40TH PARLIAMENT

Report 49

STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

Mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material

Presented by
Hon Matthew Swinbourn MLC (Chairman)

February 2019

Standing Committee on Environment and Public Affairs

Members as at the time of this inquiry:

Hon Matthew Swinbourn MLC (Chairman)

Hon Colin Holt MLC (Deputy Chairman)

Hon Samantha Rowe MLC

Hon Tim Clifford MLC

Hon Dr Steve Thomas MLC

Staff as at the time of this inquiry:

Mr Alex Hickman, LLB (Advisory Officer (Legal))

Ms Maddison Evans (Committee Clerk)

Address:

Parliament House
4 Harvest Terrace, West Perth WA 6005
Telephone: 08 9222 7300
Email: lcco@parliament.wa.gov.au
Website: www.parliament.wa.gov.au

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EXECUTIVE SUMMARY

1 This inquiry arises from a petition tabled in the Legislative Council on 13 June 2017 calling for the introduction of farmer protection legislation to compensate farmers who suffer economic loss from contamination by genetically modified (GM) crops.

2 The decision of the Supreme Court of Western Australia and the Western Australian Court of Appeal in *Marsh v Baxter* drew attention to the issue of the coexistence of GM and non-GM crops and the potential for contamination. It also gave rise to debate on whether the common law provides an adequate remedy for economic loss or whether a separate compensation scheme or other mechanism is required owing to GM contamination.

3 During its inquiry, and in this report, the Standing Committee on Environment and Public Affairs (Committee) has surveyed the approaches taken by other jurisdictions to compensation for economic loss to farmers caused by GM contamination.

4 The Committee has also assessed whether there is sufficient evidence of economic loss incurred by farmers in Western Australia caused by GM contamination to justify a departure from the current common law mechanism for compensation.

5 The Committee notes the polarised views in evidence received in this inquiry. Many of the views appear intractable and to be driven by ideological and economic factors. This has become a feature of the debate surrounding the use of gene technology in crops in Australia and other countries.

6 The Committee recognises the challenges identified with the common law as a compensation mechanism, including the perception that it is inadequate. The Committee concluded, however, that a single case, *Marsh v Baxter*, is not sufficient to conclude the existing common law compensation mechanism is inadequate to compensate non-GM farmers.

7 The Committee notes that GM canola has been grown commercially in Western Australia since 2010. This is, arguably, a sufficient period for any systemic GM contamination issues to arise.

8 The Committee found there is insufficient evidence to justify a departure from the common law mechanism for compensation in Western Australia.

This finding arose from a lack of:

- significant evidence of GM contamination in Western Australia;
- evidence presented to the Committee of actual economic loss to farmers caused by GM contamination;
- operational data on alternative compensation mechanisms in other jurisdictions to enable an assessment of their merits over existing common law remedies;
- decertifications of organic farms or other actions taken by organic certification bodies resulting from GM contamination, other than in *Marsh v Baxter*; and
- claims under insurance policies providing for cover against GM contamination.

Findings

Findings are grouped as they appear in the text at the page number indicated:

FINDING 1 Page 14

The breakdown of neighbour relationships does not help resolve cross boundary issues or the impacts from different farming systems.

FINDING 2 Page 14

The breakdown of neighbour relationships has broader impacts affecting the whole of the district, especially in the smaller communities which are so prevalent in Western Australian farming areas.

FINDING 3 Page 17

The requirements for non-genetically modified crops are largely driven by the requirements of the markets for non-genetically modified products.

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The genetically modified, non-genetically modified and organic industries are best placed to decide the techniques for the management of coexistence of genetically modified, non-genetically modified and organic crops to ensure market requirements are met.

FINDING 5 Page 18

Potential sources of contamination in agriculture extend beyond genetically modified material to include pesticides, weeds, various diseases and straying livestock.

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There is a possibility that loss, including economic loss, may be incurred as a result of contamination by genetically modified material.

FINDING 7 Page 27

Farmers seeking compensation for economic loss arising from contamination by genetically modified material face many of the same inadequacies in the common law as a compensation mechanism for economic loss as cases that do not involve contamination by genetically modified material.

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There is not a sufficient body of case law to draw a conclusion that the common law is an inadequate compensation mechanism for contamination by genetically modified material.

FINDING 9 Page 42

There is insufficient operational data on alternative compensation approaches in other jurisdictions to determine their merits over the existing common law mechanism.

FINDING 10 Page 44

There is minimal evidence of systemic contamination by genetically modified material in Western Australia.

FINDING 11 Page 44

The handling practices of Co-operative Bulk Handling Group have ensured that there has been no loss of markets due to contamination by genetically modified material and that this has helped to ensure that there has been no significant economic loss to the agricultural industry in Western Australia.

FINDING 12 Page 44

There is no evidence to suggest that economic loss to farmers caused by contamination by genetically modified material is a widespread or systemic problem in Western Australia.

CHAPTER 1
Introduction

Inquiry procedure

1.1 The Standing Committee on Environment and Public Affairs (Committee) resolved, on 6 December 2017, to commence an inquiry with the following terms of reference:

> To inquire into and report on mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material, including approaches taken in Western Australia and by other jurisdictions and any other relevant matter.[1]

1.2 The Committee sought submissions from the public[2] and received 99 submissions from industry bodies, government agencies, community organisations, companies and individuals in Western Australia as well as in other Australian and overseas jurisdictions.

1.3 Some submissions appeared to be copied from templates as part of a co-ordinated mailing campaign. The Committee resolved to publish on its website only those offering individual views in addition to the template text used (see Appendix 1).

1.4 A number of hearings were held over the course of the inquiry. Bearing in mind that there were many interested parties in regional areas, the hearings were streamed live on the internet.

1.5 The Committee travelled to a grain receival site at Avon[3] operated by Co-operative Bulk Handling Group (CBH) to see firsthand the processes for segregation of genetically modified (GM) and non-GM grain.

1.6 In adopting a procedure of seeking submissions, conducting hearings and undertaking a site visit, the Committee was seeking to obtain the views of interested parties, as well as evidence, that could inform the Committee on its deliberations on the terms of reference. In doing so, the Committee has generally taken the approach that where a person or group has made assertions or claims, there must be credible evidence to support the claim or assertion in order for the Committee to accept the claim or assertion. Further, it has also been the Committee's approach that generally where a person or group has made an assertion or claim, the onus of proving the truth or accuracy of such an assertion or claim rests on the person or group making that assertion or claim.

1.7 Appendix 1 details the stakeholders contacted, submissions received, hearings and travel conducted during this inquiry.

1.8 Transcripts of public hearings are available from the Committee's website at www.parliament.wa.gov.au/env.

1.9 The Committee extends its appreciation to those who provided evidence and information during the course of the inquiry.

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1 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 47, *Inquiry into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material - Terms of Reference*, 7 December 2017.

2 The Committee advertised the inquiry by issuing an electronic Media Release on 7 December 2017 and placing advertisements in the *West Australian* newspaper on Saturday 16 December 2017 and in *The Countryman* and *Farm Weekly* on Thursday 14 December 2017.

3 Located near Northam.

Genesis of the inquiry

1.10 Since the commercial introduction of genetically modified crops, there have been calls for compensation of farmers who suffer economic loss as a result of contamination by genetically modified material (GM contamination).

1.11 *Marsh v Baxter*[4] concerned an unsuccessful claim for economic loss by an organic farmer against a neighbouring farmer for GM contamination. The decision of the Western Australian Supreme Court and Court of Appeal gave rise to debate on whether the common law provides an adequate remedy for any economic loss.

1.12 A number of petitions calling for the introduction of farmer protection legislation tabled in the Legislative Council have drawn further attention to this issue.[5] This included a petition tabled in the Legislative Council on 13 June 2017 calling for the introduction of farmer protection legislation to compensate non-GM farmers who suffer economic loss from contamination by GM crops.

1.13 In light of the public and government interest in this matter,[6] the Committee resolved to commence this inquiry. This has included an assessment of whether there is sufficient evidence of economic loss by farmers in Western Australia to justify a departure from the current common law mechanism of compensation.

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4 [2014] WASC 187; [2015] WASCA 169. When the Committee refers to this case in this report, it is to the decision at first instance by the Supreme Court of Western Australia as well as on appeal by the Western Australian Court of Appeal.

5 Petition 10, Compensation for non-GM farmers, Tabled Paper No 262, Legislative Council, 13 June 2017; Petition 138, Compensate GM-Free farmers, Tabled Paper No 4888, Legislative Council, 16 November 2016; Petition 69, *Genetically Modified Crops Free Areas Act 2003*, Tabled Paper No 2263, Legislative Council, 19 November 2014.

6 In her response to Petition 10, the Minister expressed her support for the Committee investigating whether there needs to be a mechanism to protect non-GM farmers from contamination. The Minister added:

> In particular, there needs to be an examination of whether current laws of tort are adequate or whether strict liability for cross contamination should apply as it does in European Union Member States such as Austria, Denmark and France.

See Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Letter, 28 September 2017, p 1.

CHAPTER 2
Background to the inquiry

Genetically modified crops

2.1 GM crops are plants engineered by the insertion of pieces or strands of foreign genetic material into the plant in an effort to change the plants traits,[7] such as increased resistance to pathogens and herbicides, increased nutrient value and higher yields.

2.2 Since the first approval for the commercial sale of GM food in the 1990's (1994 in the United States[8] and 1996 in Australia[9]) there has been significant uptake in its cultivation across the globe. By 2015, nearly 180 million hectares of GM crops had been grown by more than 18 million farmers in 28 countries.[10] Maize, soybeans, cotton and canola are the primary GM crops, covering 99% of the area devoted to GM production.[11]

2.3 The adoption of GM crops has not occurred uniformly across the globe, ranging from a rapid uptake in countries such as the United States and Canada, to low adoption or moratoria in some European, Asian and African countries[12] and a number of Australian jurisdictions.

2.4 While it has been stated that GM crops were developed to boost the capacity of the agricultural sector to meet the rapidly growing demand for food and nutrition, with lower use of pesticides and emissions, their use has been controversial.[13] Despite food standards agencies and other regulators having declared GM food safe to consume,[14] there has been opposition from advocacy groups, industry bodies, governments and consumers. These groups have questioned the safety of GM food and ongoing debate continues about potential benefits.[15]

2.5 There is a great diversity of opinion on how the coexistence of GM crops with non-GM crops (such as conventional and organic crops) should be managed. This conflict about

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7 Carie-Megan Flood, Pollen Drift and Potential Causes of Action, 28 *J. Corp. L*. 2003, pp 472, 477.

8 Clive James and Anatole F. Krattiger, (1996), Global Review of the Field Testing and Commercialization of Transgenic Plants: 1986 to 1995: The First Decade of Crop Biotechnology, *ISAAA Briefs*, p v.

9 Agricultural Biotechnology Council of Australia, GM Cotton in Australia: a resource guide. See: http://www.abca.com.au/wp-content/uploads/2012/09/ABCA_Resource_Guide_3_v2.pdf. Viewed 14 November 2018.

10 Nicholas Kalaitzandonakes, Peter W.B. Phillips, Stuart J. Smyth and Justus Wesseler, 'Introduction to the Issue of Coexistence', in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 1. See also Clive James, '20th Anniversary 1996 to 2015 of the Global Commercialization of Biotech Crops and Biotech Crop Highlights in 2015', *ISAAA Brief No 51*, 2015.

11 Nicholas Kalaitzandonakes, Peter W.B. Phillips, Stuart J. Smyth and Justus Wesseler, 'Introduction to the Issue of Coexistence', in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 1.

12 Janice Tranberg and Sarah Lukie, 'Forging the Future of LLP: Building an International Coalition and Developing a National LLP Policy', in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 321.

13 Nicholas Kalaitzandonakes, Peter W.B. Phillips, Stuart J. Smyth and Justus Wesseler, 'Introduction to the Issue of Coexistence', in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 2.

14 Food Standards Australia New Zealand, 2015, *Safety assessments of GM foods*. See: http://www.foodstandards.gov.au/consumer/gmfood/safety/Pages/default.aspx, where it was stated that 'gene technology has not been shown to introduce any new or altered hazards into the food supply'.

15 Kanchana Kariyawasam, Legal Liability, Intellectual Property and Genetically Modified Crops: Their Impact on World Agriculture, *Pacific Rim Law & Policy Journal*, 2010, Vol. 19, No.3, pp 463-4.

management includes whether farmers should be compensated for economic loss caused by the contamination of their property by GM material. These differences of opinion were reflected in evidence given to the Committee during the inquiry.

2.6 The merits of gene technology, including its safety, featured prominently in some submissions but fell outside of the terms of reference of the inquiry.[16]

Regulatory framework in Australia

2.7 The release of genetically modified organisms (GMOs) in Australia is regulated by both Federal and State legislation. It is known as the National Gene Technology Scheme (Scheme), which comprises a set of similar Commonwealth, State and Territory laws that provide for uniform regulation of GMOs throughout Australia.

2.8 The Commonwealth Government and the governments of each of the states and territories signed an inter-governmental Gene Technology Agreement (Agreement) in 2008 to facilitate the Scheme. The Agreement also established the Gene Technology Ministerial Council (now known as the Legislative and Governance Forum on Gene Technology (Forum)) to provide policy input to the implementation and operation of the regulatory scheme. Under this Agreement, the Commonwealth cannot amend its gene technology legislation without Forum agreement.

2.9 Each state and territory has introduced uniform legislation to apply to the use of GMOs in their jurisdiction.

Commonwealth

2.10 The *Gene Technology Act 2000* (GTA) established the Office of the Gene Technology Regulator (Regulator) to identify and manage the risks posed by gene technology. The release of GMOs into the environment for agricultural purposes is prohibited unless authorised under the GTA.

2.11 The GTA and its provisions establish a framework to address the overall objective of the Act, which is:

> to protect the health and safety of people, and to protect the environment, by identifying risks posed by or as a result of gene technology, and by managing those risks through regulating certain dealings with GMOs.[17]

2.12 The regulatory framework provides that 'where there are threats of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[18]

2.13 The GTA applies to dealings with GMOs by constitutional corporations, which comprise the bulk of organisations involved in the field of gene technology in Australia. Accordingly, most dealings with GMOs are covered by the GTA.

2.14 The GTA does not provide for the compensation of farmers for contamination by GMOs. Its protection is confined to certain persons or classes of persons who are affected by the Regulator's decision to not issue a licence or to issue one subject to conditions, rather than third parties who may be affected by such a decision.

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16 Submission 40 from Organic and Biodynamic Meat Co-operative WA, 14 February 2018, p 2. See also Submission 60 from Grantly Marinoni, 15 February 2018, p 2. An exception is the relevance safety has to determining whether it is appropriate to impose strict liability on those growing GM crops. See further Chapter 4.

17 *Gene Technology Act 2000 (Cth)* s 3.

18 ibid., s 4(aa).

2.15 It also imposes strict liability for the breach of licence conditions. If environmental damage occurs, the Regulator can direct that remedial action occur at the expense of the person who breached the conditions.

Western Australia

2.16 Western Australia's legislation is the *Gene Technology Act 2006* and included the *Genetically Modified Crops Free Areas Act 2003* until its repeal in 2016, which removed the need for farmers to obtain an exemption order to grow GM crops.[19]

2.17 The Gene Technology (Western Australia) Bill 2014, which was introduced into the Legislative Council on 19 November 2014, sought to repeal the *Gene Technology Act 2006* and apply the Commonwealth gene technology laws as laws of Western Australia. This was in order to remove inconsistencies between the State and Commonwealth gene technology laws.[20]

2.18 It has been stated that the *Gene Technology Act 2006* has little effective role in the regulation of gene technology in Western Australia as it is not capable of conferring powers on the Regulator with respect to matters not under the ambit of the GTA.[21] This is because it has not been declared to be a 'corresponding State law' pursuant to section 12 of the GTA. This was one of the main aims of the Gene Technology (Western Australia) Bill 2014.[22]

Previous committee inquiries and statutory reviews

2.19 In Australia, there have been a number of inquiries by parliamentary committees as well as statutory reviews of the GTA which have considered the regulation of gene technology as well as liability for GM contamination. This included an inquiry by the former Standing Committee on Environment and Public Affairs (2001-2005) (Former Committee).

2.20 A concern arising from these inquiries was the failure of the GTA to deal with the issue of liability and hold responsible those who cause contamination.[23]

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19 Department of Primary Industries and Regional Development, Agriculture and Food. See: https://www.agric.wa.gov.au/genetic-modification/repeal-gm-crops-free-areas-act-2003. Viewed 7 November 2018. Under the *Genetically Modified Crops Free Areas Act 2003*, designated areas (which could include the entire jurisdiction) could be declared for the purposes of prohibiting the cultivation of certain GM crops. In 2004 the whole of Western Australia was designated an area where GM crops could not be grown. The responsible Minister could issue an exemption order for the cultivation of specific genetically modified organisms (an exemption was granted in 2008 to allow the commercial cultivation of GM cotton in the Ord River Irrigation Area and in 2010 for GM canola within Western Australia). South Australia and Tasmania have state wide GM moratoriums in place.

20 The Gene Technology (Western Australia) Bill 2014 lapsed on the prorogation of the 39th Parliament on 30 January 2017.

21 Western Australia, Gene Technology Act 2006, Review of the Act under Section 194, Report, June 2012, p 15. See: http://webarchive.nla.gov.au/gov/20130504173903/http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-gtmc.htm. Viewed 16 November 2017. See also Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, pp 191, 212-13, where the committee discussed potential inconsistencies between Commonwealth and State legislation and the issues this might cause.

22 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 89, *Gene Technology (Western Australia) Bill 2014*, 10 March 2015, pp 3-11, which provides a detailed summary of the national uniform scheme as well as the Commonwealth and Western Australian legislative framework. See also Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, pp 19-30 and Submission 38 from Gene Technology Regulator, 13 February 2018, pp 1-2. The Office of the Gene Technology Regulator has also provided an overview of the regulation of GMOs in Australia in a series of factsheets. See Office of the Gene Technology Regulator, http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/factsheets. Viewed 10 September 2018.

