

Submission to Inquiry into Compensation Mechanisms for the Unintended Presence at Low Levels of Approved Genetically Modified Organisms



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1 INTRODUCTION

CropLife Australia is the national peak industry organisation representing the agricultural chemical and plant biotechnology sector in Australia. CropLife represents the innovators, developers, manufacturers and formulators of crop protection and agricultural biotechnology products. CropLife's membership is made up of both patent holding and generic Australian and international and small and large companies and accordingly, advocates for policy positions that deliver whole of industry benefit.

The plant science industry provides products to protect crops against pests, weeds and diseases, as well as developing crop biotechnologies that are key to the nation's agricultural productivity, sustainability and food security. The plant science industry is worth more than \$20 billion a year to the Australian economy and directly employs thousands of people across the country. CropLife Australia is a member of CropLife Asia and part of the CropLife International Federation of 91 CropLife national associations globally.

The Inquiry into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material is extremely concerning. Any compensation scheme is nothing but a solution looking for a problem, as there has not been a single legitimate instance in Australia of a non-GM nor organic grower suffering a pure economic loss directly resulting from the unintended presence of an approved genetically modified organism (GMO).

The establishment of any form of compensation mechanism for the unintended presence at low levels of safe and approved GMOs in non-GM or organic products poses a real and serious threat to the farming sector and would introduce unjustifiable undermining of long established legal principles if passed.

Any scheme that purports to introduce a compensation fund for the unintended presence of an approved GMO on the owner of the intellectual property of that GMO (i.e. seed company or technology developer), or a user of the technology (i.e. farmer/grower) needs to be vigorously opposed by those committed to sound and scientifically based public policy and regulation. Such schemes would serve only to stifle the future of Australian agricultural research, innovation and competitiveness.

Such mechanisms ignore the agronomic, economic and environmental benefits of GM crops and the rights of Western Australian farmers to choose what approved crops they want to grow on their own farms. It would impose a costly mandate on farmers, technology providers and Western Australia's own publicly funded researchers, with no identifiable societal benefit.

Compensation schemes could expose the entire supply chain to a broad liability for an event that may occur long after seeds have left their control. This disregard of well-accepted standards of tort law puts all Australian seed providers and farmers at risk that their products, although safe and legal, could also be similarly decreed to be a liability to someone, somewhere at a later time. Furthermore, introduction of such schemes would go against the well-established and long-standing legal principles relating to liability for pure economic loss, discussed later in this submission.

The development, planting and consumption of an approved GM crop is safe. It is important to recognise that all GMOs approved by the Gene Technology Regulator for commercial release in Australia are as safe for human health and the environment as their conventional (non-GM) counterparts.

Globally, over 1 billion acres of GM crops have been cultivated since 1996, and over 1 trillion meals containing GM food ingredients have been consumed, without unexpected effects on ecosystems or a single documented adverse effect on human or animal health.

Independent research demonstrated that over the first 20 years of commercial GM crop cultivation in Australia (1996-2015), Australian cotton and canola farmers gained \$1.37 billion worth of extra income, and produced an additional 226,000 tonnes of canola that would otherwise have not been produced if conventional technology alone had been used.¹

GM technology has also enabled Australian farmers to reduce their use of insecticides and herbicides by 22 million kilograms of active ingredient over 20 years, equal to a 26 per cent improvement in the environmental impact associated with pesticide use on these two crops. The more sustainable use of pesticides has also resulted in a saving of nearly 27 million litres of fuel use and 71.5 million kilograms less carbon dioxide being released into the atmosphere.²

Brookes and Barfoot (2017) estimate the average net increase in gross margins for GM canola in Australia in 2015 was US\$38/ha (eq. to AU\$48.50/ha based on exchange rate of 0.78).³ Based on the Western Australia GM canola plantings in 2015 of 337,527ha⁴, this translates to a direct benefit to WA GM canola growers of AU\$16.37 million in 2015 alone.

While the global acreage of GM crops has grown at an unprecedented rate, commercial organic acreage has also grown. There is no evidence that the global increase in GM crops has had any negative impact on the organic industry, all evidence points to the organic industry also growing over the same period. Australian farmers embrace the concept of coexistence, whereby various agricultural production practices can be employed in parallel to each other without one harming the other.

A compensation scheme is a solution looking for a problem that does not exist. Its real effect would be to create unnecessary conflict between Australian farmers and in doing so be highly destructive to both Australian agriculture and the plant science industry in this country. The 'end-goal' for the anti-GM activists advocating for a compensation scheme is to end the economic viability of commercial cultivation of GM crops in Western Australia.

