



Submission to:
Environment and Public Affairs Committee -
Legislative Council

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

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Inquire into and report on mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material, including approaches taken in Western Australia and by other jurisdictions and any other relevant matter.

Introduction

The inquiry is based on the assumption that the legal precedent set through the *Marsh v Baxter* case does not adequately address concerns with the co-existence of genetically modified crops with conventional (non-GM) and organic crops.

The agricultural industry in WA has thus far successfully managed GM canola in the supply chain. The Office of Gene Technology Regulation (OGTR) regulates gene technology, GM crop trials, and the commercial release of GM technology into the environment and its impact on public health. Currently in WA, the major commercial GM crop grown is canola. Expansion of GM crops is being considered through trials of GM cotton in the Ord region. WAFarmers' submission will focus primarily on GM canola, as it is the primary commercially produced GM crop in WA.

To date in Western Australia, there has been one incidence of legal action as a result of a GM crop production. WAFarmers considers a singular issue to be an inappropriate catalyst and representative sample size for a review of the adequacy of common law to address how genetically modified crops, as a legal and approved crop in Australia, interacts with traditional agricultural production systems.

WAFarmers argues that the inquiry and any subsequent Legislation or Regulations through the Parliament would be contradicting the Separation of Powers. There has been a precedent set through the WA legal system with how genetically modified crops are dealt with.

The compensation mechanisms that are flagged in the media and advocacy topics supporting this inquiry include strict liability, compensation funds, and mandatory insurance. These methods have all been assessed by a Statutory Review of the *Gene Technology Act 2000* and the Gene Technology Agreement¹ in 2005/06. It is an important consideration that whilst gene technology and, specifically, GM crops were still relatively new in Australia at the time of this review, there have been no further issues that would warrant another inquiry.

As determined by the OGTR, commercially approved GM cultivars are a safe and legal crop in Western Australia, and they have been grown here since 2010. WAFarmers believes that implementing a scheme to protect against economic loss would be counterproductive and penalise growers who choose to use GM crops. The economic loss from GM crop contamination is yet to be an issue in WA. GM canola can, has been, and continues to be successfully segregated from non-GM crops since commercial production began in Western Australia. It is considered that any form of compensation fund to be developed would be a tax on GM farmers to solve an issue that does not exist.

Any scheme designed to manage contamination, would require a set of thresholds, such as a Low Level Presence (LLP) allowance, in order to maintain some sort of commercial value in any contaminated stocks. In WA, 0.9 per cent is the internationally accepted LLP value, and as such it would be appropriate to use this same value. To date, there have been no circumstances of economic loss where levels exceed the accepted threshold of 0.9 per cent. To implement any scheme without the support of industry or the supply chain, and where there is no evidence that a scheme is even required, would be a gross misuse of tax payer money, and a significant waste of Parliamentary resources.

Farmer choice

Farmers have the right to farm as they choose on their own property, while the government and industry ensure that the agricultural industry is producing a safe product, with minimal environmental impact. Most aspects of farming have regulations on appropriate standards, including machinery, chemicals, and genetically modified crops. They are all regulated to ensure agricultural practices can co-exist with the environment and society.

The inquiry is looking at options to regulate a crop that is regulated Federally through the Inter-governmental Agreement on Gene Technology, of which Western Australia is a party. The potential to impose a tax on farmers producing a crop that is legal, will impact on the future of gene technology in Australia. However, there are potential impacts within the market as a result of a compensation fund, such as farmer negligence, or misuse and false declaration to enable access to compensation funds. There is also the possibility for government intervention to be called upon for stray livestock, lice, spray drift, or other agricultural practices, where disputes are currently resolved through the legal system.

The recent announcement by the OGTR of the approval for commercial production of the Nuseed omega-3 GM canola⁴, is the first GM plant that does not give an agronomic benefit. The omega-3 GM canola is a potential solution to declining global fish stocks that are relied upon to produce all omega-3 that is used.

Supply chain coexistence and low level presence

The Western Australian supply chain offers co-existence for grains. This ability for co-existence is afforded by a recognised tolerance of foreign seeds within a sample of grain. This tolerance level is known as the Low Level Presence value (LLP).

