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THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1561 of 2012

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

KENNETH MARTIN J

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 10 FEBRUARY 2014, AT 10.33 AM

MR R.M. NIALL SC, with him MS L.M. NICHOLS and MS C.M. PIERCE, appeared for the plaintiff.

MS P.E. CAHILL SC, with her MS F. VERNON, appeared for the defendant.

THE ASSOCIATE: In the Supreme Court of Western Australia, civil matter 1561 of 2012, Marsh and Baxter.

KENNETH MARTIN J: Mr Niall.

R.M. NIALL SC, MR: May it please your Honour. I appear with my learned friends MS NICHOLS and MS PIERCE for the plaintiffs.

KENNETH MARTIN J: Yes. Thank you. Ms Cahill.

P.E. CAHILL, MS: If it please your Honour, I appear with my learned friend MS VERNON for the defendant.

KENNETH MARTIN J: Yes. Thanks, Ms Cahill. Mr Niall.

NIALL, MR: If your Honour pleases. Before I open the matter, can I indicate a couple of housekeeping matters.

KENNETH MARTIN J: Certainly.

NIALL, MR: None of them, I think, will cause any anxiety, I hope, your Honour. But just to update your Honour, couple of procedural matters. Firstly, in relation to the pleadings, there's an extant application for leave to further amend the defence. Your Honour may recall the sequence that we relatively recently joined the second plaintiff, there were some consequential amendments without leave, but there are some additional amendments which, I think, require leave. Those are not opposed, your Honour, but perhaps that might be attended to.

KENNETH MARTIN J: All right. Thank you. Ms Cahill, the latest minute I've got, marked up in blue and green, is dated 7 February 2014?

CAHILL, MS: Yes. That's the relevant one, your Honour, and the amendments appear at pages 18 and 19 in bold blue, double underlined.

KENNETH MARTIN J: Okay. So that's 26ABC.

CAHILL, MS: And then if your Honour follows down through to paragraph 27, there's the words "and 26(5)" that's inserted - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - at sub (1), sub (3), sub (4).

KENNETH MARTIN J: Yes. All right. Well, that not being opposed, there will be leave to amend in those terms.

CAHILL, MS: If it please your Honour.

NIALL, MR: Secondly, your Honour, can I indicate the position in relation to the tender bundle - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - or the court book. Your Honour will have a number of volumes next to your Honour, I think numbered 1 through 9 or thereabouts. The position is that they contain documents which, for the most part, are subject to agreed consent tender. There are some documents which will need to be identified by a witness, which the defendant has indicated to us. With your Honour's leave, we will seek to do that when the witness is called.

There are some documents in respect of which the tender is agreed on a limited basis in relation to some hearsay from the defendant. So the defendant has agreed to tender on a - for a non-hearsay purpose. And I will come to those in due course, your Honour, but that's the next category. Then there is another category which we've agreed, looking at the result of the - some objections, to withdraw, and we will attend to that at the appropriate time, your Honour. So some of those documents will come out.

KENNETH MARTIN J: All right.

NIALL, MR: Now, in terms of - in the opening, your Honour, I will take you through what we submit are some critical documents. But just to assist your Honour navigating the court book, if your Honour just goes to the index - the court book is not entirely chronological, but it's identified by reference to some subject matter. So if your Honour goes to the index firstly, your Honour will see volume 1 deals with the Marsh farm, which is Eagle Rest, and that goes through to document 19.

Starting at document 20, there's some documents concerning the notice of organic status. Now, what that means is it's evidence as to how the Marshes notified other persons, including the Baxters, as to their status. Starting at document - at volume 2, your Honour, we deal with the documents relating to decertification. And, your Honour, those documents are largely, although not exclusively, generated by NASA, and recall the decision making process through 2010 and onwards.

The next - through to document 95, which brings us up to date in the sense that the organic status was restored in the end of November 2013. The next volume deals with the Baxter farm, which is Seven Oaks, goes through and deals with some agronomy documents, some financial documents. Then the next documents, some Monsanto documents, and there your Honour will find the documents which Monsanto provided to those farmers who wish to licence the GM product.

Then volume 5, your Honour will see the organic standards and a few other documents. The two critical standards are document 142 and 143; they're the national standards and the NASA standards, and I will take your Honour to those in opening, and then there are some related documents, 7, 8 and 9, which I don't need to trouble your Honour with. But that's, for the purpose of navigating the court book, your Honour, that's where you will find the critical documents.

KENNETH MARTIN J: Can I just say what my normal practice is, Mr Niall, in terms of the court book. I normally take it as one exhibit, and by reference then to the index, which can be a live work in progress, I make the index exhibit 2. Reference then to documents in the nine volumes can be - say, for instance, volume 1; the volume 1 documents would be exhibit 1.1 point whatever the number is in your index. So, for instance, in volume 7, the iPhone document would be exhibit 1.7.159.

NIALL, MR: Thank you, your Honour. And some of those will come out by agreement.

KENNETH MARTIN J: Yes, indeed. So - - -

NIALL, MR: But we will keep you updated - your Honour updated on the status of the various things that find itself in the court book.

KENNETH MARTIN J: Very well.

NIALL, MR: The next issue that I should just inform your Honour on is the status of objections to evidence. Pursuant, of course, to directions, witness statements have been filed. The parties are still seeking to resolve the status of those objections without the need to trouble your Honour. Belatedly, in terms of your Honour's direction, but we have respond quite recently, as recently as last night in relation to some, and the defendant is still considering those.

But we will endeavour - my learned friend and I have discussed this endeavour to confer before each witness, with a view to clarifying the position, and how mechanically we deal with those withdrawals of the statement. Perhaps we might come to - - -

KENNETH MARTIN J: Well, ordinarily, my practice is to - if they can't be agreed, I will resolve them before the witness gets in the witness box.

NIALL, MR: Yes, your Honour. Yes.

KENNETH MARTIN J: Because dealing with witness statements can be very messy. So I would prefer to have a workable witness statement before the evidence is taken.

NIALL, MR: Indeed, your Honour. The next matter I just should note for your Honour, is that the parties have agreed on a timetable for trial.

KENNETH MARTIN J: Yes.

NIALL, MR: And your Honour should have a copy of that.

KENNETH MARTIN J: Thank you. That's very helpful.

NIALL, MR: And that records our estimates of what will be required for each witness. The only point of discussion between the parties is the position of Mr Davies. As to whether he will be required to attend, we're still discussing with our friends about the status of objections to his evidence. But your Honour will see that that has - our evidence finish on Friday of this week and the defendant's evidence finish about Wednesday or Thursday of next week.

KENNETH MARTIN J: Yes.

NIALL, MR: And then we've allowed, subject to your Honour's convenience, some time to prepare some submissions and return to a date that's convenient. We've identified, within the three week envelope, the Monday and the Tuesday of the third week.

KENNETH MARTIN J: Yes. I'm happy with that.

NIALL, MR: Thank you, your Honour. The next bit is the question of the chronology. We filed a chronology; the respondent has - the defendant has responded to it. Your Honour should have, from our learned friends, a chronology in mark up. We've just received that. We hope to be able

to resolve most, if not all of, those to get a common and single form for the chronology, your Honour.

KENNETH MARTIN J: My intention would be to take that as an exhibit at some point once it's resolved - - -

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: - - - along with the statement of agreed facts and not agreed facts which is also in the materials.

NIALL, MR: The statement of agreed facts will need to be updated in relation to some agreement as for loss, which I will come to in a minute.

KENNETH MARTIN J: Yes.

NIALL, MR: The last matter that I just note at this stage, your Honour, is that we've served and, I think, filed a fourth statement of Ms Denham, who is due to give evidence on Friday. We have a signed (indistinct) titled Further Supplementary Witness Statement of Janet Burke Denham.

KENNETH MARTIN J: It would be the third statement that has reached me, if it's the one dated - actually, it's not dated, so - - -

NIALL, MR: I understand also the fourth one was filed, your Honour. But I can hand up a copy.

KENNETH MARTIN J: It came in on 5 February.

NIALL, MR: Yes. That, on my count, is the fourth, your Honour - third, I'm sorry.

KENNETH MARTIN J: It seems to preface itself by saying it's the third.

NIALL, MR: I beg your Honour's pardon. My maths - I've counted one of them twice.

KENNETH MARTIN J: That's all right.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: Ms Cahill, have you had an opportunity to - - -

CAHILL, MS: No, your Honour, I haven't.

KENNETH MARTIN J: So you just reserve your position on that?

CAHILL, MS: Yes. Thank you.

KENNETH MARTIN J: Yes.

NIALL, MR: They're the matters of housekeeping, if your Honour pleases. I'm not sure if my learned friend has matters to raise with your Honour.

CAHILL, MS: Just one thing, your Honour, I might flag in relation to the evidence and objections. My friend is quite right about the intention to continue to confer on an ongoing basis to resolve objections. There is a latent issue that arises from the agreement as to damages. Our objections to evidence, relevantly, on the grounds of irrelevance were formulated before the agreement, and so there may be a question about to what extent the statements now contain evidence that is irrelevant arising from the agreement.

KENNETH MARTIN J: So it has become redundant after the agreement?

CAHILL, MS: Indeed.

KENNETH MARTIN J: Yes.

CAHILL, MS: And I think the idea is that we will try and confer about that as well, and, hopefully, resolve it all. If we don't, though, there may be a need for your Honour to perhaps address that issue, albeit that it hasn't gone through the process that you directed - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - where formal objections have been exchanged.

KENNETH MARTIN J: I understand.

CAHILL, MS: If it please your Honour.

KENNETH MARTIN J: Yes. Thank you, Ms Cahill. Mr Niall.

NIALL, MR: If your Honour pleases. I now seek to open the case. Can I hand your Honour a couple of documents

that - pretty much as aide-memoires or identification documents for the purpose of the opening.

KENNETH MARTIN J: Right. I receive those.

NIALL, MR: And I will come to each of those in due course, your Honour, quite shortly. If your Honour pleases. Eagle Rest, which is the farm at the centre of the controversy. It's located about 45 kilometres north-west of Kojonup. It's approximately 480 hectares, and is owned by the first plaintiff, Stephen Marsh. He acquired the farm in 1990 and since then his wife, Sue, the second plaintiff, and he have farmed the property, holding a mix of crops and sheep. In more recent times the sheep have been dorplers, and the main crop is oats. But they have also grown, and grow, spelt rye, wheat and linseed.

Since the early 2000s, your Honour, the Marshes have moved to transform Eagle Rest to organic status, with a view to obtaining certification, and that took a couple - or a number of years to complete. In 2004, the farm was accorded conversion status by NASA, the National Association of Sustainable Agriculture. Now, essentially, that is a transitional status into full certification. And in January 2006, the farm and its products were certified organic.

Your Honour, certification is legally essential for the sale of organic product crops and products for export. So it's a legal prerequisite that the producer and the goods be certified if those goods are to be labelled as organic and exported from Australia.

KENNETH MARTIN J: By what law?

NIALL, MR: It starts at the Export Control Act of the Commonwealth, to which I will take your Honour, and that's subject to delegated legislation, called a control order. And I will take your Honour shortly to some terms. The second aspect is that it is practically essential for sale into the domestic market. Without certification, organic producers can't attract the premium price that organic products attract in the marketplace. So it is a brand or a status recognised internationally and within the domestic market.

The certification process in relation to Eagle Rest was undertaken pursuant to written standards. The national standards and the NASA standards are both relevant, and pursuant to contractual arrangements between the Marshes and NASA. If your Honour goes to volume 1 of the court

book at page 50, your Honour will see a schedule to the contract, and the contract commences at page 40. But for present purposes, and I will take your Honour to its terms in due course - but for present purposes, I just note that the schedule identifies the licensee as Stephen and Sue Marsh. It identifies the standard, the accreditor, the licensee's facilities, the program and the product. So that includes mixed grain - and your Honour can read it there.

The level of certification is organic, and the licensed item is NASA-certified organic, with the mark that's there distributed. And this contract authorises the licensee to attach the brand, or the mark, to its products to identify that's certified organic. And your Honour will see - I should have identified a little bit above point 4 - that it's accredited 476 hectares of the 477 hectares of the property. And certificates are issued - and while your Honour has it - page 51 gives an example of a certificate issued by NASA from time to time.

Now, I will come in a moment to the standards and what they authorise, and how they work, but can I say something - a little bit about the farm itself, by reference to the first A3, which is this - - -

KENNETH MARTIN J: Is that the one with the cross-hatching? No.

NIALL, MR: No, no cross-hatching, your Honour, so just plain, and it will have Seven Oaks and Eagle Rest.

KENNETH MARTIN J: Yes. Got it. Thank you.

NIALL, MR: And Baxter's block. Now, Eagle Rest, your Honour will see, is divided up into 13 paddocks, and the evidence shows that the way the Marshes have structured the farm is into three blocks, block 1 being paddocks 1 to 6, which is near the homestead of the house.

KENNETH MARTIN J: So they're the most easterly blocks?

NIALL, MR: Yes, your Honour, or the north-east.

KENNETH MARTIN J: North-east.

NIALL, MR: Of the farm. And just to get well ahead of myself in the opening, those blocks, 1 to 6, remained certified at all times. They didn't lose certification. Block 2 is paddocks 7 to 10. And block 3, 11 to 13. Now, the Marshes seek to operate the farm stocking both stock

and cropping on a two-thirds pasture, one-third crop, in general terms. And during pasture, the land is used both to feed the stock - so the pasture is development for - developed for stock feed - but it's also in accordance with the standards, used as a source of nutrition and restoration of the soil for an upcoming cropping season.

So what happens, as your Honour may appreciate, is that at the conclusion of the pasture phase and moving into the cropping phase there will be some cultivation of the land which will return the organic matter to the property, do that the pasture forms an essential element of the operation of the farm. And one of the things in the standards is the importance of crop rotation or rotation of farming and also keeping ingredients, including organic material on the farm and using it. Now, that can be contrasted for conventional farmers, who may move from pasture to cropping, might apply a herbicide to clear the paddock before they plant.

Now, in the years up to 2010, and 2010 was the incursion of the genetically modified canola, the Marshes were principally cropping oats and they sold those oats to Mortons and your Honour will hear from two witnesses, Mr and Mrs Morton. And the evidence is that those oats were, if not exclusively, very largely destined for export market. And the Mortons themselves are certified.

Now, adjoining Eagle Rest is the farm of Seven Oaks, owned by the defendant. And we have sought to identify some of the paddock names which are used in the evidence to give your Honour some orientation, but in 2010, as your Honour will know, genetically modified canola was cultivated and sewn and harvested in two paddocks and they are Range, which is in the southern corner, and Two Dams, which is in the northern corner.

Now, in between the two properties is South (indistinct) Road so that runs - that boundary is a road boundary and that, the evidence shows, is about a 10 metre or thereabouts separation between the two properties. Now, in the bundle of documents that I handed to your Honour, your Honour should have a table 1 in the bundle of documents that I had just - - -

KENNETH MARTIN J: I see.

NIALL, MR: Which is taken from one of - it should be freestanding.

KENNETH MARTIN J: I have got it.

NIALL, MR: Yes. That's taken, just for convenience, your Honour, from one of the statements of Mr Marsh, and I will just use it for illustrative purposes at the moment. So this is the farming cycle that the Marshes deployed between 2007 through 2010 and your Honour will see, for example, in block 1, "Oats, pasture, pasture, oats." Now, under the organic standards, they seek to have two cropping in five. So the next cycle would expect to be pasture. And in block 2 your Honour will see what happened and block 3. And that rotational plan and the division within the three blocks is an essential aspect of the organic farming system adopted by the Marshes.

Now, to return to the Seven Oaks. The Baxter farm is somewhat larger and it runs, the evidence shows, sheep and crops. As we understand the evidence, he separates pasture and cropping in the sense that paddocks have been devoted to cropping and other paddocks have been devoted to pasture. And the evidence will show that he is heavily reliant on herbicide use, including glyphosate. He has grown canola on his property for a number of years.

Your Honour will hear a bit of evidence about canola but can I just highlight a couple of things. It produces large numbers of small seeds, which are oil seeds, and it's largely used for oil production. There are various types of canola referred to in the evidence. One is called conventional canola and then through a process of hybridisation, not genetic modification, there has been some hybrids known as IT and TT, which are resistant to certain herbicides.

GM canola was developed by Monsanto. It's subject of a patent and up until 2010 it was unlawful to commercially crop GM canola in Western Australia. In some eastern states it had been released for commercial exploitation slightly earlier and in - prior to 2010 there was some trials but 2010 was the first year of commercial exploitation of canola.