23 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003; Australian Capital Territory,

Committee inquiries

The former Standing Committee on Environment and Public Affairs (2001-2005), Western Australia

2.21 GM crops had not been commercially cultivated in Western Australia at the time of the Former Committee's report.

2.22 The Former Committee expressed concern about the lack of protection for anyone adversely affected by the planting of GM crops as well as the common law avenue for compensation, noting how time consuming and expensive it can be.[24]

2.23 The Former Committee expressed the following view about the issue of GM contamination:

> The Committee notes that this is an issue that has not been fully addressed by the national regulatory scheme. The Committee is of the view that the Government should give serious consideration to the issues raised in relation to the provision of liability and insurance, prior to the approval of the commercial release of GM crops in WA.[25]

Senate Community Affairs References Committee

2.24 In its report this committee considered liability and insurance issues relating to deliberate and accidental contamination of non-GM crops by GM crops and how those issues are being addressed in international regulatory systems.[26]

2.25 Some submissions:

- suggested a levy be paid by producers or persons dealing with GMOs and the establishment of a compensation fund which would be accessible to farmers who have suffered loss as a result of GM contamination;[27]
- supported the Regulator having the power to require that the producer of the GMO hold insurance before a licence to use gene technology is granted that enables a third party to make a claim in the event of contamination;[28] and
- questioned the adequacy of common law causes of action in trespass, public or private nuisance and negligence.[29]

2.26 While this committee acknowledged that recourse under the common law may often be appropriate it did not accept it would provide a sufficient remedy in all cases.

Legislative Assembly, Standing Committee on Health, Report 2, *Inquiry into the Gene Technology Bill 2002*, Report No. 2, 12 December 2002, p 51. See: http://www.parliament.act.gov.au/__data/assets/pdf_file/0004/375628/h02genetech.pdf. Viewed 6 November 2017; Tasmania, Joint Select Committee on Gene Technology, 11 July 2001, pp 104-9. See: http://www.parliament.tas.gov.au/ctee/old_ctees/Gene2001.pdf. Viewed 6 November 2017.

24 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, p 194.

25 ibid.

26 Commonwealth of Australia, Senate, Community Affairs References Committee, *A Cautionary Tale: Fish Don't Lay Tomatoes – Report on the Gene Technology Bill 2000* November 2000. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/1999-02/gene/report/index. Viewed 6 November 2017. See also the summary in Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, pp 190-1.

27 Commonwealth of Australia, Senate, Community Affairs References Committee, *A Cautionary Tale: Fish Don't Lay Tomatoes – Report on the Gene Technology Bill 2000* November 2000, p 147.

28 ibid.

29 ibid.

2.27 This committee did not recommend the establishment of a compensation fund based on levies but 'preferred to strengthen the link with insurance by amending the Bill to require that…the Regulator may satisfy him or herself that applicants have made provision for suitable insurance coverage…'.[30]

House of Representatives Standing Committee on Primary Industries and Regional Services

2.28 This committee focussed on the position of organic producers and where liability would rest in the event of contamination.[31]

2.29 This committee was of the view that recourse to common law causes of action such as trespass, nuisance and negligence in the event of GM contamination was 'an appropriate arrangement.'[32]

Joint Select Committee report on Gene Technology, Tasmania

2.30 Various stakeholders raised concerns about the failure of the GTA to deal with the issue of liability for damage caused to non-GM farmers; the uncertainty of how liability can be attached for economic loss and various other drawbacks of common law remedies.[33]

2.31 This committee recommended the Tasmanian Government monitor and evaluate developments under the common law in relation to possible costs for non-GM producers from any gene flow from GM producers and, if necessary, propose a legislative remedy.[34]

Standing Committee on Health, Australian Capital Territory

2.32 This committee drew attention to what it regarded was contradictory evidence it had received on liability and insurance for claims involving GM foods. This committee recommended that this be addressed as a matter of urgency and before any environmental release of GMOs occurs.[35]

Statutory Reviews of the Gene Technology Act 2000 (Cth)

2.33 Section 194 of the GTA requires an independent review of the operation of the Act 'as soon as possible after the fourth anniversary of the commencement of this Act'.

2.34 Subsequent reviews of the Act have been undertaken.

First review

2.35 The GTA was first reviewed in 2005-06.[36]

2.36 Some submissions to the review from groups opposed to the introduction of GM crops called for the imposition of strict liability under common law for any damage caused by

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30 ibid., p 152.

31 Commonwealth of Australia, House of Representatives, Standing Committee on Primary Industries and Regional Services, *Work in Progress: Proceed with Caution: primary producer access to gene technology*, June 2000.

32 ibid., p 159.

33 Tasmania, Joint Select Committee on Gene Technology, 11 July 2001, pp 104-9.

34 ibid., p 15.

35 Australian Capital Territory, Legislative Assembly, Standing Committee on Health, Report 2, *Inquiry into the Gene Technology Bill 2002*, 12 December 2002, p 51. See: http://www.parliament.act.gov.au/__data/assets/pdf_file/0004/375628/h02genetech.pdf. Viewed 16 November 2018.

36 Statutory Review of the *Gene Technology Act 2000* and the Gene Technology Agreement, pp 38-9. See: http://webarchive.nla.gov.au/gov/20130504173903/http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-gtmc.htm. Viewed 16 November 2018. See also Submission 98 from Department of Primary Industries and Regional Development, 2 March 2018, p 3.

GMOs. Other submissions stated this was unnecessary because the common law provided effective remedies and imposing strict liability would inhibit the development and marketing of GM crops.[37]

2.37 In support of its conclusion a strict liability regime should not be introduced in to the GTA, the review observed:

- courts have applied strict liability in relation to 'superhazardous goods';
- there is no other product in Australia which has attracted a strict liability presumption under the common law; and
- given that the object of the GTA is to manage risks to protect the health and safety of people and the environment, it is contradictory to categorize any GMO assessed by the Regulator and licensed for intentional release as a superhazardous good.

2.38 The review concluded that applying strict liability to a licensee of a GMO[38] could create a risk that farmers using the GMO would have less incentive to take care to avoid practices that could result in unintended presence in a neighbour's field. It also observed:

> Plaintiffs would still need to demonstrate before a court the causal link between the GMO and the damage they had incurred as well as the extent of their loss.[39]

Second review

2.39 A further review undertaken in 2011 concluded a liability regime should remain outside the scope of the GTA.[40]

Third review

2.40 The review concluded the introduction of compensation schemes for economic loss is a matter for jurisdictional governments to consider.[41]

The commercial cultivation of GM crops in Australia

2.41 GM canola and GM cotton are the only two GM crops that have been licensed by the Regulator for commercial cultivation in Australia.[42]

2.42 GM cotton was introduced into the Australian market in 1996 and now represents almost all of cotton grown.[43] Monsanto is the trademark owner of the variety licensed by the Regulator, which is resistant to insecticides and other herbicides.[44]

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37 ibid., p 38.

38 Granted a licence from the Regulator.

39 ibid., pp 38-9. See also Submission 38, Gene Technology Regulator, 13 February 2018, p 2.

40 See: http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-techact-review. Viewed 16 November 2017, p 30.

41 Australian Government, Department of Health, viewed 16 November 2018, http://www.health.gov.au/internet/main/publishing.nsf/Content/011C554B9847D6F0CA258169000FCBBE/$File/Final-Report-Oct2018.pdf, p 63.

42 Submission 98 from Department of Primary Industries and Regional Development, 2 March 2018, p 1.

43 Agricultural Biotechnology Council of Australia, GM Cotton in Australia: a resource guide. See: http://www.abca.com.au/wp-content/uploads/2012/09/ABCA_Resource_Guide_3_v2.pdf. Viewed 14 November 2018.

44 ibid.

2.43 The following two varieties of GM canola, also owned by Monsanto, were approved for commercial release in 2003:

- Roundup Ready® canola was developed to be resistant to weeds due to its tolerance to glyphosate, the active ingredient in Roundup brand herbicides used to eliminate weeds.[45]
- Roundup Ready® Triazine Tolerant canola, developed as tolerant to the triazine group of herbicides[46] used to control broad leafed weeds and some annual grasses.[47]

Monsanto licence requirements

2.44 Monsanto requires farmers wishing to grow GM canola to enter into a 'Grower Licence and Stewardship Agreement for Roundup Ready Canola and Roundup Ready Triazine Tolerant Canola'. The agreement contains the conditions upon which a grower may use GM canola seed on their property[48] and is accompanied by the following documents:

- Roundup Ready® canola Crop Management Plan;[49]
- Roundup Ready® canola Resistance Management Plan.[50]

2.45 Monsanto's documentation includes information on the coexistence of GM, non-GM and organic crops (see Chapter 3) and a recommendation on separation (or buffer) distances between GM and non-GM canola.

Permitted tolerance levels of GM canola in non-GM canola

Canola grain and seed

2.46 In October 2005, the then Primary Industries Ministerial Council set tolerance levels for GM canola in non-GM canola at 0.9% for grain and 0.5% for seed for sowing.[51] The 0.9% tolerance level was based upon that adopted by the European Union (EU) and has been widely accepted as the international standard for exported canola.[52] As long as the tolerance

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45 What is Roundup Ready® canola? See: https://www.monsantoglobal.com/global/au/products/documents/tech-topic-what-is-roundup-ready-canola.pdf. Viewed 10 September 2018.

46 Grower Licence and Stewardship Agreement for Roundup Ready® Canola and Roundup Ready® Triazine Tolerant Canola. See: http://www.monsantoglobal.com/global/au/products/documents/2015%20roundup%20ready%20canola%20lsa.pdf. Viewed 10 September 2018. See also Department of Health, Office of the Gene Technology Regulator, Genetically modified (GM) canola in Australia, http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/content/9AA09BB4515EBAA2CA257D6B00155C53/$File/12%20-%20Genetically%20modified%20(GM)%20canola%20in%20Australia.pdf. Viewed 19 October 2018.

47 ScienceDirect, Triazines, viewed 14 November 2018, https://www.sciencedirect.com/topics/neuroscience/triazines.

48 Grower Licence and Stewardship Agreement for Roundup Ready® Canola and Roundup Ready® Triazine Tolerant Canola. See: http://www.monsantoglobal.com/global/au/products/documents/2015%20roundup%20ready%20canola%20lsa.pdf. Viewed 10 September 2018.

49 Roundup Ready® canola crop management plan. See: http://www.monsantoglobal.com/global/au/products/documents/roundup%20ready%20canola%20crop%20management%20plan.pdf. Viewed 10 September 2018.

50 Roundup Ready® canola resistance management plan. See: https://www.monsantoglobal.com/global/au/products/Documents/Roundup%20Ready%20canola%20Resistance%20Management%20Plan%20August%202016.pdf. Viewed 10 September 2018.

51 See: http://agriculture.vic.gov.au/agriculture/innovation-and-research/biotechnology/genetically-modified-crops/thresholds. A GM tolerance level is the maximum allowable level of adventitious (or unintended) presence of material set by regulators or markets, for GM canola in non-GM canola.

52 Responses to questions, Tabled Paper 1 tabled by Dr Mark Sweetingham, Managing Director, Research, Development and Innovation, Department of Primary Industries and Regional Development, during hearing held

level is not exceeded, the canola can be sold and marketed as non-GM in Australia and those jurisdictions that have explicit tolerance levels.

Organic standards

2.47 The National Standard for Organic and Biodynamic Produce (National Standard) is owned by the Commonwealth and administered by six approved certification bodies through an arrangement with the Department of Agriculture and Water Resources.[53]

2.48 Three of the six approved certification bodies have their own private standard which must apply the National Standard as a minimum requirement.[54]

2.49 Each of these standards have zero tolerance to GMOs (see Chapter 3).[55]

Food labelling

2.50 Food Standards Australia and New Zealand does not require food to be labelled as containing GMOs when there is no more than 1% of an approved GM food unintentionally present in a non-GM food.[56]

Western Australia

2.51 In Western Australia, GM cotton and GM canola have been commercially grown since 2008 and 2010 respectively.[57]

2.52 The Department of Primary Industries and Regional Development (Department) gives the following information on the commercial introduction of GM crops in Western Australia:

> In 2008, the Minister for Agriculture and Food issued an exemption order to permit the commercial cultivation of GM cotton in the Ord River Irrigation Area (ORIA) in Western Australia. In the 2011 season, growers planted 700 hectares of GM Cotton in the ORIA.
>
> In 2010, the Minister for Agriculture and Food issued an exemption order to permit commercial planting of GM canola in WA. Since then, the area planted to GM canola has grown to 34 per cent of total canola plantings in WA; demonstrating grower demand for this technology.[58]

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11 April 2018, p 1. See also Submission 98, Department of Primary Industries and Regional Development, 2 March 2018, p 2.

53 Marg Will, Secretariat, The Organic Industry Standard and Certification Council Inc, Email, 31 January 2019.

54 ibid.

55 Mark Anderson, General Manager, National Association for Sustainable Agriculture Australia, *Transcript of evidence*, 23 April 2018, p 7; Justin Copeman, Chief Executive Officer, Australian Certified Organic Pty Ltd, *Transcript of evidence*, 23 April 2018, p 4, who confirms the prohibition of GMOs in each of their own standards means zero tolerance.

56 Food Standards Australia and New Zealand, viewed 19 November 2018, http://www.foodstandards.gov.au/consumer/gmfood/labelling/Pages/default.aspx. See also John van Schagen, Manager, Plant Product Integrity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 11 April 2018, p 4.

57 Department of Primary Industries and Regional Development, Genetically modified crops in Western Australia. See: https://www.agric.wa.gov.au/genetic-modification/genetically-modified-crops-western-australia. Viewed 7 September 2018.

58 ibid. See also Submission 98 from Department of Primary Industries and Regional Development, 2 March 2018, p 1. Under the *Genetically Modified Crops Free Areas Act 2003*, designated areas (which could include the entire jurisdiction) could be declared for the purposes of prohibiting the cultivation of certain GM crops. The responsible Minister could issue an exemption order for the cultivation of specific genetically modified organisms.

Uptake of GM canola in Western Australia

2.53 The following table demonstrates the increase in uptake of GM canola in Western Australia since its commercial introduction.

Table 1. *Commercial uptake of GM canola in Western Australia*

Year	Hectares	% of total canola
2010	86 006	10
2011	94 800	12
2012	121 694	13
2013	167 596	14
2014	260 000	21
2015	337 527	30
2016	344 188	28
2017	366 466	34

[Source: Agricultural Biotechnology Council of Australia, GM canola growth in Australia][59]

Departmental guidance documents

2.54 To coincide with the commercial introduction of GM canola, the Department released a factsheet on genetically modified crops and farmer liability'.[60] The factsheet gave a summary of the regulatory background and common law causes of action such as negligence, private nuisance and trespass to land. It also recommended neighbouring farmers resolve any disagreements between them:

> If the area sown to GM crops in WA increases in coming years the best way forward for both the non-GM and the GM industries is for farmers to discuss the issues with their neighbours and come to mutually agreeable solutions.

2.55 Additionally, the Department released the following publications:

- 'On-farm segregation of canola varieties',[61] providing information to canola growers on the segregation of different canola varieties.
- 'GM canola: A weed management option', providing information on the tolerance levels for GM canola and the requirements growers need to meet to plant GM canola as outlined in the agreement referred to in paragraph 2.44.[62]

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59 GM canola growth in Australia. See http://www.abca.com.au/wp-content/uploads/2015/04/2017-GM-canola-growth-in-Australia.pdf. Viewed 29 October 2018. FOODwatch has questioned the accuracy of these figures, referring to a Department of Primary Industries and Regional Development report titled 2019 Canola variety sowing guide for Western Australia. See Janet Grogan, FOODwatch representative, Email, 4 November 2018.

60 Factsheet, Genetically Modified Crops and Farmer Liability, Tabled Paper 4 tabled by Dr Rosalie McCauley, Senior Development Officer, Department of Primary Industries and Regional Development during hearing held 11 April 2018, p 12.

61 On-farm segregation of canola varieties, Tabled Paper 2 tabled by Dr Rosalie McCauley, Senior Development Officer, Department of Primary Industries and Regional Development during a hearing held 11 April 2018, p 5.

62 GM Canola A weed management option, Tabled Paper 3 tabled by Dr Rosalie McCauley, Senior Development Officer, Department of Primary Industries and Regional Development during a hearing held 11 April 2018, p 5. See also Dr Rosalie McCauley, Senior Development Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 11 April 2018, pp 5-6.

Departmental audit program

2.56 In 2010 the Department carried out audits of farmers who chose to grow GM canola following the issue of the exemption order under the *Genetically Modified Crops Free Areas Act 2003,* which permitted its cultivation. In evidence the Department stated it carried out the audits because 2010 was the first time that growers were permitted to grow GM canola in a widespread manner and to monitor compliance with the licence and stewardship agreement.[63]

2.57 The Department audited a third of the growers and found they complied with the licence and stewardship agreement.[64]

2.58 The Department has played no subsequent role in monitoring compliance with the licence agreement.[65]

Co-operative Bulk Handling Group

2.59 CBH has also set up a segregation and identity preservation system to handle GM and non-GM grains, as well as up to 50 other grain varieties.[66]

63 Dr Rosalie McCauley, Senior Development Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 11 April 2018, pp 11-12. See also Tabled Paper 3247, Legislative Council, 14 April 2011.

64 Dr Rosalie McCauley, Senior Development Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 11 April 2018, p 12.

65 ibid.

66 Submission 28 from Co-operative Bulk Handling Group, 12 February 2018 and Gavin Bignell, Operations Manager, and David Paton, Government and Industry Relations Manager, Co-operative Bulk Handling Group, *Transcript of evidence*, 11 April 2018. See also Submission 98 from the Department of Primary Industries and Regional Development, 2 March 2018, p 2.