Segregations are used to distinguish between grain types and qualities. These types include, but may not be limited to wheat, barley, oats, lupins, non-GM canola, GM canola, chickpeas, and field peas. Beyond these grain type segregations, there are numerous quality definitions used as secondary segregation points (i.e. 15 wheat grades; 13 barley grades; four canola grades). These quality segregations are regularly reviewed and defined as required, but the LLP is a standard value across segregations.

LLP has previously been termed “adventitious presence”. The term was redefined by the Australian Oilseed Federation in their annual standards update of 2017/18 as referenced below.

LLP is defined as the unintended presence (i.e. unplanned presence) of:

- Seed/meal containing GM event(s) approved by the OGTR in non-GM seed/meal; and/or
- Seed/meal containing GM event(s) approved by the OGTR in a seed-lot or meal from another GM variety approved by the OGTR”².

Since the commercial production of GM canola in WA, there have been no issues with shipments of non-GM canola to any of Australia’s trading partners. Specifically, the European Union, as the largest non-GM canola market, has accepted the LLP of 0.9 per cent, as it is in alignment with their receipt standards.

The current system for compensation

In Western Australia, there has been one legal case involving GM canola.

The precedent for that case has been set by the court. There was no compensation awarded for economic loss. It was found that the GM farmer was not at fault. The GM grower was found to be growing a legal crop (GM canola), employing legal practices (swathing), and it was found that the GM grower could not be held accountable for the actions of the organic certification board.

WAFarmers is concerned that if an inquiry such as is proposed was to find that a GM grower was liable to pay compensation for the purpose of co-existence that this finding may range wider than just the subject of GM crop production. The precedent may be set for the seeking of compensation if there were weed seed escapes or invasion by animals, domestic or feral, to or from neighbouring properties that may include private property, leaseholds, crown reserves, national parks or perhaps UCL parcels. Currently there is common law precedent dealing with many of these possible issues and to date, that has seen satisfactory outcomes.

Previous consideration for compensation and liability schemes

Statutory Review of the *Gene Technology Act 2000* and the Gene Technology Agreement¹ in 2005/06 considered a wide range of issues, including a comparison of gene technology regulation in other jurisdictions, such as US, Canada, Japan, China, Argentina, European Union, and New Zealand. The Law Library of Congress has a similar document, *Restrictions on Genetically Modified Organisms – International Protocols*³, with updated information from 2014.

The following countries use General Law and/or civil liability, according to the *Restrictions on Genetically Modified Organisms*³:

- Argentina
- Belgium
- Canada
- China
- England and Wales for general negligence or nuisance, however there was a specific note that “it would be difficult to prove the absence of reasonable care for preventing cross-pollination or other gene transfer”³.
- Italy
- Japan
- Netherlands; they also have co-existence guidelines that facilitates “cultivating GM crops alongside conventional and organic farming without one excluding the other.”
- United States of America

However there are some jurisdictions that have compensation fund systems:

- Certain parts of Belgium have mandatory insurance/compensation funds, where if economic loss is proven in a court, then a payout for the loss is paid by the fund.
- The UK has liability regime for environmental damage, however it is seen as a last resort, and the UK focuses heavily on preventing pollution.

It is noted that while some jurisdictions have mandatory insurance and strong legislation regarding gene technology, it is considered a deterrent to production. In Germany, there are strict liability requirements for GM crops, with the German Farmers’ Association advising against the cultivation of GM plants³.

The Statutory review conducted in 2005/06¹ considered a number of the options for compensation schemes, though it was reviewed and dismissed. WAFarmers endorses the reasons provided in the statutory review. Common law in Australia is an appropriate mechanism to regulate GM.

Organisational Background

The Western Australian Farmers Federation (Inc.) (WAFarmers) is the state's largest and most influential rural advocacy and service organisation. WAFarmers boasts a membership of over 3,500 primary production businesses and individual farmers including grain growers, meat and wool producers, horticulturalists, dairy farmers, commercial egg producers and beekeepers. Collectively our members are major contributors to the \$7.5 billion gross value of production that agriculture in its various forms contributes annually to Western Australia's economy. Additionally, through differing forms of land tenure, our members own, control and capably manage many millions of hectares of the state's land mass and as such are responsible for maintaining the productive capacity and environmental wellbeing of that land and the animals that graze it.

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