



Department of
**Primary Industries and
Regional Development**

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Standing Committee on Environment and Public Affairs
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

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

**SUBMISSION BY THE DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL
DEVELOPMENT**

On behalf of the Department of Primary Industries and Regional Development (DPIRD), I thank the Committee for the opportunity to make a submission in relation to the above mentioned inquiry.

Background

In 2001, the Australian Commonwealth and States and Territories signed the Inter-Governmental Gene Technology Agreement (GTA) to enable a consistent national scheme for the regulation of gene technology. The Commonwealth Gene Technology Act 2000 (the Commonwealth Act) was enacted to protect the health and safety of people and the environment, by identifying and managing any risks posed by or as a result of gene technology through regulating dealings with genetically modified (GM) organisms.

Whilst all jurisdictions are bound by the Gene Technology Agreement, some states (currently South Australia and Tasmania) maintain moratoria on GM use in agriculture. Under the GTA these moratoria are to be used for marketing purposes only.

Currently, only two GM broad-acre crops (GM canola and GM cotton) are licenced for commercial release in Australia. According to industry bodies, over 99 percent of cotton grown in Australia is GM and in Western Australia (WA) over 30 percent of canola is GM. Both GM cotton and GM canola are subject to national regulations and are legal crops. GM canola has been grown in WA since 2010, following the making of an order under the *Genetically Modified Crops (Free Areas) Act 2003* by the then Minister for Agriculture and Food. This Act was repealed in October 2016.

Since the introduction of GM canola in WA, the WA grains industry has supported the co-existence of all farming systems. WA growers have the opportunity to use a wide range of production systems to generate products that meet their customers' demands and specifications.

GM and non-GM canola in WA

DPRID acknowledges that there is the potential for GM crops to admix with non-GM crops, including unintended admixing, and windborne pollen or seed. These factors were taken into consideration by the Office of the Gene Technology Regulator when they conducted the Risk Assessment and Risk Management Plan prior to granting approval of GM canola as a legal

commercial crop. Should any unwanted presence occur, Government and industry have developed mechanisms to minimise impacts.

To deal with unintended presence of GM canola in non-GM canola, the Australian Oilseeds Federation (AOF) has adopted a threshold of 0.9 percent, which is based on the European Union threshold and has been adopted by most export markets as the international standard. Since 2010, when GM canola was first planted in WA, no shipments of grain have been rejected by our export markets due to the unintended presence of GM canola in grain. A contributing factor to this is that grain handlers, such as Co-operative Bulk Handling Ltd (CBH), have an effective segregation and identity preservation system to handle GM and non-GM grains, as well as up to 50 other grain varieties, and are able to deliver products to meet customer specifications.

In Australia, there are two key standards that govern the production, processing and labelling of organic food: The National Standard for Organic and Biodynamic Produce (Export Standard) and The Australian Standard for Organic and Biodynamic Products – AS 6000-2009 (Domestic and Import Standard). While both of these standards state that GM products or by-products are incompatible with organic or biodynamic agriculture, neither of these standards clearly defines the tolerance level for unintended presence of GM material. The Commonwealth Department of Agriculture and Water Resources (DAWR) have advised that these standards are guidelines, and that DAWR has the power to negotiate market access conditions between Australia and its trading partners for organic produce.

The AOF have advised that since the introduction of GM canola in Australia, the industry has not lost any markets for Australian canola and that the market choice principles and thresholds adopted by industry for both export and domestic supply chains have worked well in providing choice to consumers, retailers, food and feed manufacturers as well as producers. The non-GM segregations that have been developed by the industry align to the strict requirements of the EU and other export markets. The GM-sensitive European market remains a major export market for Australian canola, while China has also developed as a major export destination.

DAWR have developed a guideline for responding to contamination by prohibited substances or materials in the organic export supply chain (2018-01). This includes the (unintended) presence of GM materials and organisms. These guidelines can assist organic farmers by providing guidance in responding to various circumstances where prohibited or unintended substances are present.

Liability/Compensation Schemes

In terms of liability of GM farmers for damages allegedly caused to non-GM farmers by GM presence, most countries, including Australia, rely on tort law.

To DPIRD's knowledge, there has only been one litigated case in WA where a non-GM farmer has claimed alleged losses resulting from a GM crop. This case was based on the tort of negligence. The Supreme Court dismissed the action, ruling in favour of the GM farmer. This ruling was upheld by both the Court of Appeal and the High Court. Furthermore, the Court held that the certifying body (the National Association of Sustainable Agriculture Australia Ltd) had inappropriately and erroneously invoked the Standard in de-certifying parts of the non-GM property.

A number of European countries have adopted various schemes to compensate for financial losses as a result of the adventitious or unintended presence of GM material in non-GM crops. The compensation in such schemes is often limited to the difference in the price received between a 'contaminated' crop and the price received for a similar crop unaffected by the GM material. Some of the EU schemes are based on a strict liability regime in which the GM farmer would be liable for economic damages due to GM crops, independently of whether there has

been any negligence or wrong-doing. Most of these schemes are industry funded through the collection of GM grower levies.

In Europe, the European Food Safety Authority undertakes rigorous safety assessments on GM crops but the decision to grant or refuse authorisation of GMOs is made by the European Commission and the member States.

