STANDING COMMITTEE ON
ENVIRONMENT AND PUBLIC AFFAIRS

INQUIRY INTO MECHANISMS FOR COMPENSATION FOR ECONOMIC LOSS TO FARMERS IN WESTERN AUSTRALIA CAUSED BY CONTAMINATION BY GENETICALLY MODIFIED MATERIAL

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
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SESSION THREE

Members

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

Hearing commenced at 11.47 am

Dr KARINNE LUDLOW
Associate Professor, Faculty of Law, Monash University, sworn and examined:

The CHAIR: Professor Ludlow, my name is Matthew Swinbourn. I am the chair of the committee. I will be asking most of the questions, but other questions may come from other members of the committee. I need to go through a couple of things with you. On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take the oath or affirmation.

[Witness took the affirmation.]

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

Dr LUDLOW: I have.

The CHAIR: These proceedings are being recorded by Hansard and broadcast on the internet. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of any noise you make over the telephone and please try to make sure that there is not any superfluous or outside noise, because that is also being broadcast on the internet. I remind you that your transcript will become a matter for the public record. If, for some reason, you wish to make a confidential statement during today's proceedings, you should request that the evidence is taken in closed session. If the committee grants you request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Are you in a position to make an opening statement to the committee?

Dr LUDLOW: I have not prepared an opening statement. I am happy just to help you with your questions.

The CHAIR: All right; thank you. Perhaps, for our benefit, Professor Ludlow, can you just give us a description of your area of expertise and your interest in this matter?

Dr LUDLOW: My education is a Bachelor of Science and a Bachelor of Law with honours. Then I did a PhD combining those in the sense that I looked at legal issues for Australians trying to commercialise genetically modified organisms in Australia. Since that time, as an academic, after leaving practice, I have focused on legal challenges to science and innovation more generally, particularly focusing on biotechnology and other new technologies such as nanotechnology. Agricultural biotechnology has been a particular interest of mine.

The CHAIR: Thank you for that. Just one point of clarification—in your submission you use the term "commingling" instead of "contamination". Are you able to elaborate on why you prefer the "commingling" term instead of "contamination"?

Dr LUDLOW: To distinguish between whether you are talking about a crop that is illegal under the Australian gene technology scheme, in that sense I would use "contamination" if it was something

not approved by the Gene Technology Regulator at all; whereas I use "commingling" if it is something that somebody does not necessarily want on their land, but it is a legal entity—it is allowed to be released into the Australian environment.

The CHAIR: So you think that "commingling" is a preferable term in the context of our terms of reference and our inquiry rather than "contamination", given that the GM crop that we are most talking about, which is canola, is actually a legal crop in Western Australia?

Dr LUDLOW: I do. I have noticed that in the limited case law that we have so far both here and overseas, the use of the word "contamination" has attracted criticism from judges that it is not a defined term as such and that it is not appropriate that it be used for something that is actually legal behaviour.

The CHAIR: Thank you for that.

You have said in your submission that the peculiar facts of Marsh v Baxter mean 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 third party land. Could you please expand on this statement, potentially giving some examples to us of factual scenarios where you think a claim could or might be successful?

Dr LUDLOW: I could. I think that the joint judgement 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 will talk about how—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.

I am sure you would have already heard this multiple times—the background of what the courts require. I see that in regard to negligence there were three problems on the facts of this case. They were in three different parts of the tort—three elements of the tort—the issue of whether there was a duty at all, whether there was a breach or unreasonable behaviour by the defendant and, lastly, whether the breach by the defendant caused the harm. I think the facts of the case meant that all three were not satisfied, and I will give you a little bit more detail if you would like that.

