

**IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST**

CIV. 1561 of 2012

B E T W E E N :

STEPHEN WILLIAM MARSH

First Plaintiff

-and-

SUSAN GENEVIEVE MARSH

Second Plaintiff

- and -

MICHAEL OWEN BAXTER

Defendant

Plaintiffs' Closing Submissions

Date Filed: 26 February 2014

Filed on behalf of: Plaintiffs

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BETWEEN:

STEPHEN WILLIAM MARSH

First Plaintiff

-and-

SUSAN GENEVIEVE MARSH

Second Plaintiff

-and-

MICHAEL OWEN BAXTER

Defendant

PLAINTIFF'S OUTLINE OF CLOSING SUBMISSIONS

PART A – SUMMARY

1. In late November 2010 Eagle Rest, a certified organic farm, was inundated with GM canola swaths carrying thousands of viable canola seeds. The GM canola came from Seven Oaks, the adjoining farm in circumstances where Mr Baxter had chosen to plant GM canola in two paddocks, one contiguous and one near the northern boundary.
2. The contamination of Eagle Rest by GM canola swaths and seeds resulted in NASSA decertifying a large portion of the farm resulting in loss to Mr and Mrs Marsh.
3. At the time he chose to plant, and then harvest, Mr Baxter knew, or ought to have known, that GM canola was likely to be blown or carried onto Eagle Rest if it was planted nearby and or was swathed. He knew that if the GM canola was blown onto Eagle Rest the Marsh's certification would be imperiled. He both planted and swathed regardless of those risks.
4. In summary:
 - a) Baxter owed a duty to take reasonable care to ensure his canola swaths and seeds were not blown or carried on to Eagle Rest leading to decertification.

- b) He failed to take any precautions that a reasonable farmer, armed with his knowledge and the facts, would have taken including planting further away and not swathing his crop.
- c) The breach caused the loss. NASAA was authorised to decertify parts of Eagle Rest. Baxter is liable in negligence.
- d) Further, the presence of Baxter's GM canola on Eagle Rest constituted an actionable nuisance. Baxter's conduct constituted an unreasonable interference in the use and enjoyment of Eagle Rest as a certified organic farm.

PART B - EVIDENCE

THE MARSH AND BAXTER FARMS IN KOJONUP

- 5. The first plaintiff, Stephen Marsh (**Marsh**), has been the owner of the farm known as "Eagle Rest" in Kojonup, since 1991.¹ The defendant, Michael Baxter (**Baxter**), owns the neighbouring farm "Sevenoaks". The western boundary of Eagle Rest adjoins the eastern boundary of Sevenoaks. Along that boundary the properties are separated by a road reserve for the Qualeup North Road and the Glenorchy South Road.² Most of Eagle Rest can be seen from Sevenoaks.³
- 6. Kojonup is a rural area in the south-west of Western Australia. Farmland in Kojonup is predominantly used for broadacre cultivation of cereal and canola crops, and for grazing livestock.⁴

ORGANIC FARMING ON EAGLE REST

- 7. Since 2002, Marsh has farmed Eagle Rest organically, cultivating grain and livestock.⁵ He

¹ Exhibit 5A, Affidavit of Marsh sworn 12 April 2012 (**Marsh Affidavit**) at [1].

² Marsh Affidavit at [9]; and Exhibit 5A, aerial photograph showing Eagle Rest and Sevenoaks with paddocks.

³ Evidence of Baxter at T 756.

⁴ Exhibit 26A Witness Statement of Baxter dated 28 August 2013 (**Baxter Statement**) at [24].

⁵ Exhibit 5B, Witness Statement of Marsh dated 13 February 2013 (**First Marsh Statement**) at [19].

does so in partnership with his wife, Sue Marsh, who is the second plaintiff.⁶ The Marshes gained certification from National Association of Sustainable Agriculture, Australia (**NASAA**) for “conversion to organic for 476 ha of Eagle Rest (which comprises 477ha) in August 2003⁷.

