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Committee Secretary
Western Australia Legislative Council Standing Committee on Environment and Public Affairs
env@parliament.wa.gov.au

Dear Committee Secretary,

Please accept the attached submission regarding the inquiry of the **Legislative Council Standing Committee on Environment and Public Affairs** into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material.

This submission was prepared by me, based on research undertaken by me. I am glad, of course, to answer any questions you may have regarding the submission.

Yours sincerely

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# Submission to the Western Australian Legislative Council 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

Prepared by:

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## Terms of reference

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.

## Executive Summary

The establishment of a compensatory mechanism for economic loss caused by contamination by genetically modified (GM) material will need fundamental decisions to be made. These include a clear description of the triggers for such mechanism and acceptance of the ramifications of adoption of such a mechanism.

This submission briefly sets out the current regulatory framework for GMOs to identify the current forum for compensation, the courts. It then provides a summary of the two most relevant court judgments in the context of determining when a farmer has actually suffered economic loss to illustrate the definitional challenges a compensatory mechanism will also face. Thirdly, it describes current Australian and international regulation of organic agriculture to identify challenges that will need to be addressed by a compensatory mechanism. Finally, it summarises research on the ramifications of organic standards on broader concerns, such as consumer protection and innovation policy and how those ramifications will create challenges for a compensatory mechanism.

## 1. Context - Current Australian Regulation

The Australian national regulatory scheme was created in 2001 to regulate genetically modified organisms ('GMOs'). The centerpiece of that scheme is the *Gene Technology Act 2000* (Cth) ('*GT Act*'). This legislation is then effectively adopted into state/territory legislation and by virtue of this legislation, the Gene Technology Regulator is recognised and granted power to act in each Australian state and territory.[1] However, that scheme addresses risks to the health and safety of people and to the environment. It does not address other risks arising from GMO releases, including that of contamination of / commingling with other organisms and land and the possible consequences of that contamination / commingling.

'Contamination' is sometimes used to mean 'the unintentional and/or unwanted presence of a substance, organism or part of an organism in a particular environment, including within organisms. In the context of … GMOs, contamination is the unintended/unwanted presence of a GMO, or the genetic material of a GMO or product of a GMO in an organism, environment or product.'[2] It should be noted though, that use of this term is more correctly confined to cases concerning crops unauthorised for release under relevant legislation. Where the crop is authorised but its presence is unwanted in the land concerned the term inadvertent commingling is better suited.[3]

The proposed general commercial release of GM canola in 2003 lead a number of states and territories, including Western Australia, to introduce legislation addressing socio-economic concerns. WA's legislation, the *Genetically Modified Crops Free Areas Act 2003* (WA) has now been repealed (by the *Genetically Modified Crops Free Areas Repeal Act 2016* (WA)).

Most importantly, neither the national or state / territory legislation provides statutory immunity or ousts common law avenues for redress available to people who suffer as a result of actions taken by the Gene Technology Regulator or those using gene technology. However, the national gene technology scheme does not create liability or compensatory mechanisms in respect of harm caused by GMOs. It was clearly intended by the creators of the scheme that liability for harm arising from GMO releases be determined by

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[1] Although only in New South Wales and Northern Territory are amendments to the federal legislation automatically adopted into state mirroring legislation. In the other jurisdictions, periods of legislative inconsistency (and uncertainty), occur as each jurisdiction arranges for the passage of new amendments to the federal legislation. Australia, Productivity Commission (2016), p. 281.

[2] Commonwealth, House of Representatives Standing Committee on Primary Industries and Regional Services, *Work in Progress: Proceed with Caution. Primary Producer Access to Gene Technology* (June 2000), [6.2].

[3] Judges in Australia and Canada have noted critically the plaintiffs' use of the word 'contaminate' given the lawfulness of the releases and the lack of definition of that term in organic standards. *Hoffman v Monsanto Can Inc* 2005 SKQB 225, 264 Sask R 1 [11]; *Marsh v Baxter* [2014] WASC 187 [50]. The Canadian court instead used adventitious presence, the Australian court used airborne incursion.

common law principles.[4] The courts are therefore the forum that determines civil liability where a GMO spreads to others' property.

## 2. Relevant court decisions

As discussed below lawsuits in Canada and Australia brought by organic farmers against GM crop developers and a GM crop farmer respectively, have sought compensation for economic loss following loss of organic certification, markets and premiums.[5] In both cases the plaintiffs went so far as to (unsuccessfully) assert that the defendants owed them a duty to ensure lawfully released GM crops did not 'contaminate' land where it was not intended to be grown.[6] Both courts considered the impact of organic regulation on the organic farmers' rights and innovation adopters' liability.