Now, the case in summary, your Honour, in 2010 Mr Baxter planted GM canola in two paddocks. He failed to contain the GM seeds and material on his property and it escaped in the form of swathes, which are stalks which have been cut in a particular harvest technique, escaped through the wind and onto the Marsh property on Eagle Rest and spread through many of the paddocks. Hundreds of swathes and thousands of seeds were deposited on Eagle Rest.

Now, at the time he planted GM canola, it's our case that he, that is Baxter, knew or that it was reasonable foreseeable that genetically modified seed and plant material would escape from or be moved from Seven Oaks into Eagle Rest. So the fact that it was going to happen was something that was either known or reasonable foreseeable.

The position was brought about by two significant factors. One is the location at which the canola was planted, and your Honour will see immediately that it was planted in Range, an adjacent paddock, and Two Dams, a very close paddock. The topography of the land is that at the trees in the Range paddock, that's a hill which slopes down towards the Eagle Rest property. So the Range comes sort of across to the south, up through Seven Oaks and up into the tree area. So the location of the plantation was important.

The second aspect was the matter of harvest. There are two harvest methods employed in relation to canola. One is direct heading, where the harvester cuts the crop and deposits it in the header and it's removed from the paddock at the time of harvest. That removes the seed - that's its purpose, to remove the seed from the paddock at the time of harvest and obviously means that less seed is remaining on the property and it's much less likely for seed to be blown or carried into neighbouring paddocks.

The other form of harvest, your Honour, is what's called swathing and swathing involves cutting the crop, bringing it together in a windrow - so concentrating it in a row so that the swather moves across, cuts the plants, pushes them together or drives them together into a windrow so that you have a long elongated mound of swathes. The purpose of that is to concentrate the canola seed in a windrow - what's called a windrow and expose it to the elements.

That's one of its functions, your Honour, to expose the canola to the elements, including sun, to try it, and obviously wind and the potential for rain. The swath material remains in the paddock for two/three weeks. I think the evidence is it's about two weeks in this case. And it substantially and materially increases the risk that the swath material will blow - will be caught into the wind and move or be carried into a neighbouring property. And that's exactly what happened.

KENNETH MARTIN J: So, obviously more of the canola plant is cut in the swathing process than direct harvesting, where you just take the head of the flower?

NIALL, MR: The stalk - not sure quite - have to (indistinct) quite the distance in the stalk level as to how the header on a direct heading cuts, but - - -

KENNETH MARTIN J: You would probably cut lower to the ground when you swath.

NIALL, MR: Yes. But the stalks and - we have (indistinct) and Mr Marsh will identify one of the swaths. (indistinct) some visual idea of what a swath looks like, containing the stalks and the seed pods. And in each seed pod is - contains very many seeds. So that remains in windrows. Now, the position is that it was plainly foreseeable that canola seed would be carried onto the Marshes property.

KENNETH MARTIN J: On the wind?

NIALL, MR: On the wind. And leaving it for the wind - leaving it for the elements, plainly increased and materially increased that risk. The second aspect was that - of the summary of the case at this point, is that Mr Baxter knew and had been told that the presence of GM material endangered the Marsh certification. He was told in 2008, and I will come to that in a little more detail, and he knew or ought to have known that there was a risk that if the canola was not contained, it would produce volunteers - that is, the seed would germinate and grow - and at the presence of the canola seed, canola volunteers would threaten or imperil the certification, and that's exactly what happened, your Honour.

In December 2010, Mr Marsh notified NASA of the incursion - the contamination. NASA inspected. In accordance with the standard, they suspended, and on 29 December 2010, the property was decertified until it could be shown that the genetic material could be eradicated. The property continued to be inspected over the - - -

KENNETH MARTIN J: It lost its certification, as I understand it, on the basis of the swath material. The volunteer plants came later in 2011, didn't they?

NIALL, MR: The decertification came upon the risk that the seeds would germinate - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - and create volunteers.

KENNETH MARTIN J: Yes.

NIALL, MR: In fact, that risk materialised probably in lesser numbers than might reasonably have been expected. But the obvious result of the presence of seeds germinating in to genetically modified canola plants realised itself.

KENNETH MARTIN J: I mean, just from a chronological perspective, the certification of the farm was lost, as I understand it, before any volunteer plants germinated.

NIALL, MR: Correct. Yes.

KENNETH MARTIN J: So it was the swath material rather than the volunteer plants that caused the decertification.

NIALL, MR: Correct, your Honour. The swath material containing, on a reasonable estimate - - -

KENNETH MARTIN J: Seeds.

NIALL, MR: - - - seeds - created the significant non-compliance and risk which NASA acted upon. Now, our case - plaintiff's case is brought in two bases. (1) the action is brought in negligence - and I'm just going to pinpoint the claim at this point, your Honour, and that is that Baxter owed Marsh, as a duty of care, to ensure that canola seeds and material were not blown or carried from Seven Oaks to Eagle Rest and to ensure that the Marshes did not suffer loss as a result.

Baxter breached the duty by planting and swathing. The breach caused the GM seeds and material to be present in substantial quantities on Eagle Rest, and that led to the decertification and financial loss. The defendant seeks to put in issue each of those steps: duty, breach and causation. In relation to nuisance, the case is that the conduct of Baxter constituted an unlawful - unreasonable - I beg your Honour's pardon - interference with the use and enjoyment of land.

KENNETH MARTIN J: Both the planting and the swathing?

NIALL, MR: That's so, your Honour. So that, in summary, is the case. I wanted to take your Honour now to some of the documents in the following order. If I could take your Honour to the certification process, then to the - some GM canola and the Baxter decision to plant, and then, finally, to the decision of NASA.

KENNETH MARTIN J: Certainly.

NIALL, MR: Can I now turn to certification and the process. Your Honour, in 1983, the Export Control Act was enacted by the Commonwealth to allow for the application of export controls to goods specified in regulations. So an architecture was placed - was put in place to prohibit or regulate export of goods by being specified in regulations. The response - the legislation was in response to concerns about kangaroo and horse meat substitution into the United States market, that your Honour may or may not recall.

And the explanatory memorandum for the Act stated that stringent controls were an essential prerequisite to maintaining export markets for primary products. So the purpose of the regulatory regime of the Commonwealth is to protect export markets. It's a market based - an integrity of market based system. In 1997, the Export Control (Organic Produce Certification) Orders were enacted. I will hand up a copy to your Honour.

KENNETH MARTIN J: Thank you.

NIALL, MR: This is a Commonwealth legislative instrument, and your Honour will see, starting in paragraph 1.05 - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - that for the purposes of section 7 of the Act, the export of organic produce is prohibited unless an organic produce certificate has been issued under these orders for the produce. Organic produce is defined, your Honour, to mean that produce, for the purpose of marketing, is described as organic by the (indistinct) or by any other words of similar indication. So it would be prohibited by Commonwealth law to export goods that describe themselves as organic or certified organic unless there's compliance with the export orders and, in particular, the provision of organic produce certificate.

And your Honour will see, starting at part 2, division 1, 2.02 - and I just summarise this at this stage of the proceeding, your Honour - that an approved certifying organisation must issue to an applicant an organic produce certificate in relation to a quantity of organic produce that is intended to be exported if the produce has been subject to the organisation's QM system, the production and preparation of produce has complied with the QM system, and the produce and its preparation satisfy the organic produce importing requirements of the relevant importing country.

And the order then provides for the approval of certifying bodies by the Commonwealth, and under division part 3, your Honour, 3.01, in order to get a certificate you've got to be, that is, the organisation, has got to be operating a (indistinct) system that will ensure that organic produce, subject to the system, conforms to trade description and complies with the requirements of import control authorities.

So NASAA is one of seven bodies who are certified pursuant to the control order and capable of issuing these export orders. Now, the regulation process, of which the Commonwealth looks to NASAA, is pursuant to administrative arrangements, and your Honour will see those in volume 5 of the court book, starting at page 1292. Does your Honour have that?

KENNETH MARTIN J: I do.

NIALL, MR: And your Honour will see the purpose in 2.1:

Organisations seeking accreditation from ACWAS as an approved certifying organisation shall establish and maintain a documented system.

Over on part 4, on page 7, 4.01:

An approved certifying organisation will ensure that inspection and certification are carried out - - -

I beg your Honour's pardon, it's 1292.7.

KENNETH MARTIN J: Got it.

NIALL, MR: Top one:

An approved certifying organisation will ensure that inspection and certification are carried out effectively and uniformly.

And, over on 4.3, the QM system provides that each approved certifying organisation will ensure their certified operators comply with the relevant sections of the certification system, make the essential arrangements for inspection, including examination. And your Honour will see in (g), new certification to indicate their products are certified as compliant with the national standard. The national standard is defined to mean the national standard for organic and biodynamic produce.

Your Honour will see, pursuant to these administrative arrangements, which are binding on the certifying body, the NASAA level, inspection process is dealt with at part 14, on page 16 of the document. And we draw your Honour's attention to 14.2, and 14.2.3, as a minimum - as a minimum - the approved certifying organisation shall inspect products and systems of the operator against the relevant section of the national standard. The approved certifying organisation shall ensure that the majority of the questions are documented prior to inspection. And then in 14.2.7, there's what's required in an inspection. Your Honour doesn't need to trouble with the detail. But in 14.3 there's requirements for inspection reports.

So that's an important part of the architecture in which NASAA operates. And it makes it clear that the national standards present the minimum basis for the certification by the certifying body. So in legal structure one has control order operating, NASAA having to comply with its QM system and to undertake standards to the minimum of the national standard.

KENNETH MARTIN J: In order to be an accredited certifier.

NIALL, MR: And then to perform those jobs as a certifier, which - and then NASAA as one of the agencies has to go and inspect and certify bodies in accordance with standards. And the evidence shows that NASAA uses the NASAA standards, because as a minimum they reflect the national standards. Now, the national standards are important, your Honour - and I will take your Honour to some critical parts of it - but there are - your Honour will see them starting at 14.08 on volume 5. I will take your Honour to some of the key structures of the national standards and the key provisions.

But can I make three preliminary submissions about the standards, your Honour. The first is that organic certification describes a system and the goods that are produced out of that system. It is a fundamental misconception, in our submission, that "organic" simply describes the physical condition of goods that are produced. So it's a focus on a system of agriculture, or horticulture, which, if there's compliance with the system, the output can be certified as organic. But it's not about - and it's not just about the physical composition of the end product, and whether non-organic products can be tested, or identified, in that product.

The reasons for that, as the standards themselves demonstrate, is that organic systems are holistic and deal

with suitability of land and farming systems. The second general point I seek to make, your Honour - firstly, whether it's a system - the second is that the standards are permissive. By that I mean the standards identify what is permitted, and if it's not permitted, it's prohibited. So one doesn't primarily look in an organic standard for that which is prohibited. One looks for things that are permitted. And that's clear in the structure of the organic standards - of the national standards, and made absolutely clear in the NASAA standards.

And then the third preliminary point, your Honour, is that integrity of the system is crucial to the market. So this system, from the control order to the NASAA standards, to the certification of the operator, is about the integrity of the system as crucial to a market in which organic producers are essential suppliers. It's not about maximising individual profit for an operator, and it's not about the individual interests of an operator.

So when one comes to look at some of the submissions about unreasonableness as to NASAA's behaviour, and the standards themselves, the prism is not maximising the return of the individual operator. And, in many circumstances, certification may be denied, delayed, suspended or cancelled, completely independently of the fault of the operator.

KENNETH MARTIN J: That will just depend on the text of what the standards say.

NIALL, MR: It does, your Honour, but text in the context. Is your Honour well familiar with the debates about, and the rages between - - -

KENNETH MARTIN J: But some sort of internal interpretation act that we apply.

NIALL, MR: Well, the documents are, essentially, regulatory and contractual. So they're not legislation. And are designed to reflect the common intention of the parties, in the sense that - - -

KENNETH MARTIN J: Assessed objectively.

NIALL, MR: Yes. Now, if your Honour goes to the national standards and looks at the index - sorry, not the index - your Honour will see, on page 1, which is 1409, second paragraph, the standard stipulates:

Minimum requirements for products placed on the market with labelling which states or implies they're produced under organic or biodynamic systems. The standard provides a framework for the organic industry covering production, processing, transportation, labelling and importation.

And the last sentence:

Use of this standard provides transparency and credibility for the industry and protects the consumer against deception and fraud. Certifying organisations which have been accredited apply this standard as a minimum requirement.

Now, if your Honour goes over to page 3 of the standard, which is page 1411, just a quick examination of the index shows how systemic the standard is: soil management, water management, plant production, harvest of plants from natural environments, disease prevention and treatment, livestock housing, livestock handling, transport, cosmetic and skincare, etcetera. And to give your Honour an example why the standards don't focus on output, one of the standards deals with crop rotation, and the purpose of the crop rotation is to maintain the sustainability of the soil and the land.

You don't test a potato in order to determine how many times the crop had been rotated in the paddock; you look to the system as it's applied by the farmer from time to time. If your Honour goes to page 5 of the standard, page 1413, your Honour will see immediately that at 1.11.12, which I won't read to your Honour, but at 1.5:

Products or by-products that are derived from genetic modification technology -

(indistinct)

are not compatible with the principles of organic and dynamic agriculture, and therefore not permitted under this standard.

It says:

In itself, this standard cannot guarantee that organic or biodynamic products are free of non-allowed residue material or other environmental contaminants, so they may be subject to pollution sources beyond the control

of or protection ... however, the procedures in practice

(indistinct)

with this standard, the certified officer will ensure the lowest possible risk of contamination of organic and biodynamic produce.

Now, if your Honour goes over to page 8 and the definition of organic, organic means - page 8, 1416:

Organic means the application of practices that emphasise renewable resources, conservation of energy, recognition of livestock welfare needs, environmental maintenance and enhancement. An organic management plan refers to the maintain the integrity of the operation.

Over on the next page, there's a definition of prohibited substance and material means:

An input to organic production, processing or handling not permitted in this standard.

Now, over on page 3 - part 3, under 3.1, the standards under the general principles and the structure of it, there's general principles which are effectively object, and then you have standards, then you might have derogation. That's described in page 1 of the document. But I won't read it all to your Honour, but when your Honour goes through it, it's clear that it's all about systems. And if your Honour goes over to 3.1.2:

Operators shall identify and document how they will develop and maintain the organic integrity of the operation in accordance with this standard. The requirements of this standard must then apply to the land for at least three years before products can be labelled as organic. Only inputs listed in this standard are permitted. The use of prohibited treatments or substances will make the product ineligible for sale under the standard.

So that's an example of the permissive nature of the standard -

The use of products comprised or derived from genetic engineering is prohibited.

3.1.7, the obligation to address risks, and 3.1.8:

In the case of reasonable suspicion of land and/or product contamination, the certified operator shall advise their certification organisation and provide factual evidence to support this.

In some circumstances, your Honour, the contamination might be of the product; in other cases it might be of the soil or the land. And contamination means no more than the presence of something which is prohibited or not permitted.

KENNETH MARTIN J: Is that defined here, or is that just the dictionary definition?

NIALL, MR: No. It's not, your Honour. Yes. It's not defined, your Honour, but it deals with both land and product. And then there's 3.1.9:

Where a product has been contaminated with non-permitted substances as a result of factors beyond the control of the certified officer and chemical residue tests of the product and products known to be contaminated by either genetically modified organisms or their by-products, must be excluded from sale.

Your Honour will see the exclusion:

Where genetically modified crops -

this is the bottom one, number 12 -

have been grown, a minimum of at least five years must elapse before the products can be grown or produced on the -

(indistinct)

can be certified according to this standard.

Now, if your Honour goes over to page 13, 3.2.6, this is dealing under the heading Conversion of Land:

GMO products are not compatible with organic and biodynamic management practices and are not permitted under a parallel production system.

So a farmer is completely prohibited within a farm unit of having a GM - discrete GM farm unit on one side of the property and organic on the other side of the property. Your Honour will see under Genetic Modification, The General Principles:

Products or by-products that are derived from genetic modification are not compatible with the principles of organic architecture -

and then there's a requirement to assess risk. The standards identifies in 3.3.1:

The use of genetically modified organisms or their derivatives is prohibited. This includes, but is not limited to, animals, seed, farm input such as fertiliser, soil conditioners, vaccines, crop production, materials, food or processing aids.