CHAPTER 3
Contamination by genetically modified material

The use of the term 'contamination' during the inquiry

3.1 The Committee acknowledges there are differing views about the use of the term 'contamination' in the context of GM and non-GM crops.[67]

3.2 Various other terms were used in evidence to the Committee as an alternative to contamination, including 'commingling',[68] 'adventitious presence',[69] 'unintended presence'[70] and 'accidental incursion'.[71]

3.3 The Department observed that, as the Regulator has concluded GMOs are safe and licensed their commercial release, any presence of GM grain in non-GM grain should be referred to as accidental presence, admixture or unintended presence.[72]

3.4 The Committee regards 'contamination' as the most appropriate term in the context of an inquiry into mechanisms for compensation as well as from the perspective of someone seeking compensation.[73] The term 'contamination' is used in some crop insurance policies when explaining whether damage caused by GMOs is covered.[74] The Committee's use of the term, however, is not meant to suggest a value judgement by the Committee that GMOs are, by definition, a contaminant.

The coexistence of different farming methods

3.5 Coexistence of different farming methods has existed for many years and its success requires mutual respect and shared responsibilities by all growers and the implementation of appropriate management practices.[75] This is especially important when farmers grow crops and adopt farming methods which have the potential to impact upon their neighbours and the wider community.

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67 Gary McGill, Chairman, Pastoralists and Graziers Association of WA Grain Committee, *Transcript of evidence*, 3 May 2018, p 1, stated the heading of the inquiry 'assumes that GM plant material is capable of causing contamination'.

68 Dr Karinne Ludlow, Associate Professor, Faculty of Law, Monash University, *Transcript of evidence*, 31 August 2018, pp 1-2.

69 Submission 77 from State Agricultural Biotechnology Centre, 16 February 2018, p 5.

70 John van Schagen, Manager, Plant Product Integrity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 11 April 2018, p 16.

71 Gary McGill, Chairman, Pastoralists and Graziers Association of WA Grain Committee, *Transcript of evidence*, 3 May 2018, p 3.

72 Responses to questions, Tabled Paper 1 tabled by Dr Mark Sweetingham, Managing Director, Research, Development and Innovation, Department of Primary Industries and Regional Development during hearing held 11 April 2018, p 1.

73 The term is used a number of times in the judgment of the Supreme Court in *Marsh v Baxter*. See [2014] WASC 187; [2015] WASCA 169, at paragraphs 50, 110, 125, 126, 157 and 214.

74 CGU Crop Insurance Policy. See: https://www.cgu.com.au/sites/default/files/media/business/pds/CGU%20Crop%20C0667%20REV14%200417.pdf. Viewed 15 November 2018; WFI Early Bird Crop Policy, 1 August 2017. See: https://www.wfi.com.au/sites/wfi/files/documents/WFI-Early-Bird-Crop-Policy.pdf. Viewed 15 November 2018.

75 Graham Brookes, PG Economics Ltd, Co-existence of GM and non GM crops: current experience and key principles, October 2004, p 3. See: https://www.pgeconomics.co.uk/pdf/Coexistencekeyprinciplesdocument.pdf. Viewed 31 October 2018.

3.6 The Committee acknowledges that the majority of impacts that occur between neighbouring farms as a result of different farming systems or activities are managed by neighbours working together to reduce the impacts and economic loss. This lessens the need for costly and time consuming legal proceedings.

3.7 However, on the occasion that this results in a breakdown of neighbour relationships, it does not help resolve cross boundary issues or the impacts from different farming systems. This breakdown has broader impacts affecting the whole of the district, especially in the smaller communities which are so prevalent in Western Australian farming areas.

FINDING 1

The breakdown of neighbour relationships does not help resolve cross boundary issues or the impacts from different farming systems.

FINDING 2

The breakdown of neighbour relationships has broader impacts affecting the whole of the district, especially in the smaller communities which are so prevalent in Western Australian farming areas.

3.8 The Committee heard evidence that when significant economic loss across farm boundaries occurs due to incompatible activities, such as chemical spray drift, existing insurance instruments are available to cover these losses.[76]

The coexistence of GM, non-GM and organic crops

3.9 Measures to manage the coexistence of GM and non-GM crops, such as those described in paragraphs 3.16 to 3.26, are put in place to prevent GM contamination of non-GM crops. This enables industry to meet the different requirements of their domestic and export markets, some of whom demand an absence of GMOs.

Definition of coexistence

3.10 There is no universally accepted definition of coexistence in the context of the growing of GM, non-GM and organic crops.[77] Definitions which have been offered tend to reflect differing attitudes to the growing of GM crops.

3.11 The United States Department of Agriculture (USDA) defines coexistence as:

> the concurrent cultivation of conventional, organic, IP, and genetically engineered (GE) crops consistent with underlying consumer preferences and farmer choices[78]

3.12 The EU takes a different view:

> The objective of coexistence measures is to avoid unintended presence of GMOs in other products, preventing the potential economic loss and impact of the admixture of GM and non-GM crops.[79]

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76 Duncan Young, Grains Section President, WA Farmers Federation, *Transcript of evidence*, 3 May 2018, pp 4-5.

77 Nicholas Kalaitzandonakes, Peter W.B. Phillips, Stuart J. Smyth and Justus Wesseler, 'Introduction to the Issue of Coexistence', in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 4.

78 ibid. See also Advisory Committee on Biotechnology & 21st Century Agriculture, *Enhancing Coexistence: A Report of the AC21 to the Secretary of Agriculture*, 19 November 2012, p 3.

79 Nicholas Kalaitzandonakes, Peter W.B. Phillips, Stuart J. Smyth and Justus Wesseler, 'Introduction to the Issue of Coexistence', in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and*

3.13 These differing definitions reflect the greater acceptance and uptake of GM crops in the United States,[80] where regulation has been stated to be favourable to their development,[81] than in the EU, which has a comprehensive and strict legal regime on GMOs based on the precautionary principle.[82]

Non-GM, GM free and organic

3.14 In the context of coexistence, food which is not GM[83] can be classified as:

- Non-GM: Food made without ingredients derived from GMOs, but which are not necessarily GM free (bearing in mind those countries in which there is a GM tolerance, such as 0.9%).
- GM-free: Food that does not contain any genetically modified material.[84]
- Organic: Food derived from a farming method using natural ecological processes which avoids the use of synthetic or artificially produced pesticides, herbicides, fertilisers or GMOs and usually subject to verification through certification.[85]

3.15 Accordingly, the terms cannot, necessarily, be used interchangeably. However, in this report, when the term 'non-GM' is used, it is meant to cover all food which is not GM unless suggested otherwise.

Coexistence techniques

3.16 Coexistence can be managed by the adoption of a number of techniques, including tolerance levels and buffer (or separation) distances between GM and non-GM crops on the same farm as well as between farms. Techniques can vary from country to country and can depend on the farming method and crops,[86] and what is acceptable to the relevant markets.

Market Practices, Springer, New York, 2016, p 4. See also Graham Brookes, PG Economics Ltd, Co-existence of GM and non GM crops: current experience and key principles, October 2004, pp 3, 6. See: https://www.pgeconomics.co.uk/pdf/Coexistencekeyprinciplesdocument.pdf. Viewed 1 November 2018. See also European Commission, Coexistence of genetically modified crops with conventional and organic agriculture. See: https://ec.europa.eu/agriculture/gmo/coexistence_en. Viewed 1 November 2018.

80 The same can be said for Canada. See Library of Congress, Restrictions on Genetically Modified Organisms: United States. See: http://www.loc.gov/law/help/restrictions-on-gmos/canada.php. Viewed 1 November 2018.

81 Library of Congress, Restrictions on Genetically Modified Organisms: United States. See: http://www.loc.gov/law/help/restrictions-on-gmos/usa.php. Viewed 14 November 2018.

82 Library of Congress, Restrictions on Genetically Modified Organisms: European Union. See: http://www.loc.gov/law/help/restrictions-on-gmos/eu.php. Viewed 14 November 2018. The precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union, which 'aims at ensuring a higher level of environmental protection through preventive decision-making in the case of risk.' See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al32042. Viewed 14 November 2018.

83 For a definition of GM see paragraph 2.1.

84 Vivian Moses and Graham Brookes, The world of "GM-free", *GM Crops & Food, Biotechnology in Agriculture and the Food Chain*, 2013, Vol. 4, Issue 3. See: https://www.tandfonline.com/doi/full/10.4161/gmcr.25992). Viewed 25 January 2019.

85 National Association for Sustainable Agriculture Australia. See: https://www.nasaa.com.au/organic/organic-food.html. Viewed 29 January 2019.

86 International Federation of Organic Agriculture Movements, '*Preventing GMO Contamination, An Overview of National "Coexistence" Measures in the EU*', 2015, pp 11-14. See: http://www.ifoam-eu.org/sites/default/files/ifoameu_policy_gmos_dossier_201412.pdf. Viewed 19 October 2018.

Tolerance levels

3.17 For GM, tolerance levels apply:

- to food and feed products sold by farmers;
- to the commercial sale of seed; and
- for the purpose of labelling.

3.18 Australia and the EU have an overarching tolerance level of 0.9% for food and feed products.[87] In Japan it is 5%[88] and in the United States and Canada there appears to be no set tolerance level.

Organic standards

3.19 Organic standards have been stated to have a zero tolerance to GMOs and prohibit their presence in any segment of the organic food chain. This is regardless of whether this is deliberate or accidental.[89] While the Committee received evidence this was 'an unrealistic situation'[90] various witnesses recognized that customer requirements (which can include a demand for zero GMO presence) are one of the fundamental driving forces behind the coexistence practices of different sectors of farming industries.[91]

3.20 The Commonwealth Government has introduced Organic Export Notice 2018-01 titled 'Guideline for responding to contamination by prohibited substances or materials in the organic export supply chain' (Notice) the stated purpose of which is to:

> provide guidance in responding to unnecessary intentional use, negligent introduction and accidental introduction or necessary intentional use of prohibited substances, including the presence of genetically modified materials and organisms.[92]

3.21 One of the principles behind the Notice is that:

> Sanctions applied in response to contamination by prohibited substances or materials, including the presence of genetically modified materials and organisms, should be proportional to the instance of contamination.[93]

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87 European Union Regulation 1829/2003 allows for the 'adventitious and technically unavoidable presence of a GMO' in a given ingredient provided it remains below 0.9%.

88 United States Library of Congress, 6 September 2015. See: https://www.loc.gov/law/help/restrictions-on-gmos/japan.php. Viewed 1 November 2018.

89 Submission 58 from National Association for Sustainable Agriculture Australia, 16 February 2018, p 1. See also Mark Anderson, General Manager, National Association for Sustainable Agriculture Australia, *Transcript of evidence*, 23 April 2018, pp 6-7.

90 Submission 66 from CropLife Australia, 16 February 2018, p 15. See also Submission 62 from Grain Producers Australia, 16 February 2018, p 4 and Submission 69 from Pastoralists & Graziers Association of WA, 16 February 2018, p 15.

91 Shirley Collins, Representative, FOODwatch, *Transcript of evidence*, 23 April 2018, p 7; Jeremy Tager, Campaigner, Friends of the Earth Australia, *Transcript of evidence*, 31 August 2018, p 5; Ian Burns, Bio-Dynamic Research Institute, *Transcript of evidence*, 12 September 2018, p 6; Peter Cocks, Company Director, Biodynamic Wholefoods Pty Ltd, *Transcript of evidence*, 28 August 2018, p 9.

92 Guideline for responding to contamination by prohibited substances or materials in the organic export supply chain, Australian Government, Department of Agriculture and Water Resources. See: http://www.agriculture.gov.au/export/controlled-goods/organic-bio-dynamic/organic-notices/2018/2018-01. Viewed 2 November 2018.

93 ibid.

3.22 The Notice recommends that in minor instances of negligent or accidental introduction of genetically modified organisms or materials, the organic certification body should issue a corrective action request rather than suspend or decertify the organic production system.[94]

3.23 Some organisations who gave evidence to the Committee referred to the Notice in support of their position that an organic business can continue to trade where a low level of unintended presence of an approved GM crop is detected[95] despite there being a zero tolerance. Other witnesses referred to the Notice as non-binding and advised that the organic industry makes the rules governing organic certification.[96]

Buffer distances

3.24 The use of buffer distances (also known as segregation or isolation distances) between non-GM and GM crops both between and within farms is one of the most common coexistence measures to reduce cross pollination. It also assists to maintain any purity requirements required by markets.[97] These distances can vary greatly from a few metres to a number of kilometres, depending on the crop and jurisdiction.[98]

3.25 For example, the licence agreement that farmers in Australia enter into with Monsanto governing the growing of GM canola is accompanied by documentation recommending a buffer distance of five metres between GM and all other types of canola.

3.26 Buffer crops can also be used in conjunction with buffer distances.[99]

FINDING 3

The requirements for non-genetically modified crops are largely driven by the requirements of the markets for non-genetically modified products.

FINDING 4

The genetically modified, non-genetically modified and organic industries are best placed to decide the techniques for the management of coexistence of genetically modified, non-genetically modified and organic crops to ensure market requirements are met.

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94 ibid.

95 Submission 36 from Monsanto Australia and New Zealand Ltd, 14 February 2018, p 2; Submission 66 from CropLife Australia, 16 February 2018, p 5. See also Matthew Cossey, Chief Executive Officer, CropLife Australia, *Transcript of evidence*, 3 May 2018, p 7 and Michael Lamond, Agronomist, Grain Industry Association of WA, *Transcript of evidence*, 3 May 2018, p 11.

96 John Paull, Research Scientist, *Transcript of evidence*, 24 April 2018, p 6; Robert Phelps, Executive Director, Gene Ethics, *Transcript of evidence*, 23 April 2018, p 7.

97 This has been identified as a policy issue in the regulation of GM crops. See David Zilberman and Justus Wesseler, *Welfare and Co-existence* in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 399.

98 Some growers submitted they grow GM and non-GM side by side. See Submission 13 from Mark Adams, 6 February 2018 and Submission 30 from Ben Cripps, 12 February 2018. See also International Federation of Organic Movements European Union Group, Preventing GMO Contamination, An Overview of National "Coexistence" Measures in the EU, 2014, see: https://www.ifoam-eu.org/sites/default/files/ifoameu_policy_gmos_dossier_201412.pdf, viewed 14 November 2018, p 13, where distances of up to 600 metres for GM maize is reported.

99 Crops have been specifically developed to act as buffer zones between fields of GM and organic corn in the United States. Robert Arnason, 'Buffer crop keeps GMOs out of organic corn', *The Western Producer,* 22 February 2013. See https://www.producer.com/2013/02/buffer-crop-keeps-gmos-out-of-organic-corn/. Viewed 1 November 2018.

How and where contamination can occur

3.27 Contamination of non-GM crops by GM crops can occur in the following ways:

- cross-pollination of crops in the field, caused by the distribution of pollen from the GM crops by wind, insects or birds, or from direct seed movement;
- co-mingling during harvesting and handling, which may occur because farming equipment used for both GM and non-GM crops is not thoroughly cleaned after use with the GM crop;
- accidental spills of GM seeds from trucks;
- delayed germination of GM seeds among non-GM crops grown in fields previously sown with GM crops; and
- use of contaminated pedigree seed.[100]

3.28 The Committee notes the potential for contamination is not unique to GM material. There are a number of sources of contamination in agriculture, such as pesticides (including spray drift), weeds, and various diseases and straying livestock.[101]

FINDING 5

Potential sources of contamination in agriculture extend beyond genetically modified material to include pesticides, weeds, various diseases and straying livestock.

Potential costs resulting from GM contamination

3.29 The Committee received evidence on the potential types of financial and non-financial costs a non-GM farmer may incur resulting from GM contamination, such as:

- the cost of testing;[102]
- any price difference between the non-GM and GM product[103] (including any premium for an organic product) and a contaminated product reclassified as GM;
- loss of markets;[104]
- brand damage;[105]
- clean up costs;[106]
- the costs of audits[107] and organic re-certification;[108] and

100 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, p 161. See also Submission 84 from GM Cropwatch, 16 February 2018, pp 2-3.

101 Submission 34 from the University of Saskatchewan, 13 February 2018, p 9. See also Shirley Collins, Representative, FOODwatch, *Transcript of evidence*, 23 April 2018, p 5 and Peter Cocks, Company Director, Biodynamic Wholefoods Pty Ltd, *Transcript of evidence*, 28 August 2018, p 7.

102 Professor Bernhard Koch, University of Innsbruck, *Transcript of evidence*, 31 August 2018, p 5.

103 ibid., p 5.

104 Robert Phelps, Executive Director, Gene Ethics, Answer to question on notice asked at hearing held 23 April 2018, dated 13 May 2018, p 1.

105 Anne Jones, Manager, Gledhow Organics, *Transcript of evidence*, 24 April 2018, p 7.

106 ibid.

107 Shirley Collins, representative, FOODwatch, *Transcript of evidence*, 23 April 2018, p 8.

108 Professor Bernhard Koch, University of Innsbruck, *Transcript of evidence*, 31 August 2018, p 5.

- the possible breakdown of relationships between neighbouring farmers and the community.[109]

3.30 Some of these costs are common to all growers who are required to demonstrate they satisfy the relevant GM tolerance levels, such as testing, while others are specific to certain growers, such as a loss of organic certification. A number of the losses identified would equally apply to contamination from sources set out in paragraph 3.28 and are not unique to GM contamination.[110]

FINDING 6

There is a possibility that loss, including economic loss, may be incurred as a result of contamination by genetically modified material.

[109] This is always a very real possibility whenever there is a dispute between neighbours which results in litigation, which was the case with *Marsh v Baxter*.

[110] The Committee notes the Pastoralists & Graziers Association of WA questioned whether there is a real risk that GM crops are capable of causing economic loss to farmers. See Gary McGill, Chairman, Pastoralists and Graziers Association of WA Grain Committee, *Transcript of evidence*, 3 May 2018, p 1.