While the plaintiffs in the Australian case, *Marsh v Baxter*, were unsuccessful in their proceedings in the Western Australian Supreme Court, [7] the peculiar facts of the case means 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 a third party's land.[8]

The *Marsh v Baxter* decision is significant because it the first and only Australian decision where such a claim has been made. In that case, and a similar decision in Canada, *Hoffman v Monsanto Canada Inc and Bayer CropScience Inc*, organic farmers asserted that defendants caused them harm by not ensuring GM crops did not 'contaminate' their land. In both cases the release of GM canola was authorised under relevant national law[9] and it was not alleged that the GMO concerned was physically harmful or dangerous – the alleged damage was solely economic loss.[10]

The Canadian decision concerns a class action brought on behalf of 1250 certified organic grain farmers after Monsanto's Roundup Ready™ canola and

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[4] House of Representatives Standing Committee on Primary Industries & Regional Services, *Work in progress: proceed with caution. Primary producer access to Gene Technology* [7.108] (2000) (Aust.) *See also* Senate Committee on Community Affairs, *A Cautionary tale: fish don't lay tomatoes: a report on the Gene Technology Bill 2000*, at 152 (2000) (Aust). The Australian Government reviewed the regulations in 2006. *See* Dep't of Health & Ageing, *Statutory Review of the Gene Technology Act 2000 and The Gene Technology Agreement* 38–42 (2006). The government decided against adding strict liability for contamination, *id.* at 38–39, a compensation fund, *id.* at 39–41, or mandatory insurance, *id.* at 41–42.

[5] *Hoffman v Monsanto Can Inc* 2005 SKQB 225, 264 Sask R 1; *Marsh v Baxter* [2014] WASC 187. There have been other lawsuits against those in the GM industry in the US, Canada and the EU but not concerning claims specifically regarding organic standards.

[6] *Hoffman* (n 3) [46]; *Marsh* (n 3) [333]-[335].

[7] *Marsh v Baxter* [2014] WASC 187.

[8] K Ludlow, 'The Economic Impact of Genetically Modified Organisms as Actionable Damage in Torts' (2005) 13 *Torts Law Journal* 159-87; K Ludlow, 'Genetically Modified Organisms and Private Nuisance Liability' (2005) 13 *Tort Law Review* 92-121.

[9] *Hoffman* (n 3) [71]; *Marsh* (n 3) [2] and [87].

[10] *Hoffman* (n 3) [22] and [72]; *Marsh* (n 3) [2].

Bayer's Liberty Link™ canola were found on the land of organic farmers. The Queen's Bench for Saskatchewan dismissed a claim for certification as a class action because not all (or even a significant minority) of the plaintiff organic farmers were financially damaged by the alleged contamination.[11]

The content and status of organic standards were crucial to the decision. Smith J noted that at the time of the original introduction of the GM canola, none of the named organic certifiers expressly prohibited either the use or adventitious presence of GMOs and prohibitions were introduced gradually by private certifiers only after marketing of GM canola commenced.[12] For that reason, the plaintiffs changed their focus from a claim that because of the defendants' GMOs they were unable to meet the standards of private certifiers to being unable to meet the demands of the organic marketplace, particularly in the EU.[13] As Smith J explained they replaced 'the original emphasis upon certification standards with a new emphasis on market standards'.[14] She noted that the issue was whether defendants should be liable for losses 'related to the fact that the standards imposed by third parties (organic certifiers or organic markets) might prohibit the use or presence of GMOs in relation to commodities marketed as organic'[15] and she found they should not.[16] On appeal, the Saskatchewan Court of Appeal confirmed that developers of GM canola approved under federal law were not under a duty of care to farmers who claimed economic loss through the loss of the European market for organic canola, loss of the practical option to choose to grow organic canola, or for removal of volunteer GM canola growing on the plaintiff farmers' land.[17]

Similarly in the *Marsh v Baxter* decision in the Supreme Court of Western Australia, the zero tolerance for GMO presence relied on by the plaintiff to establish economic loss was not a legislative standard. In this case an organic farming couple sued their GM canola growing neighbour after finding 254 pieces of Monsanto Roundup Ready™ canola plant had been blown onto their property. The plaintiffs did not grow canola and there was no physical risk to the plaintiffs' crops, livestock or property[18] and negligible risk of GM material fertilising any of their crops,[19] although following the plaintiffs' failure to collect the material or allow others to do it for them until six months after its

[11] *Hoffman* (n 3) [22], [64], [341] *aff'd* 2007 SKCA 47, 293 Sask. R. 89 (Sask. C.A.).
[12] *Hoffman* (n 3) [218].
[13] *Hoffman* (n 3) [218].
[14] *Hoffman* (n 3) [218].
[15] *Hoffman* (n 3) [35].
[16] *Hoffman* (n 3) [72].
[17] *Hoffman* (n 3) [77], [86] *leave to appeal denied* [2007] 3 S.C.R. x.
[18] *Marsh* (n 3) [216].
[19] *Marsh* (n 3) [216]-[218].