There's a risk management system in 3.3.2:

Operators shall implement a risk management process to assess how they will avoid the accidental introduction of genetically modified organisms to the organic farm.

Now, just to give your Honour - they're the critical provisions in relation to GM, but just to give your Honour a flavour, if your Honour goes over to 3.5, Soil Management, your Honour will see that one of the general principles of the standard under 3.5 is:

Healthy soil is a prerequisite for healthy plants, animals and products -

(ii):

Sufficient organic material should be regenerated and/or return to the soil to improve or maintain humus levels.

Conservation and recycling of nutrients is a major feature. And your Honour see the standards reflecting that deal with rotation, composting, and the like. And that's important, your Honour, because one of the problems here was that genetically modified seed was incorporated into the pasture of the Marsh property. His pasture was an essential element of his organic production system, and he's not permitted to use pasture that contains genetically modified material.

It's completely incompatible with the system. If your Honour then turns - so the national system, in our respectful submission, couldn't be clearer, and I can deal also with the NASAA standard. Structurally, it's similar. And, your Honour, I won't take your Honour to it, but just note that the contract pursuant, which is tender bundle

page 40, imposes an obligation on the operator to comply with the standards.

KENNETH MARTIN J: The NASAA standards and the - - -

NIALL, MR: The NASAA standards are what's picked up in the contract, your Honour.

KENNETH MARTIN J: All right.

NIALL, MR: And also a contractual obligation to notify NASAA of potential contamination and you will see that at tribunal - tender bundle document page 40.

KENNETH MARTIN J: Thank you.

NIALL, MR: The NASAA standards, your Honour, start at 1293. And just to identify a couple of definitions in the NASAA standard, crop rotation is defined on page 1301. Over on 1302, farm unit is:

A farm with a clear physical and legal boundary.

Green manure is defined as:

A crop that is produced for the purpose of soil improvement and may be mulched or incorporated into the soil.

And input is:

Any product or material applied or used in the course of production.

I will just note the definition of organic management plan and the like. If your Honour goes over to page 1304, you will see that pasture is defined to mean:

Land used for livestock grazing that is managed to provide feed value and maintain or improve soil, water, or vegetative resources.

And prohibited, the definition:

Substances that are not permitted under this standard. The NASAA standard is positive; therefore, unless a substance is listed as being permitted, it is not permitted.

Your Honour will see that in the definition of prohibited. The purpose, in our submission, of the

standards is something in which your Honour ought have regard in the construction of it and your Honour will see that - this is 1.3:

NASAA certification is a total quality management system developed for organic production.

And over on 1.4, when one gets to Aims and Principles, your Honour, I won't read one to 15 but they do not focus on products. They focus on systemic issues: production systems, processes, and values. Number 3:

To work within natural systems in ways which enhance those systems -

and so on.

The process of certification is described starting in section 2. Under 2.3 your Honour will see that:

Organic certification is achieved when an operator can demonstrate that they have achieved a farming system that is compliant with the relevant sections of this standard. Organic production system requires an ongoing commitment to organic production practices.

And the standard is only:

Achieved after there is demonstrated compliance through inspection.

2.3.1. Now, if your Honour goes over to Inspection. The NASAA Organic - this is 2.11. There's a regime for inspection and how that occurs, and I will come back to sanctions in a moment.

Over on page 1316, your Honour, there's Precautions and General Requirements and 3.1 deals with Residues and Possible Contamination. I won't read it, your Honour, but it deals with the circumstances, for example, of residual contamination, where a farming system takes over from a conventional system, where there may be some residue of endemic herbicidal fertilizers and the standards in some cases allow for some residue. But, for example, in 3.1.6:

Where there is no maximum limit defined for a chemical substance for a specific product, there is zero tolerance for the chemical.

Now, Genetically Modified Organisms are dealt with under 3.2 and a significant, as we understand it, part of

the case will be your Honour's construction of this standard. It is our case that NASAA correctly applied the standard. The general principle is that organisms, which are derived from DNA technology, have no place in organic production and processing systems. And then there's a reference to:

Even where evidence of GMOs is not detected in finished organic product, the deliberate or negligent exposure of organic production systems or finished products is outside organic production principles.

Then the standards. The first standard, your Honour, describes that:

The deliberate use and/or the negligent introduction of genetically engineered organisms or their derivatives to organic farming systems or products are prohibited.

Now, some constructional issues. I think what will arise - - -

KENNETH MARTIN J: That's referable to Mr Marsh and his farming practices.

NIALL, MR: No, your Honour.

KENNETH MARTIN J: Deliberate, negligent.

NIALL, MR: Negligent introduction could include the negligent act of a third party. For example, if there was a negligent supply of seed as organic, which subsequently came out to be contaminated by genetically modified material, in our submission on a reading of its words, it would cover that episode. And then in terms of use - deliberate use, one would need to - well, one needs to read that in a context. For example, in our submission, using pasture that is contaminated with seed known to be genetically modified would constitute a deliberate use of genetically modified in the pasture system. It doesn't give a licence to ignore reality, and one has to read use in the context of a use in a system.

And when one looks at some of the examples, seed and feed, propagation material, I mean, it couldn't possibly be right and we will develop this in due course, your Honour, but there is negligent introduction of genetically modified seed by a third party supplier. The farmer knows that it's genetically modified.

KENNETH MARTIN J: Well, then that would be deliberate use.

NIALL, MR: Yes. So he couldn't feed it. He couldn't use it as feed. If he knows his paddock has been contaminated by seed and he is using that paddock for the purposes of pasture, he is plainly caught by use or an organism within a system. Ultimately your Honour will have to construe these words in the context but to indicate our construction of where 3.2.1 would operate, we have made that submission. In 3.2.3:

The certification of organic crops will be withdrawn where genetically engineered crops are grown.

3.2.5:

Operators must not knowingly permit exposure or fail to take action against the application or exposure.

KENNETH MARTIN J: Sorry, what was that one?

NIALL, MR: I beg your Honour's pardon.

KENNETH MARTIN J: Point 5?

NIALL, MR: Yes.

KENNETH MARTIN J: Must - - -

NIALL, MR: Yes.

KENNETH MARTIN J: Got it.

NIALL, MR: 3.2.7:

Operators must conduct an assessment of risks from contamination with GMOs and take action where appropriate.

And must know:

About contaminant risks, implementing distance and buffer zones, special handling, maintaining samples, testing of crops.

This is point 8:

Planting or sowing of organic production will not take place until five years after the harvest or removal of

any genetically engineered property that may have been planted on the land.

And 3.2.9:

Organic certification shall be withdrawn where NASAA considers there is an unacceptable risk of contamination from GMOs or their derivatives.

Now, that's a critical provision in the case, your Honour. It was one of the provisions that was identified by NASAA. Contamination would include contamination of land. It would include contamination of pasture. It would include contamination of products. But not limited to. And then 3.2.11 is perhaps a narrower aspect of contamination because that's contamination of organic product by GMOs that result from circumstances beyond the control of the operator may alter the organic status of the operation.

Now, ultimately, where NASAA becomes aware of non-compliance or non-conformity, sanctions can be imposed, and your Honour will see that at page 1312. Sanctions may be imposed by NASAA where there are non-compliances or non-conformities to this standard. An operator, unable to demonstrate compliance with this standard may be subject to the following: suspension, decertification, termination of certification, as a result of ongoing non-compliance with the standard following a period of suspension.

Now, the standards plainly authorised - I withdraw that, your Honour. The standards plainly obliged Mr Marsh to notify NASAA in the circumstances that happened in December 2010, and plainly, in our respectful submission, authorised, and our submission required - although we don't need to get that far - a decertification of land, at least while there was a significant risk of germination of genetically modified canola, or the incorporation of genetically modified canola, within the system. So that's the standards, your Honour. And I now wanted to turn to the development of genetically modified canola, and the decision of Mr Baxter to sow in 2010.

There is evidence in the cases to some basic horticultural explanations of canola. It's - for present purposes, your Honour, it's a broad acre oilseed crop grown quite commonly in Western Australia and other parts of Australia. It grows, I think the evidence is, to about 1.5 metres. I should check that, your Honour. It produces yellow flowers and seed heads, with hundreds of small black

seeds. One of the things about canola is that it's known to produce volunteers, and your Honour knows what that means. It's simply a plant that grows where it's not intended or wanted to grow.

KENNETH MARTIN J: Self-same.

NIALL, MR: Self-same. And it can do - it can produce volunteers from seed, and this is a seed production case. It's also capable of pollen mediated gene flow, but that's not this case. This case is one of seed movement. Apart from some trials, your Honour, in 2009, up until 2010 it was unlawful to grow GM canola on a commercial basis in Western Australia. The identity - the reason identified in the gazettal of the prohibition was preserving the identity of non-GM for marketing purposes.

In Western Australia, your Honour, the embargo that had been in place for genetically modified canola was relaxed in 2010, with two canola strains opening up for possibility. For the first time a broad acre commercial exploitation of the GM trait. Your Honour has probably read what the genetic modification does in this particular case, but, in very short terms, the - I have to start one step before. Your Honour will know of Glyphosate and Roundup, probably the most significant agricultural herbicide in the history of mankind. But it kills pretty much everything. So it's used as what's called a knockdown herbicide.

So a farmer in a conventional case might come to his paddock. It's got pasture in it, weeds in it, whatever is in it, applies a knockdown, Glyphosate, to the paddock, which will pretty much kill anything that's germinated. It doesn't kill seed. It kills germinated plants, and it comes through contact with the leaf, and it prevents some production of an enzyme to produce a protein, which kills the plant; non residual; been around for a long time. There is one known problem, which is inherent, which is that it kills everything. So you can't apply it after the crop has emerged. So if you apply it after you've - your canola or your wheat comes up, it's going to kill the wheat and the canola. So it can only be used - it can be used before sowing, really, up until the time your crop emerges, so pre-emergent.

The second problem is one that has increasingly been well understood, is that it's susceptible to glyphosate resistance. And, essentially, it's a bit like your Honour might have heard of antibiotic resistance; the more it's used, it encourages the development of resistance, and that

is a known and increasing problem. And if there's a glyphosate-resistant strain of weeds - take, for example, rye grass - the number one tool in the armoury would be rendered ineffective. So it's a second problem.

Now, what Monsanto did was, Monsanto had the patent to glyphosate, your Honour, and made inestimable amounts of money out of it, but it has come out of patent. But what Monsanto did was, they developed a means of modifying the gene of a plant to make it, effectively, immune to glyphosate. So what you do is, you modify canola, you get GM modification with these two genetic modifications, and you can spray it with glyphosate and it won't kill it. So it enables you to use glyphosate in that crop as a post-emergent herbicide, and they do it at the two-leaf stage and the six-leaf stage.

Now, for all of that, the release of genetically modified canola was a novel exercise in 2010 for Western Australia. It had hitherto been unlawful. And it was associated with some very unusual features. The first one is that when you buy it, a farmer buys it, he enters into a licence and a stewardship agreement with Monsanto. Now, that has two purposes: one is that it prohibits the farmer from retaining any seed and selling it for plant production. So what does happen in agriculture, as your Honour may know, is that a farmer may keep a proportion of his own - his or her own seed - - -

KENNETH MARTIN J: To sow next season.

NIALL, MR: - - - and to sow next season (indistinct) You can't do that with GM under the licence. And the other aspect is it has got a stewardship agreement which has, as a fundamental proposition, that GM canola is to be segregated. The segregation of GM canola is a fundamental tenant of the licence and stewardship agreement. Now, in part, that might be in Monsanto's commercial interests, because they get a licence fee from the sale of the seed. But segregation is a very important aspect.

And, secondly, your Honour - so there, in itself, is an unusual feature that you - a farmer buys grain and is subject to a stewardship agreement which exercises - they've got to go to a training exercise, they've got to - are contractually bound to segregate their grain, they're contractually bound to deal with agronomy aspects to prevent glyphosate resistance; all sorts of restrictions which would not normally be associated with buying grain to sew into your crop.

The other aspect of it is, your Honour, is that there are some restrictions, including an expressed recognition that canola produces volunteers and that you should be mindful of the interaction with other farming systems, and you should speak to your neighbours about that issue.

KENNETH MARTIN J: About volunteers?

NIALL, MR: About volunteers and the possible interference with neighbouring farmer activities. Part of it is directed to preventing and being aware of pollen flow. And one of the things that the Monsanto material shows is that it's accepted that production of volunteers can be expected over a three year period. So that's one of the - and indeed, I don't anticipate, your Honour, that there will be any controversy that it's reasonable to expect that production of volunteers, when there's contamination of seed, might occur over a three year period.

So that you don't really know - you're never going to know within that three year period what your germination rate is going to be or what's going to come up; depend on a number of factors. But the three year period is something identified by Monsanto itself in relation to this control of volunteers and control on segregation. The other fact about the introduction of genetically modified canola was that it was accompanied by significant information from the Western Australian Government. If your Honour goes to volume 1 of the court book and page 226, the - - -

KENNETH MARTIN J: Sorry. Just give me a moment. Yes, I've got it.

NIALL, MR: There's discussion in the first two pages of 226 to 227 about the process and the stewardship agreements. I won't take your Honour, but it sets out some of the steps in the Monsanto processes. But, of itself, it demonstrates the peculiarity - I don't mean that pejoratively - of the system of being able to use GM canola. And your Honour will see over on 227 at the top, or starting at the first dot point at the bottom of 226 before the box:

Attend a Roundup-Ready canola accreditation course,
sign a licence stewardship agreement -

which outlines the stewardship and commercial obligations -

review and complete a technology user agreement -

which captures specific planting details and resistance management -

Roundup-Ready canola growers should comply with all licensing requirements, which include informing neighbours of plants to grow, including buffer requirements, maintaining a minimum five metre separation between GM and non-GM crops and declaring the GM status of seed, hay -

(indistinct)

or other materials in all transactions and keeping adequate records.

Over on 228, there's a reference under the heading down the bottom of the left hand column, Resistance Management. I won't trouble your Honour with it now, but that explains the need to be cautious about the development of glyphosate resistance. Over on page 229, your Honour, and this is an example of segregation, second paragraph over on the first column in 229:

If both GM and non-GM canola are grown on the same farm and the grower chooses to deliver the non-GM canola into the CSOA standard, then particular care should be taken during harvest to prevent cross-contamination.

Now, down on the bottom, Management Volunteers:

Roundup-Ready canola will produce volunteer plants in the same way as non-GM varieties. Plants should be controlled in areas where GM canola was grown and any other places where physical movement of seed may have occurred.

Now, just pausing there for the moment, your Honour, in 2008 - so that's pre-2010 GM canola - volunteer canola plants were found on Eagle Rest which were taken by Mr Marsh - these are conventional canola - taken by Mr Marsh to see Mr Baxter. And he said, "These have come from your property. If you release GM canola in the future, I could lose my certification." So Baxter knew that canola could produce volunteer plants on Eagle Rest and this is more evidence of the obvious. And over on the top, your Honour - on top of 271 - or perhaps the bottom:

Particular areas for attention include -

And, your Honour, I won't read the dot points. But what it shows is that you're going to get seed - or there, it says:

...any other places where physical movement of seed may have occurred.

So - - -

KENNETH MARTIN J: Sorry. Just where are you reading, Mr Niall?

NIALL, MR: I beg your Honour's pardon; I've jumped about. Under that first paragraph, under Management of Volunteers - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - about the third or second - third or fourth line:

Plants should be controlled in areas where GM canola was grown and any other places where physical movement of seed may have occurred.

KENNETH MARTIN J: Yes.

NIALL, MR: And there's some examples for you to - and over at the top:

Most volunteer plants will germinate and emerge within three years.

And that's consistent with Monsanto's own material, which identifies the three year period. So if your property is contaminated by GM seed, you can expect that most will germinate within three years. Well, though, there's some qualifications on that is, your Honour, one of them: if the seed goes deeper into the land, it might go what's called a secondary dormancy, which may lead to a longer life. Your Honour, if your Honour goes over to page 230, another farm note from the State Government, describing the process of on-farm segregation of GM and non-GM canola. It talks about effective segregation being the key, and over on page 231 - does your Honour have 231?

KENNETH MARTIN J: I do.

NIALL, MR: Under the heading Machinery Hygiene.

KENNETH MARTIN J: Yes.