Anti-GM activists understand that imposing an offence on seed companies, seed retailers, technology developers or directly on growers could stop the development and marketing of GM crops, because users may not be willing to accept liability for the low level unintended presence of approved GM crops regardless of the circumstances in which the GM crops were

¹ Brookes G (2016) 'Adoption and impact of Genetically Modified Crops in Australia: 20 Years' Experience'. Report prepared for CropLife Australia Ltd, Canberra, May 2016.

² *Ibid*

³ Brookes G and Barfoot P (2017) 'GM crops: Global Socio-economic and Environmental Impacts 1996-2015'. PG Economics Ltd, Dorchester, UK. June 2017.

⁴ See <https://www.abca.com.au/materials/statistics/> accessed 12 February 2018.

cultivated. Anti-GM activists are also calling for money to be levied regardless of fault or eventual liability.

The 2005-06 Statutory Review of the *Gene Technology Act 2000* and Gene Technology Agreement noted that case law had been developing to recognise pure economic loss, and that the High Court case of *Perre v Apand*⁵ covered many of the issues that might be expected to arise concerning any losses from the unintended presence of an approved GMO in a non-GM crop.

The *Consumer and Competition Act 2010* (Cth) and relevant Western Australian consumer protection legislation would also afford redress to persons affected by purchasing non-GM seed that unintentionally contained low levels of approved GM material.

There are several other intrinsic faults identified with statutory compensation mechanisms in the 2005-06 Statutory Review, including:

- Plaintiffs would still need to demonstrate before a court the causal link between the GMO and the damage they had incurred, as well as the magnitude of their loss;
- Applying strict liability to the licensee (or seed company / technology advisor), for example through a levy on seed sales, could result in the risk that the farmer using the GMO would have less incentive to steward the technology appropriately (and could result in either self-and/or maliciously-inflicted claims); and
- It could also result in instances of inequity to the licensee. For example, if a person deliberately distributed GM seeds across his neighbour's paddock it would be unfair to require the licensee to bear any liability for use of their product.

The Commonwealth's *Gene Technology Act 2000* established a national cooperative regulatory scheme for gene technology that seeks "to protect the health and safety of people and to protect the environment by identifying risks posed by or as a result of gene technology, and by managing those risks through regulating certain dealings with GMOs".

The independent panel that reviewed the Commonwealth *Gene Technology Act 2000* in 2005-06 examined the matter of compensation and concluded that the operation of common law and consumer protection legislation in Australia provided sufficient coverage. This is the case where any other activities of a farmer affect a neighbour. Separate compensation arrangements were not considered necessary. It is crucial for the state and for the sake of growers and farmers in Western Australia that the State Government does not impose unnecessary costs and encumbrances on their own farming sector with which other farmers around Australia are not impeded.

Other state governments have considered this matter and concluded that given there is a national cooperative regulatory scheme for gene technology, no jurisdiction can introduce arrangements under the scheme to implement a compensation scheme unilaterally. Any proposals regarding compensation would need to be considered by the Legislative and Governance Forum on Gene Technology, and agreed to by the Commonwealth and all states and territories.

⁵ 198 CLR 180

Since the adoption of GM canola in WA, CropLife is unaware of one single grain shipment from WA that has been rejected by WA's trading partners due to the unintended presence of GM material. It is simply not a problem that requires Parliament to come up with a solution.

CropLife agrees with the recent statement made by the Australian Farm Institute that:

“If this Inquiry finds that there should be economic compensation mechanisms for GM contamination (other than those available under common law), it sets a precedent that the WA government would not want to establish; i.e. market-based, arbitrary accreditation standards taking priority over legal, best-practice farming methods.”⁶

CropLife argues hypothetically that the Environment and Public Affairs Committee could just have easily have titled this Inquiry “Compensation mechanisms for unmanaged weeds, diseases and insect pests on organic properties that contaminate conventional farming”.

CropLife's submission:

- clarifies the appropriate sanctions to be imposed by organic certifiers when there is accidental introduction or necessary intentional use of prohibited substances or materials, including the presence of genetically modified materials and organisms;
- summarises previous Commonwealth reviews that have found compensation schemes to be redundant;
- highlights the importance of coexistence;
- sets out the existing thresholds in Australia's food and agricultural standards that ensure product integrity and safety and quality standards; and
- details the problem with an implied zero tolerance in organic marketing standards.

