

GLEDHOW ORGANICS' SUBMISSION TO THE ENVIRONMENT AND PUBLIC AFFAIRS COMMITTEE ON THE NEW INQUIRY INTO MECHANISMS FOR COMPENSATION FOR ECONOMIC LOSS TO FARMERS IN WESTERN AUSTRALIA CAUSED BY CONTAMINATION BY GENETICALLY MODIFIED MATERIAL

POSITION OF SUBMITTING ENTITY

This submission is offered by the proprietor of Gledhow Organics, a small family-owned certified organic business located in the Great Southern of Western Australia. The thought processes and recommendations expressed in this document are provided in consideration of any producer that wishes to market their product as being free of genetically modified organisms (GMOs). Clearly this applies to any producer of certified organic produce, but this also applies to all conventional farmers that wish to produce GMO-free products. For these producers, contamination of their produce with GMOs can result in a denial of market access and, as individual producers and regional collectives move more toward branding of their products, negative impacts on consumer attitudes, particularly in export markets that seek high quality products such as the Chinese market. Product branding takes a considerable investment in time, money and effort. Branding may offer a premium price, or it may just give the branded product an edge over their competitors. This could also be seen as a economic loss if customers lose faith in the quality of the product that may be considered

For organic certification bodies in Australia there is a zero tolerance toward GMOs. Any amount of GMO contamination will result in a loss of market access. For GMO-free status Food Standards Australia anything above 1% GMO content must be listed on the label, denying that product access to the GMO-free markets¹. For certified organic producers the impact is immediate and devastating; loss of certification and no choice but to sell their products as a conventional product at a greatly reduced price, significantly impacting on total farm income and profit. In addition, the producers of certified organic produce, or GMO-free producers, are additionally burdened with costs associated with cleanup and the stress and time taken to reclaim their GMO-free status. For these producers GMOs are a biosecurity risk. This submission proposes that any mechanism for the compensation for contamination of GMOs must proceed with the acceptance that the responsibility for the negative impacts of GMOs fall squarely to those producers and businesses that wish to benefit from them. Those businesses that grow and handle GMOs are the only ones capable of having control of them and, as such, must be accountable for their impacts. Any alternative position does not satisfy natural justice.

PROPOSED MECHANISM 1: GM PRODUCTS BE RECOGNISED AS A BIOSECURITY RISK

For producers of branded GMO-free products and certified organic products GMOs pose a biosecurity risk to their enterprise. Fortunately, there are already robust sets of standards and mechanisms in place for the control of biosecurity hazards. The Western Australian Biosecurity and Agriculture Management (BAM) Act 2007 aims to:

¹ Source Food Standards Australia New Zealand website
<http://www.foodstandards.gov.au/consumer/gmfood/labelling/Pages/default.aspx> accessed 15 February 2018

“provide effective biosecurity and agriculture management for the State by providing the means to (a) control the entry, establishment and spread and impact of organisms that have or may have an adverse effect on... (iv) agricultural activities... and... (c) establish standards to ensure the safety and quality of agricultural products” (Part 1, Section 3)

The much-publicized experience of Steve Marsh, producer of certified organic produce, demonstrates that the spread of genetically modified canola seed on to his property had an adverse effect on his agricultural activities. The same risk applies to any producer of certified organic or GMO-free product. Recognition of GMOs as such as organism is already in the hands of the Minister. Part 2 Division 1 Section 12 of the BAM ACT allows the Minister to:

“declare that an organism... is a prohibited organism if there are reasonable grounds for believing that the organism – (a) has or may have an adverse effect on... (iv) agricultural activities”

Declaring GMOs as a prohibited organism allows it to be controlled under the BAM Act and for penalties to be issues in the event of failure to comply. Amendment may be made to include compensatory measures for individuals suffering economic loss because of those failures to comply.

PROPOSED MECHANISM 2: WHOLE OF CHAIN TRACABILITY OF GMOS

It should be mandatory that growers and handlers of genetically modified products keep a record of all GMO movement for clarity of responsibility and accountability (see Proposed Mechanism 3). A clear benefit of including GMOs as prohibited organisms in the BAM Act is that:

1. A code of practice may be adopted for use in growing and handling GMOs (Part 5 Division 3 Section 121) – perhaps with some minor alterations to the definition of “codes of practice” under Part 8 Section 191.
2. An auditing process has already been established where delegated authorities have the power to inspect land, records and to stop operations

Section 192 obliges the Minister to conduct public consultation before regulations and codes of practice are made under the BAM Act. This is an entirely appropriate approach. Such a consultation would likely uncover many strategies that producers and handlers of GMOs could undertake to minimize the risk of contamination. Such strategies might include:

- a. A register of licensed GMO operators that is available to the public. This would allow producers of certified organic and GMO-free products to know where the risks of contamination would come from and employ their own risk management strategies. A license should only be granted where a contamination risk management plan has been developed and implemented by entities wishing to grow or handle GMOs. Failure to adhere to their management plan may result in their GMO license being revoked. No one should be allowed to purchase GMOs or material from GMOs without a license;
- b. Legally binding production standards such as buffer zones of at least 30 meters with healthy mixed sward of grass, herb and shrub species to ensure a dense cover that has the best chance of stopping any wind-blown matter from GMOs; harvest and open-air handling ban enforced under certain weather conditions; .