NIALL, MR: That identifies one means of preventing the spread, crop management. And over on the top column on 231, there's this, your Honour:

Once canola crops are swathed and awaiting harvest, there is a risk that strong winds can move the drying plants into adjacent paddocks. It is necessary to plan for this before planting and to develop a plan to manage any resulting GM volunteer plants. The management plan should be discussed with neighbours when planning to grow GM canola in boundary paddocks. Growers need to be aware that officials, such as staff from Western Power, telephone companies and others may gain access to their properties without notification or permission. This could lead to accidental transfer of pollen and seed between paddocks, but the overall percentage should be extremely low and unlikely to affect the GM status of any canola crop.

Now, over on page - not 206, your Honour - just pardon me one moment, your Honour.

KENNETH MARTIN J: Yes, of course.

NIALL, MR: 216. I'm sorry, your Honour.

KENNETH MARTIN J: 216 of the book?

NIALL, MR: Yes, of the book. Right, this is another fact sheet distributed by the Western Australian government. It is dated January 2010 and I will return to it later, your Honour, but for the purpose of opening, if your Honour goes to over to 217, under the heading Organic Farming and Genetically Modified Crops. There the state government record that:

Throughout the world, standards for organic farming prohibit the use of GM materials in the production or processing of organic products. Australian product standards also prohibit the use of GM materials in organic products. International organic standards vary on the tolerance of accidental presence of GM material in organic product. Some standards, such as in Australia, have no defined tolerance, whereas the European Union standards limit the accidental presence of up to .9 per cent GM material.

Now, there - and over on the next page under Organic Certification the government advised the:

Organic certifiers assess GM contamination risk on a case-by-case basis.

And they put some dot points. Continuing:

Legal liability is a GM crop-related issue that was assessed independently and the outcome was that common law allows for effective remedies for persons incurring damage from GM crops. The grains industry has formulated a range of stewardship programs and codes of practice for production of both GM and non-GM crops. Organic certification organisations provide detail and procedures on how to manage any issues. All produces have a duty of care towards their neighbours and the best way forward is to discuss issues and come to mutually agreeable solutions.

Over on page 219, the state government advised again in January '10 of the possibility of negligence and nuisance arising in this context and the example is given on 220, your Honour. Under the heading Private Nuisance:

The spread of GM seed or pollen -

That's right in the middle of that paragraph:

...to a non-GM neighbour could compromise the neighbour's non-GM organic status. If a court decides the spread of pollen or seed prevents the neighbour's use and enjoyment of the property, the farmer may be liable for loss of profits and clean up of the neighbour's property.

And there's reference I won't take you to - negligence above it. So we are operating in an environment, your Honour, where there is publicly available information which directs to the very event that transpired, the movement of seed in one case by one piece - by thrashing and the potential consequences to certification, nuisance, and negligence. So it's not a case where these things were not easily considered by - - -

KENNETH MARTIN J: So you are addressing foreseeability?

NIALL, MR: Yes, your Honour. And just in terms of the other relevant information that was in the public domain, if your Honour goes to 285. A farm note published in May - 285, your Honour.

KENNETH MARTIN J: I'm there. Yes.

NIALL, MR: A farm note published in May of 2011 and the government there, through the farm note, indicated in table 1, for example, down the column - left-hand column, GM Material. Does your Honour see that?

KENNETH MARTIN J: Yes.

NIALL, MR: And the first column is Certified Organic and they're identified as not permitted. And then there's a - the next line down is Market Thresholds in Produce:

GM material not permitted in product or on farm, non-GM you must contain less than industry threshold for GM presence, .9 per cent.

And then the next item is, Consequence of Exceeding Market Thresholds:

Certified organic, loss of organic market, possible certification suspension of affected land until risk is minimised.

And then over on the next page there's reference to risk assessments and over on page 287 under table 2, headed Factors Influencing the Risk, the publication identified Proximity and under Mode of Transfer identified wind:

Consider prevailing winds strength and direction.

And your Honour will note over on the dot points, the third dot point:

Plant material. Consider prevailing winds avoiding cultivation of GM canola in areas subject to wind events, which might transfer GM material onto adjacent properties. Avoid swathing in boundary paddocks. If you must swath at a boundary paddock, leave a buffer or standing crop along your boundary fence.

So the release of GM and the information in 2010 was accompanied by some unusual features: the licence agreement, the stewardship agreement, the need for segregation and notice as to the significance of release. Now, that was the context or part of the context in which Mr Baxter made his decision to plant and swath his product.

I have mentioned to your Honour that part of that sequence included the 2008 encounter. So I am coming now to the Baxter decision to plant. I have mentioned to your Honour the 2008 meeting on Seven Oaks where Mr Marsh took a volunteer canola plant and told him - that is told Baxter that if you do GM planting and it comes onto my property, I am liable to have my certification endangered and Mr Baxter said words to the effect that if it becomes legal, I intend to plant it.

Now, the facts disclosed - the evidence disclosed, that two plants were paddocked - were planted to GM canola and Mr Baxter says that he planted conventional canola in two other plants in 2010. If your Honour goes to the large-scale - - -

KENNETH MARTIN J: Aerial photograph?

NIALL, MR: Aerial photograph. The evidence discloses that GM canola was planted in Range and Two Dams and Mr Baxter says that he planted conventional canola in Mailbox and Silo. So he has got his foot in both camps in 2010. In October - so the planting would have taken place, I think I'm right in saying about April - March, sorry, your Honour. The planting took place in March 2010 and the harvest took place in November, and I will come to that in a second.

KENNETH MARTIN J: The swathing.

NIALL, MR: The swathing. In October 2010 Marsh went to see Baxter again and handed him a notice, which directly put him on notice that the escape of canola onto Eagle Rest would result in decertification, that he would look to Baxter for compensation or recompense should that happen, and one of the things that was identified was swathing.

Now, what Baxter did was in the two GM paddocks he swathed, your Honour. He has been a canola farmer for a number of years, never swathed before. But he decides to swath the two paddocks, Range and Two Dams, and we submit as a matter of obviousness that concentrated the seed and made it vulnerable to wind disturbance. Another striking feature of the case, your Honour, is that in the same year he direct headed his conventional canola. In fact, as we understand the evidence, he has never swathed his canola - conventional canola. Now, he gives some evidence, which will be heard, your Honour, but we anticipate that what he will say will be, "Well, that maximised my return." Swathing increased - - -

KENNETH MARTIN J: Yes.

NIALL, MR: Had the benefit of increasing the yield.

KENNETH MARTIN J: Swathing is the recommended method or the method most favoured for harvesting canola, is it not?

NIALL, MR: I'm not sure the evidence will go that far.

KENNETH MARTIN J: One of your experts actually said that.

NIALL, MR: But they're certainly identified benefits and we would say risks of swathing. One of the risks of swathing is that you sit the canola material proud on the land for a couple of weeks, and Baxter didn't swath the other conventional paddocks. Now, after the swathing, Mr Marsh observed literally hundreds of swathes scattered across his farm and in general terms - and the red-shaded map gives a general reflection and it's taken from one of the documents that we tendered but just for illustrative purposes, your Honour, it gives your Honour a general sense of the area covered; when I say covered, area within which the canola swathes were found. And they were found strewn across the pasture and paddocks 7 to 13.

At the time, your Honour, sheep were grazing on 7, 8, 9 and 13 and the pasture in 10, which was contaminated, was - didn't have stock on it. In 11 and 12 there was - crops had been sowed. In paragraph 12 it was rye and spelt. In paragraph 11 it was wheat.

KENNETH MARTIN J: Paddock.

NIALL, MR: Paddock.

KENNETH MARTIN J: Yes.

NIALL, MR: Sorry, your Honour.

KENNETH MARTIN J: That's all right.

NIALL, MR: Now, Mr Marsh notified NASAA, who inspected on 4 December. If your Honour goes to volume 1 page 291 - - -

KENNETH MARTIN J: Volume 2 maybe?

NIALL, MR: I beg your Honour's pardon. I have compressed mine a little bit so I might make that mistake from time to time, your Honour. It's volume 2. This part of the tender bundle really sets out the NASAA documents and I don't want to take you to all of them, your Honour, but just indicate the chronology of events.

So your Honour will see in 291 and 292 there was a fax on 1 December dealing with what Mr Marsh described to NASAA as substantial contamination. And over on the next page, in the middle, another fax to Ms Goldfinch, who is a reviewer and who will be giving evidence, your Honour. Mr Marsh described in the middle of that paragraph:

There are hundreds of swath GM plants and thousands of seeds spread across our land.

And identifies the problem of the stock.

Now, your Honour, the next document at 293 is entitled Inspection Checklist and Report, and there are a number of these in evidence, your Honour, and I won't take your Honour to them all - in the tender bundle. But pursuant to the standards and the administrative arrangements, inspections are undertaken and they are largely recorded in writing. So the evidence will be that these are completed by an inspector, they're returned to NASAA and NASAA makes decisions in relation to them.

And this first document is a document authored by - well, there's an objection to the document, your Honour, but not to - for a non-hearsay purpose. So it's not objection to a tender, it's an objection to a tender of - - -

KENNETH MARTIN J: For the content - - -

NIALL, MR: For the contents.

KENNETH MARTIN J: For the truth of the content.

NIALL, MR: For the truth of the content.

KENNETH MARTIN J: All right.

NIALL, MR: And what I am just identifying for your Honour is - - -

KENNETH MARTIN J: Is this something Ms Goldfinch prepares after her inspection?

NIALL, MR: No, this was Ms Purvis, who is not giving evidence.

KENNETH MARTIN J: Purvis.

NIALL, MR: But she provided this to Ms Goldfinch, the reviewer, and this was part of the material which Ms Goldfinch relied on to make her decision. Now, I wanted to show your Honour just the structure of the document for the moment, which deals with a whole range of things which an inspector would look at in the course of an inspection - an annual inspection. And some of the record relates to the record provided to NASAA of the incident.

Your Honour will see that - I won't - I don't think I need to take your Honour to in opening but it recorded the extent of incursion, and on page 307 Ms Purvis - in a compliance issue nonconformity is reported:

Given the incursion of GM material containing GM seeds, Steve will send the results of agriculture department testing. If confirmed, NASAA will need to determine: capacity of the sheep to return to organic status, given that there seems to be GM canola seed contamination on up to 50 per cent; capacity to grow an organic crop in future years; and the status of the current crops, which have some of the canola swath, including seed heads, that have blown into his current crops, noted in paddock 12 and suspected to be present in paddock 11.

Now, that prompted a review by Ms Goldfinch and on 10 December, at 323, your Honour will see that there was a suspension of certification. And some standards were identified, including 329, which your Honour may recall was the unacceptable risk of contamination clause. And NASAA concluded - withdraw that - Ms Goldfinch concluded, on the basis of the material set out in the table, including paddock 7 through 13, are contaminated, that those paddocks are suspended. And for the - to resume organic status, the paddocks must be eradicated of GM material.

And what happened on 21 December - this is at 325 - there was another inspection by Ms Coleman, who is another inspector, and she will be giving evidence before your Honour, and she records what she observed on the property. And the evidence is to the effect that the sample that Ms Purvis had taken had somehow been mislaid, or lost, and so Ms Coleman took another sample for testing. And your Honour will see that recorded.

Having set out - and I won't read it to your Honour - the record of her observations, taken some photos, one of the things she did - on 327 - is took a sample amounting to about 100 grams for inspection. Your Honour will see that in the table at 327. The document identifies that there were many stems of canola blowing around in the pasture, and that they were recorded in a number of paddocks.

KENNETH MARTIN J: Any photographs?

NIALL, MR: Sorry, your Honour?

KENNETH MARTIN J: Photographs?

NIALL, MR: Yes. And the - over on 328, there's a map, which provides a legend for what's described on page 326, and your Honour will see that canola (indistinct) were spotted (a), (b), (c) and other points. And your Honour will see some photographs on 329 to 331. The genetic material was confirmed - the material was confirmed as having genetic - being genetically modified in about 23 December - your Honour will see that at 339 - when 100 grams of seed that were taken by Ms Coleman were established to be positive for Roundup-Ready (TM) canola.

And the decision, a few pages earlier than that on 333, was that to decertify part of the farm - and your Honour will see that at page 333, a letter dated 29 December, that 134.6 hectares of the 459-hectare property would be certified. They are paddocks 1 through 6, and then six hectares of the old orchard and well and house (indistinct) And then decertified was 326 hectares, being paddocks 7 through 13. And then it was said in the letter that:

Decertified areas will remain as such until it can be verified that the GM material has been entirely removed. For this farm to resume organic status paddocks must be eradicated of GM material and verified by inspection during the cropping season.

And over on 335, your Honour will see the amended schedule for the contract.

Now, what Mr Marsh did in relation to the incursion is that - the sheep were feeding on some of the affected paddocks. Initially, he tried to fence off the swathes. But - and in evidence there's some photographs of some fencing. But that step wasn't further taken. The swathes remained on the property for some time, and they were decertified. Mr Marsh continued to endeavour to operate his farm in an organic system basis, but only blocks 1 through 6 were certified.

Now, the evidence discloses that a number of volunteers were found in 2011. The state of the balance of the seeds, it's likely, we will be submitting, that an unknown amount will have germinated and either eaten, or otherwise perished. Some volunteers were discovered in 2011, and they were found and removed, and they were tested.

KENNETH MARTIN J: Hand pulled, presumably?

NIALL, MR: Yes. And no volunteers were found in 2012. NASAA continued to inspect the property over a number of inspections between 2011 through to 2013, and there was monitoring of the farm. Now, ultimately, in November 2013, NASAA determined that, effectively, the contamination had been addressed to its satisfaction, and the land was recertified. The seeds, of course, being small and black, are themselves largely undetectable on the property. They're going to be very difficult to identify.

The management regime that would generally be adopted would be to allow germination and then address the germinated crop - the germinated plant, that is, you don't know how many - or what's going to happen to the seeds until they germinate, and the material from Monsanto, for example, in a conventional context, would be that to manage volunteers you would wait for them to emerge and then you would spray them with a relevant herbicide.

Now, that method really describes two things happening: firstly, you wait for germination; and, secondly, you address the plant once it's germinated. So NASAA were confronted with the position with an unknown number of seeds extensively contaminating an organic farm system. They took the view that that is not compatible or compliant with the standards, and the paddocks were decertified until the end of 2013. As a result of the decertification, the Marshes suffered significant financial harm. The agreed figure over the three-year period until certification was restored is \$85,000. That represents a significant burden on a farm of this size, and on income that the farm had earned.

KENNETH MARTIN J: So, really, across 2011, 2012, 2013 growing seasons?

NIALL, MR: That's so, your Honour. Well, the two - it's really 2010, 11 and 12, because - - -

KENNETH MARTIN J: Well, they got decertified at the end of 2010.

NIALL, MR: So they had - - -

KENNETH MARTIN J: 11, 12, 13.

NIALL, MR: Yes. But they were entitled after recertification in November 2013 - they were entitled to sell things harvested after that date as organic. Now, can I return to the questions in - that arise in negligence and

nuisance. Firstly, your Honour, we plead that the defendant, Mr Baxter, owed the plaintiffs a duty to take care - reasonable care to ensure that GM canola seeds did not move or transferred onto Eagle Rest, causing decertification and consequent loss.

Your Honour will see the terms of the duty pleaded in paragraph 35. A duty to take reasonable care to ensure that GM canola was not blown or carried from Seven Oaks onto Eagle Rest, and ensure that the Marshes did not suffer loss as a result of the GM canola being blown or carried from Seven Oaks. Now, the question - sorry. The loss that the Marshes suffered was an inability to sell produce as certified organic (indistinct) a species of economic loss.

The question of whether a duty exists - a legal question - turns on a number of factors, and we emphasise foreseeability, knowledge of the risk and its magnitude, vulnerability, the determinacy of the extent of liability, and autonomy. In relation to foreseeability, your Honour, can we say this by way of opening: it was reasonably foreseeable that canola seed and material would be blown or carried from Seven Oaks to Eagle Rest in 2010.

Canola produces a very large number of small, black seeds that are mobile, and swathing material increases the risk of movement. It was also foreseeable that the seed that was blown or carried onto Eagle Rest might germinate, and by germinating would become incorporated into the system of the farm on Eagle Rest. Now, in terms of the germination question, in our submission, plainly the evidence will show that there was a reasonably foreseeable that seed, once blown or carried onto Eagle Rest, would germinate.

It was also reasonably foreseeable that should canola seed and material be blown or carried onto Eagle Rest, that decertification might follow. Baxter knew that the farm was organic. He was told of that very consequence in 2008. He was told again in 2010, before he swathed. The standards are clear. And genetically modified plants and material have no place in organic agriculture. So it was reasonably foreseeable that NASAA would decertify if GM seed were blown or carried onto Eagle Rest.