⁶ <http://www.farminstitute.org.au/ag-forum/inquiry-risks-contaminating-gm-debate>

2 CLARIFYING THE SANCTIONS FOR ACCIDENTAL INTRODUCTION OF PROHIBITED SUBSTANCES OR MATERIALS IN ORGANIC AGRICULTURE

Recognising the need for clarity when interpreting Australia's organic standards, the Federal Department of Agriculture and Water Resources has recently issued a new Organic Export Notice 'Guideline for responding to contamination by prohibited substances or materials in the organic export supply chain' ⁷.

This Export Notice was developed in consultation with the Organic Industry Standards and Certification Council (OISCC)⁸, which is the organic industry body charged with oversight for the National Standard. OISCC's membership includes the six major organic certifiers in Australia, including NASAA and Australian Certified Organic.

This Notice provides direction to organic certifiers in how to respond to the unnecessary intentional use, negligent introduction and accidental introduction or necessary intentional use of prohibited substances or materials, **including the presence of genetically modified materials and organisms.**

Table 3 of the Notice stipulates sanctions to be applied in response to the accidental introduction of prohibited substances or materials, including genetically modified organisms and materials. Accidental introduction is defined as the introduction of prohibited substances or materials, including genetically modified organisms and materials, where the presence of those inputs did not occur through deliberate action and could not have been reasonably avoided through a level of care that someone of ordinary prudence would have exercised under the same circumstances.

Importantly, in the situation where there has been accidental introduction of a GMO to an organic production unit, and such presence is determined to be minor (non-persistent, effective treatment can be applied), the sanction is to issue a Corrective Action Request only, not suspend or decertify the unit. This means that an organic business can continue to trade and makes a compensation fund irrelevant.

The Notice also makes it very clear that organic growers can continue to sell their produce on the market where the presence of prohibited substances does not exceed the requirements of Australian or exporting legislation. In the case of approved GM material in Australian food, for example, this labelling threshold requirement is 1%.

The issuing of this Notice with the support of Australia's organic certifiers makes it very clear that an organic grower should not be decertified if the accidental introduction of a prohibited input is detected in the organic production system – thus mitigating the circumstances that led to the *Marsh v Baxter* litigation, and to some extent the basis of this very Inquiry.

Given this simple clarification has now been made and agreed to by the organic certifiers themselves, it is now completely unnecessary to go through the motions of looking for solutions to problems that do not exist.

⁷ <http://www.agriculture.gov.au/export/controlled-goods/organic-bio-dynamic/organic-notices/2018/2018-01>

⁸ <https://oiscc.org/>

3 PREVIOUS COMMONWEALTH REVIEWS HAVE FOUND COMPENSATION SCHEMES TO BE REDUNDANT

The 2005-06 Statutory Review of the *Gene Technology Act 2000* and Gene Technology Agreement considered issues raised in submissions relating to strict liability, mandatory insurance and compensation under the Act for any unintended or negative impact caused by GMOs. The Independent Panel that led this review, systematically explained why such matters were not relevant for inclusion in the Act. In addition to the commentary on this review in the Introduction, a summary of the key findings of the Independent Review Panel follows.

Strict liability for 'contamination'

In considering this issue, the Independent Panel noted that:

“there is no other product in Australia which has attracted a strict liability presumption under the common law. In the past, and also in overseas jurisdictions, courts have imposed a strict liability regime in relation to ‘superhazardous goods’. Given the object of the Act is to manage risks to human health and safety and the environment, it is contradictory to categorise any GMO assessed by the Regulator and licensed for intentional release as a superhazardous good.”⁹

The Independent Panel concluded that a strict liability regime should not be introduced into the Act. CropLife supports the findings of the Independent Panel and recommends to the current Inquiry that Strict Liability is not an issue that requires re-visiting as the common law of torts continues to provide effective remedies for persons claiming to have incurred damage from GMOs.

Compensation fund

In 2006, the Independent Panel concluded that:

“the need for a compensation scheme rested on the presumption that the common law and consumer protection legislation would not prove adequate for dealing with losses...”

“Having considered these issues as well as the operation of the common law and consumer protection legislation in Australia, the Review concluded that a mandatory compensation scheme such as the Danish scheme should not be introduced.”¹⁰

CropLife supports the 2006 findings of the Independent Panel and recommends to the current Inquiry that a Compensation Fund is not an issue that requires re-visiting as the common law and consumer protection legislation continue to provide adequate protection. As Denmark is not a GM crop cultivating country, reference to the coexistence and compensation scheme established there is irrelevant and based on an entirely false premise. There have been no incidences or situations since the Independent Panel’s last assessment of this matter that would justify a change in this position.