In Denmark, for example, an industry funded (through levies by GMO cultivators) compensation scheme is in place, administered by the Danish Government. The Danish scheme is not a liability scheme, as there is no specific requirement for proof of causation. If the injured party is authorised as an ecological farmer, the presence of GM seed in non-GM seed is sufficient to trigger compensation. If the causal agent can be identified, the Government can reclaim the compensation costs from that party. Compensation is awarded if the non-GM crop is within a certain specified area from a GM crop, is of the same kind as the GM crop, GM presence is above a certain level, and grown within the same growing season.

In some EU countries, farmers are encouraged to invest in crop protection insurance, and their compensation scheme is designed as a short term scheme until such a time when insurance options are commercially available.

It should be noted that the EU is a net grain (bulk commodity) importer and although there is very little GM crop production in the EU, it does import significant quantities of GM grain for food/feed/processing.

A report on liability and compensations schemes for damage resulting from the presence of genetically modified organisms in non-GM crops was published in 2007, which provides a detailed analysis of the situation in EU States. The report states that some countries maintain traditional tort law rules, while other jurisdictions have introduced strict liability regimes, or a combination of the two. The Committee is encouraged to examine the EU schemes.

Compensation schemes in Australia

It is noted that in 2006, an independent Statutory Review of the Commonwealth Gene Technology Act and the Gene Technology Agreement considered issues such as the need for strict liability rules for potential economic damage from mixing GM and non-GM crops. The Review concluded that the common law allows for effective remedies for persons incurring damage from GM crops.

The Review further concluded that a strict liability scheme and mandatory compensation should not be introduced into the Gene Technology Act, reasoning that strict liability is generally reserved for catastrophic damage and GM crop related matters did not fall into this category. One of the conclusions of the 2006 Review was that moratoria on the production of GM crops had detrimental rather than beneficial impacts. Attached is advice on strict liability for straying animals.

In terms of international agreements, the Nagoya-Kuala Lumpur Protocol (N-K-L Protocol) on liability and redress addresses issues of liability from GMOs. The N-K-L protocol is part of the Cartagena Protocol. Australia is not a party to either but both Australia and the EU are party to the parent Convention on Biological Diversity. Article 8(g) of the convention requires parties to have in place means to manage the risks associated with the use of GMOs. In Australia this is achieved through the legislation and regulatory scheme.

Only the Commonwealth Government has exclusive powers to impose levies in Australia. In further considering compensation schemes for WA, the Committee is encouraged to determine the capacity of the State to raise a levy independently of the Commonwealth. The Commonwealth Government generally does not become involved in State matters such as a

State-based compensation fund. Therefore, any compensation scheme funded through a levy would likely need to be a national scheme.

Consideration needs to be given as to whether the introduction of a compensation scheme for non-GM farmers could have the potential to set a precedence for farmers to claim for alleged damages incurred by a range on unwanted 'contaminants' in their crops, including weeds. No matter which farming system farmers choose to adopt, it is likely there will be a certain level of presence of unwanted organisms that could potentially affect crop value.

On-going regulation of GM crops

The Office of the Gene Technology Regulator has a post-release framework that allows on-going oversight of general/commercial releases of GM crops in Australia. Details of this can be found at <http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/fact-gmcanola-htm>. There is no evidence that the national regulatory scheme is under-performing or requires additional control measures. Both the Commonwealth Act and Regulations, and the national regulatory scheme, are currently undergoing a routine 5-yearly review. Outcomes of the regulatory scheme review will be presented to the Legislative and Governance Forum on Gene Technology in mid 2018.

Conclusion

DPIRD supports a nationally consistent legislative scheme for the regulation of Gene Technology. Experience to date suggests that the current mechanisms to minimise the impacts of unintended consequence of GM materials in non-GM farming systems, such as effective supply chain segregation and identity preservation systems, are effective.

Different systems internationally rely on both tort law and strict liability, or combinations of these. All systems have challenges.

As well as consideration of potential mechanisms for compensation schemes, the Committee is encouraged to consider how changes may be made to tort law to meet the needs of non-GM farmers, if this were deemed necessary and appropriate.

The Government does not generally become involved in commercial transactions between technology development companies and growers on private on-farm trading commodities provided the technology is appropriately regulated and legal. Ultimately, growers choose whether they wish to grow varieties of crops based on their own business decisions, which may include the agronomic advantages of certain varieties, and the market benefits associated with the varieties produced.

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- 2006 Statutory Review of the Commonwealth Gene Technology Act and the Gene Technology Agreement - <http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-gtmc.htm>

Is there strict liability for the straying of cattle in Australia?

Strict liability for cattle trespass has been abolished by legislation in the Australian Capital Territory, New South Wales and South Australia. It has been abolished in relation to animals straying on highways in Western Australia by section 3 of the *Highways (Liability for Straying Animals) Act 1983 (WA)*. Strict liability still applies in the other States of Australia, according to information in *Halsbury's Laws of Australia* online which is current to 3 December 2016. Further checks are needed to determine whether the legislation in any Australian State (apart from WA) has changed since that date, or new relevant legislation has been passed.

Section 3 of the *Highways (Liability for Straying Animals) Act 1983* is current law in WA. The gist of it is in subsections (3) & (4), which modify the tort law of negligence in relation to animals straying on highways.

In WA, in relation to animals (other than dogs, to which the *Dog Act* applies) straying elsewhere, strict liability arises where the animal is known to have vicious propensities. This is only likely to apply to cattle in exceptional cases. In the absence of such knowledge, liability will depend upon the ordinary law of negligence.