arrival,[20] eight volunteer GM canola plants grew on the plaintiffs' land the following year.[21]

The plaintiffs claimed, incorrectly, that the contractual terms of the private standards between them and their certifier imposed a zero tolerance for GMOs by prohibiting both intentional and unintentional 'contamination'.[22] Justice Martin found that the third party certifier had misunderstood its' own rules when it decided to decertify the plaintiffs' land.[23] One important reason why no duty of care was owed by the GM farmer to his organic farmer neighbours was that the plaintiffs had what was essentially a 'self-inflicted contractual vulnerability' that generated their claimed economic losses, particularly given the certifier's behaviour could be objectively assessed as unreasonable or even in breach of the contract between the certifier and plaintiffs.[24] This was confirmed on appeal[25] and the High Court of Australia refused the plaintiffs special leave to appeal to it.[26]

## 3. Organic regulatory frameworks

There is no internationally binding regulation of organic production. The Codex Alimentarius Commission (Codex), the international standards setting body for food products, has developed guidelines for countries developing national organic regimes - the *Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods* - although nations are free to impose different requirements.[27] The Guidelines' purpose is to protect consumers from deceptive trade practices rather than address conflicts between different agricultural production sectors.[28] The transnational organic industry regulator, the International Federation of Organic Agriculture Movements (IFOAM),[29] has also created a framework intended to be the norm for the world's organic producers.[30]

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[20] *Marsh* (n 3) [438].
[21] *Marsh* (n 3) [138] and [669].
[22] *Marsh* (n 3) [739].
[23] Biological Farmers of Australia General Standards – primary production s 4.8.16. The certification arm of this group is Australian Certified Organic.
[24] *Marsh* (n 3) [321].
[25] *Marsh v Baxter* [2015] WASCA 169.
[26] *Marsh v Baxter* (P44/2015) Results of Special Leave Applications heard 12 February 2016.
[27] Codex Alimentarius *FAQS – Questions about specific Codex work. Is Codex promoting genetically-modified food (GM foods) and irradiated food? What about organic or halal foods?* <www.codexalimentarius.org/faqs/specific-codex-work/en/> accessed 6 July 2017. See also CAC/GL 32-1999 (n 10) Foreword [2].
[28] Codex Alimentarius Commission, *Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods* CAC/GL 32-1999 <www.codexalimentarius.org/standards/list-of-standards/> accessed 6 July 2017, [2].
[29] IFOAM has 800 affiliates in more than 100 countries. IFOAM website www.ifoam.bio/en/about-us accessed 6 July 2017.
[30] International Federation of Organic Agriculture Movements, *The IFOAM Norms for Organic Production and Processing, The IFOAM Standard for Organic Production and Processing* (version 2 2014) 7.

Despite the Codex and IFOAM models, national and supranational regulatory frameworks for organic production vary. This is significant if a compensatory mechanism is to apply for economic losses arising from loss of export markets. It will need to be decided which versions of such frameworks will justify a finding of economic loss.

In Australia, the legislatively established regulatory framework for organic produce applies only for products for the export market.[31] Australia's domestic organic food industry operates under a voluntary scheme in the sense that there is no legislative standard that must be met before food can be labelled as organic for sale within the country.[32] Nevertheless, most Australian organic produce on the domestic market is certified by organic status conferral bodies which have in turn been accredited by the federal government under Australia's export regime.[33] However, in Australia and other international jurisdictions including the USA, private organic certification schemes are likely to have standards beyond the federal standard. These additional private standards add to the complexity that a compensatory mechanism will be asked to accommodate when assessing whether economic loss has occurred.

Inconsistent tolerances for adventitious GM presence illustrates this diversity. For example, while inadvertent GM presence does not impact organic labelling in the US and Canada, it does so in Australia at any level. In contrast and adding to the confusion, the EU allows up to 0.9% of inadvertently present GM material without loss of organic labelling rights. Even *within* jurisdictional frameworks that diversity exists - while the UK as part of the EU tolerates 0.9% GM presence, at least one UK certifier (the Soil Association) has demanded that there be no tolerance threshold.

Any compensatory mechanism will need to determine what tolerance for GM presence will be used to measure economic loss but as illustrated above, knowing what that tolerance should be, is difficult.

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[31] Export Control Act 1982 (Cth), Export Control (Organic Produce Certification) Orders 2005 (Cth) and National Standard for Organic and Bio-dynamic Produce (Edition 3.7, 1 September 2016).