In terms of the duty, that is the most difficult hurdle to get over under Australian law. I am sure you would have heard already that there are a number of factors that the court is asked to look at to decide whether it is appropriate that there be a duty in a case involving a claim for economic loss. One of those factors is the issue of the plaintiff's vulnerability to the defendant's actions in the sense that they are not able to protect themselves in a reasonable way from the risk of the harm that they are complaining about. The case that is the closest parallel to this is a High Court decision of Perre v Apand, which I know you have been referred to previously. That was the potato case. In that case, similarly, the plaintiffs were not able to protect themselves from a risk of decertification under Western Australian law regarding infection control in agriculture. The parties, the appellants, were actually in South Australia. They were potato producers that farmed around an infected property. The property that was infected had that infection introduced by the defendant's negligence. The appellants in the case did not suffer any property harm, just like Marsh v Baxter, and they were at no risk of ever suffering any property harm. But they lost their ability to sell into the Western Australian market at a premium. It is a very close parallel to what we are talking about here—the stripping of certification because of somebody's behaviour. Although in Marsh's case,

you have not got a risk at all. There is no risk of an infection. Under Marsh, there was no decertification under legislation. It was under voluntary standards, and that is the important difference, I think. Marsh's case involves a plaintiff who has defined in their own terms what they think harm is. The law cannot say to a defendant, "You need to know what everybody out there thinks the standard should be and how they want to live." That is not a request that the law would make of somebody. I think that if we did have a legislative or regulatory standard for what organic meant in Australia—if you want to use the term "contamination" or "commingling", what that actually meant—then that would change the court's attitude there. That would be the biggest hurdle to get over, I think.

The next one is the breach of that standard or showing that the defendant behaved unreasonably. Again, the difficulty here is not—the defendant was not being sued because they grew a GM crop. They were, of course, as you know, being sued because they swathed the crop. There are two parts to showing a failure to take reasonable care. One of those is showing that the defendant should have foreseen that they could cause harm to somebody else. The next question is what they should do about knowing that. I think, on the facts, the court was saying was that it was not foreseeable by the defendant that their behaviour could actually cause this type of harm through swathing. The defendant had not used swathing before. That is not necessarily an excuse, but the combination of not having used swathing and, in fact, no evidence being given to the court about what was reasonable behaviour in swathing and that the defendant did not know that the material could spread that way made the risk of harm unforeseeable. That, I think, was what prevented the court from finding that Baxter had failed to take reasonable care. It is true it was raised that material had previously spread from his farm to the Marshes' farm. That was not genetically modified material, but material had spread in the past. That had been carried across by rabbits and deposited through their droppings, which is quite a different way of travelling through space. It is not that they are saying that a GM farmer could never be in breach, but on these particular facts there was not a breach.

In the future I think that evidence would have to be gathered about what is reasonable precautions to be taken in swathing. I know that your committee has been looking at that—in the particular circumstances of WA, what would be reasonable. Certainly, it is foreseeable now that this can happen. It has happened. Again, I do not think that would block a future case.

The last one is causation. That is the plaintiff has an obligation to show that if there was a failure to take care, that the failure caused the plaintiff harm. Here, this was a very live problem, I think, for the plaintiff because the harm did not occur until their organic certifier decided to decertify their farm. As you know, there was no actual property damage or any risk of property damage.

So the person who actually caused the harm was the certifier when they made their decision to de-certify the farm. As the trial judge told the Marshes, they possibly had a remedy against the certifier for that behaviour for causing their loss, but for whatever reason, the Marshes chose not to sue them for compensation. So when would it succeed in the future? I think having a regulatory standard for organic would be very helpful in doing that. I think now that we know about the risk of swathing and investigations in what should be done where that method is used would be helpful, and I think a focus on what actually has led to the harm and better application by certifiers of their own rules would improve the chances in the future. That is the negligence cause of action. I cannot see your faces so I do not know if you have understood or fallen asleep, sorry!

[12 noon]

The CHAIR: No, we are still all here!

Dr LUDLOW: All right—hang in there! Nuisance is a more difficult one and I do not know if that would actually succeed. But, as you would have been told probably ad nauseam, nuisance involves more of a balancing of the relevant circumstances in the interests of both parties to decide what is reasonable behaviour because you have to show an unreasonable interference with the plaintiff's use of their land. Again, if there was actual material damage—if harm was actually caused to the plaintiff's crop, harm in the sense that the crop got sick—then you would clearly win; there would be no problem. But in these more abstract cases where you do not have that, it is going to be much more difficult to get a successful private nuisance action, I think.