KENNETH MARTIN J: Well, that's now talking about foreseeability of loss as opposed to foreseeability of plaintiff.

NIALL, MR: Well, the duty is a duty to take reasonable care to avoid loss of the class that suffered. So he had

to foresee that the injury of the type sustained - not the specific terms of it, but the type sustained - was reasonably foreseeable. And, plainly, in our submission, the evidence will disclose that it was. Beyond foreseeability, the knowledge of the magnitude of the risk and consequences were known to Baxter. He was told twice that the presence of GM on Eagle Rest would imperil certification.

Certification is an essential element of the conduct of organic farming, both in an export context and domestically. So the harm that was to be sustained was a very, very significant one. In terms of vulnerability, we submit that Mr Marsh was vulnerable in the sense that he had no control over the areas in which Mr Baxter planted or the method by which he harvested. Mr Marsh, the evidence will show, took many steps to alert Mr Baxter to the risks that were present.

He published articles, warning signs in the local newspaper, identifying the problem and the concern that he had. So he took steps to alert those who might have control, including Mr Baxter, and specifically Mr Baxter, but beyond that he was vulnerable to what Mr Baxter did. Now, it's said that, as we understand it, that a duty shouldn't be imposed because it interferes with the autonomy of Mr Baxter to conduct a lawful farming operation, that is, it's said that GM canola is lawful, swathing is a recommended tool for the harvesting of canola crops, but that question and those two - the fact that it's lawful and the fact that it's used doesn't answer the relevant question about whether there was an action in negligence.

It will often be the case that (indistinct) action might be lawful and might be reasonable in a different context. But here, when one looks at the autonomy and the interests of Mr Baxter, there was no - the duty does not interfere with that autonomy in a context where GM canola is heavily regulated by contract, that it had been banned up until 2010, that its release and its use is accompanied by strict segregation protocols, that its users are required to adhere to strict use controls addressing volunteers and resistance, and there are many other reasonable alternatives available to Mr Baxter, including a different planting location, a different method of weed control and a different harvest method.

In those circumstances, there is no interference with autonomy such as to deny the existence of the duty. What Mr Baxter did was, in the teeth of the warnings, in the

face of the communications from Mr Marsh, he completely, indifferently, and we submit, recklessly, planted in the adjoining paddocks and harvested without any consideration of means by which he might manage risk that he had thereby created. Now, having established the duty, in our submission, the evidence will comfortably establish that there was a breach of that duty and that it was causative.

As to factual causation, we submit that the planting and harvesting was the condition for the presence of GM canola on Eagle Rest and for the decertification. They were the essential ingredients to both the presence of GM and the decision to decertify. In terms of the scope of liability question, the NASAA standards are reasonable and lawful and contractual. But none of those three things are relevant. The respondent is not - the defendant is not entitled to say, "Well, we shouldn't be liable for the consequences of an unreasonable standard."

The existence of the standard is a necessary and essential ingredient for export of organic products. And there could be no suggestion at all that the contract and the standards between the Marshes and NASAA were somehow void or unenforceable. Marsh was faced with the contract and the terms of the standards, and so, in our respectful submission, was Baxter.

KENNETH MARTIN J: Sorry. Well, one is bound contractually - I understand, Mr Marsh. Baxter, because?

NIALL, MR: Because it is - it was a reasonably foreseeable consequence that it would be applied in that way.

KENNETH MARTIN J: To Marsh - - -

NIALL, MR: To Marsh.

KENNETH MARTIN J: - - - by NASAA.

NIALL, MR: By NASAA. So it's not - Baxter can't say, "Well, I'm not responsible for - I can't be held responsible for what NASAA did because it was unreasonable or the standards were unreasonable." The fact is that there was an enforceable contract and enforceable standards. The standards are mandatory in the sense that they have to reflect the national standards; and, relevantly, these do reflect the national standards.

And so there's no room, in our submission, for Baxter to somehow say, "Well, I think the NASAA standards are unreasonable, therefore liability shouldn't be extended to me." In terms of the decision itself, the decision to suspend and decertify was plainly open to NASAA on the material before it, and plainly accorded with the application of the standards as they are properly construed. So, in our submission, there was a duty, there was a breach and there was causation, and the loss is agreed. Can I turn now to the case as presented in nuisance, your Honour.

KENNETH MARTIN J: Certainly.

NIALL, MR: The essential elements of the cause of action involve the unreasonable interference with the use and enjoyment of land. Now, in that context, the Marshes were using land to cultivate certified organic produce which complied - which required compliance with standards. Baxter sowed on contiguous paddocks and undertook swathing, both of which were deliberate acts. The swathing concentrated the swathes and the seeds, and a purpose of his exercise was to deliberately expose the canola to the elements.

The planting and swathing were each conditions for the loss and they were unreasonable, and they constitute unreasonable interference for the following reasons. Firstly, they were done in close proximity to Marsh, who had been conducting a pre-existing and well-established farming practice. There was no relevant sensitivity. Second, Baxter knew that the presence of canola on Eagle Rest would put certification at risk. (3) he knew that canola had a tendency to produce volunteers by seed transfer, including on a neighbouring property.

(4) Baxter was not cultivating conventional canola, but a new product whose release was heavily regulated by the contract with Monsanto, and the subject of specific and cautious advice from the state. Segregation and cautious use were the hallmarks of the product that Baxter chose to plant and swath. And Baxter took no precautions. He didn't even do what he was willing to do for conventional canola in the same season on the very next paddock. He didn't even take the precaution of harvesting by direct heading, despite being able to do so and despite doing so on the very next paddock. So, in our submission, there was an unreasonable interference with the use and enjoyment of land. Can I turn now to the question of relief, your Honour.

KENNETH MARTIN J: Yes. Indeed.

NIALL, MR: Your Honour has heard the question of damages has been resolved. But in our submission, the plaintiff is also entitled to injunction to abate the nuisance. And, in our submission, there remains in the face of a real and substantial risk that Baxter will plant genetically modified canola in adjoining paddocks to Eagle Rest, and will continue to swath them in a way which renders them liable to being carried or blown onto Eagle Rest with the consequences that occurred in 2010. In our submission, it's plainly a case where an injunction should issue to abate the nuisance to prevent that happening in the future.

KENNETH MARTIN J: Now, is that in the terms of your minute of 24 August 2012?

NIALL, MR: Pardon me one moment, your Honour. It's in the form of the undertaking that the defendant gave on - which was subject to a consent order that on the - that the defendant not plant genetically modified canola within 1.1 kilometres of the boundary of the plaintiff's land or swath genetically modified canola plants. So it has two aspects to it, your Honour, and I will provide a minute to your Honour immediately after lunch.

KENNETH MARTIN J: All right. I did actually ask during a 2012 directions hearing for the actual form of the permanent injunction to be crystallised, so to speak. As formulated, it seeks to permanently restrain swathing anywhere, as I read paragraph 2, by Mr Baxter, or alternatively, to restrain swathing under paragraph 3 within descending distances to - of Eagle Rest, ranging two kilometres at the maximum, down to 1.1 at the minimum. In terms of the actual planting of genetically modified canola, paragraph 1 as formulated wouldn't seek to prohibit Mr Baxter doing that, as I read that injunction, but it would seek to inhibit him from planting within some sort of buffer zone of Eagle Rest, again within the ranges of 2 ks to 1.1 k.

NIALL, MR: That's so, your Honour.

KENNETH MARTIN J: All right. Well, perhaps I might just allow you to - - -

NIALL, MR: Yes. Can I - - -

KENNETH MARTIN J: - - - review that over lunch.

NIALL, MR: Yes, your Honour. Can I correct something that we - can I correct something that we wrote in our submissions, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: We - and it's my fault, your Honour. We inaccurately described that an injunction had been given. That's not true, your Honour.

KENNETH MARTIN J: I remember the argument vividly, Mr Niall.

NIALL, MR: When I say it's not true, it's not accurate, your Honour. Some undertakings have been given to the court - - -

KENNETH MARTIN J: About not swathing in 2013.

NIALL, MR: Yes. But no injunctions have been issued by the court. Quite so. So I apologise for that, your Honour.

KENNETH MARTIN J: That's all right.

NIALL, MR: Before my learned commences, can I return immediately after lunch and just make some short submissions on the form of the injunction.

KENNETH MARTIN J: Yes, indeed. By all means.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: All right.

NIALL, MR: Otherwise, that is the opening.

KENNETH MARTIN J: Yes. Thank you, Mr Niall. Court will adjourn till 2.15 pm.

(LUNCHEON ADJOURNMENT)

KENNETH MARTIN J: Yes. Please be seated. Mr Niall.

NIALL, MR: Thank you, your Honour. Can I hand to your Honour two copies of the same - two pages of the same document, which is just a narrower form of the injunction that your Honour had earlier seen, and it's limited to a single distance.

KENNETH MARTIN J: Thank you.

NIALL, MR: And it identifies in paragraph 1 that the plaintiff seeks a permanent injunction, restraining the defendant from planting genetically modified canola within a kilometre of the plaintiff's land, and secondly, to prevent him from swathing any genetically modified canola which is planted on Seven Oaks within one kilometre.

KENNETH MARTIN J: Right.

NIALL, MR: If your Honour pleases, that's the opening for the plaintiff.

KENNETH MARTIN J: Thank you, Mr Niall. Ms Cahill.

CAHILL, MS: If it please your Honour. Perhaps unusually in this case, the best place to start is in the middle, and that's with the organic standards. In particular, the NASAA standard, which the proper construction of which is the key factual matter, your Honour, relevant to the determination of almost all of the legal issues that your Honour has to decide in this case. The question of the proper construction of the standard calls for consideration of what the standard does or purports to do, and what it says about those objectives.

In order to address your Honour on that, can I start not with the NASAA standard itself, but with the national standard. There's two reasons for that. The first is that it's compliance with the national standard, not the national standard, that is the legal requirement for exporting from Australia, produce or products labelled as organic or certified organic; and secondly, as we understand it, the plaintiff's case is that it's the NASAA standard that is consistent with the national standard in any event.

Your Honour, the national standard commences in volume 5 at page 1408. At page 1413, your Honour, clauses 1.1 and 1.2 make it quite clear what the purpose of the standard is, and that is, the minimum criteria that have to be met before a product can be labelled as relevantly organic for commercial purposes. That's the clear effect of clauses 1.1 and 1.2. Now, when these clauses talk about product, they must be referring to the end product of an agricultural process, because it is that end product which is to be labelled relevantly as organic. And when one understands that that's a reference - "product" is a reference to end product, that then explains the

limitations in clauses 1.3 and 1.5, when your Honour reads on, on this page. 1.3:

The standard applies to the following products -

Goes on. That must be reference to end products. And 1.5:

Products or by-products that are derived from GM technology are not compatible with organic principles -

and so forth. So what's being - - -

KENNETH MARTIN J: That just seems to be a matter of definition. If you've got something inherently natural, then something inherently unnatural doesn't fit within the definition.

CAHILL, MS: Yes. Yes. I will come to that in a moment. With respect, your Honour is absolutely correct; one can see how that's worked out in the clauses of the standard as we proceed through them. Now, the focus on the composition of the end product is also emphasised in clause 1.6. And what is apparent there is that one of the objectives of the standard is to minimise the risk of what's called contamination, but contamination in the end product, the end product that's to be labelled as organic.

Your Honour, I will return to this word "contamination" and what the standard might mean by that in due course, but can I pause here to say that there might be something of attention between the fundamental purpose of the standard to deal with the labelling of end product and the composition of end product, and the definition of organic, which my friend has already taken your Honour to, which appears at page 1416. What is meant by "organic" under the standard is not defined by reference to the composition of end products, but as my friend has pointed out, rather a set of agricultural practices, the emphasis of which is upon natural, sustainable, environmentally conservative processes that are humane to animals.

That explains, your Honour, coming back to your Honour's observation a moment ago, why GMO products are treated as incompatible with organic agricultural practices, because they rely on the use of GMOs that don't occur in nature or through traditional breeding. And just to reinforce that point, at 1415, the page before, your Honour will see the decision of GMO there, third of the way down the page, which makes that point about the way in

which the genetic make-up of the organism does not occur naturally or through traditional breeding.

So, for an end product, your Honour, to be organic under this standard, it has to be produced using certain agricultural practices, and those are quite clearly the practices of the certified operator, not the practices of a third party who's not subject to the national standard. And your Honour will see that that point is reinforced when one goes to page 1418, in the section dealing with production requirements generally, and you have these general principles set out there.

And, in particular, if your Honour looks between (i) and (iii), one can see that what this is all about is the objectives of the certified operator and their practices, how they practice agriculturally and that that fits with the principles of organic farming as set out in the standard. Notably, in (iii), second last dot point, the principle objectives of the operator include the avoidance of pollution resulting from agricultural practices and processing.

So these are objectives of the operator, your Honour; things to achieve as part of his or her agricultural practices, and I will return to that concept again when we look at the issue of contamination and what that might mean in the context of these standards. Can I note this though in passing: your Honour will see that I've drawn your Honour's attention to what is described as general principles. Your Honour can contrast that over the page with standards, and the difference between the two is explained at 1409.

At the bottom, your Honour will see the three distinct components mentioned. Helpfully, general principles are intended to give the reader a general appreciation of what the standard intends to achieve. So, statements of intention, one would normally understand that in construction context, and then the standards - well, those are the things that must be met, and there's a significance, we say, in this case, to carefully distinguish between the two in terms of what Mr Marsh did and did not need to comply with.

Consistent with the focus on the agricultural practices of certified operators to produce end products, there's a significant part of this national standard that is devoted to what an operator may not use in the agricultural practice; in other words, prohibited inputs - expressly prohibited inputs which are deemed inconsistent

with organic principles. Examples, your Honour, appear at page 1419 at 3.1.4, 3.1.5, 3.1.6.

Coming to the section that deals with GMOs specifically - that's section 3.3, commencing at page 1421 - 3.3.1, 3.3.3 over to page 1425, 3.7.3, 1432, 3.14.7(d), 3.15.8 at 1434, and then 4.3.4 at page 1446, and 4.5.3 at 1448. These provisions occasionally, but not usually, use instead of the word "input", the word "product", somewhat confusingly, but clearly to describe an input, we say. An example of this is at 3.1.5, which is at page 1419. In the context in which it is used, it can only sensibly, we say, mean an input and not an end product of the agriculture process.

The national standard refers in several places to the fact or risk of contamination or the existence of contaminants; it uses those words. It doesn't appear to deal with incursion, short of, or other than, contamination. There is no - as my friend has submitted, there is no definition expressly given of contamination in the standard. Helpfully - I'm being ironic when I say that - there's a definition of adventitious contamination at clause 1.6, and that appears at page 1414; means contamination that has come from outside, accidental or occurring in an unusual place.

So the word "contamination" or the word "contaminant" is mentioned in clause 1.6, this definition here, 3.1.7, 3.1.8, 3.1.9(b), 3.2.5, 3.3, but only insofar as it is mentioned in the general principles, not in the standard, and then in the standard itself at 3.3.2.

KENNETH MARTIN J: Sorry. What was the first one you mentioned before 3.1.7?

CAHILL, MS: The definition of adventitious contamination - - -

KENNETH MARTIN J: I've got that one.

CAHILL, MS: - - - I've just taken your Honour to, and before that, clause 1.6.

KENNETH MARTIN J: 1.6. Yes.

CAHILL, MS: Now, the absence of a definition of contamination means that we are given no clue as to what might constitute contamination or what is to be the subject matter of the contamination; what is to be contaminated in order to come within this section. In the majority of

cases though, when you look at the clauses to which I've just referred your Honour, the contamination appears to be focused upon the end product. 1.6, that I took your Honour to a moment ago at page 1413, self evidently, when dealing with - - -

KENNETH MARTIN J: That's environmental contaminants.

CAHILL, MS: Yes. But it's dealing with environmental contaminants in the end product that's to be labelled organic, and that's the point that I seek to make here. The similar point can be made in relation to 3.1.8. There is a reference to land and product - yes, land and product - and I will come back to the point about land in a moment. 3.1.9(b), and in the prefatory words, quite clearly to do with end product; similarly, 3.2.5.

There, in the last three lines, your Honour will see at page 1421 the reference to avoiding contamination of the certified product. And in 3.3(ii), quite importantly when one is looking at the objectives set out in the general principles, when it comes to the Genetic Modification section (ii) makes clear that the contamination that is being talked about there - the last two lines, your Honour - is the organic or biodynamic products themselves.