CHAPTER 4
Compensation mechanisms

Introduction

4.1 A range of compensation mechanisms are in place in various jurisdictions to deal with GM contamination. The approaches in other Australian jurisdictions as well as selected overseas jurisdictions are described in Chapter 5.

4.2 Compensation mechanisms that may be available to farmers who allege they have suffered economic loss caused by GM contamination include:

- common law causes of actions in negligence, nuisance and trespass;
- a statutory compensation scheme; and
- insurance.

4.3 This chapter provides an overview of these mechanisms as well as a summary of the opposing views of those who gave evidence to the Committee.

Common law

4.4 In the absence of a regulatory system which assigns liability for GM contamination, a claim for damages for economic loss is dealt with under the common law.[111]

4.5 Negligence, nuisance and trespass to land[112] have been recognised as the principal actions at common law for compensation for economic loss caused by GM contamination. There has also been consideration of whether the theory of strict liability should also apply to GM contamination.[113]

4.6 There are inherent drawbacks associated with taking legal action, such as cost,[114] time[115] and uncertainty.[116]

4.7 Also, those seeking damages for economic loss resulting from GM contamination at common law have faced a number of obstacles in satisfying the elements of negligence, private nuisance and trespass to land, which are discussed in this Chapter.[117]

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111 Or the common law equivalent in the relevant jurisdiction.

112 These are also known as torts, which are civil wrongs causing a claimant to suffer loss or harm resulting in potential legal liability for the person alleged to have caused the wrong.

113 Sabrina Wilson, Induced Nuisance: Holding Patent Owners Liable for GMO Cross-Contamination, 2014-15, Volume 64, Issue 1, *Emory Law Journal*, p 184.

114 Submission 40 from Organic and Biodynamic Meat Co-operative WA, 14 February 2018, p 2; Submission 73 from Friends of the Earth Australia, 16 February 2018, p 2.

115 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, p 194. See also Steen Bonde, Head of Department, Danish Agricultural Agency, *Transcript of evidence*, 31 August 2018, p 3.

116 Submission 49 from Dr Anna Bunn and Michael Douglas, 15 February 2018, Appendix, p 6.

117 See also Factsheet, Genetically Modified Crops and Farmer Liability, Tabled Paper 4 tabled by John van Schagen, Manager, Plant Product Integrity, Department of Primary Industries and Regional Development during hearing held 11 April 2018, p 12, which is a factsheet containing a summary of these causes of action.

Actions in negligence, private nuisance and trespass to land

Negligence

4.8 A person who has suffered a physical injury to person or property and who wishes to take legal action to shift the loss to another will often rely on the tort of negligence.

4.9 Generally, to succeed the person must show:

- that there was a duty of care owed to them by the other person (a reasonable foreseeability of injury if care is not taken);[118]
- there has been a breach of that duty (a failure to meet the required standard of care, determined by considering what a reasonable person would have done or not done in the same circumstances); and
- a breach of the duty of care has caused damage that is reasonably foreseeable (in some cases the cause of an injury may be difficult to determine).[119]

4.10 Recovery of damages for pure economic loss[120] caused by negligence is rare due to the reluctance of courts to impose burdens on the legitimate pursuit of commercial interests[121] or require someone to put their competitor's interests ahead of their own.[122]

4.11 It may be difficult for a non-GM farmer to prove that loss or injury was actually caused by GM material. This is because they would need to demonstrate the GM material actually came from a farm where GM crops are grown.[123] This may be especially challenging in areas where there are a number of farms growing GM and non-GM crops.

Private nuisance

4.12 Private nuisance is a wrongful or unreasonable interference with another's enjoyment of their land or premises.[124]

4.13 To establish an action in private nuisance, a person must prove ownership of the land or a right of possession and interference by another person with the enjoyment of the land which is substantial and unreasonable. There is no need to prove any fault by the other party.

4.14 In *Sedleigh-Denfield v O'Callaghan*, Lord Wright described the test for establishing private nuisance as follows:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is

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118 *Civil Liability Act 2002* s 5B, which sets out general principles applying to the establishment of a duty of care in Western Australia.

119 Also known as remoteness of damage. See H Luntz, AG Hambly, R Hayes, *Torts: cases and commentary*, Butterworths, 1980, p 62. See also Halsbury's Laws of Australia, paragraph 300-80, citing *Tubemakers of Australia v Fernandez* (1976) 10 ALR 303, p 50 per Mason J and *Perre v Apand* [1999] HCA 36 per Kirby J at paragraph 259.

120 Economic loss which is not the result of injury to person or tangible property. In *Perre v Apand* [1999] 198 CLR 180, a manufacturer of potato chips supplied potato seeds infected with bacterial wilt to a number of growers, resulting in them being prohibited from exporting potatoes to Western Australia for five years. The High Court held the manufacturer owed the growers a duty of care to not cause them financial loss and should have foreseen that supplying them with infected seeds would affect the ability to sell potatoes, despite there being no physical injury to property or person.

121 Dr Anna Bunn, Senior Lecturer, Curtin University Law School, *Transcript of evidence*, 31 August 2018, p 2.

122 Submission 49 from Dr Anna Bunn and Michael Douglas, 15 February 2018, p 4.

123 Dr Anna Bunn, Senior Lecturer, Curtin University Law School, *Transcript of evidence*, 31 August 2018, p 10.

124 *Marsh v Baxter* [2014] WASC 187, at paragraph 302. See also *Sedleigh-Denfield v O'Callaghan* [1940] All ER 349, per Lord Atkin. A private nuisance can be caused by a number of things such as noise, odour, smoke, vibrations, dust and obstructions.

> impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.[125]

4.15 Assessing the existence of a private nuisance requires balancing what someone can legitimately do on their land against the neighbour's right not to have the use and enjoyment of their land unreasonably interfered with.

4.16 The former President of the Western Australian Court of Appeal stated:

> Specifically, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the hypersensitivity (if any) of the user or use of the claimant's land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.[126]

4.17 One of the main obstacles to succeeding in an action for private nuisance is establishing that the growing of GM crops in close proximity to a non-GM farm is an unreasonable interference with the use and enjoyment of that land. This is particularly the case in jurisdictions where growing GM crops is legal and grown under licence from an approved GM supplier.

Trespass to land

4.18 Trespass to land occurs when someone enters or remains upon or directly causes an object or other matter to come into contact with land in possession of another and leaving it there without authority or after that authority has been withdrawn.[127] For example, a trespass occurs where a person wrongfully sets foot on or causes soil to fall on another's property.[128]

4.19 As a trespass must be intentional, reckless or negligent, the plaintiff must demonstrate there has been a physical invasion of, or interference with, their exclusive possession of property.

4.20 It has been argued that the spread of GM material via wind drift or insect pollination would be unlikely to be regarded as a trespass due to it not constituting a direct interference.[129] However, it has also been stated that if the non-GM farmer can show that the GM farmer knew of a substantial certainty of cross-contamination, they may be liable for trespass.[130]

Strict liability

4.21 Strict liability has been applied to substances and activities considered inherently dangerous, including hazardous wastes, blasting and explosives, nuclear energy, as well as to dangerous animals. It does not depend on actual negligence or intent to harm and exists regardless of fault on the part of the defendant.

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125 *Sedleigh-Denfield v O'Callaghan* [1940] All ER 349, per Lord Wright. The High Court referred to this passage with approval in *Elston v Dore* [1982] HCA 71 per Gibbs CJ, Wilson and Brennan JJ.

126 *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] 42 WAR 287 per McClure P at p 118.

127 H Luntz, AG Hambly, R Hayes, *Torts: cases and commentary*, Butterworths, 1980, p 826.

128 Halsbury's Laws of Australia, paragraph 415-480, citing *Watson v Cowen* [1959] Tas SR 194.

129 Kanchana Kariyawasam, Legal Liability, Intellectual Property and Genetically Modified Crops: Their Impact on World Agriculture, *Pacific Rim Law & Policy Journal*, 2010, Vol. 19 No 3, p 473.

130 Sabrina Wilson, Induced Nuisance: Holding Patent Owners Liable for GMO Cross-Contamination, 2014-15, Volume 64, Issue 1, *Emory Law Journal*, p 184.

4.22 Strict liability can apply when a defendant brings or does something on their land that is abnormally dangerous or not natural which causes harm to the person or property of the plaintiff.[131]

4.23 Factors to consider when imposing strict liability are:

- the existence of a high degree of risk of some harm to the person, land, or chattels of others;
- the likelihood that the harm that results from such risk will be great;
- the inability to eliminate the risk by the exercise of reasonable care;
- the extent to which the activity is not a matter of common usage;
- the inappropriateness of the activity to the place where it is carried out; and
- The extent to which its value to the community is outweighed by the danger involved.[132]

4.24 The main issue that has been identified with applying strict liability to the use of GMOs is that they are not regarded as abnormally dangerous or superhazardous, having been licensed by the Regulator as safe.[133] Therefore, in the absence of a legislative prescription of strict liability, a farmer will have difficulties in demonstrating that GMOs were not a natural use of the land.

Cases concerning claims for economic loss caused by GM contamination

4.25 There appear to be few recent cases which have involved a claim for damages for economic loss caused by GM contamination.[134]

4.26 The Canadian case of *Hoffman v Monsanto Canada Inc and Bayer CropScience Inc* and the recent Western Australian case of *Marsh v Baxter* have received significant attention and been subject to substantial commentary. This has given rise to debate on whether the common law provides an adequate compensation mechanism for farmers claiming economic loss caused by GM contamination.

Hoffman v Monsanto Canada Inc and Bayer CropScience Inc

4.27 This case involved a class action by two Saskatchewan organic grain farmers, on behalf of all registered organic farmers in this Canadian province, against Bayer CropScience and Monsanto, the developers of GM canola. They sought damages for negligence, nuisance, trespass and strict liability[135] arguing GM canola had destroyed the export market for organic canola.

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131 Stuart J. Smyth and Drew L. Kershen, Agricultural Biotechnology: Legal Liability Regimes from Comparative and International Perspectives, *Global Jurist Advances*, 2006, Vol. 6, issue 2, Art 3, p 5. See: http://fbae.org/2009/FBAE/website/images/PDF%20files/Agricultural%20Biotechnology%20and%20legal%20liability.pdf. Viewed 14 November 2018. This has included blasting as well as the escape of dangerous animals.

132 Kanchana Kariyawasam, '*Legal Liability, Intellectual Property and Genetically Modified Crops: Their Impact on World Agriculture*', *Pacific Rim Law & Policy Journal*, 2010, Vol. 19 No.3, pp 475-6.

133 Statutory Review of the *Gene Technology Act 2000* and the Gene Technology Agreement, pp 38-39. See: http://webarchive.nla.gov.au/gov/20130504173903/http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-gtmc.htm. Viewed 9 November 2018.

134 Other cases have involved claims of patent infringement by Monsanto against farmers for the adventitious presence of GM material on their property. See, for example, *Monsanto Canada v Schmeiser* [2004] 1 S.C.R 902, cited in Michael Blakeney, Organic Versus GM Agriculture in the Courtroom in Australia and the USA, in *The Coexistence of Genetically Modified, Organic and Conventional Foods, Government Policies and Market Practices*, Springer, New York, 2016, p 130.

135 *Hoffman v Monsanto Canada Inc* S.K.Q.B 225, 2005.

4.28 The action for damages was unsuccessful.[136] Some of the factors the court took into account in making its decision included:

- neither a majority nor even a significant minority of the proposed class of organic farmers had suffered loss due to the inability to produce canola sufficiently free from GM contamination to be marketed as organic;
- no organic certifiers expressly prohibited either the use or adventitious presence of GMOs;
- many of the organic farmers had never grown organic canola;
- those that were growing organic canola, 10 years after the introduction of GM canola in Canada, were still finding markets for it; and
- developers of GM canola approved under Canadian federal law were not under a duty of care to farmers who claimed economic loss.

4.29 It has been argued that, following this case:

> it was determined in Canada that GM crops would not constitute a liability within the production of any form of commodity production, should that be non-GM, conventional or organic.[137]

Marsh v Baxter

4.30 The decisions of the Western Australian Supreme Court and Court of Appeal in *Marsh v Baxter*[138] concerned an unsuccessful claim for damages for economic loss by an organic farmer, Mr Marsh, against a neighbouring farmer, Mr Baxter, for contamination of his land by GM canola.

4.31 It appears to be the only case in Australia which has considered a claim by a farmer against another farmer for damages for economic loss caused by GM contamination.

4.32 A detailed summary appears in Appendix 2.

4.33 Mr Marsh ran an organic operation from 2004, farming cereal crops and sheep. Mr Baxter ran a conventional operation, farming cereal crops and sheep. He had also grown canola since 2000.

4.34 On advice from his agronomist, Mr Baxter sowed two of his paddocks (adjacent to Mr Marsh's farm) with GM canola seed. At the same time, Mr Baxter switched from direct harvesting, where crops are harvested immediately, to swathing, where crops are cut and left to dry for some weeks before collection.

4.35 Two hundred and forty-five canola swathes blew onto Mr Marsh's farm, which led his organic certifier, the National Association for Sustainable Agriculture Australia (NASAA) to suspend then decertify 70 per cent of his land in late 2010. It was recertified in 2013.[139]

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136 Submission 51 from Monash University, 15 February 2018, pp 3-4 and Stuart J Smyth, The state of genetically modified crop regulation in Canada, *Taylor & Francis Online*, 30 October 2014. See: http://www.tandfonline.com/doi/full/10.4161/21645698.2014.947843. Viewed 26 October 2018.

137 Stuart J Smyth, The state of genetically modified crop regulation in Canada, *Taylor & Francis Online*, 30 October 2014. See: http://www.tandfonline.com/doi/full/10.4161/21645698.2014.947843. Viewed 26 October 2018.

138 [2014] WASC 187; [2015] WASCA 169.

139 Joel Silver, Certified Organic, *Law Institute Journal – Law Institute of Victoria*, 1 November 2016. See: https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/November/Certified-organic. Viewed 26 October 2018.

4.36 Mr Marsh brought proceedings against Mr Baxter for negligence (pure economic loss) and private nuisance in the Supreme Court of Western Australia, failing at trial and on appeal.[140] The primary reasons for the failure of Mr Marsh's claims in negligence and private nuisance were:

- Mr Marsh did not prove he was owed a duty of care by Mr Baxter or that his loss was a reasonably foreseeable consequence of Mr Baxter's actions, which is needed to give rise to a duty of care against pure economic loss.
- Mr Marsh's choice to farm organic according to the NASAA requirements meant his land was put to a hypersensitive use (against other uses in Kojonup), for which private nuisance will not compensate.
- Mr Marsh never farmed canola or any other genetically compatible species.[141]

Evidence to the Committee on the adequacy of the common law

4.37 The Committee heard opposing views regarding the adequacy of the common law as a compensation mechanism.

Views that the common law is inadequate

4.38 Friends of the Earth Australia considered tort law inadequate to compensate farmers for GM contamination:

> 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 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.[142]

Views that the common law is adequate

4.39 Industry bodies, companies and some individuals believed the common law provides adequate remedies.[143] Some stated *Marsh v Baxter* set a precedent for claims for GM

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140 The High Court refused special leave to appeal. See *Marsh v Baxter* [2016] HCATrans 22 (12 February 2016).

141 Joel Silver, Certified Organic, *Law Institute Journal – Law Institute of Victoria*, 1 November 2016. See: https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/November/Certified-organic. Viewed 26 October 2018. See also Submission 49 from Dr Anna Bunn and Michael Douglas, 15 February 2018, pp 5-6; Submission 51 from Monash University, 15 February 2018, pp 4-5; Submission 64 from Hon Rick Mazza MLC, 16 February 2018, pp 1-2; Submission 69 from Pastoralists & Graziers Association of WA, 16 February 2018, p 5.

142 Jeremy Tager, Campaigner, Friends of the Earth Australia, *Transcript of evidence*, 31 August 2018, p 2. See also Submission 42 from National Association of Sustainable Agriculture Australia, 14 February 2018, p 2; Submission 90 from Dr John Paull, 18 February 2018, p 5; Submission 92 from MADGE Australia, 19 February 2018, p 2; Submission 93 from Gene Ethics, 20 February 2018, pp 1, 6; Submission 49 from Dr Anna Bunn and Michael Douglas, 15 February 2018, p 1.

143 Submission 66 from CropLife Australia, 16 February 2018, p 6; Submission 36 from Monsanto Australia and New Zealand Ltd, 14 February 2018, p 1; Submission 79 from WA Farmers, 16 February 2018, p 4; Submission 81 from Grain Industry Association of WA, 16 February 2018, p 3; Larissa Taylor, Chief Executive Officer, Grain Industry Association of WA, *Transcript of evidence*, 3 May 2018, p 6; Matthew Cossey, Chief Executive Officer, CropLife Australia, *Transcript of evidence*, 3 May 2018, p 6.

contamination[144] while others pointed out that 'each legal case is decided on its unique facts and circumstances'.[145]

4.40 In her submission Dr Karinne Ludlow, an Associate Professor in the Law Faculty of Monash University, refers to the possibility that liability in nuisance or negligence could be established:

> While the plaintiffs in the Australian case, *Marsh v Baxter,* were unsuccessful in their proceedings in the Western Australian Supreme Court, the peculiar facts of the case means that given appropriate facts, it remains possible that liability could be established in private nuisance and negligence following the inadvertent presence of GM crops on a third party's land.[146]

4.41 Dr Ludlow expanded on this view:

> I think that the joint judgment of the Western Australian Court of Appeal has left open the possibility for success. I would say it is not a precedent that would block any possible actions, but, of course, you would need the right factual circumstances. I think that the choice of Marsh v Baxter as a test case was a poor one. It was unlikely to have been successful right from the start. The factual scenario involved was one that was going to make it very difficult to succeed. If the factual situation changed…I think that it is still possible that an action could be successful. Whether those factual circumstances are likely to arise is a different question, but from a legal point of view I do not think that the opportunity to be successful is in any way closed.[147]

Committee observations

4.42 The Committee acknowledges:

- the challenges that have been identified with the common law as a compensation mechanism;
- the perception the common law is inadequate for this purpose; and
- *Marsh v Baxter* may have had a chilling effect on the making of claims for GM contamination.