The CHAIR: Thank you for that very thorough explanation. It is appreciated. Do you have views on strict liability generally and its utility in establishing liability for GM contamination or commingling?

Dr LUDLOW: From the common law perspective, strict liability has very much fallen out of favour. Back when I was a law student, we did learn about one of the last remaining torts that was a strict liability tort, but that has gone. That is a reflection of my age, I think. But the attitude of the courts is that it is more equitable now to allow balancing of people's interests—the two parties. So it has fallen out of favour but it does still have a role. As I said, if you can show actual property damage in private nuisance, the tort pretty much operates as a strict liability. There is little hope for the defendant to escape liability in those cases. There are a few ways out, but it is quite difficult. It is also quite strict in the sense that if there has been an unreasonable interference with the plaintiff's interest, the defendants are liable whether they used reasonable care to try and stop it or not. Again, it is pretty strict. It is not so concerned about fault. Lastly, if the defendant is dealing with an extremely dangerous or super-hazardous good, the standard that they have to take in protecting others is so very high, it is virtually strict liability. Of course, statute is free; you are free to override the common law, and that would mean you would not have to prove fault. It would not mean, though, that there are not other things that would not have to be proven—things that I have just mentioned were a problem for the Marshes. So you would still have the issue of what types of harm and the causation issue, or proving that it was the person they are suing that actually caused the harm. You would still have to show a causal link. So in Marsh's case, would strict liability be used against the certifier who actually caused the harm? The last point I thought I might make on that is that we know from other areas where there is this taking away of a fault idea, that the people who would be responsible for protecting others from harm—perhaps the GM farmers or the GM seed providers—may have less incentive to take precautions because their behaviour does not really matter anymore.

The CHAIR: Are there any other possible causes of action, other than those you have covered in your submission, which may be a viable option for a farmer to pursue under the common law or statute?

Dr LUDLOW: In the rare case that there was an intentional misbehaviour where some rogue deposited GM material on their farm, then there is clearly a trespass and it would succeed. There would not be too many problems with that. But in the more usual—hopefully—situation of an accident or negligence, there is a possibility under some environmental protection legislation and state legislation around pollution. I know in Victoria that it is possible under our EPA act to ask a court to compensate, but that is only for property damage and I do not know the position under Western Australian legislation, I am sorry.

The CHAIR: Are you familiar with the submission that was provided to us by Dr Anna Bunn and Mr Michael Douglas?

Dr LUDLOW: Yes, I read it after you asked me.

The CHAIR: So, in relation to their submission that farmers who have suffered economic loss caused by GM contamination would not be likely to be able to obtain compensation by bringing civil litigation and that the law of torts is unlikely to provide affected farmers with a remedy, are you able to express a view on the rationale that they provide in their submissions on this position?

Dr LUDLOW: I agree with a lot of what they say but I do not agree with some of the subtleties. I do not think that, as I said at the start, recovery for economic loss is impossible and I certainly do not think that an amendment to the Western Australian Civil Liability Act is essential for that to occur. I do think, as I said, that the lack of regulation around organic farmers is a problem, but I do not think it is your Civil Liability Act that is causing the problem. I know they suggest adding a concept of genetic damage to your Civil Liability Act but I do not think that actually would have helped in the Marsh's case. They did not suffer genetic damage, so I do not see why that would be useful in this sort of situation. Then there are more subtle differences. As I just said, how I interpreted vulnerability, I think I interpret that a bit differently to how they do. I also do not think that the breach is, as they described—I think the reason that the court could not find that there was a breach of duty by the defendant was because the defendant could not be expected to foresee harm. So it is a subtle difference to what they concluded. On the private nuisance issue, I do not know how much this has been spoken about, but there is a concept of a plaintiff who is abnormally sensitive or hypersensitive to interference by others and I think that Dr Bunn and Mr Douglas suggested that the hypersensitivity in the plaintiff's case in Marsh was that they were organic farmers. I do not think that was the hypersensitivity; I think an organic farmer would be treated like a farmer, but the problem was that they adopted these voluntary and, in effect, confidential or private standards that your average person would not know about. So there are subtle differences there.