⁹ *Statutory Review of the Gene Technology Act and the Gene Technology Agreement (2006), Commonwealth of Australia, p39.*

¹⁰ *Ibid., p41.*

The *Marsh v Baxter*¹¹ litigation is addressed specifically in greater detail later in this submission. Just because the anti-GM activist community do not agree with the original judgment in *Marsh*, it does not mean the system is broken. Rather, it demonstrates unequivocally that the common law is the most appropriate mechanism and worked effectively for dealing with claimed instances of pure economic loss that may arise from the torts of trespass, negligence and nuisance.

Mandatory Insurance for GMOs

The 2006 Review concluded that:

“[In Australia] there are no products covered by statutory insurance requirements.”

“The Review sought comment from the Insurance Council of Australia (ICA) and noted that the ICA was not in favour of imposing mandatory insurance because of practical limitations.”

“On balance, the Review concluded that mandatory product insurance for GMOs should not be required.”¹²

CropLife supports the conclusion of the Independent Panel in 2006, and **recommends** to the current Inquiry that Mandatory Insurance for GMOs is not an issue that requires re-visiting in the current review as the Regulator has existing power under sub-section 62(3) of the Act to impose licence conditions for the release of GMOs into the environment that may:

“include conditions requiring the licence holder to be adequately insured against any loss, damage or injury that may be caused to human health, property or the environment by the licensed dealing.”

In the 17 years the Act has been in operation, no Regulator has found it necessary to impose any conditions of this sort on a licence holder.

¹¹ [2013] WASC 187

¹² *ibid.*, p42.

4 *MARSH V BAXTER* [2013] WASC 187

The Supreme Court of Western Australia's decision in *Marsh v Baxter* highlighted the extent to which the National Standard for Organic and Biodynamic Produce (National Standard) is misinterpreted by approved organic certifying bodies, resulting in inconsistent and flawed outcomes for organic growers.

The Supreme Court held at first instance that the Marshes' loss was not caused by any action of Mr Baxter (who was found to have grown a legal crop in a legal manner). This judgment was upheld by the full bench of the Appeals Court in Western Australia and also by the High Court of Australia.

In his judgment, the learned Justice Kenneth Martin of the Supreme Court of Western Australia cast significant doubt on the competency of NASAA, the Marshes' organic certifier. Justice Martin found:

Para 528 – “A failure by NASAA/NCO to recognise and then apply the distinction between a case of the deliberate or negligent presence of GMOs in an organic operator's system, as opposed to an adventitious presence of GMOs, would be, in my view, a serious misapplication of the language of the standards – which clearly mandate this necessary differentiation be respected.”

Para 529 – “On the evidence adduced at this trial, I would conclude that Standard 3.2.9 was inappropriately invoked as against Eagle Rest and Mr and Mrs Marsh by NCO on 29 December 2010. The GM canola swathe circumstances which prevailed were clearly adventitious from the perspective of the Marshes. The NASAA Standards which governed them vis-à-vis their certification, properly understood, recognised this.”

Para 532 – “To sensibly invoke Standard 3.2.9 there needed to be some sensible risk of a contamination to an organic product then being grown or raised on Eagle Rest. But there was nothing to meet that criterion as at 29 December 2010.”

Para 535 – “The decertification of Eagle Rest by NCO on 29 December 2010, and then ongoing throughout 2011 to 2013, manifests as having been unsupportable under a proper application of the NASAA organic standards.”

Para 538 – “All in all, there appears to have been a gross overreaction by NCO to this incident by it proceeding to what presents as very much an unsupportable decertification as to 70% of the area of Eagle Rest (paddocks 7 to 13) imposed over the period December 2010 to October 2013.”

Para 737 – “There is therefore a very strong body of evidence in this trial to suggest that there was no legitimate contractual basis for NCO to decertify, for nearly three years, paddocks 7 to 13 of Eagle Rest, as regards a use for pasture or for crops.”

Para 739 – “That is no criticism of the NASAA standards. Rather, it is my concern as to their misapplication by NCO officials who appear to have been overawed by the December 2010 incident and applied zero tolerance rather than the terms of the NASAA standards as written.”

Para 741 – “Nor do I find any degree of vulnerability as arising from the contract the Marshes entered into with NCO/NASAA and under which they appear to have been wrongly denied their contractual right by NCO to use the label 'NASAA Certified Organic' on their Eagle Rest produce.”

Justice Martin held that the Marshes' organic operation should not have been de-certified by his organic certifier and that any economic loss borne by the Marshes' was caused by the incorrect interpretation and application of the organic standard by his certifying body, not through the unintended presence of low levels of approved GM material.