[32] The Organic Consultative Committee Legislative Working Group, comprising government and industry representatives, is currently reviewing regulation of the export of Australian organic products. That work is in confidence and not publically available but the terms of reference do not include setting a legislative standard for the Australian domestic market www.agriculture.gov.au/export/controlled-goods/organic-bio-dynamic/organic-orders-review#the-administrative-arrangements accessed 11 July 2017.

[33] Export Control Act 1982 (Cth). Goods may be declared prescribed goods which can then be controlled as specified in the Act. Pursuant to s 15, it is an offence to apply false trade descriptions to prescribed goods or export prescribed goods with false trade descriptions. The Export Control (Organic Produce Certification) Orders 2005 (Cth) Order 1.03 declares organic produce to be prescribed goods for the Act's purposes and those wanting to export such produce must comply with the Orders.

## 4. Challenges for and ramifications of any proposed compensatory mechanism

Any compensatory mechanism for economic loss will need a clear minimum threshold for loss and clear description of the forms of harm that will be included within the term 'economic loss'. As illustrated by the cases discussed in section 2 above, claims of pure economic loss are likely to arise because voluntary private standards set by non-government bodies, such as industry groups, or private contractual arrangements between commercial entities cannot be satisfied.[34] **A compensatory mechanism for economic loss in such circumstances will need to consider whether it will give deference to such standards and contractual terms, set by bodies not answerable to the broader WA community.**

There are also ramifications from endorsing private and voluntary arrangements through a government created compensatory mechanism. These include the **creation of a precedent for claims to compensation by non-adopters of future innovative products**, the **difficulties such a mechanism will cause for those wanting to adopt GMOs and establish fair co-existence measures with those who do not want to adopt GM agriculture**, and **the impact on WA and Australian innovation policy more broadly**.

While diversity can be a positive, the diversity of organic standards as between individual certifiers within a single jurisdiction as well as looking across different jurisdictions challenge the creation of effective coexistence measures. Without clarification of which standard is to be used by the compensatory measure, coexistence will require either bespoke development to respond to the needs of each producer, or will need to respond to the strictest of possible standards. Some may see these as acceptable solutions but the point here is that demanding innovation governance (such as coexistence measures) respond to the requirements of what are essentially private standards may effectively defeat national policies of allowing innovation adoption. Policymakers may be comfortable with this, but that outcome should be an informed, intentional decision rather than a hidden obstacle to innovation adoption.

A second challenge for the creation of a compensatory mechanism that relies on private standards such as those of the organic industry, is around future innovation. In the case of organic regulation, lack of clarity in objections to innovation and innovation definition make it difficult to predict which future technological changes will be opposed and are likely to create further demands for compensation. The early responses of organic standards to nanotechnology, including differences in the definition of nanotechnology, demonstrate the

[34] See further K Ludlow and S Smyth, 'The Quandary of Agricultural Biotechnology, Pure Economic Loss and Non-Adopters: Comparing Australia, Canada and the United States' (2011) 52 *Jurimetrics, The Journal of Law, Science and Technology* 7-41.

diversity of responses organic regulatory frameworks can take to one innovation. More modern plant breeding techniques may also be rejected by the organic industry even though they are not classified as GM by Australian legislation. The adoption of organic standards by the WA government as a measure of economic loss for a compensatory mechanism may discourage development and adoption of newer and as yet unknown innovations because non-adopters' responses cannot be accurately predicted, in turn negatively impacting research and development into future innovation.

Thirdly, a compensatory mechanism for harm caused by GMO contamination/ commingling may create consumer confusion despite innovation governance attempts to prevent that. For example, GM regulatory regimes such as the Australian food standards code and ACCC address GM and non-GM labelling. However, organic regulatory frameworks may allow organic labels to be used as de facto GM-free certifications and a compensatory mechanism that triggers to compensate organic farmers for the loss of such labels, may reinforce the misleading nature of such labels. Only the UK Soil Association and Canadian Organic Standards expressly address consumer understanding of the labelling term 'organic'. The approach of the Canadian Organic Standards and the organic federation's (IFOAM) benchmark regarding prevention of consumer deception provide examples of steps to begin to solve this problem. They expressly explain that organic practices cannot assure that organic products are entirely free of prohibited substances, but that permitted practices are designed to assure the least possible residues at the lowest possible levels. The approach to labelling following adventitious presence is consistent with that in all jurisdictions, except Australia where organic labelling cannot be used in such cases. 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.

Problems caused by lack of clarity around the responsibilities of organic farmers is the fourth challenge for any compensatory mechanism. In the agricultural context, the behaviour of organic farmers inevitably shapes the precautions that must be taken by innovation adopters to avoid unfairly impacting organic production. However, lack of detail around organic farmers' responsibilities creates significant uncertainty around the measures that GM adopting farmers must take to protect the organic sector's interests. Lack of clarity around the obligations may mean organic farmers feel they have no responsibility in minimising the risk of contamination and may increase their own risk of contamination.