The CHAIR: But you accept that in the normal course of tort law, that a tortfeasor finds their victim—for want of a better word—as they find them, even if there are those confidential arrangements. Why should that be any different in these circumstances?

Dr LUDLOW: Although there is the saying that you take your victim as you find them, in terms of the court saying to someone, "We expect you to behave this way", there are limits to what they can ask defendants to see might be out there in the public. So, if you are abnormally sensitive in the tort of negligence, it might be that you are not actually owed a duty; you are just—to put it in a very impolite way—too bizarre for a defendant to have predicted that you might react that way. Similarly, in private nuisance, if you are hypersensitive and you are complaining and the only reason you have been interfered with is you are hypersensitive and that the "ordinary person" would not have been impacted, then you cannot expect the defendant to compensate you. So although I know that statement, "You take your victim as you find them", or the plaintiff as you find them, it is not entirely true in the torts.

The CHAIR: We understand that for pure economic loss, it is not a principle that necessarily applies. I think that was explained to us this morning in quite a lot of detail. Are you in a position to make comment about the potential constitutional issues?

Dr LUDLOW: No, I am sorry; I am not a constitutional lawyer.

The CHAIR: That is all right. There are enough of them out there; we do not need any more! I will not deal with those questions, and I appreciate your candour in not professing an opinion outside of your area of expertise. You state in your submission that one of the challenges for any compensation scheme will be to determine what tolerance for GM presence will be used to measure economic loss—for example, zero for organic or 0.9 per cent for industry. How would you suggest the issue of divergent views on tolerance levels—that is, zero versus 0.9 per cent—is overcome and a consensus reached to enable a clear way forward on determining what constitutes reasonable

economic loss due to GM contamination? I note that you have already mentioned regulating an organic standard.

[12.10 pm]

Dr LUDLOW: Yes, I do not know if you will get consensus. That is a very big ask. I think that is a big problem for the organic industry—its rules are so vague that to ask other people to respect them, when it is not clear when you read them what is wanted, is a very big difficulty, I think, in the legal sense. In terms of tolerance for other production systems, I think it is very important, and you are probably doing this, to distinguish between intentional use by an organic farmer versus adventitious presence, either on their farm or in their product. They are two very different things. I know that I saw in some of the submissions, for example, that there would be a quote of a rule or a definition of a GMO. There is no context in terms of what are we talking about there. Are we talking about intentional use or are we talking about adventitious presence? To travel along with that, it is also not clear what responsibility the organic farmers have. Some of the rules will say that they have to take certain precautions, but it is totally unclear what those precautions are and, from the GM farmer's point of view, how much of a role the organic farmer should be taken to have played if something goes wrong. They are expected to take certain steps under their production guidelines, but they are not entirely clear what those steps are.

When you look across different jurisdictions or even different certifiers, there can be quite a lot of variety in the language. I tried in my submission to set out for you a sort of global picture of the different organic rules. I am not going to run through those unless you want me to. There are international levels, there are industry levels and then there are all the different supranational and national levels. All of them prohibit intentional use by organic farmers—that is clear. But adventitious presence is actually something that is very different amongst the different regimes. In all except Australia, adventitious presence does not automatically result in the loss of certification. In many jurisdictions they can continue to label as organic. But, of course, under the Australian national standards, which are the export standards, there is a zero tolerance. Depending on where the organic farmer is intending to sell to, that could impact what the tolerance is that they are worried about.