Accordingly, this case and any and all of the facts surrounding it do not form any basis, reasoning or justification for the introduction of any form of compensation scheme such as is being considered by this Inquiry.

This case is a most regrettable and unnecessary situation that caused great personal anguish to both farmers, their families and the community. There are no winners when poorly interpreted organic marketing standards create unnecessary conflict between farmers and it is now clearer than ever that this dispute between neighbours should not have gone down the legal route. The new Organic Export Notice (described previously) seeks to clarify interpretation of the standards to avoid future scenarios such as this. It is highly likely that the implementation of a compensation mechanism would result in the pitting of GM and non-GM / organic farmers against each other in the community, leading to a situation on a larger scale to that which developed during *Marsh v Baxter*.

Australia is a globally competitive, innovative provider of safe and nutritious food, and high-quality feed and fibre. Both GM farming and organic agriculture are a part of this.

The very same organic industry that makes impossible 'GMO free' assurances and argues vehemently that there is no need to have agreed threshold levels for unintended presence, now wants to make neighbouring farmers or the seed industry and technology providers pay for their own ideological position. In economic parlance, this is often referred to as 'rent seeking'; and goes against normal agricultural practice whereby producers seeking premium prices for their products bear the costs associated with obtaining those premiums.

5 THE IMPORTANCE OF COEXISTENCE

Coexistence is the practice of growing crops with different quality characteristics or intended for different markets in the same vicinity without becoming commingled and thereby possibly compromising the economic value of both. Coexistence is based on the premise that farmers should be free to cultivate the crops of their choice using the production system they prefer, be it conventional, organic or biotech.

Coexistence of various production methods is not a new concept to the agricultural community. Farmers have practiced coexistence for generations to meet demands for different types of products. Historical experience shows that coexistence of a wide range of production methods is not a problem, provided technical and procedural guidelines are carefully followed and cooperation between neighbouring farmers is encouraged.

Coexistence is not about environmental or health risks, it refers only to the growing of crops that have been authorised as safe for the environment and for human health by the regulatory authorities in the country in which they are being grown, and which are therefore available commercially to farmers in the area.

In Australia different types of wheat, barley and rice are grown in close proximity to, and channeled to different uses (e.g. bread wheat versus noodle wheat; malt barley versus feed barley and short-grain versus long-grain rice). Farmers follow simple but effective procedures to achieve agreed standards of quality and purity in their harvested products. **It is important to note that agricultural crops are never 100% pure: coexistence means meeting agreed, low level thresholds of admixture.**

In Australia, GM and non-GM canola has been grown side-by-side successfully and productively without creating marketing issues. With over eight years under our belt of growing GM canola, there has not been one incident across more than 6.5 million tonnes of canola delivered domestically, or more than 19 million tonnes delivered internationally, where an end user (seed crusher / oil or meal buyer, or food / feed manufacturer) has not received what they had ordered in terms of the GM status.¹³ Australia has continued trading all other agricultural commodities, including certified non-GM canola without incident or price differential since the commercialisation of GM canola.

Accessing ready-export markets such as China has been a boon for Australian farming since the Asian nation re-opened its borders to importation of canola in 2013. Since then, two million tonnes of Australian canola (GM and conventionally farmed) has been sold to China for a value of nearly A\$1.2 billion. China is a large importer of GM grain, as evidenced by the three to four million tonnes of canola imported from Canada (95 per cent GM) and 80 million tonnes of mostly GM soybeans imported from North and South America per annum. Similarly, Japan is a large user of GM grain, importing around two to three million tonnes each of Canadian canola and US/South American soybeans per year.¹⁴

¹³ Data provided courtesy of the Australian Oilseeds Federation

¹⁴ *Ibid.*

Coexistence is the foundation of all Australia's farming. There are systems in place to ensure farmers can keep commodities sufficiently separate so that all customers can get what they paid for. The same systems apply to GM crops, because approved GM plants are no harder to control, and pose no greater risk than conventionally bred plants. It is essential to continue to work together with all farming systems to ensure that no farmer is exposed to unnecessary economic risk because of unreasonable commodity standards.

Australian farmers must be allowed to remain competitive. A farmer's inability to grow approved, safe crops on their land purely because of a neighbour's ideological opposition to those crops will severely impact Australia's capacity to remain globally competitive as an agricultural exporter.

Western Australia successfully exports canola to several markets, including: Netherlands, Belgium, Argentina, South Africa, UAE, Japan, China, France, Germany, Hong Kong, Indonesia, Oman, Pakistan, Portugal, South Korea, Spain, Taiwan and the United States.