4.43 However, the failure of a plaintiff to succeed in one case does not mean that the common law as a compensation mechanism has failed and such a conclusion should not be drawn from a single case.

4.44 Many of those seeking a new compensation mechanism to the common law raised inadequacies in the common law for claims of economic loss arising from contamination by GM materials that it would be fair to say would equally apply to common law claims for economic loss in matters unrelated to GM contamination. That is, many of the inadequacies of the common law as a compensation mechanism for economic loss are not unique to farmers seeking compensation for economic loss for contamination by GM materials under the common law.

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144 Submission 62 from Grain Producers Australia, 16 February 2018, p 3; Larissa Taylor, Chief Executive Officer, Grain Industry Association of WA, *Transcript of evidence*, 3 May 2018, p 6.

145 Brian Bradley, Lawyer and Associate Member, Pastoralists and Graziers Association of WA, *Transcript of evidence*, 3 May 2018, p 6.

146 Submission 51 from Monash University, 15 February 2018, p 3.

147 Dr Karinne Ludlow, Associate Professor, Faculty of Law, Monash University, *Transcript of evidence*, 31 August 2018, p 2.

FINDING 7

Farmers seeking compensation for economic loss arising from contamination by genetically modified material face many of the same inadequacies in the common law as a compensation mechanism for economic loss as cases that do not involve contamination by genetically modified material.

FINDING 8

There is not a sufficient body of case law to draw a conclusion that the common law is an inadequate compensation mechanism for contamination by genetically modified material.

4.45 Furthermore, there may be other scenarios which may lead to a successful claim where the facts are distinguishable from *Marsh v Baxter*.

Statutory compensation scheme

4.46 One of the main features of a statutory compensation scheme is the 'no fault' principle, where a claimant receives compensation for losses if they satisfy the scheme's criteria, regardless of fault or negligence.

4.47 Some stakeholders have identified difficulties in seeking compensation under the common law (including the challenges in establishing negligence) in their calls for a compensation scheme to provide cover for economic loss to farmers for GM contamination.[148]

Evidence to the Committee on statutory compensation schemes

4.48 The Committee heard opposing views regarding the merits of introducing a statutory compensation scheme.

Views in favour

4.49 A number of organisations,[149] some of whom gave evidence to this inquiry, have proposed an approach called 'Principles for Farmer Protection Legislation'. A copy is attached in Appendix 3. The rationale is:

- allowing simple and efficient compensation for losses suffered by non-GM landholders whose land is contaminated by GM crops, seed or other GM material;
- making GM seed merchants responsible for compensating landholders when GM contamination occurs, by requiring them to pay a levy on seed sales into a fund; and
- to enable farmers and other affected parties to rapidly and efficiently recover for any losses, extra costs or harm they suffer, without having to resort to the common law.[150]

4.50 Gene Ethics contends that a compensation fund is a fair, affordable approach that provides:

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148 Submission 39 from Paul and Meg Wilson, 14 February 2018, p 2; Submission 40 from Organic and Biodynamic Meats Co-operative (Western Australia), 14 February 2018, p 2; Submission 73 from Friends of the Earth Australia, 16 February 2018; Submission 75 from Australian Food Sovereignty Alliance, 16 February 2018, p 3; Submission 92 from MADGE Australia, 19 February 2018; Submission 93 from Gene Ethics, 20 February 2018, p 3.

149 Friends of the Earth Australia, FOODwatch, GM-Free Farmers, Conservation Council of Western Australia, The Wilderness Society of Western Australia, Gene Ethics, South Australia Genetic Food Information Network, GM-Free Australia Alliance, Australian Food Sovereignty Alliance, MADGE Australia.

150 Submission 93 from Gene Ethics, 16 February 2018, p 13.

> a no-fault system; automatic compensation for proven economic loss, extra costs and other harms; compensation for all landholders, including public and other lands, supply chain managers and the food industry; independent management of the farmer protection fund so that it is not political; funding for the scheme through a small levy on all GM seeds; assess and set the levy annually, responding to the demand on the fund's resources; and incentives for the GM industry to minimise GM contamination.[151]

4.51 Friends of the Earth Australia submitted that a fund that allows rapid, no-fault compensation for loss or harm caused by GM contamination is the most effective mechanism for protecting and compensating landholders.[152]

Views against

4.52 The WA Farmers Federation referred to the legality of GM crops when expressing the view that the Principles for Farmer Protection Legislation were unnecessary.[153] The Pastoralists and Graziers Association of WA referred to them as meeting 'an illusory problem'.[154]

4.53 In its submission, CropLife Australia highlighted that the 2006 statutory review of the *Gene Technology Act 2000* considered the introduction of a compensation scheme and concluded it should not be introduced on the basis the operation of the common law was sufficient.[155]

4.54 The State Agricultural Biotechnology Centre submitted a compensation scheme would give rise to the making of false claims[156] and inhibit or stifle agricultural innovation.[157]

Evidence regarding a compensation scheme covering other risks

4.55 There were differences of opinion on whether a compensation scheme should also cover contamination risks such as weeds,[158] disease,[159] and spray drift.[160] Some spoke about the

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151 Robert Phelps, Executive Director, Gene Ethics, *Transcript of evidence*, 23 April 2018, p 2.

152 Submission 73 from Friends of the Earth Australia, 16 February 2018, p 1.

153 Maddison McNeil, Executive Officer, WA Farmers Federation, *Transcript of evidence*, 3 May 2018, p 10.

154 Gary McGill, Chairman, Pastoralists and Graziers Association of WA Grain Committee, *Transcript of evidence*, 3 May 2018, p 9. See also Tony May, Managing Director, Monsanto Australia and New Zealand Ltd, *Transcript of evidence*, 3 May 2018, p 11 where he stated that this inquiry was the first he had been made aware of them.

155 Submission 66 from CropLife Australia, 16 February 2018, p 6. See also Submission 79 from WA Farmers, 16 February 2018, p 4.

156 Submission 77 from State Agricultural Biotechnology Centre, 16 February 2018, p 7. See also Submission 79 from WA Farmers, 16 February 2018, p 3 and Maddison McNeil, Executive Officer, WA Farmers Federation, *Transcript of evidence*, 3 May 2018, p 8.

157 Submission 77 from State Agricultural Biotechnology Centre, 16 February 2018, p 2; Matthew Cossey, Chief Executive Officer, CropLife Australia, *Transcript of evidence*, 3 May 2018, p 2; Dr Karinne Ludlow, Associate Professor, Faculty of Law, Monash University, *Transcript of evidence*, 31 August 2018, p 10. This was challenged by others who gave evidence to the Committee, who stated the possibility of fraud exists in any compensation scheme. They also pointed to other industries where compensation schemes exist which have not, in their view, adversely affected innovation. See Jeremy Tager, Campaigner, Friends of the Earth Australia, *Transcript of evidence*, 31 August 2018, p 5; Dr John Paull, Research Scientist, *Transcript of evidence*, 24 April 2018, p 7; Robert Phelps, Executive Director, Gene Ethics, *Transcript of evidence*, 23 April 2018, pp 7-8 and Shirley Collins, Representative, FOODwatch, *Transcript of evidence*, 23 April 2018, p 5.

158 Submission 18 from Frank Panizza, 7 February 2018; Submission 66 from CropLife Australia, 16 February 2018, p 4; Submission 77 from State Agricultural Biotechnology Centre, 16 February 2018, p 2; Submission 98 from Department of Primary Industries and Regional Development, 2 March 2018, p 4.

159 Submission 77 from State Agricultural Biotechnology Centre, 16 February 2018, p 2.

160 Submission 3 from WA Farmers, 16 February 2018, p 3; Submission 34 from the University of Saskatchewan, 13 February 2018, p 9.

increased risk of weed and disease issues with organic farming practices,[161] which can adversely affect neighbouring farms.[162] Others pointed to these issues as being common to all farming systems.[163]

Committee observation

4.56 While statutory compensation schemes are an alternative to the common law as a means of dealing with compensation claims, they do not remove the possibility of legal action and its associated drawbacks identified in paragraph 4.6. This can result from appeals from decisions made under such schemes.[164]

Potential legal issues with a State based statutory compensation scheme

4.57 The following issues were raised with State legislation establishing a compensation fund.

Excise levy

4.58 The Committee received evidence that State legislation establishing a compensation fund which was financed by the imposition of a levy on farmers may be invalid. This was because such a levy may be categorised as an excise levy which the Commonwealth has the exclusive power to impose pursuant to section 90 of the *Commonwealth Constitution*.[165]

4.59 The Department submitted that any compensation scheme funded through a levy would likely need to be part of a national scheme.[166]

4.60 An alternate view given by Dr Anna Bunn, a Senior Lecturer at Curtin University Law School, was that a levy would not necessarily be treated as an excise:

> 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.[167]

Inconsistency with the Gene Technology Act 2000

4.61 State legislation establishing a compensation fund must be consistent with the GTA to ensure it is not invalid pursuant to section 109 of the *Commonwealth Constitution*. The fact that the GTA does not provide for compensation was referred to as a reason why State legislation would be unlikely to be directly or indirectly inconsistent.[168]

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161 Submission 21 from Sam West, 8 February 2018, p 1.

162 Submission 77 from State Agricultural Biotechnology Centre, 16 February 2018, p 2.

163 See Robert Phelps, Executive Director, Gene Ethics, *Transcript of evidence*, 23 April 2018, p 7.

164 See the Principles of Farmer Protection Legislation in Appendix 3, which states 'The Administrator may seek submissions from third parties regarding compensation and interested parties may appeal decisions under the Judicial Review Act.'

165 Private submission.

166 Submission 98 from Department of Primary Industries and Regional Development, 2 March 2018, pp 3-4. See letter from Hon Gail Gago MLC to Matthew Cossey, 6 September 2012, Table Paper 4 tabled by Matthew Cossey, Chief Executive Officer, CropLife Australia, during a hearing on 3 May 2018, p 6 and Submission 77 from State Agriculture Biotechnology Centre, 16 February 2018, p 5.

167 Dr Anna Bunn, Senior Lecturer, Curtin University Law School, *Transcript of evidence*, 31 August 2018, p 12.

168 Private submission. See also Dr Anna Bunn, Senior Lecturer, Curtin University Law School, *Transcript of evidence*, 31 August 2018, p 12, who remarked, when referring to the matters the GTA deals with, such as prohibiting GM dealings unless they are licensed, 'I do not see that a compensation scheme really crosses into that area.'

Committee observation

4.62 The Committee has not drawn a conclusion on whether a levy imposed on farmers as part of any state based statutory compensation scheme may be categorised as an excise levy and therefore invalid. Further research and analysis would be required on such a question.

Insurance

4.63 Section 62(3) of the GTA provides that licence conditions for the release of GMOs may include a requirement that the licence holder is to be adequately insured against any loss, damage, or injury that may be caused by the licensed dealing. However, there is currently no requirement that GMO licence holders hold insurance.[169]

4.64 Insurance is available to farmers to cover a number of risks associated with primary production, including various weather incidents such as fire, hail and drought as well as spray drift,[170] pests and plant disease. The Committee received evidence, however, of insurance policies containing specific exclusions for liability caused by GMOs. This includes 'blending or contamination claims' and 'loss or damage resulting from the unintentional, non-agreed or improper blending or mixing of GMOs with other organisms or products'.[171]

4.65 The Insurance Council of Australia gave the following explanation about why, historically, insurance cover has not been offered to cover damage alleged to have been caused by GMOs:

> It is in essence that there has been no body of evidence around claims that we would see coming through the courts that have ended in economic loss. On top of that, there is no statutory regime that imposes any kind of penalties that operators using GMO may need to go and seek cover for; so no mandatory insurance provisions there.[172]
>
> While there is no economic loss to measure, it is very hard to set up a premium in essence to amortise that over how many GMO farmers there are and establish some kind of commercially viable product.[173]

4.66 The Committee has identified the following examples of crop insurance policies which provide cover for damage caused by contamination from GMOs:

- CGU Crop Insurance Policy: Maximum cover of $100,000 for damage to harvested seed caused by seed contaminated by a GMO or substance occurring between the taking out of the policy and the final harvest date.[174]

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169 Statutory Review of the *Gene Technology Act 2000* and the Gene Technology Agreement. See: http://webarchive.nla.gov.au/gov/20130504173903/http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-gtmc.htm. Viewed 2 November 2018, pp 41-2. See also Submission 93 from Gene Ethics, 16 February 2018, p 2.

170 Spray or pesticide drift is the airborne movement of pesticides from an area of application to an unintended site. See Duncan Young, Grains Section President, WA Farmers Federation, *Transcript of evidence*, 3 May 2018, pp 8-9.

171 Submission 86 from FOODwatch, 16 February 2018, p 7; Submission 80 from Janet Liddelow, 16 February 2018, p 2.

172 Karl Sullivan, General Manager, Risk, Insurance Council of Australia, *Transcript of evidence*, 31 August 2018, pp 1-2. See also Department for Environment Food and Public Affairs, Summary of responses to Defra consultation paper in proposals for managing the coexistence of GM, conventional and organic crops, November 2007, p 12 (see Submission 5 from United Kingdom Department for Environment, Food and Rural Affairs, 30 January 2018).

173 ibid., p 2.

174 CGU Crop Insurance Policy. See: https://www.cgu.com.au/sites/default/files/media/business/pds/CGU%20Crop%20C0667%20REV14%200417.pdf. Viewed 15 November 2018.

- WFI Early Bird Crop Policy: Maximum cover of the greater of $200,000 or the aggregate amount shown on the certificate of insurance for crop damage directly caused by contamination from a GMO or substance.[175]

4.67 Insurance Australia Group Limited (IAG), the owner of CGU and WFI, informed the Committee this cover was added in July 2017 due to the increased general awareness around GM crops and the need to provide a degree of protection to their customers.[176]

4.68 In 2018, CGU sold 55 policies and WFI, 1,695. There have been no claims and payouts made pursuant to the clauses.[177]

4.69 Some submitters drew attention to what they regarded as drawbacks of insurance as a model for compensation, such as:

- requiring claimants to identify neighbouring farms or operators they allege are at fault for GMO contamination, creating divisiveness;[178]
- delays in payouts;[179]
- unfairness in requiring non-GM growers to pay premiums, given they are not creating the alleged harm;[180] and
- the potential cost of premiums.[181]

4.70 These perceived drawbacks were put to The Insurance Council of Australia, which described them as 'common perceptions of drawbacks of insurance' and pointed to successful claims constituting the vast majority of all claims:

> There are 99.5 per cent of people who get compensated quickly and walk away the better for the insurance transaction. It is very easy for some stakeholders to characterise any use of insurance as ultimately resulting in a bad experience for the user, but that is certainly not what we see in 99 per cent of cases.
>
> It is certainly not in the insurer's interest to hold back on payment, but you do need to satisfy yourself that it is a legitimate claim and what payment should be made at what speed and for what processes.[182]

Multi-Peril Crop Insurance

4.71 The Committee received evidence of a type of insurance which may provide cover for damage caused by GMOs, known as 'Multi-Peril Crop Insurance' (MPCI).[183] This provides cover for a larger number of risks than under most crop insurance policies.[184]

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175 WFI Early Bird Crop Policy. See: https://www.wfi.com.au/sites/wfi/files/documents/WFI-Early-Bird-Crop-Policy.pdf. Viewed 15 November 2018.

176 Veronica Newman, Government Relations Manager, Insurance Australia Group Limited, Letter, 14 January 2019; Veronica Newman, Government Relations Manager, Insurance Australia Group Limited, Email, 15 January 2019.

177 ibid.

178 Submission 93 from Gene Ethics, 20 February 2018, p 4; Submission 86 from FOODwatch, 16 February 2018, p 7.

179 ibid.

180 Submission 90 from Dr John Paull, 18 February 2018, p 6.

181 Submission 73 from Friends of the Earth Australia, 16 February 2018, p 5.

182 Karl Sullivan, General Manager, Risk, Insurance Council of Australia, *Transcript of evidence*, 31 August 2018, pp 7-8.

183 Submission 22 from Insurance Council of Australia, 9 February 2018; Submission 90 from Dr John Paull, 18 February 2018, p 6.

184 David Barbeler, Multi-peril Crop Insurance: Challenges and Opportunities, *Insurance and Risk*, August – September 2016. See: https://insuranceandrisk.com.au/article/multi-peril-crop-insurance-challenges-and-opportunities/. Viewed 6 November 2018.

4.72 This is not, as yet, a common form of insurance cover. According to The Insurance Council of Australia MPCI is 'in its absolute infancy'[185] and 'relatively new in the Australian market'.[186]

4.73 Various commentators have pointed to the significant costs of taking out MCPI as one drawback to its uptake in Australia.[187]

Proposal for Compulsory Third Party GMO Incident Scheme Insurance

4.74 Dr John Paull, a researcher in the area of agricultural science at the University of Tasmania, submitted that a model he described as Compulsory Third Party GMO Incident Scheme insurance should be adopted.[188]

4.75 Dr Paull is of the view that this model, referred to as a risk management strategy, has a long history of working successfully for all parties in other harm situations (e.g. motor accidents), including in WA. Some of the features of this model are:

- the collection of aggregated premiums from the potentially harming party;
- delivering a remedy, at little or no cost, on a no fault basis, decoupling the harming party from the harmed party, eliminating any acrimony;
- outsourcing the management to existing insurance companies or a government business enterprise, such as The Insurance Commission of Western Australia and the Tasmanian Motor Accidents Insurance Board; and
- the recovery of costs from the harming party.[189]

4.76 Dr Paull said premiums could be collected on GM seed sales at the point of sale.[190]

Committee observations

4.77 It is not possible for the Committee to make an assessment on the effectiveness of insurance as a compensation mechanism due to the lack of evidence on any claims having been made for losses caused by GM contamination under insurance policies in Western Australia.