There are also differences in the level of decertification—how long it takes before they can be recertified. That is relevant because that impacts how much loss they suffer. If they can be recertified in 12 months, as suggested under the Codex guidelines, they will suffer a lot less loss than if they have to wait for five years, like they have to under the Australian guidelines. Those sorts of differences make it really hard for people on the other side of the equation to have an idea of what sort of loss somebody else could suffer. In terms of getting consensus, it has not happened yet and I am not sure how you will do it. I think that is their big problem.

Hon COLIN HOLT: You just prompted a question from me. We heard evidence that the national organic standards are driven by markets to be zero tolerant. Did you say that overseas jurisdictions do not have a zero tolerance, and that is also market driven per se?

Dr LUDLOW: Correct. Other jurisdictions do not have a zero tolerance. In the EU, you can still bring in product that has up to 0.9 per cent adventitious presence, as long as it is a legal GMO in that country. So it does not have to work the way it works here.

Hon COLIN HOLT: No. For example, we heard evidence from an association that to export organic, it is zero tolerance, as set by the certifying bodies in Australia. But that produce could get sold to a country that is not zero tolerant. Is that right?

Dr LUDLOW: Yes. It is quite tricky. What you just said is correct—the national standard to export from Australia has to have a zero level of GM. There are rules in each country about accepting other countries' organic material. Australia, for example, allows Europeans to sell organic produce into Australia and they will meet the European standard.

Hon COLIN HOLT: Right. And that may not be zero.

Dr LUDLOW: No. There have been instances where not necessarily Australian produce but other countries' organic products have been knocked back by one country and simply moved onto a different port and still sold as organic, because they can find a different regime that will accept them.

Hon COLIN HOLT: So when they talk about export-driven zero tolerance from Australia, that is only because that is what the certifying body has set here, is it not? It has nothing to do with market destination.

Dr LUDLOW: Correct.

Hon COLIN HOLT: Okay. Thanks.

The CHAIR: Are you able to expand on your statement at page 7 of your submission that a zero tolerance for adventitious presence is not appropriate where the terms "organic" and "organic production" are defined on the basis of an approach to production rather than the characteristics of the final product? Are you saying there needs to be an allowance for the unintentional presence of substances such as GM material; and, if so, why? I think you may have covered this to some extent, but perhaps if you can just focus on that.

Dr LUDLOW: Yes, it is linked to what we have just spoken about. But there is also a slightly different facet of it, and that is linked to what consumers understand. Organic agriculture of course is a value-based production system. The organic label means that that system has been used. But from a consumer's perspective picking up organic products in the supermarket, they have got no idea what has gone on. That issue of certification by accredited organisations is very important to protect the consumer. In the domestic market, people selling organic produce do not have to follow the national standard; it only applies for exports. Most of them do comply with the national standard, but they do not have to. They could write their own rules and call themselves organic. Similarly, the federal government could change the national standard if it chose to. They are made up rules.

The CHAIR: Is it a bit like the free-range egg issue that we have been grappling with over the last couple of years?

Dr LUDLOW: Yes, it is. As I said, most of the certifiers do follow the national standard but they do not have to. The Australian consumer protection authority, the ACCC, has said that it is watching the use of organic labels, like the free-range egg issue. It has suggested yet another standard—a private standard by Standards Australia that it uses as a reference for what is organic. So you have got all these different interpretations of what organic actually means, again adding to the difficulty when you are sued for infringing someone's ability to be organic, you do not necessarily know what they mean by that. The other point I want to make is that all of the global organic regulatory frameworks that I have looked at, such as IFOAM, the industry standard, and Codex and so on, say that GMOs are incompatible with organic production, but they all pragmatically recognise that GM may be present in organic products. They also say that organic labels should not be used as de facto GM-free labels. I think the danger here is that that is the message that is being sent to the public with some of these claims that it has to be zero. That is not actually necessarily the case. It is not the case overseas and it does not have to be that way here.

The CHAIR: Just if I can clarify: do you know what the standard is in the Australian Standards for GM contamination or commingling? Is there a percentage set under that? You said that the ACCC is making reference to the Australian Standards.