Some of these markets demand certified non-GM canola (CSO-1A), whilst others accept commodity grade canola (CSO-1), which can be a combination of non-GM and GM canola. The ability to service many different markets provides evidence of the capacity of bulk handlers to effectively segregate between grades of canola within the permitted tolerance levels (described later).

Australia is a globally competitive, innovative provider of safe and nutritious food, and high-quality feed and fibre. All of GM, conventional and organic agriculture are part of this. The ongoing incident-free success of WA's and indeed Australia's grain trade clearly demonstrates no basis, need or justification for consideration of compensation mechanisms. The sustainability of diversity in our production systems ensures this for the long-term.

6 EXISTING THRESHOLDS IN AUSTRALIAN FOOD AND AGRICULTURAL STANDARDS ENSURE SAFETY AND QUALITY STANDARDS

The setting of thresholds for the unintended presence of approved GMOs is not a new concept in Australian food and agricultural standards.

In 2005, the then Primary Industries Ministerial Council agreed to a nationally consistent definition of threshold levels in canola seed and grain for the adventitious presence¹⁵ of GMOs approved for commercial release by the Gene Technology Regulator. The Council agreed to two thresholds:

- A 0.9 per cent threshold for approved GM canola in non-GM canola grain (supported by the Australian Oilseeds Federation)
- A 0.5 per cent threshold for approved GM canola in non-GM canola seed for sowing (supported by the Australian Seed Federation).

At the time, these thresholds were supported by the Australian grains industry for three main reasons:

- They achieved end-user requirements
- They were economically achievable
- They were achievable for farmers and others in the supply chain to implement.

Food Standards Australia New Zealand (FSANZ) administers Food Standard 1.5.2 – Food Produced Using Gene Technology. Under this Standard, all genetically modified food and food ingredients are required to be labelled where they contain novel DNA and/or novel protein in the final food. This standard includes a threshold where labelling is not required in the case of:

“Food, ingredients or processing aids in which the genetically modified food is unintentionally present in a quantity of no more than 10g/kg (1 per cent) per ingredient.”

Thresholds exist for a range of quality factors in grain bulk handling. For example, the Grain Trade Australia standard for Australian Prime Hard Wheat (APH1) allows up to 1 per cent of grain to be insect damaged and up to 10 small insects (i.e. aphids) to be present per half litre of grain. The international Codex Standard for Wheat and Durum Wheat includes tolerances for other cereals (3 per cent), shrivelled grain (8 per cent), and even harmful or toxic seeds (0.5 per cent). Tolerances also exist for mycotoxins, which are produced when certain grains are infected with fungal spores.

¹⁵ Adventitious presence in the context of these thresholds is now termed low level presence (LLP), as announced by the Australian Oilseeds Federation for the 2016/17 season
https://www.graintrade.org.au/sites/default/files/AOF_Standards_All_Changes_Explanatory_Note_%2016_17.pdf

All of these thresholds recognise the practicalities of food production and transport while still ensuring safety and quality standards. They recognise this even when the threshold relates to a genuinely harmful contaminant. GMOs that have been approved by the Gene Technology Regulator for release into the environment are at least as safe as their non-GM counterparts so it does not make sense to not have a threshold for them in agricultural supply chains.

The lower a threshold is set the greater the cost to meet that threshold, because the cost increases exponentially as the threshold approaches zero. Different protocols for organic farmers, increased testing, increased cleaning and potentially the use of specifically developed storage, transport and distribution facilities all add to the final cost of the product. These costs are currently passed on to consumers in the form of higher priced end products.

Therefore, unnecessary costs imposed onto the farming system that do not provide any genuine quality or value proposition to either the farming sector or consumers, is not a good initiative.

7 THE PROBLEM WITH AN IMPLIED ZERO TOLERANCE IN ORGANIC MARKETING STANDARDS

The current implied zero tolerance by some Australian organic certifiers for the unintended presence of approved GMOs in organic and biodynamic production systems is scientifically and technically unenforceable. This is because even with a state of the art analytical laboratory, it is impossible to prove with a 100 per cent statistical confidence that a product contains 0.0 per cent GM without destroying the product (i.e. destroying every kernel of grain in a shipment). Even if every kernel of grain were to be destroyed, the current sensitivity of DNA analytical techniques cannot go as low as 0.00 per cent.

Nowhere in the current Australian organic Standards is zero tolerance to GMOs explicitly stated. GMOs are listed as a 'prohibited input' and some Australian certifiers have incorrectly interpreted this to mean zero tolerance. As discussed previously, this flawed interpretation was questioned in *Marsh v Baxter* [2013] WASC 187 in the judgment of Justice Martin.