4.78 It is also not possible to comment on insurance models referred to in evidence to the Committee due to their hypothetical nature and a lack of operational data.

4.79 It is notable that insurance instruments are being developed to cover potential loss from GM contamination, which is a relatively recent development.

Other possible statutory compensation mechanisms raised in submissions

4.80 Some of the other compensation mechanisms referred to in evidence to the inquiry were as follows.

Competition and Consumer Act 2010 (Cth)

4.81 The object of the *Competition and Consumer Act 2010* (Cth) is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for

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185 Karl Sullivan, General Manager, Risk, Insurance Council of Australia, *Transcript of evidence*, 31 August 2018, p 2.

186 Submission 22 from Insurance Council of Australia, 9 February 2018.

187 David Barbeler, Multi-Peril Crop Insurance: Challenges and Opportunities, *Insurance and Risk*, August – September 2016. See: https://insuranceandrisk.com.au/article/multi-peril-crop-insurance-challenges-and-opportunities/. Viewed 6 November 2018. See also the statement by the Minister for Agriculture, Hon Alannah MacTiernan MLC on MPCI at Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2018, pp 9127-8.

188 Submission 90 from Dr John Paull, 18 February 2018.

189 ibid., pp 7-8.

190 Ibid, p 8. See also Dr John Paull, Research Scientist, *Transcript of evidence*, 24 April 2018, p 5.

consumer protection'.[191] One of the ways it does this is by making it illegal for business to engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses.[192]

4.82 CropLife Australia submitted:

> The *Consumer and Competition Act 2010* (Cth) and relevant Western Australian consumer protection legislation would also afford redress to persons affected by purchasing non-GM seed that unintentionally contained low levels of approved GM material.[193]

4.83 In a hearing before the Committee, Dr Anna Bunn, while confirming this application of the legislation, stated:

> 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.[194]

Civil Liability Act 2002

4.84 The *Civil Liability Act 2002* codifies and in some cases, varies, certain common law rules of negligence in relation to foreseeability, standard of care, causation and damages.[195]

4.85 In their submission, Dr Anna Bunn and Michael Douglas recommended the Law Reform Commission consider amendments to the *Civil Liability Act 2002*, which could provide affected farmers with compensation.[196]

4.86 They suggested the introduction of a statutory concept of 'genetic damage' or a 'statutory tort, tailored to provide compensation for affected farmers', which they stated would, ideally, be the subject of an inquiry by the Law Reform Commission of Western Australia.[197]

4.87 Dr Bunn provided the following further information:

> 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.[198]

4.88 Mr Douglas clarified that any use of a statutory tort would still be subject to the inherent drawbacks accompanying taking legal action, as identified in paragraph 4.6, such as costs.[199]

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191 *Competition and Consumer Act 2010* (Cth), s 2.

192 *Competition and Consumer Act 2010* (Cth), Schedule 2, s 18. See also Australian Competition & Consumer Commission, Advertising and selling guide. See: https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct. Viewed 7 November 2018.

193 Submission 66 from CropLife Australia, 16 February 2018, p 3.

194 Dr Anna Bunn, Senior Lecturer, Curtin University Law School, *Transcript of evidence*, 31 August 2018, p 8.

195 Civil Liability Amendment Bill 2003, *Explanatory Memorandum*, Legislative Assembly, p 1.

196 Submission 49 from Dr Anna Bunn and Michael Douglas, 15 February 2018, p 8.

197 ibid., pp 1-2.

198 Dr Anna Bunn, Senior Lecturer, Curtin University Law School, *Transcript of evidence*, 31 August 2018, p 9.

199 Michael Douglas, Senior Lecturer, University of Western Australia, *Transcript of evidence*, 31 August 2018, p 10.

CHAPTER 5
Compensation approaches in other jurisdictions

Introduction

5.1 The Committee undertook a desktop review of approaches to compensation for economic loss caused by GM contamination in other Australian and some overseas jurisdictions. The review provided an overview of approaches in other jurisdictions, including:

- common law tort remedies;
- statutory based compensation schemes; and
- statutory based strict liability.

5.2 Australia, Canada and the United States do not have compensation schemes and common law causes of action apply.

5.3 Other countries, including Austria, Denmark, Portugal and Germany, apply strict liability or have set up a dedicated compensation scheme.[200]

5.4 The Committee has set out the approaches of jurisdictions in Tables 2, 3 and 4.

5.5 The Committee has also provided more detail on:

- the statutory compensation schemes that were introduced in Denmark and Portugal; and
- the approaches in the United States and Canada, given their status as two of the leading producers of GM crops.

Approaches in other jurisdictions

Table 2. *GM compensation approaches to economic loss in other Australian jurisdictions*

Jurisdiction	Legislation regulating GMOs	Compensation mechanism
New South Wales	*Gene Technology (New South Wales) Act 2003* and the *Gene Technology (GM Crop Moratorium) Act 2003*. Under the latter, with the exception of GM canola, which has been grown commercially since 2008, there is a moratorium on all GM food crops.	Common law[201]
Victoria	*Control of GM Crops Act 2004*, under which no orders have been made declaring GM free regions.	Common law[202]

200 Further information can be obtained from the Library of Congress, Restrictions on Genetically Modified Organisms. See: http://www.loc.gov/law/help/restrictions-on-gmos/. Viewed 1 November 2018.

201 The Department of Primary Industries stated it is unaware of any examples of contamination and that if such an event were to occur the common law could provide adequate remedies. Philip Wright, Director Science, Chief Scientist, Chief Scientist's Branch, Department of Primary Industries, Email, 3 November 2017.

202 The Department of Economic Development, Jobs, Transport and Resources stated that, as a general regulatory principle, the State Government will generally not intervene in instances which can be addressed through civil

Jurisdiction	Legislation regulating GMOs	Compensation mechanism
Queensland	*Gene Technology (Queensland) Act 2016* No moratorium legislation is in force.	Common law
South Australia	*Gene Technology Act 2001* and the *Genetically Modified Crops Management Act 2004* There is a state-wide moratorium in place on the growing of GM crops, which is currently being reviewed.[203]	Common law
Tasmania	*Genetically Modified Organisms Control Act 2004*. There is a moratorium on the commercial release of GMOs into the environment.[204]	Common law
Northern Territory	*Gene Technology (Northern Territory) Act 2014*. No moratorium legislation is in force.	Common law
Australian Capital Territory	There is a moratorium on three varieties of GM canola under the *Gene Technology (GM Crop Moratorium) Act 2004*, which designates the territory as an area in which certain genetically modified food plants may not be cultivated.[205]	Common law

Table 3. *GM compensation approaches to economic loss in the European Union*

Jurisdiction	Legislation regulating GMOs	Compensation mechanism
European Union	There is a comprehensive and strict regulatory regime in place governing GMOs.[206]	This varies between Member States.

remedies. Stuart Holland, Manager Plant Industry Policy, Agriculture Policy, Employment, Investment and Trade Group, Agriculture, Food and Fibre Division, Department of Economic Development, Jobs, Transport and Resources, Email, 1 November 2017.

203 Madeleine Stuchbery, 'Government review into South Australian GM crops', *The Weekly Times,* 18 September 2018. See also http://pir.sa.gov.au/primary_industry/genetically_modified_gm_crops/gm_review.

204 Tasmanian Government, Department of Primary Industries, Parks, Water and Environment, Tasmanian Gene Technology Policy 2014-2019. See: https://dpipwe.tas.gov.au/agriculture/tasmanian-gene-technology-policy-2014-2019. Viewed 1 November 2018.

205 Elizabeth Hallam, Ag Senior Policy Officer, Health Improvement Projects, Population Health Protection and Prevention, Email, 23 October 2017.

206 Library of Congress, Restrictions on Genetically Modified Organisms: France. See: http://www.loc.gov/law/help/restrictions-on-gmos/eu.php. Viewed 16 November 2018.

Jurisdiction	Legislation regulating GMOs	Compensation mechanism
	Authorisation is based solely on an evaluation of the risks of the GMO on health and the environment and excludes the consequences of contamination by GMOs.[207] Member States may take appropriate measures to avoid the unintended presence of GMOs in other products.[208] A number of Member States have adopted various measures aimed at preventing contamination by GMOs, with some declaring themselves GM free.[209]	
Austria	Since 1999 there has been a ban on GMO cultivation.[210]	A detailed liability regime is in force.[211]
Denmark	*Genetically Modified Crops (Co-existence) Act 2004*	A special compensation scheme is in force. See paragraphs 5.6 to 5.9 for further details.
France	Relevant provisions of the Environmental Code and the Rural Code.[212]	A strict liability regime applies and compensation is limited to the difference in price between a GM and non-GM labelled product.[213]

207 Authorisation of GMOs is regulated by Directive 2001/18/EC on the deliberative release of GMOs in the environment and Regulation 1829/2003 on the marketing of GMOs for food and feed.

208 Article 26a of Directive 2001/18/EC. This reflects the principle of subsidiarity which recognises it is an issue better handled at national or regional level.

209 International Federation of Organic Agricultural Movements European Union Group, Preventing GMO Contamination, *An Overview of National 'Coexistence' Measures in the EU*, 2014, pp 18-19. See: https://www.ifoameu.org/sites/default/files/ifoameu_policy_gmos_dossier_201412.pdf. Viewed 1 November 2018. This contains a useful table giving an overview of national measures of EU Member States preventing GM contamination.

210 ibid., p 23.

211 ibid. See also Submission 89 from Bernhard Alexander Koch, 17 February 2018, p 2, 28-9, 110-1.

212 Library of Congress, Restrictions on Genetically Modified Organisms: France. See: http://www.loc.gov/law/help/restrictions-on-gmos/france.php. Viewed 1 November 2018.

213 International Federation of Organic Agricultural Movements European Union Group, Preventing GMO Contamination, *An Overview of National 'Coexistence' Measures in the EU*, 2014, p 16. See: https://www.ifoameu.org/sites/default/files/ifoameu_policy_gmos_dossier_201412.pdf. Viewed 1 November 2018. See also Library of Congress, Restrictions on Genetically Modified Organisms: France, http://www.loc.gov/law/help/restrictions-on-gmos/france.php. Viewed 1 November 2018.

Jurisdiction	Legislation regulating GMOs	Compensation mechanism
Germany	Part V of the *Genetic Engineering Act 1993*.[214]	Strict liability is imposed for the accidental contamination of GMOs.[215]
Portugal	Decree law No 160/2005, which set up a compensation scheme, was previously in force. See paragraphs 5.10 to 5.11 for further details.	Civil law
United Kingdom	*Environmental Protection Act 1990*.	Common law[216]

214 Submission 88 from German Federal Ministry of Agriculture and Food, 16 February 2018.

215 Library of Congress, Restrictions on Genetically Modified Organisms: Germany. See: http://www.loc.gov/law/help/restrictions-on-gmos/germany.php. Viewed 2 November 2018.

216 Submission 5 from United Kingdom Department for Environment, Food and Rural Affairs, 31 January 2018, which states 'Currently there are no plans for GM crops to be grown commercially in the UK, and we do not have any plans for compensation measures in respect of GM contamination'. See also Bernhard A. Koch, 'Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops', *European Centre of Tort and Insurance Law*, 2007, p 91. See: https://www.usda.gov/sites/default/files/documents/EU_Comp_Schemes_on_GE_from_MM.pdf. Viewed 8 November 2018.

Table 4. *GM compensation approaches to economic loss in other jurisdictions*

Jurisdiction	Legislation regulating GMOs	Compensation mechanism
Canada	*Food and Drugs Act 1985*	Common law
New Zealand	The use of genetically modified organisms must be approved under the *Hazardous Substances and New Organisms Act 1996*.[217] At present, no genetically modified products manufactured in New Zealand are commercially available.[218]	Common law[219]
Switzerland	Federal Law relating to Non-human Gene Technology. The country has a moratorium on the commercial cultivation of GM crops (it is permitted for research). In 2016 the Swiss Cabinet approved an extension from 2017 to 2021.	Strict liability applies to any damage to agricultural or forestry enterprises by authorised GMOs[220]
United States	Under the Food, Drug, and Cosmetic Act 1938, substances added to food can be classified as food additives that require approval from the Food and Drug Administration (FDA) that they are safe or are generally recognised as safe. In a 1992 policy statement, the FDA stated that in most cases it would treat foods derived from GMOs like those derived from conventionally bred plants, and that most foods derived from GM plants would be presumptively generally regarded as safe.[221]	Civil remedies

217 More detail can be found at https://www.loc.gov/law/help/restrictions-on-gmos/new-zealand.php. Viewed 15 November 2017.

218 New Zealand Ministry for the Environment, viewed 2 November 2018, http://www.mfe.govt.nz/more/hazards/new-organisms/genetic-modification-new-zealand/about-gm-new-zealand.

219 Submission 93 from Gene Ethics, 20 February 2018, p 10.

220 Markus Muller-Chen, Economic Loss Caused by GMOs in Switzerland, in Koch B.A. (eds) Economic Loss Caused by Genetically Modified Organisms, Tort and Insurance Law, Vol 24, Springer, Vienna, 2008. See: https://www.alexandria.unisg.ch/33341/1/Economic%20Loss%20Caused%20by%20GMOs%20in%20Switzerland.pdf. Viewed 2 November 2018. See also Submission 89 from Bernhard Alexander Koch, 17 February 2018.

221 Library of Congress, Restrictions on Genetically Modified Organisms: United States. See: http://www.loc.gov/law/help/restrictions-on-gmos/usa.php. Viewed 1 November 2018.

Denmark

5.6 In 2005, Denmark introduced a dedicated compensation scheme for losses due to the presence of GM material in conventional and organic crops. This reflected the wish of the Danish Parliament to give farmers cultivating conventional or organic crops easy access to compensation for loss of income arising from GM material in their crops.[222] This is despite no GM crops having yet been grown in Denmark.

5.7 The scheme was approved by the European Commission after an assessment of whether it was compatible with the common market under Article 87 of the Treaty Establishing the European Community (EC Treaty).[223]

5.8 The scheme has the following features:

- The scheme only covers loss of income by farmers in primary agricultural production which is a direct result of the admixture of GM crops in non-GM crops above 0.9%. The presence of GM material above the 0.9% threshold could cause a loss of income to the farmer as these conventional or organic crops have now to be labelled as containing GMOs. As a consequence, their market price will be lower.

- The duration of the scheme is limited until a privately financed insurance solution is found. At present there is no insurance available in Denmark due to the lack of GM crops having been grown, making an adequate risk assessment impossible.

- Each farmer cultivating GM crops pays a cultivation fee of 100 DKK (approximately AUS $20) per hectare of land cultivated with GM crops to the Ministry, which is paid into the compensation fund.

- Compensation is limited to:
  - the price difference between the market price of a crop that had to be labelled and containing GM material and a crop for which no labelling is required; and
  - cases where the GM material found is of the same crop or a closely related crop as the non-GM crops in which the GM crop is found and the GM crop is grown within a specified area (a specified distance from the GM crops).

- Compensation may be given for the conversion periods until the crop can again be sold as organic.

- Compensation is payable regardless of whether the relevant GM farmer can be identified.

- The presence and amount of GM material will be verified by testing and analysis.

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222 Submission 4 from Ministry of Environment and Food of Denmark, 22 January 2018, p 2.

223 The Treaty Establishing the European Community provides:

> Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

European Commission, Article 87 of the Treaty Establishing the European Community (ex Article 92). See: http://ec.europa.eu/competition/legislation/treaties/ec/art87_en.html. Viewed 8 November 2018. This is now Article 107 of the Treaty on the Functioning of the European Union.

- The Ministry will take measures to recover from the GM farmer, if they can be identified, amounts paid by way of compensation if fault can be demonstrated.[224]

5.9 The Committee notes that as no GM crops are currently grown in Denmark; no cultivation fees have been paid and no claims for compensation have been made, the scheme has yet to be tested.[225]

Portugal

5.10 Like Denmark, Portugal's compensation scheme was approved by the European Commission and had similar features, though, unlike Denmark:

- a tax of EURO 4 was to be levied on each package containing 80,000 seeds of a GM crop sold or used in Portugal and paid by producers or sellers of GM seed; and
- GM maize is grown in Portugal.

5.11 The Portuguese Ministry of Agriculture, Forestry and Rural Development has advised that Decree law No 160/2005, which set up a compensation scheme, was in force for five years but has since lapsed. The Ministry also advised it is not aware of any complaints regarding contamination of non-GM crops by GM maize having been made while the law was in force.[226]

United States

5.12 Since the Former Committee's report, there appears to have been little change in the position of the USDA on GM crops as well as compensation measures.[227] The United States continues to strongly embrace gene technology and be a leading producer of global GM crops, including canola, cotton, soybeans, corn and maize. It also has no dedicated compensation scheme for economic loss to farmers caused by GM crops, which is left to civil law causes of action.[228]

5.13 In 2012 the USDA Advisory Committee on Biotechnology & 21st Century Agriculture (AC21 Committee) released a report which considered compensation mechanisms.

5.14 The AC21 Committee concluded it is difficult to obtain direct data on actual farmer losses suffered for a variety of reasons, including its confidentiality and reluctance by farmers to disclose that their products may sometimes not meet market specifications.

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224 Submission 4 from Ministry of Environment and Food of Denmark, 22 January 2018. See also Steen Bonde, Head of Department, Danish Agricultural Agency, Ministry of Environment and Food, Transcript of evidence, 31 August 2018, pp 1-2.

225 Steen Bonde, Head of Department, Danish Agricultural Agency, Ministry of Environment and Food, *Transcript of evidence*, 31 August 2018, p 1.