Dr LUDLOW: No, I do not know, but I do know for food labelling, of course, that it is up to one per cent. That is the Australian food standards code. That is a one per cent threshold. I do not know the threshold but I can give you the standard number—it is AS 6000–2009.

The CHAIR: Thank you.

Hon Dr STEVE THOMAS: When you talk about the characterisation as organic and you talk about the worldwide capacity to have some GM contamination in organic certification elsewhere, could you comment on the Marsh v Baxter case in Western Australia in particular? I understand that the judgement referred to that in some detail. I am just wondering if that is worth expanding on a little.

Dr LUDLOW: So the certifier in the Marsh v Baxter case, ACO, is an accredited certifier under the national standard, so it uses the national standard. That is a minimum standard. All the certifiers in Australia are free to add additional standards or additional hurdles to be certified under their system. So ACO does that; ACO imposes a zero tolerance.

Hon Dr STEVE THOMAS: But the judge in the case made reference to that, did they not, in the judgement to suggest that that was an inappropriate standard to apply?

Dr LUDLOW: Yes; you are correct, although I have read that a couple of times and I am not exactly sure which part of it the judge is not happy with. I think part of the problem was the messing up of intentional use versus adventitious presence and presence where. It is not clear from, or was not at the time, ACO's rules, to use your words, where the commingling had to be for it to it be a problem. It was not actually in his crop; it was on his land and the judge had a problem with that actually being interpreted against the ACO's rules. I think they have tried to clarify that since the hearing.

Hon Dr STEVE THOMAS: You raised earlier—a number of people have raised it—the potato bacterial infection as a standard set-up some time earlier, but is there a significant difference in the potato crops where you had contamination with a bacteria—which I presume would have been a designated organism or a pest organism; depending on that state's legislation, it would have had a designation as a disease state or a registered organism, which we would call it here—versus a genetically modified organism which is registered and empowered under legislation? Would there not be a significant difference in the legal impacts based on those two different causes? Therefore, is that a good example or comparison to make, or is it, because of that, a significant difference in a legal sense?

[12.20 pm]

Dr LUDLOW: Yes; very good. True. In Perre's case, that was the infection case, it was a virus that if the potato got it, it would make the potato very sick. It would go all floppy and decompose, so it was a danger to the property in itself. The fact that harm was done to someone's property and that then also resulted in economic loss to other people around them, that was an important difference compared to Marsh where there is no physical risk at all to the property. So, you have got economic loss being caused to one party and possibly to other parties, so, yes you, could distinguish the cases in that way.

The CHAIR: Some submitters have stated that there has not been a single legitimate instance in Australia of non-GM organic growers suffering a pure economic loss directly resulting from the unintended presence of an approved GMO and that no shipments of grain have been rejected by our export markets due to the unintended presence of GM canola. They have also stated any

compensation scheme is nothing but a solution looking for a problem. What is your position regarding these particular statements, professor?

Dr LUDLOW: Yes, I would agree with those.

The CHAIR: Is GM contamination properly seen as subject to, at most, isolated incidents, or is it a more potentially wider spread issue in your view?

Dr LUDLOW: If you are speaking about GM contamination leading to economic loss, then I think it would be quite rare.

The CHAIR: But if we are not talking about that?

Dr LUDLOW: So simply just moving into the environment?

The CHAIR: Yes.

Dr LUDLOW: Yes, that would be more likely to occur but, presumably, it would not cause any legally worthy problems in the sense that there would be an action that you could sue over.

The CHAIR: Some submitters have asked that if a compensation scheme was introduced for GM contamination or commingling, to use your words, whether there would also need to be compensation for all sources of commingling or contamination, including weed intrusion, which some have submitted is a problem from organic farms—which they deny, of course, and they are entitled to deny that—due to the lack of weed control. What is your feedback on this proposition?

