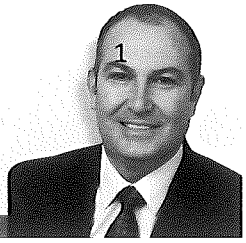
The Hon. Rick Mazza MLC
Member for the Agricultural Region
Parliament of Western Australia
Shooters, Fishers and Farmers Party



15th February 2018

Hon Matthew Swinbourn MLC
Chairman
Standing Committee on Environment and Public Affairs
Parliament House
4 Harvest Tce
West Perth WA 6005

Dear Mr Swinbourn

Inquiry into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material

Thank you for the opportunity to make a submission to this inquiry.

I further note that the inquiry's Terms of Reference will seek to inquire into and report on approaches taken in Western Australia and by other jurisdictions and any other relevant matter.

The only reliable factual evidence on economic loss suffered by farmers in Western Australia caused by contamination from genetically modified (GM) material was adduced in the Supreme Court of Western Australia, when organic farmer Mr Steve Marsh sought a permanent injunction against his neighbour Mr Mike Baxter from cultivating GM canola, and damages for contamination of his organically certified farm by the GM canola grown by Mr Baxter.

Put briefly, these facts were that Mr Baxter planted GM canola on his farm in accordance with all the guidelines, and with the advice of his farm agronomist.

He observed all the requirements with regard to buffer zones on his property, which in any case was separated from his neighbour's property by a 20.9 metre road reserve and a line of trees.

To harvest the canola, it was first windrowed and left to dry – a standard practice for canola crops.

Before it was harvested, some of the drying canola plants were blown onto his neighbour Mr Marsh's property, who is a certified organic farmer.

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Mr Marsh identified the plants, but rather than removing them, left them there for up to six months and meanwhile notified his organic certifier, the National Association for Sustainable Agriculture Australia (NASAA), about the presence of the plants.

NASAA subsequently visited the organic farm and decided to decertify it, which meant that Mr Marsh lost his organic certification, and could no longer sell his produce as organic.

This resulted in a financial loss which Mr Marsh then decided to seek to recover via a court action.

Mr Marsh commenced his civil action in 2013 with a request for an interlocutory decision that was refused.

This was followed by a further civil action in 2014 where Mr Marsh sought a permanent injunction preventing Mr Baxter from cultivating GM canola and damages for nuisance and negligence. This action was dismissed.

In 2015 Mr Marsh then appealed the award of damages against him (but did not further pursue an injunction) to the Western Australian Supreme Court of Appeal.

The appeal was dismissed by a majority.

Finally Mr Marsh applied for special leave to appeal this decision at a directions hearing of the High Court of Australia. This was refused with costs awarded against him.

However, areas of the Marsh farm had already been decertified previously due to the use of chemicals to drench sheep, and as there was no canola being grown on the organic farm, so there was no possible risk of genetic contamination.

The only other court based litigation in a similar jurisdiction was between Monsanto and Mr Percy Schmeiser.

This court case has been widely misunderstood and misrepresented.

Mr Schmeiser replanted canola seed that he had harvested from his field, which he discovered was mixed with Monsanto's patented glyphosate-tolerant GM canola by spraying it with glyphosate, leaving only the herbicide resistant plants.

Monsanto approached him to pay a license fee for using its patented technology without a license. Mr Schmeiser refused, claiming that the actual seed was his because it was grown on his land, and so Monsanto sued Mr Schmeiser for patent infringement.

The Supreme Court of Canada ruled that Mr Schmeiser was in violation of Monsanto's patent because he knowingly replanted the resistant seed that he had harvested and also imposed fees of over $200,000 on him.

Mr Schmeiser justified his actions by saying "I have always campaigned on the right of a farmer to save and re-use his own seed. This is what I have been doing for the last 50 years. I will continue to support any efforts to strengthen the rights of a farmer to save and re-use his own seed".

His actions were never to do with contamination.

Almost 10 years later, Mr Schmeiser and Monsanto Canada Inc. came to an out of court settlement whereby Monsanto would pay for the clean-up cost of C$660.

There are only two types of GM crops available to cultivate in Western Australia, Bt cotton and RR canola.

Both crops have been engineered to reduce the agronomic inputs (fuel, chemicals, fertilizer) required to grow these crops.

In the context of the broad acre farming that is typical of the Western Australian grain belt, RR canola is the primary GM crop that is cultivated.

Western Australian grain growers plant canola in general as part of their crop rotation plans.