3.1.7 and 3.1.8 are a little different from all of these other clauses that seem to be focused exclusively on contamination in the end product. These two clauses refer to either contamination in the product or contamination of the land and they use that expression explicitly. That's at 1419.

Our submission is that when one considers the overarching purpose of the national standard, which is the labelling of end product, and when one has regard to all of the clauses that I have just taken your Honour to, in this context the contamination of land must be a reference only to circumstances in which the contamination of land, such as by way of chemicals which continue to reside in the soil, have the potential to affect the composition of the end product. So, for example, the take-up of a residue chemical - a residual chemical by a plant that is then harvested and labelled as organic for sale.

In this way contamination in the context of a GMO must necessarily, we say, mean probably only genetic contamination, some kind of genetic or DNA transfer that allows that actual organic product to be changed in terms of its genetic content. Alternatively, at its highest, it

can only mean one additional thing in addition to genetic contamination and that's an intermingling of product.

So one might have some genetic material intermingled with grain, for example, organic grain, probably capable of being separated out, we would say, but were it not and it remained intermingled, then arguably that might constitute contamination in an end product. But only those two possibilities, in our submission. 3.1.9(b), your Honour - - -

KENNETH MARTIN J: I think some of audience are struggling to just catch your voice at times, Ms Cahill.

CAHILL, MS: I will speak up, your Honour. Page 1419, your Honour, clause 3.1.9(b). This clause, we say, is very important in terms of the relevant construction of the national standard. This is why. This seems to be the only clause that deals with the issue of contamination in the context of adventitious introduction of contamination outside the control of the certified operator.

There is no other clause that deals in its terms with this scenario and, as we say, on a proper construction you can see all of the other clauses that I have taken your Honour to deal with one of two things: either the use in the context of the agricultural process of products or practices that have the potential or, in fact, contaminate end product; secondly, the circumstances in which - I will just have to gather my thoughts - where the agricultural - where the certified operator has failed to take adequate steps in order to minimise the risk of the adventitious introduction of substances that have the potential to contaminate end product.

Those are the only two scenarios that the standard otherwise contemplates. They are directed towards the conduct of the operator and necessarily impose obligations that if the certified operator, by his or her acts or omissions does not fulfil those standards or breaches them, then they have sanction consequences. This is the only one that deals with something that happens notwithstanding the conduct of the certified operator, for reasons outside his or her control, and it is very explicit about what the consequences are.

The obligation is upon the operator to exclude from sale any product, not that has the potential or the risk or a suspicion that it might be susceptible to contamination, but that the certified operator knows is contaminated. And

that is a bar that is set quite high we say, your Honour, and it is logical that it should be done so when one considers the overarching purpose of the national standard, and that is to regulate the agricultural practices of a certified operator in a way that gives comfort to a person buying a product labelled as certified organic, that it has been produced by the operator in accordance with those practices, resulting in a product where there is minimal risk that it is composed of substances that are prohibited in normal organic agricultural methods.

Can I come, your Honour, to section 3.3, specifically, which deals with genetically modification. The general principles are important, of course. That's at page 1421. The reason they're important is because they are the statement of objective or intention, which provide the circumference or context in which the standards that perceive thereafter are to be construed. Now, (i) is, of course, nothing more than a restatement of clause 1.5(a) that I took you to at the beginning of my submissions, your Honour. This is talking about the end products or end by-products of the agricultural process. If they're derived from GMOs then they are not compatible with the principles of organic and biodynamic agriculture.

(ii) is something that identifies the risk of contamination from the certified operator's own landholding, not from a neighbour's, and that's in circumstances where the certified operator's own land has previously been used to grow GMO crops or livestock. And again, as I submitted earlier, the emphasis is very important because the purpose of this risk management articulated in (ii) is to reduce the risk and therefore meet the expectations of the consumer public that the end product will be free from GM material.

Now, none of section 3.3, we say, deals either in its terms or even by a most generous construction with the adventitious introduction of GM material which is outside the control of the certified operator. As I've submitted, that's what's specifically dealt with in 3.1.9(b). If I can take your Honour through these standards. Well, 3.3.1 is tolerably clear. That prevents any use by the certified operator of GMO material. 3.3.2, risk management plan, these two clauses very neatly throw up the examples of the two different ways in which the standard regulates the certified operator's conduct. One is the expressed prohibition on use of things in the agricultural process and the other is this is your obligation to minimise the

risk of exposure to things that are inconsistent with the agricultural process.

3.3.3, quite clearly, prohibition on use by requiring inputs to be traced back as to their GM history, if I could put it that way. 3.3.4 is an interesting one. The provision appears in pretty much the same terms at 3.1.12 of the standard; why it's repeated is not clear. It must relate though to the general principle (ii) on page 1421, in my submission, on a proper construction. And, presumably, there's only one of a couple of things that can be contemplated here.

Perhaps the risk of cross-pollination, genetic contamination through a pre-existing GMO crop with something that might be planted later that has the ability to cross-pollinate with GM canola; secondly, the possibility, perhaps, that because of the use of GMOs there has been an application of particular types of chemicals or pesticides that might reside in the ground - that wouldn't apply to glyphosate, of course, which is non-residual - but that might make the soil susceptible to chemical residues which are - which persist, which are inconsistent with organic principles.

3.3.5, your Honour, is, once again, a prohibition on use and is obviously directed towards growing or producing non-organic produce by the certified operator deliberately on the same farm. Now, your Honour, if I can take you to 6.3, which deals with sanctions. That's at page 1451.

KENNETH MARTIN J: Yes.

CAHILL, MS: Importantly, the general principles are clear at (i): decertification is available in circumstances where there is, (a) an infringement, and (b) it's significant. So one needs to have a breach of the standard, firstly, and secondly, it has to be a significant breach. The actual standards themselves devote most of their time to talking about suspension; that's at 6.3.1 through to 6.3.5. Over the page, decertification, read with the general principle, 6.4.1, is tolerably clear, that what is being discussed there is decertification in the event of a significant infringement which entitles decertification.

So if that's right, if there - if what is required is a significant infringement for a decertification, then, in the absence of a significant infringement, this standard offers no ability on the part of the certifier; they may

not decertify the operator other than for a significant infringement of the standard. Now, if your Honour has the particulars of reply of 28 January 2014 that the plaintiff has filed.

KENNETH MARTIN J: I will just have to call for those. Just give me the date again, if you would, Ms Cahill.
28 - - -

CAHILL, MS: 28 January 2014.

KENNETH MARTIN J: 28 Jan. Actually, no. I do have them. That's fine.

CAHILL, MS: Just need to - I've lost my own set, your Honour. I will just - now, the - your Honour can see in here at paragraph 1 that what is alleged here is this - these are what is said to be the breaches of the national standard the plaintiff has alleged that permitted decertification under the national standard. Your Honour should have, reading down, clauses 1.5, 3.1.5, 3.1.9, 3.3.5 and 6.3.3.

KENNETH MARTIN J: Yes.

CAHILL, MS: Can I just take your Honour quickly through them. 1.5, of course - now, that's not a standard; that's an explanation about the scope of the national standard. It's at 1413, and as we've submitted, your Honour, clearly only applies to products or by-products that are derived from GMO technology, that is, end products. There's no suggestion here that Mr Marsh was - the wheat or oats that he grew was derived from GM technology, so that can't be the basis for alleging a significant infringement.

And we've got 3.1.5; that's at page 1419. No suggestion that there has been any use of products by him that are derived from genetic engineering. He hasn't breached the standard in that way. The same point can be made about 3.3.1, which is at 1421; hasn't breached that provision either, because he hasn't purported to use GM technology in his agricultural process. 3.3.5 is the same point: he hasn't grown or produced genetically modified crops, livestock or agricultural products on his farm, and so he hasn't breached that provision.

3.1.9, of course, there's - that's at page 1419 - there's no suggestion that he has tried to sell any crop that is known to be contaminated with GMOs. He certainly hasn't done that. So there's no breach of that provision.

And that just leaves us with 6.3.3, which has no application because - and that's at page 1451, your Honour.

KENNETH MARTIN J: Sorry. 145 what?

CAHILL, MS: 1451.

KENNETH MARTIN J: Thank you. I've got it. 6.3.3.

CAHILL, MS: You will see there - - -

KENNETH MARTIN J: Integrity of the product has been compromised.

CAHILL, MS: Yes. But that's a suspension - - -

KENNETH MARTIN J: End product.

CAHILL, MS: - - - sanction, your Honour, not decertification. So one can see how that 6.3.3 might work with 3.1.9(b). So there might be a suspicion that an end product is contaminated with some substance; the suspension upon the sale of that product as certified would be imposed. Perhaps there might be some testing done, and if it then became known that the product was contaminated, then, presumably, it would be excluded from sale. That's logically how clause 6.3.3 would appear to work in tandem with 3.1.9(b), but it's all rather by-the-by, because it's certainly not a breach of a standard that would warrant any imposition of a sanction of decertification.

The important point of all of these, of course, is this: it is tolerably plain that there was no entitlement to decertify under the national standard as a result of this incursion that happened in November 2010. There is no identifiable infringement of the national standard at all, let alone a significant infringement. And, in those circumstances, applying the national standard, NASAA had no power to decertify Mr Marsh's farm.

And that's for these reasons: Mr Marsh hadn't used GMOs; secondly, the introduction of the GM canola onto his farm was outside of his control - that's not a controversial fact in the trial, there was no act or omission on his part that caused it to be introduced; there was no evidence of any crop having been contaminated in any normal sense of the word and he hadn't tried to sell any product that he knew to be contaminated. Those are the reasons why the standard had not been infringed and that is

the reason why there was no entitlement on the part of the certifier to decertify it in those circumstances.

So when we come to the NASAA standard, it needs to be considered against that background in terms of the plaintiff's decertification in December 2010. If the plaintiff says that the NASAA standard is consistent with the national standard, then logically it must follow that decertification under the NASAA standard was likewise not permitted.

If it was in the alternative, then it could only be because the NASAA standard was more onerous or is more onerous in its terms than the national standard and that will have implications, your Honour, for the legal issues that your Honour needs to consider in terms of, for example, assessment of vulnerability in the context of duty of care, control of risk, abnormal sensitivity when one considers the issue of nuisance and in respect of both causes of action, the issue of causation.

Can I come to the NASAA standard, your Honour. That's at page 1293 of this same volume - at page 1305, your Honour. Articulated slightly differently at clause 1.3 but nevertheless the purpose is plain. It's a labelling purpose - a labelling purpose in relation to product that is to be sold and advertised as organic. Now, over the page at 1.4, one sees the aims and principles of organic farming and this really mirrors the concept or the definition of organic that one sees in the national standard at page 8 of the national standard.

And here we have set out what are the essential principles of organic farming. They include the same concepts that one sees in the national standard of using natural resources in a sustainable way, in an environmentally conservative way, taking into account considerations of animal welfare. And then it even continues beyond that and gives a more expanded concept where it picks up notions of, for example, social justice, if you see the item at point 13.

This is what it means to farm organically and because these aims or emphases in terms of the agricultural practice are set out here, one finds a correspondingly truncated definition of organic at page 1303. Note, your Honour, how it's described as a - or defined a labelling term.

KENNETH MARTIN J: I do.

CAHILL, MS: If I can draw your Honour's attention to page 1300.

KENNETH MARTIN J: It's a labelling term in respect of an agricultural product.

CAHILL, MS: Yes.

KENNETH MARTIN J: Yes. Sorry, what was the next page?

CAHILL, MS: 1300.

KENNETH MARTIN J: 1300.

CAHILL, MS: And pausing here to just mention while it's convenient that the same distinction between general principles and standards is adopted, you also have interleaved between the two what's called recommendations in this standard. So general principles are those that sit behind the architecture of organic agriculture and include a range of recommendations. But importantly, your Honour, can - if your Honour sees under the second dot point this important provision, these two sections are clearly identified but unlike the numbered standards, are not subject to inspection and compliance.

The recommendations could, if deemed appropriate, become standards in future revisions. And then it goes on to describe what the standards are. So general principles and recommendations clearly do not need to be complied with. To the extent that this standard only provides for decertification or the sanction of decertification in the event of noncompliance, you can't be relying upon a general principle or a recommendation to ground that in our submission. I also just draw to your Honour's attention, without making a submission on it at this time, halfway down the text the reference to AQIS and IFOAM in the way in which those standards and documents are expressly incorporated into this document or concepts, and I will explain why in a moment.

1316, your Honour. This is a section that deals generally with what is called precautions and general requirements. There's two subsections of this section which are of particular interest to us in this matter: 3.1, which deals with residues and possible contamination; and 3.2, which commences at 1317, over the page, which deals with GMOs.

Dealing with 3.1 first, again, although the subsection is littered with references to contamination, nowhere in

this standard is the word defined. But once again, one can see that there is a focus in terms of agricultural practice upon the certified operator in adopting appropriate risk management strategies in order to minimise the risk of contamination. And in particular, your Honour, if you see at the very top of page 1316, second paragraph:

This standard cannot guarantee.

It's nothing zero tolerance or strict liability about this standard. It can't guarantee that there won't be residues of contaminants in any product that is labelled as organic. The purpose of this standard - but that would ignore practical reality. What it does seek to do is to reduce that risk to the lowest practicable risk possible and that's the background against which the standards need to be assessed. Now, the only exception to that is where the certified might, in the first instance when someone is applying for certification, take the view that the risk of contamination, however that is to be defined, is so high that it might actually preclude someone from getting certification.

The recommendations, as I have said that come underneath this, are all focused upon and revolving around the certified operator's responsibilities to engage in appropriate risk management. Except where, if your Honour can pick up the third paragraph - I think it's the fourth paragraph under Recommendations that commences:

Contamination that results from circumstances -

KENNETH MARTIN J: Yes.

CAHILL, MS: Continuing:

... beyond the control of the operation does not necessarily alter the organic status of the operation.

I pause to say there, so much therefore for the plaintiff's contention in his - sorry, I withdraw that - in their reply that decertification was required in this circumstance. These recommendations - this is the way in which the standards are to be read - this is the objective section here - is quite plain, that for adventitious contamination outside your control, it need not compel a consequence of decertification. So that, we say, is off the table under these standards.

That leaves only two possibilities: either this standard did not permit decertification or it did; it certainly did not compel it. Now, standards 3.1.1 through to 3.1.7 appear to be, in their terms, dealing with a different subject matter from GMO contamination. If one reads these clauses together and the language of them, they seem to be all concerned with chemical contamination from things such as pesticides and herbicides and the like. And note that under 3.1.3, what is acknowledged there is the possibility of or the fact of a tolerance in an organic product for a certain level of residual, I suppose, this standard would say contaminant.

And then in 3.1.6, by contrast, there is the situation where there is no tolerance, here described as zero tolerance. Now, on my reading, your Honour, that is the only place in this standard where the words "zero tolerance" appear. Not in relation to any GMO, as the standard would have it contamination, only in relation to what is self-evidently chemical contamination where there is no maximum limit of tolerance specified.

It's also very significant to understand what the consequence is where, in this zero tolerance for chemical residue scenario, where that occurs, what the response is in the standard. That comes at 3.1.6 in the second sentence. So we're told that there's no - there's zero tolerance in those circumstances. What must one do? Well, there will have to be soil tests for residue and tissue testing, which presumably means tissue testing either of a plant, a crop, or livestock, presumably, again, for the purposes of detecting any residue of the chemical.

So there's no automatic decertification here in circumstances even where there's zero tolerance for a product - for a substance. Rather what happens is that the issue is identified and tests are conducted to see whether or not the end product, in my submission, is quite clearly affected by the residue. 3.1.12: this gives your Honour a flavour of the circumstances when there will be decertification of an operation; quite different from the present circumstances and in clear contra distinction to them, where here, rather than any intentional or deliberate use of a prohibited substance, we have the accidental introduction without any action or omission on the part of the certified operator.

And note again, your Honour, at 3.1.13, consistent with this definition of organic, which is the labelling of an agricultural product, the focus, yet again, is upon testing that product to see whether or not it is something

that has been tainted in any way by a substance that is prohibited. Then we come to section 3.2, the GMOs. Now, the general principles and the recommendations that are to be read as part of that make clear that GMOs have no place in the production system, even if you can't detect them in the finished product. As I've already submitted, your Honour, and as your Honour has observed, there's no surprises there, because it is not a natural process that would be consistent with - - -

KENNETH MARTIN J: It's a matter of definition.