Dr LUDLOW: Two thoughts—one is that wherever you have two different production systems in competition, there is going to be a claim that the loser should be compensated, so I would expect all of the different production systems to make similar claims where they are being impacted by another system. The weeds one is an example where it is probably also equally difficult to sue under common law, as it is for GM spreading, as for weeds. There has been not very much case law actually in Australia where our farmers have sued each other.

The CHAIR: Are you aware of any international cases regarding that?

Dr LUDLOW: North America is not useful because they have, I think you have been told, legislation that stops farmers suing each other, so it would only be Europe, and I have not looked at their case law, I am sorry, because they are not a common law area.

The CHAIR: That is okay. There is only so much free work we can ask you to do for us!

Dr LUDLOW: My other thought on that was—again, I am sorry to keep bugging on about this—this idea of people setting their own standards. Supermarkets control what the characteristics are that are sold by our farmers. In some cases now they are starting to specify things such as genetic characteristics. So there are going to be situations where perhaps one farmer impacts another's ability to meet its contractual warranties or consumer expectations in dealing with those supermarkets. They also may have claims that other people are stopping them being able to meet the standards they have decided they want to live by. It is an area that will open up, I think.

Hon TIM CLIFFORD: Are there any other jurisdictions in the world where they have explicit definitions of organic material? You are saying that in Australia, Coles and Woolies are setting their own sort of standard about characteristics. Are there any other jurisdictions which have that? Given that those companies are setting their own standards, do you think it should be legislated here in Australia, like on a state level or federal level?

Dr LUDLOW: Certainly, the EU; the UK, if we treat it separately after Brexit; Canada; USA; and the industry regulator, IFOAM, the international federation of organic whatever it stands for, all have—not IFOAM, sorry, but the others—actual legislation that defines what "organic" means. It is a lot

easier to know in those overseas countries what you have to do to be organic. They also have certifiers who impose additional requirements like we do in Australia, but they at least have a baseline of legislation. We do not have that.

The CHAIR: Are you aware if Japan has a baseline for that as well?

Dr LUDLOW: No; I have not done a global search, I am sorry. I do not know.

The CHAIR: Some people have just mentioned the Japanese market, that is all. I am just interested.

Dr LUDLOW: Okay.

Hon Dr STEVE THOMAS: Are you aware of any reference materials or case law, in Australia in particular, where there has been either a proven or uncontested, I guess, case of economic loss due to adventitious commingling? Is there a demonstrated provable baseline that we can say, "There is this piece of research or this case that has demonstrated that", or is that process at this point, effectively, anecdotal?

Dr LUDLOW: Do you mean: Has there been a case where the organic farmer has won? Is that what you are asking?

Hon Dr STEVE THOMAS: Effectively, I am looking for that piece of research that everybody can say an economic loss occurred because of—we are not using the word "contamination", but I will use it this time—the presence of genetically modified material in a crop, whether it was non-GM, GM-free or whatever it was. Is there a baseline case study or legal precedent that said an economic loss has occurred, that we could refer to?

Dr LUDLOW: Marsh v Baxter suffered an economic loss; the issue is that the defendant was not responsible for it. I am pretty confident that it is an economic loss and the things that I have written would say that it is and there are various people I cite that say that. I think I have sent that, but if not, I can send that material to Maddison. That is not the query. The query is whether they are allowed or able to sue the GM farmer or seed producer or whoever it is for their loss. That is the more difficult question because the StarLink case was settled, most of the cases are settled, so you do not get a final judgement on them.

The CHAIR: I am conscious of the time, professor, so we might push through with some of these other questions.

Some submitters have stated that the introduction of a compensation scheme would stifle agricultural innovation. I know that in some countries where compensation schemes have been established, such as Denmark, there is yet no commercial cultivation of GM crops. What are your views on this?