8. While Eagle Rest was in the process of converting to an organic farming system Marsh had notified local authorities and his neighbours of the organic status of Eagle Rest.⁸ He had also erected signs in 2004 and again in 2010 around the external boundary of Eagle Rest notifying of that status.⁹
9. The Marshes were granted full organic certification in January 2006.¹⁰
10. Eagle Rest is divided into three blocks, and each block is subdivided into paddocks. There are 13 paddocks in all.¹¹ Around one-third of Eagle Rest is used to grow crops (predominantly oats, and some wheat and rye)¹² and two-thirds are used to grow pasture to feed livestock.¹³
11. Marsh rotates crops and pasture throughout each of the paddocks on Eagle Rest.¹⁴ Crop rotation is a system of soil regeneration designed to return nutrients to the soil through the pasture phase.¹⁵ Crop rotation is both a requirement of, and a principle underscoring, the NASAA Organic Standard (**the NASAA Standards**).¹⁶
12. Marsh sells the bulk of his oats to Morton’s Seed & Grain Co, a grain handler and exporter of certified organic oats.¹⁷ Certification by an accredited organic certifier such as NASAA

⁶ First Marsh Statement at [14].

⁷ TB23

⁸ TB212,215

⁹ T187-188

¹⁰ TB36

¹¹ Exhibit 6; and exhibit 5B at [25].

¹² Tables 1 and 3 to exhibit 5B.

¹³ Exhibit 5B at [19].

¹⁴ Exhibit 5B at [22].

¹⁵ Exhibit 13A - Report (Supplemental 1) of Peter McInerney dated December 2013 at p 7.

¹⁶ Relevantly, the version current as at 13 May 2008 at TB1293; see, especially cl1.4(4) and (8) at TB1306; cl 2.4.1 at TB1308.

¹⁷ Marsh,T334.

enables Marsh to access premium prices for his organic produce.¹⁸ Organic certification relates to how the product is grown and how it is processed prior to sale.¹⁹ Proof of that certification is essential: Morton's requires a copy of Marsh's organic produce certificate as proof that the grain is being produced organically on Eagle Rest, and Morton's supplies that proof to its customers.²⁰

THE REGULATION OF GM CANOLA CULTIVATION IN WESTERN AUSTRALIA

13. The *Gene Technology Act 2000* (Cth) (**the CGTA**) prohibits dealings with genetically modified organisms (**GMO's**) relevantly, unless those dealings are authorised under a GMO license which may be granted by the Office of the Gene Technology Regulator (**OGTR**), under the Act. Dealings with a GMO include breeding, propagating, using, growing, raising, culturing, importing, transporting or disposing of a GMO or possessing, supplying or using it for purposes of any dealings. It is intended that the object of the Act be achieved through a regulatory framework which operates in conjunction with other Commonwealth and State regulatory schemes relevant to GMO's and GM products.²¹ The CGTA does not regulate the civil consequences of the release of GMO pursuant to a license granted under it.
14. The CGTA is one component in a national regime. Whilst the GM technology regulator may license dealing in a GMO under the CGTA, regard must be had to the position of any relevant State law. It is intended that State laws operate concurrently insofar as they are capable of doing so.²²
15. In 2003 the Office of the Gene Technology Regulator in Australia issued a licence to Monsanto for the commercial release of a variety of GM canola known as Roundup Ready® (**RUR**).²³ RUR was developed and is owned by Monsanto.²⁴ In the same year the OGTR

¹⁸ Davies T 721. Exhibit 23, Statement of Jonathan Danton Morton (**Jonnie Morton**).

¹⁹ Denham, T 615.

²⁰ Marsh, T333; Jonnie Morton, T 717; Exhibit 22, Statement of Janine Maree Morton at [3].

²¹ CGTA s.4

²² CGTA ss.5 and 16

²³ Exhibit 28, Report of Patrick LJ Rüdelsheim dated 2 October 2013, p 11.

²⁴ Roundup Ready Canola Grower Licence and Stewardship Agreement, see, e.g., cl 2.3 at TB1260.

issued a license to Bayer CropScience for the commercial release of Invigor, a hybrid GM canola.²⁵