CAHILL, MS: - - - organic principles. But, quite clearly, the reference there in terms of the use of GMOs in the process has to be use by the certified operator. Now, the recommendation is both interesting and important, because, on my submission, on a proper construction of the section and, in particular, the standards, the recommendations provide perhaps one of the rare clues as to what contamination might mean here. Your Honour will see there the recommendation to identify every potential source of GMO in the supply and input chain, including sources from historic or adjacent usage, and to familiarise - operators are to familiarise themselves with the vectors and modes of potential transfer of material with modified DNA to avoid contamination.

Now, that's the strongest clue, your Honour, and we say that's a pretty strong clue that what this standard is talking about is genetic contamination. So, for example, in the case most relevant here on the facts with canola, the cross-pollination of plant material that would then, by virtue of that cross-pollination process, genetically modify the agricultural product to be labelled as organic. This suggests - this recommendation suggests that contamination is not being used in this - in - for the purposes of section 3.2 as including what I described to your Honour a moment ago as a lesser form of contamination, if you like, which is an intermingling of GM product with organic product in a way that could be separated out, but if not, might be otherwise said to be contamination.

So we say everything that comes after in terms of the standards must be read in that context. In any event, whether it is or it isn't, it's useful to see the same distinctions that are made in section 3.2 between prohibitions on use of GMOs and then risk minimisation strategies. So the prohibition on use, that arises fairly at 3.2.1, 3.2.2, 3.2.3, 3.2.4 and 3.2.6. My learned friend made a submission to your Honour that 3.2.1 ought be construed so broadly as to embrace the deliberate use or

negligent introduction of GMOs by third parties who were not amenable or bound by the standards.

That's not a fair reading against the background of the recommendations. The purpose of the NASAA standard as a whole, the sequence of these clauses - for example, just moving onto 3.2.2, it's quite plain what's being talked about in this section, which is the conduct or agricultural practices of the operator themselves and not somebody else. But, in any event, when one has regard to 3.2.11 at 1318, that's the section that deals with adventitious introduction, things that happen by virtue of the actions of others.

And 3.2.1 can only be fairly and properly construed against the background of 3.2.11, if it is confined to the negligent introduction by the certified operator of GMOs onto their property. Quite consistent, again, we say, with this bifurcation in the standards between prohibitions on use and obligations to engage in risk management procedures to minimise the risk of exposure.

3.2.8, your Honour, at 1318, is in the same terms as clause 3.3.4 of the national standard. And I don't need to address your Honour on that again. The risk management provisions are at 3.2, point 5, point 7 and point 9 through to 12. 3.2.12 is important, because that seems to be a reference back to 3.1.9(b) of the national standard, which is critical. That's a critical provision. It's the only provision under the national standard, in our submission, that provides for the consequences of the accidental introduction of prohibited material.

But rather than doing what 3.1.9(b) of the national standard does, which is prohibit the operator from selling product know to be contaminated, what this does is, it provides for the decertification - importantly, your Honour - not of any land or of any operation or any operator, but of products, products that are tested and reveal the presence of GMOs. So it has to be a demonstrated fact that the product destined for labelling and then sale, contains GMOs before that product will be decertified.

That's a very powerful point, your Honour, because the suggestion that where there is something less than a known risk in the end product, not even a suspicion of risk, that an entire operation could be certified - decertified, where 3.2.12 makes it plain that it's only product - the only circumstances in which product can be decertified is where there has been proven that there's the existence of GMOs in

the end product. The two simply don't - are not - cannot coherently and consistently sit side by side. So what does this standard say, then, in section 3.2? On a fair reading, it can only ever provide for decertification of product in circumstances where it is - there is contamination, however that's to be determined, but we say, obviously, genetic contamination in the end product itself.

3.2.10 I refer to specifically, because it does talk about contamination of a production area. That seems to be the language of it. I'm not sure what that might mean, how a production area could be at risk of contamination. In my submission, consistent with the national standard, and the extent to which the national standard on two occasions talks about the risk of contamination to land as well as product, that can only mean contamination of a production area if, and to the extent, that that has the potential to contaminate the end product. In the context of GMOs that must be where - only where there's a risk of genetic contamination.

1312, your Honour. My friend took you to the sanctions this morning. The general principles make it clear that there can only be sanctions imposed where there are non-compliances or non-conformities. Usefully, neither of those are defined. The use of two different expressions implies that there may be some difference between a non-compliance and a non-conformity. What that - what that could be is unclear. I will tell you a little bit about non-conformities in a moment, in the context of the IFOAM standards. I suggest that, really, what the standard is saying here is the same thing two ways, which is, there must be a breach of the standard in order for there to be a sanction.

And your Honour will see there - this will become relevant later - factually, that for suspension, it's a - suspension of certification is for a period usually up to two weeks. But the purpose of the suspension period is important. That's where the operator has to provide verification of compliance with the standards following non-compliance. And then decertification is where you have ongoing non-compliance after a period of suspension. Now, the standards that follow are interesting. 2.12.4 is not relevant here. But 2.12.2, point 3, point 5 all require the operator to have breached the standard in some way by an act or omission of - by the certified operator.

KENNETH MARTIN J: But 12 - sorry, 2.12.1, would seem to be the most heinous of transgressions.

CAHILL, MS: Yes. Yes.

KENNETH MARTIN J: Manifest non-compliance, such as, mixing - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - organic and conventional products will result in decertification.

CAHILL, MS: Yes.

KENNETH MARTIN J: But failure to observe contract terms will result in suspension.

CAHILL, MS: Yes. So I mentioned point 2, point 3, point 5 first, because they're obviously directed to what the certified operator does or doesn't do in contravention of the standards. When you look at 2.12.1, as your Honour, with respect, has rightly observed, this is the most severe sanction for a manifest non-compliance, which must mean something that's very plain and, presumably, mirrors the concept in the national standard of a significant infringement.

The idea that the sanction of decertification, by way of a manifest non-compliance, might be imposed upon a certified operator for something - in circumstances where they have fully complied with the standards, is simply not a sensible or proper construction, we say, and is yet another reason why these standards cannot be read in a way that would suggest that decertification was an available sanction in circumstances where the introduction of the GM canola was outside Mr Marsh's control and, further, did not result in any identifiable risk of, as the standard would put it, contamination to the end product.

So there's no power or entitlement to decertify otherwise than under these standards here, your Honour, under the NASAA standard. And if we come back to the reply again, what the plaintiff says here is that - I think he means "he" or "there was", I don't know if it's maybe put in passive language:

There were breaches of standards 3.2, 3.2.1, 3.2.3, 3.2.5, 3.2.9, 6.5.1 and 6.12.5 - - -

which entitled, alternatively required, NASAA to decertify.

Well, just taking them in order, your Honour, 3.2, it's a statement of general principle or recommendation.

So that's - you can't be decertified for that. 3.2.1, there was nothing negligent or deliberate about Mr Marsh's conduct here relevant to the incursion, so there's no breach there. 3.2.3, he hasn't grown a GM crop; that doesn't apply. 3.2.5, certainly no suggestion that he has done anything that - - -

KENNETH MARTIN J: Intentionally.

CAHILL, MS: No.

KENNETH MARTIN J: By the word "knowingly".

CAHILL, MS: Or fail to take action against - - -

KENNETH MARTIN J: No.

CAHILL, MS: - - - the application of or exposure. Indeed, the plaintiff's case is that he did everything he possibly could, and we certainly accept that he took a great deal of measures immediately to address the consequences of the incursion. 3.2.9: now, it simply can't be the case, on a proper construction, that where there is no identifiable risk of contamination to the product, 3.2.9 could be invoked as a basis for the decertification of the property and there is obviously no suggestion of that here, because there was no potential for cross-pollination of any crop that Mr Marsh grew with the GM canola.

And any intermingling, even if the standard extended beyond genetic contamination, which it doesn't, having regard to the recommendation at the commencement of 3.3, that could have been cleaned out of the product before it was sold. So, importantly, it was always open to Mr Marsh, if there was any risk of any canola seed making its way into his harvested crop, of cleaning the grain that was harvested to remove the canola seed. Importantly, what that meant was he could have labelled and sold a product that was in fact GM free and organic insofar as it was produced in accordance with the agricultural practices set out in the standard.

Now, 6.5.1, which is at 1341, we're now in sheep territory, your Honour. It could not be sensibly suggested, we say with respect, that if a sheep inadvertently eats some canola that has blown into the property, that somehow Mr Marsh has breached the standard by not providing 100 per cent organic diet to the sheep. Obviously again, this is directed towards his own

management - agricultural practices. And 6.2.5 is in a similar vein.

KENNETH MARTIN J: What if the sheep chomped on some of the swath material that had germinated?

CAHILL, MS: I beg your pardon? I beg your pardon/

KENNETH MARTIN J: What if the sheep grazing in the paddock of Mr Marsh chomped on some of the swath material?

CAHILL, MS: Yes. I think that in fact happened, your Honour. That did happen. It doesn't affect the end product.

KENNETH MARTIN J: How does that gel with 6.5.1?

CAHILL, MS: Yes. Because what this is about here - and you can see it in relation to the general principles and the recommendations. What this is directed to is what you're feeding - what you decide to feed your sheep and how you feed them. What it's not directed towards is what might be lying in a pasture that you're not feeding them, otherwise then pursuant to these principles. Now, it could be a GM canola swath. It could be a conventional canola swath. It could be weeds that are in the pasture that are there anyway. They could be weeds that are blown in from another property or from the bush.

KENNETH MARTIN J: Sure.

CAHILL, MS: There's no suggestion that this standard is intended to decertify an entire operation in any circumstances where the sheep have eaten, as opposed to being fed, something other than the diet fed to them by the certified operator. This would seem to preclude any natural grazing, which wouldn't - wouldn't seem consistent with normal - with organic agricultural principles, certainly.

The other point is this, your Honour, that even were sheep to have been fed or eaten substances that are not in accordance with agricultural principles or permitted under the standard, the normal consequence would be quarantining of the sheep - - -

KENNETH MARTIN J: Decertify the sheep - - -

CAHILL, MS: Decertify the sheep.

KENNETH MARTIN J: - - - from being sold.

CAHILL, MS: And we see that - we do actually see that in this case, where it would appear all - practically all, if not all of the sheep on the farm were decertified at around the time of the incursion because they had been recently drenched. So they - with a prohibited substance, so they were not able to be sold as certified organic.

Can I just check that fact, your Honour. Yes. I'm not sure if it were - whether there might have been some breeding stock that weren't drenched that remained certified organic, but, on our overstanding of the evidence, all of the sheep and lambs who - that were intended for sale in that season had been drenched within a month or two of the incursion, and for that reason were - if they had not already been decertified, were about to be by reason of the drenching.

And in those circumstances, the sheep were quarantined in a paddock for a month, and the standard required that a certified crop could not be sewn in that paddock within 12 months of the quarantine period. I digress to say that that had some significance - that has some significance in relation to paddock 12, which was the one with the rye spelt in it at the time of the incursion. That paddock, your Honour will have seen it in the papers, was quarantined at the time.

It was quarantined because there had been some drenching of sheep in 2009 and the paddock was quarantined as a result. Mr Marsh had nevertheless sewn some spelten rye within the 12 month window, and there was a question about what was going to happen to that crop, whether he could sell it as certified or not, because he hadn't left that 12 month window. Ultimately, it appears NASAAs decision was he couldn't sell it as certified, so it was - - -

KENNETH MARTIN J: He couldn't?

CAHILL, MS: He could not.

KENNETH MARTIN J: Could not.

CAHILL, MS: The final breach relied upon is 6.12.5, your Honour, at page 1347. There's a couple of problems in relying upon that provision or that standard. One is it quite clearly talks about the operator feeding and using prohibited substances, but the other thing is it's just not relevant insofar as it's talking about conventional livestock that are actually being moved, and how one treats

them in transport. So it's just an inapplicable standard to the facts of this case.

So there you have it, your Honour. There is no - when one looks at all of the provisions of the standard, even in the detail and without regard to the proper construction limited by the sorts of concepts that I've submitted to your Honour, the labelling - the ultimate purpose which is the labelling of product, the way in which the recommendations talk about genetic contamination, and the standards focus upon contamination in end product rather than something broader - I think it was put in opening today by the plaintiff - contamination of the process, whatever that might mean.

KENNETH MARTIN J: The system.

CAHILL, MS: The system. I mean, a farm consists of land and seeds that are sewn in the ground in the case of a farmer who grows a crop, sheep that are either shorn or sold for meat. One needs to we say, with respect, avoid generic expressions that obscure rather than enlighten this issue of what is meant by contamination and contamination in relation to what. Certainly neither standard talks about contamination in the broad, except for that one example in the national standard that talks about contamination of a certified production area, and I have already addressed your Honour about that.

So our submission is that the first point is this, decertification was clearly not permitted under either the national standard or the NASAA standard. Alternatively, we say that even if there were under the NASAA standard - there's clearly none under the national standard, but even if there were under the NASAA standard an entitlement to decertify, the question would then become whether it could ever be reasonable to do so in these circumstances where the national standard didn't permit it, there was no risk of cross pollination between crops, there was no risk of genetic contamination between crops, there was no risk of contamination through intermingling of product because of the ability of Mr Marsh to clean his grain, and there was no suggestion at all that the introduction of the GMOs onto Eagle Rest was due to any act or omission of Mr Marsh.

So in those five circumstances, we say it could never have been reasonable to impose the sanction of decertification, even if it had been available. And put shortly, that's because the product could have been sold as GM free and that's what the standards are all about at the

end of the day. And if they could be sold as GM free - if products could be sold as GM free, as organic, then we ask rhetorically on what possible basis could NASAA have decertified this operation.

I mention before I leave the standards the IFOAM norms. These are international norms, as they are called, and as we understand it, the objective of these IFOAM norms is to try to provide some coherence and consistency between the different international standards in each country. I did take your Honour at page 1300 of the volume to just that mention in the front of the NASAA standard, that it is an accredited IFOAM certifier. It's relevant, your Honour, to go to volume 6, page 1574. This, as we understand it, was the IFOAM standard that was in place at the time of the incursion. The reason I take your Honour to it is at page 1590 there is a definition of contamination and your Honour will see that that's:

Pollution of organic product or land, or contact with any material that would render the product unsuitable for organic certification.

So there's some subjective elements in there but nevertheless it is interesting that it focuses on product or land, and we keep coming back to this point, that what is the focus is the product at the end of the day and how it is to be labelled. There's also another definition of contamination, which I can find it at one - sorry, your Honour.

I think I have lost a tab. If you will just bear with me for a second, your Honour. I have to come back to it. There's a set of standards and then there's the - another set of criteria which provide the definition of contamination in a different way and I just wanted to take your Honour to it so that you could see the differences between the two. But perhaps if I can just give you that reference - - -

KENNETH MARTIN J: Yes, of course.

CAHILL, MS: - - - in a moment. I think it might be at 1605, your Honour. I will come back to it, your Honour. The IFOAM standard deals in section 2.3 of the GMOs. That's at page 1596. I won't dwell too long on this, your Honour. I really just wanted to draw your Honour's attention to the existence of the standards and the way in which they provide for the regulation of GMOs. But once again, your Honour will see that there's this focus on the twin aspects of prohibition of use and risk minimisation.

You will see in such things at 2.3.6, direct mirrors of the contents of the NASAA standard.

And 1605, which I drew your Honour's attention to a moment ago, is important because this is really enshrining this concept of the obligation on the certified operator to minimise risk. And your Honour will see that this whole section here, 4.6, deals with that. There are later versions of the IFOAM standard, which were not in operation at the time of the incursion. These appear in volume 7 and, your Honour, at 1928 and 1936 there are definitions of contamination there, which are in different terms again from how contamination is defined here.

Yes, and my learned junior has drawn my attention to 4.6.2 at page 1606, your Honour, as to what standards should require. And you will see there that it's all about testing product where there is a reasonable suspicion of contamination. If your Honour goes back one page, the same point is made, second to last paragraph:

Standards should establish procedure on how to evaluate organic products in case of a reasonable suspicion of pollution.

And there's two things there, based on due expert consideration - that's the first thing - and then the precautionary principle. As to what the precautionary principle means or might connote - your Honour can see that at 1637. Under the heading Product Input Criteria, there's a reference to the precautionary principle and then it's quoted.

