what the distances are. Obviously, the greater the distance, the less contamination you are likely to get, but because contamination does not just occur on farms, it occurs along roadways and verges, contamination in my view is likely to occur in some fashion anyhow and it is probably for, I think, the committee to measure the cost of segregation versus the risk involved and come to a conclusion about the appropriate distances. I could not tell you for other crops besides canola, but for me, canola—you would be talking kilometres if you want to reduce the risk as low as possible.

The CHAIR: On page 2 of your submission you state the inadequacy of the common law tort remedies, now been amply demonstrated by the Marsh case. To the contrary, some submitters have stated that the existing common law provides sufficient coverage for any damage by GMOs and that a single case is not sufficient to draw a conclusion that common law remedies are inadequate to compensate farmers. What is your response to these statements?

Mr TAGER: I think from the very beginning those who were opposed to GM pointed to the inadequacies and limitations of tort law. And those included, I mean firstly, that there are provisions for instance that limit the possibility of liability depending on the nature of the harm or loss that occurred, so pure economic loss is not subject to tort remedy. There are serious difficulties with causation because if you have multiple sources of GM contamination, proving causation is incredibly difficult. The onus of showing that is going to fall on the non-GM farmer who does not have the resources that the industry has and litigation itself has an enormous chilling effect on farmers who would much rather be farming than going through costly and difficult litigation with a very well-resourced industry. And I think the Marsh case basically confirmed all of those fears that were articulated early on in the GM debate. Not all of them have come to pass, but I think it is pointed out that indeed common law tort remedies is not adequate to deal with the complexities of GM and GM contamination.

The CHAIR: Could you have envisaged there being possible factual scenarios which might have led to a different result to the one in Marsh and Baxter?

Mr TAGER: I could even imagine that the same set of facts would have led to a different result. As you know, the McLure dissenting opinion was quite clear in its view that the basis for liability could be found in the circumstances of that case. I think more generally, if it had not been a traditional farming practice but the result of an act of negligence or gross negligence then perhaps the result would have been different—if Baxter was not acting according to his consent and licence conditions that it would have been different, but again, those are limitations on recovery and compensation for farmers affected, surely not something that says that the tort law is going to work well.

The CHAIR: On page 3 of your submission you raise the prospect of non-GM farmers being at risk of litigation from the biotech sector—presumably actions for unlicensed patent use. What would your recommendation be to overcoming this?

Mr TAGER: First, can I say that there is a kind of irony here coming out of the Marsh case that the biotech industry uses traditional farming practices to justify contamination with a patented organism and then also seeks recovery for contamination with a GM organism on somebody else's property on the basis that it is their patent and it is being exploited. The problem with the litigation in the United States, and I am not aware of any of it happening here, is that a report was put out about a decade ago on the number of litigation cases that had occurred. Most of them did not go to litigation. There were approximately 150; most of them settled out of court for the very reason I indicated before, that litigation has a chilling effect on farmers who cannot afford litigation and do not want to be involved in litigation. The average settlement in those cases was $15 000. For farmers that are cash poor, that is a lot of money. I think there are some easy answers to it, although I do not think there is an imminent threat of seeing similar litigation here at the moment. But not relying on litigation again, make this go to a mandatory mediation, ensure that the onus of proof is on the biotech sector to show that the arrival of the GM-patented organism was intentional and intentionally used, not simply incidental. And also make clear that recovery and compensation for farmers who have been contaminated is available if the mediation finds that they are not liable for misusing the patent.

The CHAIR: Some submitters have stated that there has not been a single legitimate instance in Australia of non-GM or organic growers suffering a pure economic loss directly resulting from the unintended presence of an approved GMO and that no shipments of grain have been rejected by export 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 statements?

Mr TAGER: Firstly, it is a kind of curious question, because pure economic loss is not recoverable in the absence of evidence of harm or injury under taut law. That said, it is quite clear and the courts agreed, in the Marsh case that Steve Marsh has lost around $85 000 in costs associated with the contamination of his property. So to say there is no pure economic loss is again asking the wrong question. Was there loss? Absolutely. In terms of shipments, I am not aware of any shipments of canola that have been stopped, but I am certainly aware of other shipments. I worked a long time ago on the LL rice case, which you may remember, where an experimental variety of rice contaminated virtually the entire US rice crop. They lost their entire European market and the clean-up costs associated with that were in the realm of $1 billion. The fact that is has not happened yet is certainly not an indication that the risk is not very real and the costs, if it does happen, are enormous. Finally, the question of whether it is a solution in search of a problem. The structure of the farmer protection fund that we have recommended is actually designed to be adjusted according to the level of demand for compensation or legitimate demand for compensation. If there

is no problem, and I think the Steve Marsh case shows there is a problem, but if there is no problem, then the levy will either be reduced or disappear. If there is a problem, then the levy is adjusted to meet the cost of compensation. I think that is not looking for a problem, it is responding to problems that exist.