The perceived zero tolerance for the unintended presence of approved GMOs erroneously applied by some certifiers in the Australian National Standards undermines the capacity for different, approved cropping systems to coexist within the same farming region in the Australian grains value chain.

There is considerable concern amongst the Australian agricultural industry and international experts that setting thresholds at zero introduces difficulties that at this time are technically complicated to overcome and operationally difficult to implement and monitor for compliance. The long-term outcome of maintaining a perceived zero tolerance will be a significant cost burden to the organic industry and ultimately increase the cost of both GM and organic planting seed for all Australian farmers.

The current perceived zero tolerance approach limits the amount of available organic sowing seed in Australia and compromises the integrity of both the approved GM and conventional planting seed required by growers across Australia.

Perceived zero tolerance makes the production and testing of organic sowing seed significantly more expensive as separate production areas are needed, with quality seed needing to be produced on a "production system" basis.

This has led to a significant increase in the costs of certified organic planting seed for organic farmers in all Australian jurisdictions, and seed companies may need to review the desirability of marketing organic seed given the high cost and low return on investment.

Perceived zero tolerance introduces avoidable complications for Australian organic producers that undermine the capacity for different, federally approved cropping systems to coexist in the Australian seed and grain supply chain. Perceived zero tolerance also adds complications and costs compliance activities of organic certifiers, as well as the potential to prohibit production on organic farm land areas. This is not a desirable outcome for organic farmers nor the broader organic industry in terms of growing the industry over time.

It is important to note that any premiums from organic production go to the organic producer. It is therefore entirely appropriate that any extra costs incurred in the organic production system to meet contractual standards should be borne by those who get the premiums and not the GM or conventional producer. A compensation mechanism will not change this but will simply impose unnecessary costs on other farmers.

The anti-GM activists supporting this Inquiry are specifically calling for the introduction of a so-called 'Farmer Protection Fund' based on a self-imposed zero tolerance to the unintended presence at low levels of approved GMOs that does not actually exist in either Australia's organic standards or conventional grain marketing standards. Zero tolerance of a self-imposed prohibited input automatically creates an unrealistic situation whereby unintended presence (a long accepted and well managed concept in agriculture) is mischievously redefined as 'contamination'.

7.1 How do other countries deal with tolerances in organic production systems?

Organic production systems in some overseas countries allow a threshold for the unintended presence of approved GMOs on organic properties or in organic produce, some examples are given below. In some countries, such as the US, it is even possible to cultivate organic and GM produce on the same property, provided adequate steps to segregate the commodities are taken.

7.1.1 United States

United States Department of Agriculture (USDA) Policy Memorandum 11-13 (Issue date: 7 March 2011).

The use of GMOs is prohibited in the USDA National Organic Program regulations. However, as these regulations are process-based the USDA released Policy Memorandum 11-13 to clarify the situation. The policy memorandum states:

"Organic certification is process-based... The presence of a detectable residue from a genetically modified organism alone does not necessarily constitute a violation of this regulation."

"As long as an organic operation has not used excluded methods and takes reasonable steps to avoid contact with the products of excluded methods as detailed in their approved organic system plan, the unintentional presence of the products of excluded methods should not affect the status of the organic operation or its organic products."

"Organic producers that implement preventative measures to avoid contact with GMOs will not have their certification threatened from the inadvertent presence of the products of excluded methods (GMOs). Crops grown on certified organic operation may be sold, labelled and represented as organic, even with the inadvertent presence of GMOs."

“The use of excluded methods, such as planting genetically modified seeds, would require a specific intent... However, the inadvertent presence of GMOs in organic seeds does not constitute a use because there was no intent on the part of the certified operation to use excluded methods. The presence of detectable GMO residues alone in organic seed... does not constitute a violation of the National Organic Program regulations.”

“Organic agricultural products should have minimal if any GMO contaminants; however, organic food products do not have a zero tolerance for GMOs.”

Because of this process-based approach, American organic farmers have lower production costs than Australian organic farmers and are not subjected to an unreasonable risk of loss of income due to decertification. The US has not seen the need for the compensation mechanisms at the heart of this Inquiry. In fact, it is even possible to cultivate organic, conventional and GM crops on the one property in the US. This allows US farmers to adopt the best of each farming system that best suits their individual farm and circumstances.

7.1.2 Canada

Organic Production Systems General Principles and Management Standards.