Canola in the rotation allows farmers to better manage their weeds. Because canola is a broadleaf crop, and because there are different herbicide tolerant varieties of canola, famers have more options for weed control than in cereal crops such as wheat and barley.

Further, cereal yields after canola is cultivated are often enhanced because of the disease cleaning that occurs when an unrelated crop type such as canola is alternated with cereals and kept free of grassy weeds.

Canola is a profitable crop in its own right and is an excellent fit with the cereals or pulses that the vast majority of Western Australian grain belt farmers grow.

Canola is grown for its seed which is crushed, and the oil used in margarine, cooking oils, salad oils and edible oil blends, and as a bio-fuel.

Oil from GM canola does not contain any GM material from the plant, as the genetic material/DNA is removed in the refining process.

This then raises the question of what contamination would need to be compensated.

It cannot be contamination of crops other than canola, because cross pollination with other crops is not possible.

Fugitive GM canola plants, although tolerant of glyphosate (Round Up) herbicides can be destroyed by using Triazine. This would remove any possibility of property (land) contamination.

Separate grain logistic supply chains for GM and non-GM canola have been successfully operated in Western Australia since 2009, and is now a mature activity that is routinely carried out without any significant events.

In fact, the state's leading grain logistics company, CBH, has no difficulties segregating GM and non-GM canola at its receival points, silos, train sets, grain centres and port terminals.

This shows that the separation of GM and non-GM crops can be achieved in working systems, and the risk of admixture can be successfully controlled, if not eliminated.

The process of separating oil from canola seed produces a by-product, referred to as the meal or flour component, which is used for stockfeed.

If GM canola is used, the meal will contain GM material from the plant.

However, scientific evidence published so far, including the OECD document entitled "Considerations for the safety assessment of animal feedstuffs derived from genetically modified plants" (http://www.olis.oecd.org/olis/2003doc.nsf/linkTo/env-jm-mono(2003)10), indicates that feeding GM plant material to livestock and poultry does not affect the nutritional value or safety of the meat, milk and eggs derived from those animals.

Further, the Australian Government Office of the Gene Technology Regulator (OGTR) has agreed not to approve any GM food crop for use as a stockfeed unless it has also been approved for human consumption by Food Standards Australia New Zealand (FSANZ).

This means that a GM food crop cannot be grown for stockfeed in Australia unless it has also been approved for human consumption.

Therefore it is physically harmless if consumed by persons and animals. When something is harmless, then it cannot be contamination.

Consequently, it becomes difficult (if not impossible) to determine where contamination could occur and what its material effects could be.

Without such damages it then becomes equally difficult to determine a compensation regime.

Under Australian gene technology legislation the OGTR regulates for human health, safety and the environment, but not for marketing issues.

There is, however, provision within Australia's federal gene technology legislation to create zones free of GM crops.

Under the Commonwealth Gene Technology Act 2000, the Ministerial Council, comprising of federal, state and territory Ministers, has the opportunity to issue a policy principle, 'Recognising areas, if any, designated under state law for the purpose of preserving the identity of one or both of GM or non-GM crops for marketing purpose'.

Clearly there is a Commonwealth and State regulatory architecture that provides the framework for the purpose and effect of resolving any significant matters in dispute.

There should be no need to add to it and further complicate regulatory matters for Western Australian farmers.

There are also a number of other relevant matters that I draw to the committee's attention;

- It is a good rule of thumb that in civil law suits for damages, the plaintiff will sue the defendant with the most money. In the Marsh versus Baxter case, the GM canola seed cultivated by Mr Baxter was provided by a publicly traded American multinational agrochemical and agricultural biotechnology corporation Monsanto Company. Its revenue in 2016 was US$13.5 billion.
  It therefore seems odd that Mr Marsh would seek to sue his neighbour for damages when Monsanto has much more extensive financial wealth as compared to an average Western Australian grain belt farmer, as Mr Baxter is.

- The total amount of Mr Marsh's damages was mutually agreed at $85,000. In 2015 - 16 the average farm cash income for a Western Australian grain industry farm was $343,000.
  Again it seems odd that the damages claim was of an inconsequential amount compared to average farm income.

- With respect to the certification of organic produce, third party organizations accredited by the Australian Government Department of Agriculture and Water Resources can certify produce with organic, bio-dynamic, biological or ecological trade descriptions in compliance with the National Standards for Organic and Biodynamic Produce.