- c. Legally binding carriage standards such as complete cover of bins with rigid rooves; GMOs are not to be carried in the same vessel or by the same vehicle as those carrying non-GMO products; etc. Note that there are standards for transportation published by the Office of the Gene Technology Regulator ([http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/tsd-guidelines-toc/\\$FILE/tsd-guidelines.pdf](http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/tsd-guidelines-toc/$FILE/tsd-guidelines.pdf)) but that these standards are non-binding and have no penalty for those not adhering to the codes. These guidelines provide a useful starting point as they cover issues such as containment, labelling, spill or loss procedures, reporting and decontamination of vessels and containers. Western Australian standards need to be legally binding with penalties and work orders applied to non-compliance
- d. GMO handlers and growers have clear delineation between GMO processes and non-GMO processes
- e. GMOs and GMO products to be clearly labelled at each stage of handling

PROPOSED MECHANISM 3: ACCOUNTABILITY FOR CONTAMINATION

"Polluter pays" is a creed employed in the justice system for decades. It's a reflection of the position that whoever does the damage bears the responsibility of the cleanup. The Court of Justice in the European Union (EU) came to the same conclusion. In 2011:

"the Court upheld the right to compensation of a German beekeeper who instituted legal proceedings against the State of Bavaria when Monsanto's GM corn (MON810), which was cultivated for research purposes in plots owned by the State of Bavaria, contaminated his honey. The Court found that the beekeeper suffered an economic loss by not being able to sell his product and that he ought to be compensated"²

In this respect, the addition of strict labelling and reporting standards for the transport and handling of GMOs will assist in identifying who is responsible for the matter at any time. Alternatively, the BAM Act already allows for inspection and analysis by delegated authorities. In this way the impact of contamination from non-intentional pathways in the growing phase can be determined.

Establishment of clear standards, and the requirement for a risk management plan linked with the license approval process provides a clear process by which growers and handlers of GMO products will understand their responsibilities and accountability where contamination occurs. These mechanisms also allow for the implementation of penalties to be enforced if the standards are not met. Currently the penalties associated with BAM Act are in the form of fines. Penalties in the form of compensation to aggrieved producers for contamination due to breach of conditions may also be introduced through an amendment to the Act.

There is also provision under the BAM Act for penalties relating to "Adulteration of agricultural products or animal feed" (Part 3 Division 3) where to "adulterate" is defined as including to "contaminate the agricultural product or animal feed". In this instance, windblown genetically modified

² EU Library of Congress website <https://www.loc.gov/law/help/restrictions-on-gmos/eu.php> accessed 16 February 2018

canola onto the pasture of certified organic sheep may also constitute an act of contamination. Furthermore, Section 6o allows for significant penalties where such action (either intentional or by simply being reckless) causes “public alarm or anxiety or economic loss”.

One other factor, related to accountability, is the notion of insurance. The EU Parliament instituted an article in their gene technology legislation that

“requires EU Members to establish a general mandatory system of financial liability and financial guarantees, such as through insurance. Such a liability and insurance scheme will be applicable to all operators and will ensure that the polluter pays for the unintended effects of damage that may occur due to the deliberate release or marketing of GMOs”³

Western Australia may introduce a similar requirement through the code of standards, ensuring that insurance cover for contamination is included in their management plan.

PROPOSED MECHANISM 4: POWER TO COMMENCE LEGAL PROCEEDINGS

Amending the BAM Act to include GMOs as prohibited organisms requiring license and strict code of practice to be in place creates a legal structure by which the contamination of GMOs causing economic loss may be compensated for. Further consideration needs to be given to who may commence legal proceedings. For legitimate legal processes it may be more appropriate for the entity that has suffered the economic loss to be awarded the power to commence proceedings. Alternatively, the Director General has the power to authorize a person to commence prosecution (Part 5 Division 1 Section 104), but whether it is appropriate for the Director General to delegate this authority to a private individual is for legal counsel on drafting amendments to determine. The other option may be that the Act directs the Director General to commence proceedings on an individual’s behalf if certain conditions are met. This would avoid subjectivity in interpretation of the Director General’s powers to prosecute. In addition, procedures where an aggrieved entity may lodge objections to a Director General’s decision to a third party or council would improve the transparency of the process. Either way, it needs to be acknowledged that the entity that suffers the economic loss has some power to initiate legal proceedings, and for the penalties to be reflective of their losses and remunerated directly to them. In this way, a minimum amount of effort is required to enact procedures around prosecutions. The financial burden of the legal proceedings should also not be borne by the entity that has suffered the economic loss.

Signed,

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³ EU Library of Congress website <https://www.loc.gov/law/help/restrictions-on-gmos/eu.php> accessed 16 February 2018