226 Paula Cruz de Carvalho, Deputy Director General, Portuguese Directorate General for Food and Veterinary, Email, 14 November 2018, attaching answers to written questions

227 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 8, *Gene Technology Bill 2001 and the Gene Technology Amendment Bill 2001*, 11 July 2003, p 161.

228 While there have been attempts to introduce legislation providing for liability for any injury caused to farmers by GMOs, such as the *Genetically Engineered Organism Liability Act 2010*, these do not appear to have progressed beyond the committee stage in the House of Representatives. See: https://www.congress.gov/bill/111th-congress/house-bill/5579. Viewed 2 November 2018. See also Debra M. Strauss, We Reap What We Sow: The Legal Liability Risks of Genetically Modified Food, *Journal of Legal Studies in Business*, Vol. 16, 2010, pp 171-2. See: https://journaloflegalstudiesinbusiness.files.wordpress.com/2015/08/wrwws_2010_149to177.pdf. Viewed 2 November 2018.

5.15 The AC21 Committee recommended the USDA gather information on economic losses to farmers caused by unintended GM presence and set up a pilot program for a compensation mechanism, if this is justified by the information collected.[229]

5.16 A survey conducted by the USDA in 2014 found:

- Losses by organic growers amounted to roughly $6.1 million over the years 2011-14 (compared to $5.5 billion in overall sales for organic farmers as a group in 2014).
- 0.65% of farmers surveyed reported losses, which was very small relative to the overall response rate.
- Further analysis suggests that while less than one percent of all organic farmers in California, Indiana, Maine, Minnesota and Michigan experienced losses due to the unintended presence of GM material, between 5 and 10 percent of organic farmers in Illinois, Nebraska, Oklahoma, and Texas experienced losses.[230]

5.17 The US organisations Food & Water Watch and Organic Farmers' Agency for Relationship Marketing have criticized the approach taken by the AC21 Committee to contamination, describing it as inadequate and 'unacceptable to most organic producers'.[231]

5.18 These organisations conducted their own survey of organic grain producers and found that:

- one out of three responding farmers have dealt with GMO contamination on their farm;
- of those contaminated farmers, over half have been rejected by their buyers for that reason, reporting a median cost of $4 500; and
- nearly half of responding farmers would not purchase crop insurance unless legally required to do so to cover losses associated with GMO contamination.[232]

5.19 These conflicting views reflect the difference of opinion on how the coexistence of GM crops with non-GM and organic crops should be managed and whether farmers should be compensated for economic loss caused by the contamination of their property by GM material.

Canada

5.20 Like the United States, Canada:

- strongly embraces gene technology;
- is one of the largest producers of GM crops in the world; and

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229 This is a brief summary of this recommendation. See Agriculture Advisory Committee on Biotechnology & 21st Century Agriculture, 'A Framework for Local Coexistence Discussions', A report of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21) to the Secretary of Agriculture, 8 December 2016, p 8. See: https://www.usda.gov/sites/default/files/documents/ac21-report-final-local-coexistence.pdf. Viewed 1 November 2018. See Agriculture Advisory Committee on Biotechnology & 21st Century Agriculture, 'Enhancing Coexistence: A Report of the AC21 to the Secretary of Agriculture', 19 November 2012, pp 14-15 for the full text of the recommendation.

230 Agriculture Advisory Committee on Biotechnology & 21st Century Agriculture, A Framework for Local Coexistence Discussions, *A report of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21) to the Secretary of Agriculture*, 8 December 2016, pp 66-7, https://www.usda.gov/sites/default/files/documents/ac21-report-final-local-coexistence.pdf (viewed 1 November 2018).

231 Organic Farmers Pay the Price for GMO Contamination, *Issue Brief*, March 2014. See: https://www.foodandwaterwatch.org/sites/default/files/GMO%20Contamination%20Farmers%20IB%20March%202014_0.pdf. Viewed 1 November 2018.

232 ibid.

- has no formal compensation scheme for economic loss caused to farmers by GM crops and therefore reliance must be had on the common law.[233]

5.21 Significantly, each Canadian province has agricultural operations legislation which contain provisions preventing one farmer from suing another for what is deemed standard operating practices.[234]

5.22 For example, section 3(1) of the *Agricultural Operations Act 1995* of the province of Saskatchewan states:

> **Agricultural Nuisance Provisions**
>
> PROTECTION FROM NUISANCE CLAIMS
>
> **Protected**
>
> 3(1) The owner or operator of an agricultural operation is not liable to any person in nuisance with respect to the carrying on of the agricultural operation, and may not be prevented by injunction or other order of any court from carrying on the agricultural operation on the grounds of nuisance where the owner or operator uses normally accepted agricultural practices with respect to the agricultural operation.[235]

5.23 According to one commentator, the production of GM crops is now viewed as a standard operating practice in Canada.[236]

Committee observations

5.24 The Committee's review of the approach of other jurisdictions reveals significant reliance on common/civil law remedies and no operational data on alternative compensation mechanisms to enable an assessment of their merits over these remedies.

5.25 It is apparent that some compensation mechanisms in other jurisdictions have acted, whether by accident or design, as a bar to the introduction of GM crops.

FINDING 9

There is insufficient operational data on alternative compensation approaches in other jurisdictions to determine their merits over the existing common law mechanism.

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233 Stuart J Smyth, College of Agriculture and Bioresources, Department of Agricultural and Resource Economics, University of Saskatchewan, Letter, 24 August 2018. See also Moran et al., A Cause of Action for Regulatory Negligence? The Regulatory Framework for Genetically Modified Crops in Canada and the Potential for Regulator Liability, 6 *Univ. Ottawa L. & Tech. J.* 4 (2009). See: http://www.uoltj.ca/articles/vol6.1-2/2009.6.1-2.uoltj.Moran%20.1-23.pdf and Stuart J Smyth, The state of genetically modified crop regulation in Canada. See: https://www.tandfonline.com/doi/full/10.4161/21645698.2014.947843. Viewed 2 November 2018.

234 Stuart J Smyth, College of Agriculture and Bioresources, Department of Agricultural and Resource Economics, University of Saskatchewan, Letter, 24 August 2018.

235 The Agricultural Operations Act. See: http://www.publications.gov.sk.ca/freelaw/documents/English/Statutes/Statutes/A12-1.pdf. Viewed 1 November 2018.

236 Stuart J Smyth, College of Agriculture and Bioresources, Department of Agricultural and Resource Economics, University of Saskatchewan, Letter, 24 August 2018.

CHAPTER 6
Is GM contamination causing economic loss to farmers in Western Australia?

Introduction

6.1 The Committee believes justifying a departure from the common law compensation mechanism in Western Australia and investment in considering alternative compensation mechanisms requires evidence to suggest economic loss to farmers caused by GM contamination is a widespread or systemic problem.

6.2 Accordingly, the Committee has sought to ascertain whether such evidence exists.

Evidence received by the Committee

GM contamination

6.3 The Committee received limited evidence of GM contamination in Western Australia. For instance, CBH has found a very small percentage of non-GM loads over the last five harvests (an average of 0.04%[237]) contain unintended low-level presence of GM canola above the 0.9% tolerance.[238]

Economic loss caused by GM contamination

6.4 The Committee received very little direct evidence from farmers of economic loss caused by GM contamination, other than the losses that were the subject of *Marsh v Baxter*.[239]

6.5 The Committee notes:

- No evidence was received of organic certification bodies imposing any sanctions on organic farmers in the form of corrective action requests, suspensions or de-certifications as a result of GM contamination, apart from that reported in *Marsh v Baxter*.[240]
- A number of representative bodies that gave evidence to the Committee stated they have not received any communication from members raising concerns about economic loss from GM contamination.[241]
- GM canola has been grown commercially in Western Australia since 2010 which is, arguably, a sufficient period for any systemic GM contamination issue to arise.

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237 This equates to 61 truckloads from a total of 155 060 loads. See David Paton, Government and Industry Relations Manager, CBH Group, Letter, 1 May 2018, p 1.

238 Gavin Bignell, Operations Manager, CBH Group, *Transcript of evidence*, 11 April 2018, p 2.

239 Submission 85 from Ian James, 16 February 2018, p 2. See also Ian James, Deputy Chair, National Association for Sustainable Agriculture Western Australia, *Transcript of evidence*, 29 August 2018, p 6.

240 Justin Copeman, Chief Executive Officer, Australian Certified Organic Pty Ltd, *Transcript of evidence*, 23 April 2018, p 3; Mark Anderson, General Manager, National Association for Sustainable Agriculture Australia, *Transcript of evidence*, 23 April 2018, p 5, Ian Burns, Bio-Dynamic Research Institute, *Transcript of evidence*, 12 September 2018, p 3, 5.

241 Maddison McNeil, Executive Officer, WA Farmers Federation, *Transcript of evidence*, 3 May 2018, p 7; Mr Gary McGill, Chairman, Pastoralists and Graziers Association of WA Grains Committee, *Transcript of evidence*, 3 May 2018, p 6; Larissa Taylor, CEO Grain Industry Association of WA, *Transcript of evidence*, 3 May 2018, p 8; Matthew Cossey, Chief Executive Officer, CropLife Australia, *Transcript of evidence*, 3 May 2018, p 9.

FINDING 10

There is minimal evidence of systemic contamination by genetically modified material in Western Australia.

FINDING 11

The handling practices of Co-operative Bulk Handling Group have ensured that there has been no loss of markets due to contamination by genetically modified material and that this has helped to ensure that there has been no significant economic loss to the agricultural industry in Western Australia.

FINDING 12

There is no evidence to suggest that economic loss to farmers caused by contamination by genetically modified material is a widespread or systemic problem in Western Australia.

CHAPTER 7
Conclusion

7.1 The Committee recognises there are opposing views on gene technology due to differing ideological positions and economic considerations.

7.2 The Committee has inquired into the approaches of other jurisdictions to compensation for economic loss to farmers caused by GM contamination and whether there is sufficient evidence of this to justify a departure from the common law mechanism used in Western Australia.

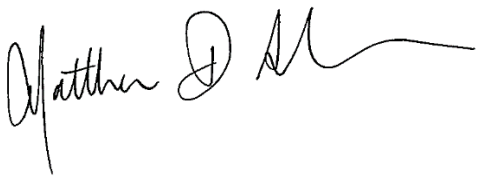
7.3 Challenges have been identified with the common law as a compensation mechanism for GM contamination and there is a perception it is inadequate to address this issue. However, the Committee is of the view the outcome of a single case, *Marsh v Baxter*, is not sufficient to conclude the existing common law compensation mechanism is inadequate to compensate non-GM farmers.

7.4 The Committee is also of the view there is insufficient evidence to justify a departure from the common law mechanism for compensation in Western Australia

7.5 This is based on a lack of:

- evidence of GM contamination in Western Australia;
- evidence presented to the Committee of economic loss to farmers caused by GM contamination;
- operational data on alternative compensation mechanisms in other jurisdictions to enable an assessment of their merits over existing common law remedies;
- evidence of decertifications of organic farms or other actions taken by organic certification bodies resulting from GM contamination, other than in *Marsh v Baxter*; and
- claims under insurance policies providing for cover against GM contamination.

7.6 The Committee also notes the time period GM canola has been grown commercially in Western Australia has arguably been a sufficient period for any systemic GM contamination issues to arise.



Hon Matthew Swinbourn MLC
Chairman

APPENDIX 1

STAKEHOLDERS CONTACTED, SUBMISSIONS RECEIVED, PUBLIC HEARINGS AND TRAVEL

Stakeholders contacted

Number	Name
1	Pastoralists and Graziers Association of Western Australia
2	Western Australian Farmers Federation
3	Hon Alannah MacTiernan MLC, Minister for Agriculture and Food
4	Department of Primary Industries and Regional Development
5	Hon John Quigley MLA, Attorney General
6	Office of the Gene Technology Regulator
7	Organic Association of Western Australia
8	National Association for Sustainable Agriculture Australia
9	CropLife Australia
10	Law Society of Western Australia
11	Professor Michael Blakeney
12	Dr Anna Bunn and Michael Douglas
13	Gene Ethics
14	Food Standards Australia and New Zealand
15	Bayer CropScience Pty Ltd
16	Monsanto Australia and New Zealand Ltd
17	AusBiotech Ltd
18	GM Free Australia Alliance
19	Conservation Council of Western Australia
20	Australian Seed Federation
21	Western Australian Citrus
22	Australian Oilseeds Federation
23	Co-operative Bulk Handling Group
24	Insurance Council of Australia
25	Bernard Lehmann, Director, Swiss Federal Office for Agriculture
26	Torben Berg, Ministry of Environment and Food of Denmark
27	Austrian Ministry for Agriculture, Forestry, Environment and Water Management
28	Professor Bernhard A. Koch, University of Innsbruck, European Centre of Tort and Insurance Law

Number	Name
29	Phil Hogan, Commissioner, European Commission Directorate-General for Agriculture and Rural Development
30	Eduardo Cuoco, Director, International Federation of Organic Agriculture Movements
31	Agriculture and Agri-Food Canada
32	Clare Moriarty, Permanent Secretary, Department for Environment, Food and Rural Affairs
33	Dr. H.-Christoph von Heydebrand, Head of Division 222 "New Technologies", Federal Ministry of Food and Agriculture, Germany
34	Karen Thomas, United States Department of Agriculture

Submissions received

Number	From
1	Miguel Pez
2	Melva Mitchell
3	Mary Morgan
4	Ministry of Environment and Food of Denmark
5	United Kingdom Department for Environment, Food and Rural Affairs
6	Private submission
7	Tracy Skippings
8	Linda Andrews
9	Richard Negus
10	Ken Manton
11	Tom Powell
12	Charles Whitfield
13	Mark Adams
14	Darrin Lee
15	Tomas Pradas
16	Clancy Michael
17	Hon Wilson Tuckey
18	Frank Panizza
19	Andrew Duncan
20	Dale Tyler
21	Sam West
22	Insurance Council of Australia

Number	From
23	Nick Panizza
24	Kristin Lefroy
25	Kadambot Siddique
26	Rose Marsh
27	Raylene Burns
28	Co-operative Bulk Handling Group
29	Professor Stephen Powles
30	Ben Cripps
31	Householders' Options to Protect the Environment
32	Tristan Stanich
33	Ronald McLean
34	University of Saskatchewan
35	United States Department of Agriculture
36	Monsanto Australia and New Zealand Ltd
37	Ian Onley
38	Office of the Gene Technology Regulator
39	Paul and Meg Wilson
40	Organic and Biodynamic Meat Co-operative WA
41	Valerie Vallee
42	National Association of Sustainable Agriculture Australia (WA)
43	SD & A De Garis
44	Margaret River Regional Environment Centre
45	Multiple Submitters[242]
46	Private submission
47	GM Free Farmers
48	Suzanne Blumer
49	Dr Anna Bunn and Michael Douglas
50	Bio-Dynamic Agricultural Association of Australia
51	Monash University
52	Naomi Halford
53	Carolyn Groves

[242] Shayne Paskins; Jan Slee; Andrew Slee; Gerald Slee; Karina West; Leigh West; David Fulwood; Colin Pearse; Peter Norris; David Taylor; Gareth Barnes; Simon Kerin; Alan Brandenburg; Hilton Paterson; Nigel Beagley; Tiffany Chown; Chris Wilkins; Romina Nicoletti; Charlie Messina; Colin Green; Jocelyn Green; Jennifer Panizza; Horace and Sandra Panizza and Bernie Panizza. See paragraph 1.3.

Number	From
54	Bridget Leggett
55	Bee Winfield
56	Tia Cordwell
57	John Tate
58	National Association for Sustainable Agriculture Australia
59	Alaina Smith
60	Grantly Marinoni
61	Lillian Lear
62	Grain Producers Australia
63	Terry Enright
64	Hon Rick Mazza MLC
65	David and Lyn Slade
66	CropLife Australia
67	Brian Duggan
68	Hon Diane Evers MLC
69	Pastoralists & Graziers Association of WA
70	Yuna Farm Improvement Group
71	Nina Stick
72	Gledhow Organics
73	Friends of the Earth Australia
74	Australian Seed Federation
75	Australian Food Sovereignty Alliance
76	Val Cain
77	State Agriculture Biotechnology Centre
78	David McFall
79	Western Australian Farmers Federation
80	Janet Liddlelow
81	Grain Industry Association of WA
82	Private submission
83	Cotton Australia
84	GM Cropwatch
85	Ian James
86	FOODwatch
87	Agsure Consulting

Number	From
88	German Federal Ministry of Agriculture and Food
89	Professor Bernhard Alexander Koch
90	Dr John Paull
91	M McLaren
92	MADGE Australia
93	Gene Ethics
94	Private submission
95	National Farmers' Federation
96	Grain Growers
97	Australian Certified Organic
98	Department of Primary Industries and Regional Development
99	Private submission

Public hearings held

Date	Participants

11 April 2018	• Co-operative Bulk Handling Group
	  ○ Gavin Bignell, Operations Manager
	  ○ David Paton, Government and Industry Relations Manager
	• Department of Primary Industries and Regional Development
	  ○ Dr Mark Sweetingham, Managing Director, Research, Development and Innovation
	  ○ John Van Schagen, Manager, Plant Product Integrity
	  ○ Katy Ashforth, Legal Officer
	  ○ Dr Rosalie McCauley, Senior Development Officer

23 April 2018	• FOODwatch
	  ○ Shirley Collins, Representative
	• Gene Ethics
	  ○ Robert Phelps, Executive Director
	  ○ Jessica Harrison, GM Cropwatch Technician
	• National Association for Sustainable Agriculture Australia
	  ○ Mark Anderson, General Manager
	• Australian Certified Organic
	  ○ Ben Copeman, Chief Executive Officer
	  ○ Sachin Ayachit, General Manager

Date	Participants
24 April 2018	• Gledhow Organics ○ Anne Jones, Manager • Dr John Paull

3 May 2018	• CropLife Australia
	  ○ Matthew Cossey, Chief Executive Officer
	  ○ Osman Mewett, Director
	• Grain Industry Association of WA
	  ○ Larissa Taylor, Chief Executive Officer
	  ○ Michael Lamond, Agronomist
	• Monsanto Australia and New Zealand Ltd
	  ○ Tony May, Managing Director
	• Pastoralists & Graziers Association of WA
	  ○ Gary McGill, Chairman
	  ○ John Snooke, Executive Member
	  ○ Brian Bradley, Associate Member
	• WA Farmers Federation
	  ○ Duncan Young, Grains Section President
	  ○ Maddison McNeil, Executive Officer

29 August 2018	• Bio-Dynamic Agricultural Association of Australia (WA)
	  ○ Peter Cocks, Chair
	• National Association of Sustainable Agriculture Australia (WA)
	  ○ Ian James, Deputy Chair
	  ○ David McFall

Date	Participants

31 August 2018	• Dr Karinne Ludlow
	• Professor Bernhard Alexnder Koch
	• Friends of the Earth Australia
	  ○ Jeremy Tager, Campaigner
	• Insurance Council of Australia
	  ○ Karl Sullivan, General Manager, Risk
	• Dr Anna Bunn and Michael Douglas
	• Danish Agricultural Agency and Ministry of Environment and Food, Denmark
	  ○ Steen Bonde, Head of Department, Danish Agricultural Agency
	  ○ Naja Steen Andersen, Head of Section, Ministry of Environment and Food, Denmark
	  ○ Karen Viggers, Head of Section, Ministry of Environment and Food, Denmark
	  ○ Morten Storgaard, Special Consultant, Ministry of Environment and Food, Denmark

12 September 2018	• Bio-Dynamic Research Institute Demeter ○ Ian Burns, Representative

Committee travel

On 25 October 2018 the Committee visited a grain receival site at Avon operated by Co-operative Bulk Handling Group (CBH), at which genetically modified (GM) and non-GM canola is tested, stored and transported to port. This was to obtain a first-hand appreciation of grain segregation practices as well as the robustness of CBH's testing regime in detecting GM in non-GM canola.

