Hon Alannah MacTiernan MLC
Minister for Regional Development; Agriculture and Food;
Minister Assisting the Minister for State Development; Jobs and Trade

Our ref: 64-03797
Your ref: Petition No. 10

Hon Matthew Swinbourn MLC
Chair
Standing Committee on Environmental and Public Affairs
Legislative Council Committee Office
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Dear Mr Swinbourn

PETITION NO 10 - COMPENSATION FOR GENETICALLY MODIFIED (GM) FREE FARMERS

Thank you for your letter dated 17 August 2017 regarding a petition requesting information on containment of genetically modified (GM) crops and the idea of a compensation fund for growers who have incurred economic loss resulting from accidental presence of GM material.

I support the Committee investigating whether there needs to be a mechanism to protect non-GM farmers from contamination. 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.

There are two Australian standards for organic production systems and these do not clearly define the tolerance level for unintended presence of GMOs. The Commonwealth Department of Agriculture and Water Resources (DAWR) has advised that as the standards are guidelines DAWR has the power to negotiate market access conditions between Australia and its international trading partners for organic produce.

CBH Group has an effective segregation and identity preservation system to handle grain and deliver the grain to meet customer specifications. Since the adoption of GM canola in WA no shipments of grain have been rejected due to the unintended presence of GM canola in non-GM canola shipments and the GM sensitive European Union continues to be the major export destination for WA canola. The AOF advised

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that since the introduction of GM Canola in Australia the industry has not lost any markets for the canola.

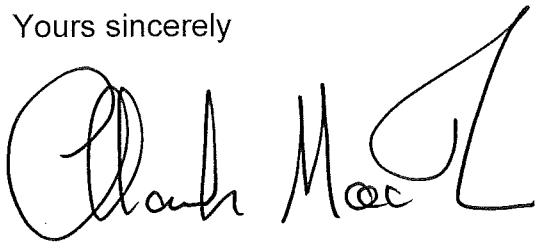
The submission from Ms Janet Grogan, principal petitioner, refers to a media article which states "...GM wheat will soon be introduced to WA by a farmer in Morowa." The Department has informed me that, to the best of its knowledge, no applications to commercially grow GM Wheat varieties in WA have been received by the Office of the Gene Technology Regulator, nor have any commercial licences been issued to this effect, to date.

The 2005-06 independent Statutory Review of the Commonwealth's *Gene Technology Act 2000* considered the need for strict liability rules for potential economic damage from mixing GM and non-GM crops. The review concluded that the current law allows for effective remedies for persons incurring damage from GM crops.

However, in WA's only case in 2014, Marsh v Baxter, the court found against the GM farmer so it may be useful to review the adequacy of existing laws. The judge 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. In relation to common law negligence, the judge considered that 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.*" I've attached a summary of the judgement for this case to this letter.

I hope this information is helpful.

Yours sincerely



HON ALANNAH MACTIERNAN MLC
MINISTER FOR REGIONAL DEVELOPMENT; AGRICULTURE AND FOOD;
MINISTER ASSISTING THE MINISTER FOR STATE DEVELOPMENT,
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28 SEP 2017

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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.