Dr LUDLOW: I do think that there is a very great danger of stifling innovation if you introduce this type of scheme, but that is subject to broader policy balancing. One problem in Denmark, of course, is that the GM crops developed so far I do not think are particularly attractive to that market, so I do not know if it is a compensation scheme or just the science that is the problem there. I do know, though, from work I am doing on genome editing—a newer science different to genetic modification—that many in the EU feel that the way they approach GM has driven that type of innovation out of their jurisdiction. I did read through the Danish scheme to see what it was saying. I see that it is limited to cross-pollination risks, not to spreading onto land like Marsh's case. They also use a 0.9 threshold, not a zero threshold. They also say that the organic farmer must not have been negligent. Again, that is a problem because I do not know what they mean by that. I also would say that if you are having a compensation scheme for GM interfering with other people, it is not clear to me—this is a problem with those organic rules—what on earth they mean by GMO. In

Australia we have two different definitions that are used in the GM regulatory framework. The Gene Technology Act has a definition of "GMO" and "gene technology", but our food standards also have a different definition and they define "gene technology" differently. So when the organic industry is talking about a GMO, I do not know what they are talking about; there is no one meaning of that. I do not know if you have looked into this, but both those schemes—the Gene Technology Act and the food standards code—are under review at the moment to try to figure out what to do about genome editing and decide if that, or some of it, should be gene technology and GMOs. Again, in the organic sense, I have no hope of understanding what they think GMO is. That is a risk with such a scheme—that the door will be open and every new technology will simply be classified as GM and they will want compensation for that. You would need a nice, tight definition of what you mean by "GM", I think, if you did bring in such a scheme.

[12.30 pm]

The CHAIR: What are your views on the principles for farmer protection legislation?

Dr LUDLOW: They are just principles, so they are not very tightly written. A couple of things: it talks about the right to be free of GM contamination. At the moment, of course, there is not an absolute right to that under Australian law as far as I know—not under tort law and not under statute, which is what you are looking at I suppose. I see that the principles anticipate a payout even though the non–GM landholder is not necessarily concerned about the GM presence; it is just that they can prove that it is there, then they can demand compensation. Its stated objectives did not fit what they are actually doing. It says that it is intended to protect from contamination, but all it is doing is introducing a method of compensation. It says it is strengthening monitoring and detection, and encouraging detection of contamination earlier than it would otherwise occur, but there is no detection mechanism under the principles and there is not even an obligation to report quickly or any obligation to try and minimise loss. I think there are some big holes there if the principles were to be converted into regulation.

The CHAIR: I suppose it might go without saying from what you have just said, but do you believe they constitute a reasonable framework for setting up a legislative compensation scheme?

Dr LUDLOW: No.

The CHAIR: Regarding the funding for a proposed levy, what are your views?

Dr LUDLOW: I do not have an opinion either way on that, sorry.

The CHAIR: Okay. There have been a range of views given in evidence to this inquiry about the usefulness of insurance as a means of compensating any GM contamination of non-GM crops, and some have stated that multi-peril crop insurance may be one solution. Do you believe insurance offers suitable products to cover GM contamination?

Dr LUDLOW: I am sorry; I do not have any expertise on insurance availability.

The CHAIR: No; I thought you might say that as I was dealing with that question. I do not have any further questions. You have provided us with a paper that you have recently written. Do you want to speak to that?

Dr LUDLOW: If the committee is wanting to pursue looking at what it means to be organic overseas, and I think that is important in the sense of this claim that there are market losses and so on with where people are trading overseas, then that paper would give you a place to start. It names the different regimes in those main jurisdictions, but not Japan, I am sorry.

The CHAIR: That is okay. The paper "Growing Together: The Impact of the Regulation of Non-Innovative Activities on Agricultural Innovation Governance" by Karinne Ludlow is tabled. As I say, I

do not have any further questions. Does anybody else have any questions? No. Would you like to make a closing statement, professor?

Dr LUDLOW: No. Thank you for the honour of being allowed to speak with you.

The CHAIR: That is okay. I just need to go through these final formalities. Thank you for attending via telephone today. A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. I do not believe we have had any questions on notice, so we do not need to worry about that. If you want to provide additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence. Thank you for your time today, professor.

Dr LUDLOW: Thank you.

Hearing concluded at 12.35 pm

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