The CHAIR: Some submitters have stated that because GM canola cannot cross-pollinate with other crops, farmers will not suffer economic loss because contamination is not possible. What is your position on this claim?

Mr TAGER: I have two responses. The first is that there are approximately 160-plus brassica species in Australia, and when the OGTR first reviewed the possibility of cross-pollination in a document that they put out, they recognised that the risk was quite low, but that cross-pollination was possible. But I think probably the more important answer is that cross-pollination is not the primary form of contamination that we are seeing and are likely to see. We see contamination of land, we see contamination of seed, we see contamination of shipments and things like roadside contamination, which can easily lead to contamination on farm. All of those are more common forms of contamination, and those will and can certainly result in economic loss.

The CHAIR: Are you familiar with the organic export notice 2018–01, recently issued by the federal Department of Agriculture and Water Resources?

Mr TAGER: I have read what you wrote, but I was not aware of it. I was aware of efforts by both the federal government and the industry to move the goalpost on the organic industry once again.

[1.30 pm]

The CHAIR: If we just go to the substance of that and its recommendation that where there has been an accidental introduction of a prohibited substance including GMOs, the appropriate sanction by the certification body should be the issue of a corrective action request only, not a suspension or a decertification of the relevant unit. What is the position of Friends of the Earth on that?

Mr TAGER: First of all, the guidelines were not a step that was actually recommended or taken by the organic industry. As I said, if you look at the history of how the biotech industry has played GM, when they first began—and I was involved in that ancient history—in Australia they insisted that contamination was not an issue, that a five-metre buffer zone was fine and segregation could be achieved. Now, they since then argue that, "Oh no; well, contamination is inevitable so you need a 0.09 adventitious presence standard to apply", which we have seen coming for a while. The industry is now trying to get rid of the decertification and even the zero tolerance positions which was, I do not know if you know, canvassed in the Gene Technology Regulator's review of legislation. The goalposts are being moved again. We totally oppose such measures. Those decisions about the organic industry are neither unreasonable in light of the market demand, nor are they unachievable, but it is obviously, in our view, a desire of the industry to see widespread contamination as a way of undoing those kinds of protected measures that the market has demanded, not simply the organic industry.

The CHAIR: What would the Friends of the Earth's position be on the government regulating an organic standard?

Mr TAGER: I guess my view is that regulating an organic standard in order to satisfy the interests of the biotech industry, we would be totally opposed. If they are regulating an organic standard as a result of the organic industry saying, "We need either regulation or we need to ensure that the standards that we are imposing are standardised and we want your help in doing that", that is a very different thing.

The CHAIR: We have had submissions this morning regarding some of the difficulties in there being a lack of an organic regulated standard in terms of being able to establish a standard which courts

could apply with respect to damage, so perhaps, and this is a proposition, that a regulated standard would help the organic industry to be able to recover under the existing common law. Are you in a position to comment to that?

Mr TAGER: I am not quite sure how that would occur. As I said, I do not think the common law is an appropriate mechanism at all for recovery for organic farmers or non-GM farmers, but I think that it does tie in with my previous comment that if those regulatory needs need to be both either driven by or certainly supported by the organic industry as ones that will enhance the organic industry not curtail it, because if they lose for instance the zero tolerance threshold, that will have obvious impacts on markets which have been pretty consistent in wanting to make sure that organic food is GM-free. I certainly do not want to see the government regulating the organic industry in an effort to lower the standards of the organic industry it itself has developed.

The CHAIR: Some submitters have asked that if a compensation scheme was introduced for GM contamination whether there would also be compensation for all sources of contamination including weed intrusion, which some have submitted is a problem from organic farms due to a lack of weed control. What is your feedback on this proposition? We note that organic farmers deny that they are responsible for poor weed control, so that is not really what the issue is here; it is the argument that we are more concerned about.

Mr TAGER: I think there is no question that there are a bunch of issues in agricultural and farming practices that are contamination-like in their nature. Weed resistance from glyphosate is another one certainly. It feels like the question is suggesting that there is a slippery slope that we embark on if we go down the road of compensation, and that if you compensate for GM contamination, then you are going to have to compensate for all of these other contamination-like problems in the farming communities. I do not think that is accurate at all. I think some of those problems are partially regulated, like spray drift; others may need mechanisms to control them. I think the weed resistance problem as a result of glyphosate is a far larger problem than organic weed movement. I think those will get dealt with in their own time and their own place as both communities—farmers and regulators—see these as problems that are demanding of a solution, and it is not necessarily one that has to fit under a compensation scheme at all. I think it is a question that is trying to make this part of a much bigger problem that it does not have to be. I think compensation for GM contamination can stand alone.