APPENDIX 2

SUMMARY OF MARSH V BAXTER

SUPREME COURT
OF WESTERN AUSTRALIA
Stirling Gardens
Barrack Street
Perth WA 6000

Media Contact: Manager, Media & Public Liaison
Ph: (08) 9421 5303; Pager: (08) 9324 4319

***MARSH v BAXTER* [2014] WASC 187**
(CIV 1561 of 2012)

JUDGMENT SUMMARY

What follows is a summary of the Court's detailed reasons in this action which are in the order of 150 pages. This judgment summary issued by the Court is provided as an aid to obtaining a prompt understanding of the outcome of the lengthy reasons for decision delivered in this matter. It is not an addition to, or qualification upon, those reasons and has no purpose or effect beyond that stated.

Judgment was delivered today in this action which was tried over eleven hearing days during February 2014.

The plaintiffs, Mr Steve Marsh and his wife, Mrs Susan Marsh (the Marshes) were claiming $85,000 damages plus a permanent injunction against the defendant, Mr Michael Baxter. The Marshes and Mr Baxter are neighbouring farmers in the locality of Kojonup in the southwest of Western Australia.

The Marshes have, since December 2004, been approved growers of organic produce for some years from their Kojonup property, called Eagle Rest. A road reserve of approximately 20 m width separates Eagle Rest from Mr Baxter's somewhat larger farm, Sevenoaks, located to the west of Eagle Rest.

Mr Baxter is a conventional farmer growing crops which include Genetically Modified (GM) canola.

In late November 2010, Mr Baxter cut, stacked in windrows and left to dry his GM canola crop from two paddocks on Sevenoaks. This was before the final phase of the harvesting of the canola seeds from the canola plant seed pods attached to each plant. This type of 'two phase' harvest process for canola is widely used. The harvest technique is known as 'swathing'. The cut plant (with attached seed pods) is referred to as a '*swathe*'.

Some of the cut canola on Sevenoaks was blown by the wind into Eagle Rest (approximately 245 cut canola plants, as subsequently identified).

The swathed canola plants on the two Sevenoaks eastern boundary paddocks in 2010 that blew into Eagle Rest were of a variety which had been the subject of genetic modification by prior human scientific intervention. The particular variety of GM canola grown by Mr Baxter in 2010 was known as Roundup Ready or (RR canola). The genetic modification to this variety of canola gave the canola plant the engineered property of being immune to the effects of a herbicide manufactured by the Monsanto Group, namely glyphosate (sold under the brand name Roundup). Immunity of a growing canola crop to glyphosate delivered the agricultural advantage to the canola grower of being able to treat a late developing weed problem in a growing canola crop before harvest by that herbicide.

In January 2010 it became lawful in Western Australia for farmers to grow GM canola. At that time there was an order made under the relevant legislation by the Agriculture Minister at the time, Mr Redman, for RR canola (s 6 of the *Genetically Modified Crops Free Areas Act 2003* (WA)). This allowed the Minister to exempt persons growing certain genetically modified crops from the prohibitions of that legislation.

The Marshes commenced this litigation against Mr Baxter in 2012. Their complaint was that the late November 2010 airborne incursion into Eagle Rest of RR canola swathes from Eagle Rest had caused them to ultimately lose their contractual rights to apply the label 'NASAA Certified Organic' - when

selling their organically grown cereal crops or organic meat (lamb) grown or raised upon Eagle Rest.

The Marshes' organic labelling rights had been heavily impacted by the decertification of approximately 70% of the area of Eagle Rest in December 2010 under their contract with the National Association of Sustainable Agriculture Australia (NASAA) and NASAA's subsidiary certifying organisation NASAA Certified Organic Pty Ltd (NCO).

The 29 December 2010 decision to decertify Eagle Rest appeared to be based on the RR canola swathes and their seed pods being identified and the perceived risk of scattered GM canola spilling seeds over the soil of Eagle Rest.

The Marshes' two causes of action brought against Mr Baxter for damages were, first, for common law negligence (ie, for breach of an asserted duty of reasonable care owed to the Marshes to ensure there was no escape of GM material into Eagle Rest) and, second, for the tort of private nuisance.

The remedies sought by the Marshes were for common law damages and a permanent injunction. Significantly, the Marshes only claimed a financial injury against Mr Baxter. They did not claim to have suffered any physical damage or injury to themselves, to their animals or to their land at Eagle Rest.

The state of the evidence led at the trial on both sides was that RR canola swathes were physically harmless to persons, animals or land, even if consumed.

GM canola only posed a risk of transferring genetic material if a canola seed germinated in the Eagle Rest soil (as a volunteer canola plant) and then later cross-fertilized through its pollen being exchanged with another compatible species (such as, for instance, with another canola variety).

There was no evidence at the trial of any genetic transference risks posed by the RR canola swathes blown into Eagle Rest at the end of 2010. The Marshes had never grown canola upon Eagle Rest.

In 2011, eight GM canola plants were found to have grown up as self-sown volunteer plants on Eagle Rest. They were identified and pulled out. No more volunteer RR canola plants grew on Eagle Rest in subsequent years.

But from 29 December 2010, 70% of the Eagle Rest area was decertified by NCO. Consequently, the Marshes were denied the right, as organic operators in the period between December 2011 and October 2013, to apply the 'NASAA Certified Organic' label to their organically grown crops or produce from decertified paddocks (paddocks 7 - 13).

The decertification decision against Eagle Rest and the Marshes was a decision pursuant to the Marshes' private contract with NASAA and its certifying status subsidiary corporation, NCO. Officers of NCO from December 2010 and thereafter denied the Marshes the contractual right to apply the label 'NASAA Certified Organic' to Eagle Rest produce by reason of NCO's assessment that the late 2010 airborne swathe incursion and the RR canola seeds scattered across the soil of Eagle Rest, posed an 'unacceptable risk' of 'contamination'. This result was occasioned by the erroneous application of governing NASAA Standards applicable to NASAA organic operators as regards GMOs (genetically modified organisms) at the time.

Justice Kenneth Martin dismissed both the Marshes' causes of action in common law negligence and private nuisance.

For private nuisance, his Honour assessed that it had not been shown that there had been any unreasonable interference by Mr Baxter in the Marshes' use and enjoyment of Eagle Rest. This evaluation involved a balancing of many considerations. His Honour focused relevantly upon Mr Baxter's decision to harvest his RR canola crop by the swathing process, rather than his decision to grow RR canola in 2010.

Mr Baxter had grown a lawful crop in 2010. In deciding both to grow and to swathe that crop that season he had acted with advice of a local agronomist, Mr Robinson.

Mr Baxter had used an orthodox and well accepted harvest methodology by swathing his RR canola crops in 2010. He had engaged a swathing contractor to cut the canola plants and push them into windrows, where they would dry out for some weeks before the final phase of harvest. The end of season winds and the blowing of swathes from Sevenoaks eastwards into Eagle Rest had not been an outcome intended by Mr Baxter. Even so, no physical injury whatsoever had been sustained at Eagle Rest in consequence. Mr Baxter was not to be held responsible as a broad acre farmer merely for growing a lawful GM crop and choosing to adopt a harvest methodology (swathing) which was entirely orthodox in its implementation.

Nor could Mr Baxter be held responsible, in law, for the reactions to the incursion of the Marshes' organic certification body, NCO, which in the circumstances presented to be an unjustifiable reaction to what occurred. The Court needed to examine and evaluate the workings of the Marsh/NASAA/NCO private contractual relationship as an aspect of its overall task to evaluate whether there had been an unreasonable interference by Mr Baxter with the use and enjoyment by the Marshes of the Eagle Rest land. In the end, there was not.

His Honour also rejected the Marshes' cause of action in common law negligence (ie, breach of the asserted duty of reasonable care). The Marshes' action for an exclusively financial loss, in the presenting circumstances, was without precedent. In prior cases courts had adopted a cautious attitude when allowing claims for pure economic loss. No basis in principle was shown to extend the law to these events. Furthermore, Mr Baxter had not been shown to have acted negligently, either by growing or then by swathing the lawfully grown GM canola crop in 2010.

Accordingly, both the Marshes' causes of action failed. Necessarily, that result occasioned an allied failure of the Marshes' claim for a permanent injunction to restrain Mr Baxter from ever again swathing a GM canola crop in

the (eastern boundary) paddocks of Sevenoaks, which were closest to the Eagle Rest (western boundary) paddocks. However, that claim for the injunction would have failed in its own right. The Marshes' positions over time, in terms of attempting to formulate a perpetual injunction, had fluctuated considerably over the period after they had commenced their action, right up until the end of trial. The plaintiffs' position fluctuated from 2 km down to 1 km when seeking appropriate buffer distances restraining Mr Baxter from his growing or swathing GM canola. By the end of the trial the injunction sought against growing GM canola was abandoned. So too was the attempted imposition, by permanent injunction, of some fixed linear buffer distance to be measured from the western boundary of Eagle Rest. Instead, what was sought was a perpetual injunction against the swathing of GM canola by Mr Baxter in only his eastern boundary paddocks of Sevenoaks, with no identified linear distance of buffer.

In the absence of more convincing and reliable evidence to justify an identifiable linear buffer distance to support a permanent restraint against the activity of swathing, the claim for a perpetual injunction was not supportable, even when it was diminished to the extent seen at the end of the trial. This was particularly relevant in circumstances where the remedy of injunction sought is discretionary relief. The absence of a reliable underlying evidentiary platform to support a perpetual injunction against swathing was a significant deficiency in its own right.

Accordingly, the Marshes' action against Mr Baxter wholly failed.

The full judgment of the Court is available on the Supreme Court of Western Australia website at www.supremecourt.wa.gov.au.

APPENDIX 3

PRINCIPLES FOR FARMER PROTECTION LEGISLATION

Principles for Farmer Protection Legislation

Objectives:

A Bill to establish a publicly managed fund, paid into by GM seed merchants, in order to compensate non-GM land holders for contamination by GM seed or other GM material.

To strengthen the protection of non-genetically modified landholders (both organic and conventional, and including public land) from all forms of contamination by genetically modified organisms (GMOs).

To strengthen monitoring and detection mechanisms in order to detect contamination early and reduce compensation costs. This includes, but is not limited to, making the existing guidelines mandatory.

Rationale:

The Farmer Protection Legislation will replace sole reliance on common law remedies by:

- Establishing a Fund to allow simple and efficient compensation for losses suffered by non-GM landholders whose land is contaminated by GM crops, seed or other GM material;
- Making GM seed merchants responsible to compensate landholders when GM contamination occurs, by requiring GM seed merchants to pay a levy on seed sales into the Fund;
- Entitling farmers and other affected parties to rapidly and efficiently recover for any losses, extra costs or harm they suffer, without having to resort to the Common Law.

The Farmer Protection Fund

- The Government will establish a Fund to provide speedy, no-fault compensation in cases of GM contamination for purposes of cleaning up such contamination and compensating for economic loss or other harm;
- The Minister will appoint an independent Administrator to administer the fund;
- The Administrator will have broad investigative powers, including auditing financial records, inspecting properties and recommending enforcement action;

- The Administrator to make recommendations as needed to the Minister regarding any measures he or she believes would reduce the levels of contamination and therefore reduce the amount of the levy;

- The Fund will protect the right of all non-GM landholders to be free of GM contamination, at the limit of detection of the presence of a GM event;

- Non-GM landholders must be able to recover costs and losses related to all manner of contamination by GM seeds and crops, quickly and easily by lodging an application with the Administrator;

- Applicants for compensation funds would have to prove the presence of a GM event on their land or in their seeds or crops and provide a declaration that they did not plant or authorise the planting of the GM seed or crop;

- Funding for the compensation Fund will be annually levied on the GM seed merchants;

- The levy will be assessed per kilo of seed sold;

- All GM seed merchants must submit to the Administrator declarations on the amount of GM seed sold in a financial year, no later than the end of September following;

- The amount of the initial levy will be set in the regulations;

- The Administrator may from time to time recommend changes to the amount of the levy, to the Minister, taking into account the costs of previous GM contamination cases;

- If compensation claims exceed the value of the fund, the Administrator will request from the Minister that the levy in the subsequent year be raised in order to cover the cost of the shortfall;

- The Administrator may seek submissions from third parties regarding compensation and interested parties may appeal decisions under the Judicial Review Act.

Factors to use in determining compensation payments for contamination incidents:

The Administrator will pay non-GM landholders compensation for actual economic loss or extra costs which must include:

- costs for detection and identification of GM seeds or plants;
- all GM contamination clean-up costs;
- lost profits;
- lost premiums on non-GM produce;
- reduced property values;
- compensation for time spent dealing with the contamination;
- harm, where harm includes unwanted GM contamination for the full duration of its impacts.

Note: The Administrator will determine an annual calculation for payable losses, extra costs and harm where continuing GM crop contamination occurs.

Definitions

GM seed merchants - businesses licensed by the GM patent holders for the sale of GM seed, their agents, licensees, subsidiaries or contractors and any other legal entity that deals with the sale or other distribution of GM organisms ('dealing' is defined in the Gene Technology Act 2000).

Non-GM landholders - any party occupying, owning or caring for land (including local or state government) where no-one intended that GM plants would be grown.

Non-GM land - any land on which no-one intended to grow GM plants.

GLOSSARY

Term	Definition
AC21	United States Department of Agriculture Advisory Committee on Biotechnology & 21st Century Agriculture
Agreement	Gene Technology Agreement
CBH	Co-operative Bulk Handling Group
Conventional crops	Crops produced from non-GM crop varieties that are not produced in compliance with the requirements of an organic standard
Department	Department of Primary Industries and Regional Development
EC Treaty	Treaty Establishing the European Community
EU	European Union
FDA	United States Food and Drug Administration
Former Committee	The Standing Committee on Environment and Public Affairs 2001-2005
Forum	Legislative and Governance Forum on Gene Technology
GM	Genetically Modified
GM contamination	Contamination by genetically modified material
GMO	Genetically Modified Organism
GTA	*Gene Technology Act 2000* (Commonwealth)
IAG	Insurance Australia Group Limited
IFOAM	International Federation of Organic Agriculture Movements
MPCI	Multi-Peril Crop Insurance
NASAA	National Association for Sustainable Agriculture Australia
National Standard	National Standard for Organic and Biodynamic Produce
Notice	Organic Export Notice 2018-01 titled 'Guideline for responding to contamination by prohibited substances or materials in the organic export supply chain'
Organic crops	Crops grown without the use of GMOs as well as pesticides, synthetic fertilizers, hormones and other similar artificial inputs
Regulator	The Commonwealth Gene Technology Regulator
Scheme	National Gene Technology Scheme
Tolerance level	The level for adventitious presence of GMOs found in non-GM crops acceptable in order for non-GM crops to retain their non-GM status
USDA	United States Department of Agriculture

Standing Committee on Environment and Public Affairs

Date first appointed:

23 May 2017

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'2. Environment and Public Affairs Committee

2.1 An *Environment and Public Affairs Committee* is established.

2.2 The Committee consists of 5 Members.

2.3 The functions of the Committee are to inquire into and report on –

(a) any public or private policy, practice, scheme, arrangement, or project whose implementation, or intended implementation, within the limits of the State is affecting, or may affect, the environment;

(b) any Bill referred by the Council; and

(c) petitions.

2.4 The Committee, where relevant and appropriate, is to assess the merit of matters or issues arising from an inquiry in accordance with the principles of ecologically sustainable development and the minimisation of harm to the environment.

2.5 The Committee may refer a petition to another Committee where the subject matter of the petition is within the competence of that Committee.

2.6 In this order "environment" has the meaning assigned to it under section 3 (1) and (2) of the *Environmental Protection Act 1986*.'

Parliament House,
4 Harvest Terrace, West Perth WA 6005
Telephone: +61 8 9222 7222
Email: lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au