I won't read it out, your Honour. I might leave your Honour for a moment to just read it, then I will make a submission on it. So there's a few elements there. The threat of harm has to be based on some kind of expert consideration; it can't be theoretical or simply based on a belief. And note the reference to, in the second half of the definition, the discussion about the process of applying the principle and the way in which it needs to include potentially affected parties and involve an examination of the full range of alternatives, including no action.

And that issue, coupled with what we have - sorry, that principle - the precautionary principle, when it's coupled with what is set out at section 4.6 of the IFOAM standard in relation to the avoidance of contamination, is informative when one is looking at an IFOAM accredited

body, responding to what it says now was a novel case, unprecedented in its experience to which it had no firm - these are my words, not NASAAs on the evidence - firm idea how to respond.

Whether or not NASAA, at the end of the day, your Honour, judges to have adhered to these sorts of principles, may well be a relevant consideration in determining the reasonableness or otherwise of its response to the incursion. Now, your Honour, so much for the standards; they are really everything around which this case revolves though, we say, because how they are construed and whether or not there was an entitlement to decertify in this case, alternatively, a reasonable entitlement to decertify, is - has very obvious implications, as I said, for all of the legal issues; most obviously and immediately for the issue of causation. I'm obviously - - -

KENNETH MARTIN J: So all those standards are basically contractual - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - vis-a-vis NASAA and Mr Marsh.

CAHILL, MS: So they will be construed objectively.

KENNETH MARTIN J: But from the perspective of Mr Baxter, who's not privy to any of those contractual relationships, he sort of sits there as a neighbouring outsider. Is he expected to conduct a two hour analysis of every minute clause of some sort of international code to evaluate those sort of considerations?

CAHILL, MS: And we've also contemplated the scenario, your Honour, where the standards change from time to time. So for whatever reasons that might be in NASAAs self interest or in its industry's self interest, or - which would then include Mr Marsh, consideration is given to even more onerous conditions. So let us say it then became a - it then became prohibited to even, for example, farm - have a certified operation within 10 kilometres of a genetically - where a genetically modified crop is being grown, might it then be suggested that if all the notices are put out and so fort, that an attempt to grow a crop at all within a 10 kilometre radius, if decertification follows, is something that was reasonably foreseeable and the loss flowing as a result is to be sheeted home to the GM farmer? That would be a consequence of ignoring the need for reasonableness in the standards, we say.

KENNETH MARTIN J: Well, the maximum duty you can expect of Mr Baxter is reasonable care, if we're talking about common law negligence. If we're talking about the other cause of action, private nuisance, it's an unreasonable use of his land. So - - -

CAHILL, MS: An unreasonable. Yes.

KENNETH MARTIN J: - - - that qualifying factor of fact in each circumstances - - -

CAHILL, MS: Indeed.

KENNETH MARTIN J: - - - in terms of what's reasonable and what isn't, is going to condition every single obligation.

CAHILL, MS: Exactly, your Honour. And that's why we've started with those standards and the way in which they ought be properly understood, what they say, what their purpose is, to then understand the relative reasonableness or otherwise of seeking to assert that Mr Baxter's lawful actions could then be construed as somehow unreasonable, a breach of a duty of care, simply by going about his business. You know.

KENNETH MARTIN J: The point that you've sought of brought out through the analysis of the regulations is not so much their content, but rather their application, isn't it?

CAHILL, MS: Indeed.

KENNETH MARTIN J: But in the circumstances of Mr Marsh.

CAHILL, MS: Well, perhaps we go a little further, your Honour, in this sense. We say those standards did not permit decertification. And if - - -

KENNETH MARTIN J: Well, that is the (indistinct) application then, I suppose, to put it at a higher level.

CAHILL, MS: Yes. But if we're right about that, then this plaintiff doesn't even meet the but-for test on a causation point, because we are really quite extraneous to the whole decertification point, the whole issue of loss.

KENNETH MARTIN J: So there's an interrupting cause?

CAHILL, MS: Indeed. It's a cause that had nothing to do with us insofar as the incursion could not have led to that loss. That's the point about the standards not permitting decertification. To the extent that were your Honour to

find that the NASAA standard possibly retains some discretion on a construction of it to decertify, that's when the question of reasonableness emerges and that weighing exercise between the two parties, and that would then be the second limb of causation that would need to be considered under section 5C of the Civil Liability Act.

And, of course, we say that when one looks - and I won't repeat myself - but looks at such things as the purpose of the standard, what's trying to be achieved, the ability of Mr Marsh to sell product that was GM free and organic, there is a far more proximate cause - I've put that badly - a far more obvious cause within the meaning of section 5C than our decision to grow GM canola, whether it was adjacent to Eagle Rest or not, and to then swath it, and that was the conduct and the response of NASAA. That is the real cause of the decertification; decertification when it was neither reasonable nor necessary to achieve the objects of the standard.

In his opening submissions, my learned friend Mr Niall, in terms of the issue of a duty of care, sought to make much - not just in terms of reasonable foreseeability, but really more particularly on the issue of the salient factor of autonomy. As I understood it, the novelty of growing GM canola in our commercial/agricultural district, and, as he put it, the significant restrictions that Mr Baxter was under by virtue of his licence agreement and the guidance notes issued by the Department of Agriculture.

Now, in relation to this topic of autonomy, we make the point in our written submissions that previous case law has really only indicated a willingness to extend the concept of the duty of care in respect of lawful, reasonable activities where there is already a restriction on the defendant arising from a pre-existing duty owed elsewhere or to another person. And relevantly here, that would need to be a duty that otherwise impeded his right to grow GM canola and/or grow GM canola adjacent to a neighbour and/or swath that GM canola.

Now, that's just not the case here. There's no pre-existing duty owed to a third party that relevantly restricts Mr Baxter's lawful reasonable entitlement to do any one or all of those three things. The plaintiff doesn't seek to identify any such duty, instead they take your Honour to agricultural - Department of Agriculture guidance notes, the licence conditions issued by Monsanto.

These, of course, are a rather different thing, because we all live in a regulatory environment. We're all subject to some form of regulation in the - legal regulation in the activities we go about in a - on a day-to-day basis. But, notwithstanding those guidance notes and the licence agreement, Mr Baxter is within the purview of those entitled to grow a GM canola crop, grow it next to his neighbour, as long as he observes the 5-metre buffer zone, which he has, and he is entitled to swathe that - the resultant crop.

There's no suggestion here that Mr Baxter did anything other than conform to the legal regulations and requirements that were imposed upon him. He followed the guidance of the Department of Agriculture by telling Mr Marsh in April 2010 that he was going to grow GM canola in the two dams and range paddocks, which are on the road boundary between the two farms. And the evidence will be, your Honour, that Mr Marsh's response at the time was that he would grow his crops to the north of Eagle Rest, away from the GM canola. And you will see, your Honour, that that's in fact what happened. Mr Marsh's primary crop, the oats, the organic oats, which was, in my words - this is my submission - the centrepiece of his agricultural operation.

They were grown in that year in paddocks 1 to 6, away from the boundary. And, of course, they were unaffected by the incursion, your Honour, and certification was not lost in relation to those six paddocks. What you had left, your Honour, as I said a moment ago, was paddocks largely given over to pasture with two exceptions: paddock 11 had a crop of wheat in it, but then only as to part of the paddock; and paddock 12 had spelt and rye. I won't repeat what I said. That was a quarantine paddock where the spelt and rye had been sown otherwise than in accordance with the standard that imposed a 12-month fallow period, if you like, after the drenching of sheep in that paddock in 2009.

Importantly, the notices of 2010 that went up - Mr Marsh putting notices in the paper, delivering notices to Mr Baxter - they came after Mr Baxter had sown his crop. They came in the September, October period, and after Mr Marsh had had this conversation with Mr Baxter in April, and after Mr Marsh had moved his organic crop to paddocks 1 to 6. So our submission is this: having done what he reasonably ought to have done, in accordance with the prevailing guidance and licence regime, there is clearly no basis, in terms of the law of negligence, to further restrict Mr Baxter's lawful and reasonable entitlement to grow GM canola, to grow it next to his neighbour's boundary, and to then swathe the resultant crop.

Without rehearsing the written submissions, your Honour, in terms of reasonable foreseeability, one of the other important features of our defence is we say that one cannot create reasonable foreseeability where none would otherwise exist, by the provision of, in effect, incorrect or inaccurate warnings.

And so, to the extent that Mr Baxter - I beg your pardon, Mr Marsh sought to warn Mr Baxter before the crop was swathed that any contamination, however that might be described, but presumably, with the benefit of hindsight, must have been - must have meant any incursion of GM canola into Eagle Rest would result in decertification, that the standards had a zero tolerance for GM material, that he was GM-free accredited, and that that somehow had some implication for GM canola being blown onto his property. Those are - to the extent that those things were inaccurate, and clearly they were when one has a look at the standards and the limits of the standards, those things cannot be used to, as we say, create duty through creating reasonable foreseeability because things eventually happened that way.

KENNETH MARTIN J: The duty that's put against you at common law is the duty to ensure.

CAHILL, MS: Yes.

KENNETH MARTIN J: Which is something of a absolute duty, which is then contrasted to the breach, which is that, look, it got on there, therefore you didn't ensure, therefore you breached the duty.

CAHILL, MS: Yes, sir.

KENNETH MARTIN J: Now, there's some cases about defining duty of care in novel cases in such a way that they don't effectively deliver the breach. I think McHugh J might have said that in - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: But - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: Do you make anything of that word, ensure?

CAHILL, MS: Well, yes, in two ways. That's one way but the second way is it's a curious way to articulate the breach in the factual context with which we are dealing, and your Honour is likely to hear evidence - a great deal of evidence about the almost inevitability of material - crop material moving from one neighbour to another, whether it be by swaths, whether it be by animals taking material from one paddock to another, or through animal droppings germinating. So these are the normal incidences of agricultural production in Australia for which there is a rich history. It might be weeds blowing into another property or seeds deposited; in this case, it was a neighbouring crop.

But if that's right, if the idea behind this formulation of duty is that we had an obligation to ensure that the canola - any amount of canola is the way in which the risk is put remained on our property, then to use a colloquial expression, we are just being set up for failure because that is not the way in which normal commercial agricultural production works. It would not be possible for us to contain it in that way. Can I address your Honour briefly on the issue or the salient factor of vulnerability.

KENNETH MARTIN J: Yes.

CAHILL, MS: The case law tells us that this is an important factor - an essential factor if one is going to try and establish a duty of care, certainly in a novel case.

KENNETH MARTIN J: Particularly vis-à-vis economic loss.

CAHILL, MS: Indeed, indeed. And what is meant by vulnerability though, we need to be very clear about. Vulnerability means specifically the inability of the plaintiff to protect themselves from the risk that has eventuated. Now, obviously here that is going to be tied up very much with an analysis of the reasonableness of NASAA's decision to decertify because the ability to address the risk of decertification in the circumstances, as we submit, entirely lay with the plaintiff through an appeals process that was enshrined both in his licence agreement and in the standards themselves; further or alternatively, his response otherwise to the incident.

Your Honour, in terms of the tort of nuisance, we are largely content to rest on our written submissions. This is obviously going to be a value judgment for your Honour at the end of the day, whether the interference could be

said to be reasonable or unreasonable. Again, the issue of the NASAA standards, the reasonableness of the actions taken by the certifier is highly relevant to the critical factor of abnormal sensitivity, which is a constant feature in the value judgment assessment that needs to be made. And again, there is nothing, we say, in terms of the facts that would suggest here that a finding of liability would be appropriate in circumstances where this activity was completely lawful and reasonable.

I've addressed your Honour on the things that Mr Baxter did as a precursor to planting his crop. In terms of the swathing, it is, your Honour, the evidence indicates - the plaintiff's own evidence indicates, and as we're set out at paragraph 69 of our written submissions, swathing is a preferred or recommended way of getting in the crop; it has a couple of very obvious advantages in the way in which it deals with the risk of pod shattering and the seeds falling to the ground, and therefore a loss of yield.

As, I think, McInerney points out, more seed that falls to the ground, the more volunteers one is going to get at the end of the day. There's also this very important aspect to swathing, which is, of course, that the field is swathed green before the canola has matured and is ready for harvest. And what that means is it delivers very practical benefits to a farmer, because they don't have to wait for the crop to mature to harvest, and, like all produce, usually all matures at the same time.

In a direct harvesting situation, your farmer is confronted with having to get the crop off all at once, whereas when one swathes, one can take a far more orderly approach to it, because, as I say, the canola is swathed green and can then be left to ripen in the field. Your Honour, damages have been agreed. The damages arising from decertification have been agreed, but, of course, liability remains in issue and as does the question of causation.

Whether the actions of the defendant caused any or all of the loss is centrally in issue, and apart from the question of whether there ever should have been a decertification at all, there is also a question of how long the operation remained decertified and whether that too was reasonable in all of the circumstances. In terms of the evidence, your Honour, we have three lay witnesses: Mr Baxter himself, Mr Stretch is a farmer is a farmer on the Kojonup district who has grown both canola and GM canola, and he speaks from his own observations as to the

benefits of that - the benefits of swathing and the benefits of - and how he handles ryegrass problems on his farm; and Mr Robinson is Mr Baxter's agronomist, and he speaks to, amongst other things, the advice he gave to Mr Baxter about planting the GM canola and swathing prior to the incursion.

We have four expert witnesses: Mr Slee, Dr Preston, Professor Powles and Professor Rudelsheim. Mr Slee talks about the standards and provides some comparative evidence of international organic standards. Dr Preston, Professor Powles and Professor Rudelsheim don't all talk about exactly the same thing, but between the three of them there is some overlap, and essentially, they are here to provide expert evidence about propensity for cross-pollination of GM canola, the survival of volunteers, the movement of canola material on the wind and the removal of volunteers and the like. They will also give your Honour some evidence about the actual constituent make-up of GM canola - sort of science behind the technology. Those are my submissions, your Honour.

KENNETH MARTIN J: All right. Thank you very much, Ms Cahill. Just in terms of the program for tomorrow then, Mr Niall.

NIALL, MR: Yes, your Honour. Yes. Tomorrow we will start with the plaintiff, Mr - first plaintiff, Mr Stephen Marsh.

KENNETH MARTIN J: Yes.

NIALL, MR: He will be followed by Ms Coleman, who was the inspector. I told your Honour there was an inspection on 21 December.

KENNETH MARTIN J: You did.

NIALL, MR: That was Ms Coleman. There had been an earlier inspection on 4 December by a Ms Purves, who's not giving evidence.

KENNETH MARTIN J: Yes.

NIALL, MR: Ms Goldfinch was the author of the suspension letter and the decertification letter, and she will conclude tomorrow. Ms Gore is another review officer within NASAA. When I talk about a review officer, your Honour, the process is you've got an inspector; the inspector provides a report back to NASAA and someone within NASAA makes a decision, and that's an annual basis

as to whether the farm needs to have any particular steps taken.

Mr McInerney is an agronomist. Davies, Morton and Morton, your Honour, deal shortly with some evidence about purchasing of oats, processing of oats, and Davies is linseed. Bishop is from Tasmania; he will talk about some trials about - which goes to persistence of canola; and Ms Denham is at NASAA. She has been on the board and she will give some evidence about that. Mr Ayachit is also from NASAA. And then finally, Van Acker gives some expert evidence along similar lines to that identified by my learned friend. And that would conclude the week. The only other matter, your Honour - - -

KENNETH MARTIN J: Are there any objections to resolving Mr Marsh's witness statements?

NIALL, MR: There are, your Honour. There are. But - - -

KENNETH MARTIN J: So we should deal with that first thing tomorrow.

NIALL, MR: Yes, your Honour, if that's convenient.

KENNETH MARTIN J: All right.

NIALL, MR: Just before your Honour rises for the day, it may be the way I put my submission; in terms of the duty that we plead, we don't plead a duty to ensure, but rather - this is paragraph 35 - a duty to take reasonable care to ensure that the canola was not blown or carried away, and it is very much directed to a duty to take reasonable care, not predicated at all by what happened. So we haven't pleaded it in that minute sense that sometimes gets the problem with cases where you look at what happened, and then you work back and engineer a duty which is very specific. But I just thought I would make that point, your Honour. They are the only matters for today, if your Honour pleases.

KENNETH MARTIN J: All right. Yes. All right. Well, if there's no further matters, then that completes the respective openings, and we will resume with the evidence of Mr Marsh tomorrow at half past 10.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: Court will adjourn.

AT 4.08 PM THE MATTER WAS ADJOURNED UNTIL

TUESDAY, 11 FEBRUARY 2014

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