The CHAIR: Thank you for that. Some submitters have stated that the introduction of a compensation scheme would stifle agricultural innovation. What is your response to that, Mr Tager?

Mr TAGER: I think this is classic deregulatory mythology. I would like to refer the committee to a publication called “Late lessons from early warnings”. I can get the details of that. I do not have those on me right now.

The CHAIR: If you could provide it to us through our committee clerks, that would be helpful—the document you have referred about, when you get access to it, if you could provide it to us.

Mr TAGER: Sorry; I am afraid I missed that.

The CHAIR: I am just saying can you get the document to us when you can so that we can see it.

Mr TAGER: Okay; I will certainly do that. What that document looks at is how the failure to regulate a number of things—everything from asbestos to chemicals, and thalidomide and a bunch of pharmaceuticals as well—has resulted in enormous costs. But the regulation has not stifled innovation. They look both at the costs of not regulating and they look at whether regulation has stifled innovation. Their conclusion is that regulation does not stifle innovation, but it does make sure that the conditions under which innovation occurs are ones that are acceptable to the community and to the country. That does not happen a great deal anymore, where commercial

imperatives certainly drive commercialisation, and regulation, if it comes in at all, comes in well after the fact, which certainly in our view is a really dangerous approach to innovation because not all innovation is good.

The CHAIR: Thank you. Some submitters have raised the prospect of a compensation scheme giving rise to false claims to access compensation. What is your response to that?

Mr TAGER: I suppose that is always possible. In any kind of government compensation scheme, the possibility of fraud exists. That really is a matter for legislative drafters to put together mechanisms, if necessary, because there are already mechanisms in criminal law for dealing with fraud, but to put in any mechanisms that are necessary for ensuring that the possibility of fraud or fraudulent claims is minimised to the extent possible.

The CHAIR: So you are saying it would not be any greater problem than it would be in any other segment of the economy or the community?

Mr TAGER: Exactly. I do not think it is. I think certainly the way we have set out the farmer protection fund is that it allows an administrator to make a prime facie finding that compensation is justified but also creates provisions for the industry or GM farmers to argue that this is a fraudulent claim and there actually is no compensation warranted. But, again, as we do in this farmer protection fund, it shifts the onus of proof onto the industry rather than onto the farmer.

The CHAIR: The committee has received evidence that agricultural crops are never 100 per cent pure, or certainly people have submitted this, and that coexistence means meeting agreed low-level thresholds of GM. What is your feedback from the Friends of the Earth on this statement regarding GM?

[1.40 pm]

Mr TAGER: The first premise does not justify the second. Of course crops are not 100 per cent pure. They contain residues of chemicals or residues of other crops. There is no question that there is no 100 per cent purity in crops. That in itself does not tell you anything about whether you should have a zero tolerance for GM. We know you would have a zero tolerance for faeces in crops. You cannot argue that those should be permitted because other forms of contamination are allowed in cropping systems. So I think the premise is incorrect and fallacious. Our view would be that there is certainly justification for a zero tolerance standard for GM. We would prefer no adventitious presence, because we see that standard as one that is going to creep upwards if and when GM crops become more common. So we do not think that is an argument for getting rid of zero tolerance.

The CHAIR: Is Friends of the Earth aware of instances of economic losses by farmers claimed to have been caused by GM contamination, apart from the Marsh case; and, if you are aware, can you share those details of the farmers and their location and dates? You do not have to do that over the —

Mr TAGER: I am actually not aware of any. One of the things that I have not said is that Friends of the Earth only works partially on GM now. I used to work on it full-time with Greenpeace. We are working primarily on the new GM techniques, which I mentioned in my opening statement, and we are aware at a general level of what is going on with GM, but we are not doing the on-the-ground work with farmers which we once did. I know that other people who work on GM have other names that I gather they have given to you, but we do not have any and there is no point in me repeating what they have already provided to you.

The CHAIR: Thank you. You state in your submission your support for the principles of farmer protection legislation. I note the principles refer to a requirement for GM seed merchants to pay a levy on seed sales into a fund. Are you aware of the potential constitutional issues that may arise as a result of such fund in terms of it being characterised as an excise duty under the commonwealth Constitution?

Mr TAGER: I realise that that argument can be had. My understanding is that a levy which is understood as a temporary tax for stated public purposes is perfectly legitimate for states to implement. I think there are probably elements in the drafting of any farmer protection fund that would need to be done carefully in order to avoid, to the extent possible, that kind of contest with the commonwealth.

The CHAIR: Do you have in mind a rate that any levy should be set at?