  The current 'organic' standard has a zero percent tolerance for genetically modified organisms, when the US standard is 5% and the EU standard is 0.9%.

  It is fair to say that the intolerant and unreasonable nature of this standard is actually driving confrontation over admixtures of GM and non-GM crops.
  It was certainly the basis for the Marsh versus Baxter case.

- By comparison, food processing aids as diverse as ammonium hydroxide, ethoxylated fatty alcohols, fatty acid polyalkylene glycol ester, hydrogenated glucose syrups, isopropyl alcohol, polyethylene glycols, and sodium lauryl sulphate are routinely used in the manufacture of food in Australia, and may end up in the finished product, subject to maximum permitted levels as defined in regulated standards.

- The Schmeiser case showed that the actual costs of cleaning up an accidental GM canola movement to another farm is minute, and is not technically difficult.

- With respect to potential remedies for contamination caused by GM crops, I note that there was previously in Western Australia, legislation specifically formulated to resolve any differences between farmers with different farming methods.

  The *Agricultural Practices (Disputes) Act 1995* made provision for the resolution of disputes related to the carrying on or management of agriculture.

  This Act was repealed in 2011, as the provision for mediation was used only rarely, with three being the maximum in any one year and none at all being conducted in some years, including the last three financial years before its repeal.
  There was a board to determine a dispute, but it was never called upon to do so.

This was despite the fact that this Act overlapped with the trial and commercial introduction of GM canola into Western Australian grain belt farms for several years.

This suggests that the threat of contamination of non-GM crops with GM crops is not considered significant by broad acre farmers, and is over-stated and embellished by activists with anti-science agendas.

- If a non-GM crop is mixed up with a GM crop, its commercial value is not a write off. It is not a zero sum argument.

  The GM canola market (and even the conventional canola market, depending on destination) is still available and financial losses can be minimised and reduced.

  In the case of canola, the biggest determinant of value is its oil content, and not its provenance (GM versus non-GM).
  Many Western Australian grain belt farmers report that oil content from GM canola is higher, as seasonal influences such as weed competition (and therefore competition for available moisture and nutrients) can be better controlled.

I note that the evidence led at the Marsh versus Baxter trial on both sides was that RR canola swathes were physically harmless to persons, animals or land, even if consumed.

Mr Baxter had grown a lawful crop. In deciding to grow and to swathe that crop that season he had acted with the advice of a local agronomist.
Mr Baxter had used an orthodox and well accepted harvest methodology by swathing his RR canola crops in 2010.

The financial loss that Mr Marsh suffered flowed from the decertification decision by NASAA Certifying Organization Ltd. (NCO).

Consequently, Mr Marsh was 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.

The decertification decision against Mr Marsh was a decision pursuant to Mr Marsh's private contract with NASAA and its certifying status subsidiary corporation, NCO.

From a legal point of view, Mr Baxter's lawful use of his own land did not constitute a wrongful interference with Mr Marsh's use or enjoyment of his land.

Further Mr Marsh was deemed to have put his land to an abnormally sensitive use and he could not unilaterally enlarge his own rights and impose limitations on his neighbours to a greater extent than would otherwise be the case.

In reality, the greatest source of contamination in the Western Australian broad acre farming system is probably chemical spray drift.

However, there are no specific Western Australian regulations that address the damages that may be caused by the escape of terrestrial applications of chemicals to broad acre farms caused by atmospheric conditions (spray drift).

Rather, such regulation that has been written is concerned with use and disposal, contaminated agricultural produce (because it may be unfit for consumption), supply, transport and storage, and environmental pollution.

In other words, this regulation is to ameliorate any detriment to public health and safety and the environment from the use of agricultural chemicals.

Commercial damages caused by spray drift is therefore an event to be insured against, and if it is unable to be settled in this way, it can be pursued through the civil court system.

In conclusion, it would be very unwise to introduce and implement compensation mechanisms for economic loss to farmers in Western Australia caused by contamination by genetically modified material, when there is no sound basis to do so, either scientifically, in law or even measured by that most uncommon of virtues, common sense.

The real losses from admixtures of GM and non-GM crops are largely illusory, and are based on subjective differentiation of similar products in retail markets by labelling that have no scientific basis.

Imposing compensation mechanisms that have no public benefits would only impose an unnecessary burden on Western Australian grain belt farmers.

Such additional burdens would increase their costs of production and reduce the ability of Western Australian broad acre farmers to compete in the overseas markets they mainly supply.

Yours faithfully

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Hon Rick Mazza MLC