Like the National Organic Program Regulations in the United States, the Canadian General Standards Board organic standards describe a process based regulatory system for organic production systems. In June 2009, the USDA and Canadian Food Inspection Agency signed an agreement recognising each country's organic standard as equivalent. As in the US, the deliberate use of GMOs as part of an organic production system is prohibited. However, the Standard states:

“Organic practices and this standard cannot assure that organic products are entirely free of residues of substances prohibited by this standard and of other contaminants, since exposure to such compounds from the atmosphere, soil, ground water and other sources may be beyond the control of the operator. The practices permitted by this standard are designed to assure the least possible residues at the lowest possible levels.”

“This standard is intended for certification and regulation to prevent deceptive practices in the marketplace. The certification of a process, rather than a final product, demands responsible action by all involved parties.”

Like in the US, in Canada the organic industry coexists with the conventional and GM cropping industries and they have not seen any need to introduce any form of compensation mechanisms.

7.1.3 European Union

Regulation EC No 834/2007 on organic production and labelling of organic products and Report from the Commission to the European Parliament and the Council on the application of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products.

In contrast to the US and Canada, the EU regulations describe a product based system similar to that of AS6000–2009. Like other organic standards, the intentional use of GMOs is prohibited in organic production systems. However, the EU regulation includes the following article:

“(10) The aim is to have the lowest possible presence of GMOs in organic products. The existing labelling thresholds represent ceilings which are exclusively linked to the adventitious and technically unavoidable presence of GMOs.”

The ‘existing labelling thresholds’ referred to in Article 10 of EC 834/2007 are contained in Regulation EC 1829/2003 on genetically modified food and feed, in which Section 2, Article 12(2) permits a threshold of 0.9 per cent for the presence of GMOs before they must be labelled, “provided that this presence is adventitious or technically unavoidable”.

The 0.9 per cent threshold means “almost all Member States and most stakeholders judge the current legislative framework as providing sufficient guarantees regarding the prohibition of GMOs in the organic production system. It ensures that products marketed without references to GMOs on the label only contain adventitious and unavoidable levels below 0.9 %.”

“The leading principles are to have the lowest possible adventitious presence of GMOs in organic products, as set out in recital 10, and at the same time to avoid undue constraints and additional burden on organic operators.”

In Europe, each member state is responsible for setting its own coexistence mechanisms, there is no whole-of-EU approach. Some member states, such as Denmark (described previously) and Germany have enacted schemes that address coexistence and compensation. However, as none of the states who have enacted these schemes are GM crop cultivating countries, their existence is merely symbolic and have served no practical purpose other than to stifle agricultural innovation and further delay the benefits GM cultivation could bring to these countries.

8 CONCLUSION

This Inquiry is considering solutions for which there is no problem.

The real effect of the introduction of compensation mechanisms would be to create unnecessary conflict between Australian farmers and in doing so, be highly destructive to both Australian agriculture and the plant science industry in this country. The 'end-goal' for the anti-GM activists is to end the economic viability of commercial cultivation of GM crops in Western Australia.

Any scheme that purports to introduce a compensation mechanism for the unintended presence of an approved GMO on the owner of the intellectual property of that GMO (i.e. seed company or technology developer), or a user of the technology (i.e. farmer/grower) needs to be vigorously opposed by those committed to sound and scientifically-based public policy and regulation. Such schemes would serve only to stifle the future of Australian agricultural research, innovation and competitiveness.

Importantly, the Department of Agriculture and Water Resources' new Organic Export Notice makes it clear that organic businesses can continue to trade in the situation where there is the minor unintended presence at low levels of a GMO and therefore, in conjunction with common law and consumer protection remedies makes the need for a compensation mechanism irrelevant.

The *Marsh v Baxter* case was a most regrettable and unnecessary situation that caused great personal anguish to both farmers, their families and the community. However, just because the anti-GM activist community do not agree with the original judgment in *Marsh*, it does not mean the system is broken. Rather it demonstrates unequivocally that the existing common law is the most appropriate mechanism for dealing with pure economic loss that may arise from the torts of trespass, negligence and nuisance.

Those very same anti-GM activists who argue vehemently that there is no need to have agreed threshold levels for unintended presence, now want to make neighbouring farmers or the seed industry and technology providers pay for their own ideological position. In economic parlance, this is often referred to as 'rent seeking'.

Since the adoption of GM canola in WA, CropLife is unaware of one single grain shipment from WA that has been rejected by WA's trading partners due to the unintended presence of GM material. It is simply not a problem that requires Parliament to come up with a solution.

Australia is a globally competitive, innovative provider of safe and nutritious food, and high-quality feed and fibre. All farming systems, be they organic, conventional or involving approved GMOs are a part of this.