Mr TAGER: We have a view that it should be between 50c and $1 a kilo. It is a little bit uncertain. I mean, as we indicated in our submission, we think that part of a farmer protection fund has to be a far better job of doing monitoring and determining where and when contamination occurs, because the best way to both reduce contamination and reduce the amount of the levy is to have a handle on where contamination is occurring and then being able to take measures to get rid of it. Fifty cents to $1 is not quite random, but it is not based on a really clear view of the level of contamination, because we do not have that and I do not think anybody does.

The CHAIR: So we will take that as a ballpark figure rather than as a specific scientific-type calculation that has brought you to that conclusion.

Mr TAGER: Yes. It is definitely not a scientific calculation at this point.

The CHAIR: Thank you. I refer to page 5 of your submission. Why does Friends of the Earth not support funding for any proposed compensation scheme coming from the taxpayer rather than from a levy on the industry?

Mr TAGER: The answer probably is partially historical. Our view is quite strongly that the biotech industry has seen contamination as a useful tool in generating acceptance of GM, because contamination normalises or naturalises its presence in the food system. So the contamination that we are seeing and likely to see is the result of a clear strategy from the biotech industry. But in any event, even without being able to prove that kind of strategy, this is a result of the biotech industry not taking strong enough measures to ensure proper segregation of their crops. They are the ones responsible, not the general taxpayer, many of which—perhaps most of which—did not want GM in the first place.

The CHAIR: What are the types of possible losses, both economic or otherwise, that a farmer might suffer as a result of GM contamination that you envisage they would be able to claim should be covered by any compensation fund?

Mr TAGER: I think the starting point is the unwanted presence of GM organisms on a property is a basis for a potential compensation claim, even though that is a kind of low threshold, because it can happen easily. Farmers will not claim compensation unless it is for something that involves an expense in dealing with it; they will otherwise deal with it themselves. But once you allow contamination on land and it is not dealt with, that is where a series of cascading problems can begin to follow, so everything from decertification if you are an organic grower to not getting the premium on your canola prices, which currently is over $50 a tonne, to the possibility of lost shipments. Darren West's testimony about the cost to farmers from this very cautious mixing of canola seed deliveries with GM, if there is even a possibility of that shipment being GM, is another one of those costs that can be incurred by farmers. They should not be covering those costs. That should be the industry that is dealing with that, in our view.

The CHAIR: All right.

The committee has received evidence from some submitters that a zero tolerance for organic standards is unreasonable and is driving confrontation over the mixture of GM and non-GM crops, pointing to maximum permitted levels of other substances in food. Also, some submitters have

stated they believe the issue of GM contamination in Australia has become a contentious issue due to the organic standards being too tight. What is your position on these statements?

Mr TAGER: I missed a bit of that. Is this 1.15?

The CHAIR: No. I have moved over from that. I am talking about 1.17. Sorry, I have jumped over the other ones. If you have prepared a response to 1.16 or 1.15, I am happy to deal with that, but I took the view that it was a bit outside of what we have been discussing generally. But I am happy, if you have prepared a response, to hear it.

Mr TAGER: I am happy to move on to 1.17. I think what is causing conflict, it could be argued, is trying to advocate for a zero tolerance position for an industry that has made it very clear from before GM was even introduced in Australia that that would be their position on GM. I do think this question of the shifting goalposts, in an industry that is trying to effectively regulate the organic industry and non-GM industry rather than itself, is kind of reprehensible, and I would like to see that that kind of approach is not complied with, because it is really driving a level of conflict both within the farming industry and within consumers who do not want GM.

On the diversion, I do not know that we are going to get a clear way —

The CHAIR: I will read the next question for those who are following. I said: how would you suggest that the issue of divergent views on tolerance levels—that is, zero versus 0.9 per cent—is overcome and a consensus reached to enable a clear way forward on determining what constitutes reasonable economic loss due to GM contamination?

Mr TAGER: I think the notion that these are divergent views is somewhat of an overstatement. What we have is an industry that wants a 0.09 adventitious presence level, and I would suspect you would not find anyone in the consuming community—the people who eat food—who would argue that that is the standard that they want in their food. I do not have much time for the 0.09 presence. As I have said a number of times, I think it was part of a strategy to legitimise contamination, and that has been the case everywhere where GM crops have been grown.

The CHAIR: Mr Tager, I do not have any more questions for you. Do you want to make a closing submission to us?

Mr TAGER: No, thank you. I think I have said my piece.

The CHAIR: All right; excellent.

I will just go through these final formalities. 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. Thank you for persevering through the trials and tribulations of the technology. We really appreciate your contribution.

Mr TAGER: Thank you very much for your time, and thank you very much for undertaking this inquiry, because it is an incredibly important issue and it is much appreciated that it is happening in WA.

The CHAIR: Thank you.

Hearing concluded at 1.50 pm

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