16. Two concerns were identified in the regulatory process. The first was the potential for the development of herbicide resistant weeds, should glyphosate be used inappropriately.²⁶
17. The second was the possible economic and market impacts if RUR canola was to spread to adjoining farms.²⁷ In issuing licenses to deal in GM canola the OGTR was not itself attempting to regulate those economic impacts and market impacts.²⁸
18. At or about the same time Western Australia enacted the *Genetically Modified Crop Free Areas Act 2003 (W.A)*. The purpose of that Act was to prohibit the cultivation of certain GM crops in designated areas of the State and to provide for their destruction in certain cases. The Act empowered the Minister to designate either the whole or parts of the State as an area in which a GM crop must not be cultivated. The Act provides for revocation of GM free designations and required a review of its operation every 5 years.²⁹
19. On 24 March 2004 the Minister for Agriculture, Forestry and Fisheries in Western Australia made an order under s 4 of the *Genetically Modified Crop Free Areas Act 2003 (WA)*, the whole of the state of Western Australia was designated as an area in which a genetically modified (**GM**) crop may not be cultivated³⁰ (**the banning order**).
20. At the time of the banning order the Marshes were in the process of converting to full organic certification.³¹
21. In 2006 Western Australia enacted the *Gene Technology Act 2006 (W.A.)*³² which substantially mirrors the CGTA. The Western Australian *Gene Technology Act 2006*

²⁵ Rüdelsheim, T884

²⁶ Exhibit 28, p 11

²⁷ Exhibit 28, p 11.

²⁸ Rüdelsheim, T880

²⁹ *Genetically Modified Crop Free Areas Act 2003 (W.A)*.

³⁰ Western Australian Government Gazette: Genetically Modified Crops Free Areas Order 2004 at TB0210.

³¹ Marsh Affidavit at [13].

³² See s4 of the WA Act – regulatory framework. S15 of the WA Act provides that its provisions are in addition to and not in substitution for the requirements of any other law of Western Australia.

effectively enacts as a law of Western Australia, the provisions of the Commonwealth Act which describe the regulator regime administered by the OGTR. That is, a separate regulatory regime is not established by the State legislation, rather, the Commonwealth system of licenses is recognised.

22. In 2009 the Department of Food and Agriculture, Western Australia (**DFAWA**) authorised commercial trials of GM canola in southern agricultural areas of Western Australia, including Kojonup.³³ DFAWA monitored the trials³⁴ and imposed conditions on the participants in the trials. It required participants to contain GM canola material within the boundaries of their properties and to report any escapes of GM canola material to DFAWA.³⁵
23. Digby Stretch, who gave evidence for the defendant, participated in the DAFWA trial. In order to contain the GM canola grown during the trial within his property Mr Stretch grew it on a paddock located away from his neighbours. He achieved containment.³⁶
24. On 25 January 2010 the Western Australian Minister for Agriculture issued an order under s 6 of the *Genetically Modified Crop Free Areas Act 2003 (WA)* exempting any person cultivating GM canola in any part of Western Australia from the application of s 5(l) of that Act, if the GM canola in question was licensed for intentional release into the environment under the *Gene Technology Act 2000 (Cth)*.
25. As a consequence, the farmers wishing to grow RUR canola in Western Australia could do so on condition of entering into Grower License and Stewardship Agreement (**LSA**) with Monsanto.³⁷ The regulation of the use of RUR canola is achieved in this model by growers being bound to the conditions of the licenses between them and Monsanto.³⁸
26. By entering on the LSA, farmers are bound to comply with the licence terms and the

³³ Exhibit 29, Statement of Digby Noel Stretch (**Stretch**) at [18(2)].

³⁴ Stretch, T901.

³⁵ Stretch, T901-902.

³⁶ Stretch, T901-902

³⁷ E.g., at TB 1258.

³⁸ Rüdelsheim, T880

associated Crop Management Plan (CMP).³⁹

27. Pursuant to the LSA, each grower of RUR canola agreed to:
 - a) deliver all grain produced from RUR canola only to a Monsanto-approved grain handler (cl 1.6);
 - b) read and strictly comply with the Crop Management Plan, which was incorporated into the LSA, and to abide by and be bound by the terms of the most recent Crop Management Plan (cl 1.7); and
 - c) to implement the Resistance Management Plan as specified in the applicable sections of the most recent Crop Management Plan (cl 1.12; see also cl 3.1).
28. Baxter was permitted to grow RUR canola on terms requiring his strict adherence to the LSA and CMP.
29. As a condition of planting RUR canola, farmers were required to attend a Roundup Ready canola accreditation course in Katanning in March 2010.⁴⁰ During the seminar, participants were provided with Monsanto's 2010 Crop Management Plan⁴¹ and the Roundup Ready Canola Comprehensive Information Guide.⁴² Participants were also required to complete an accreditation workbook at the seminar.⁴³ Those terms governed Baxter's use of RUR canola.
30. A stated objective of the Crop Management Plan was to manage risks to the integrity of grain crop supply-chains and the sustainability of agricultural production. To that end, the Crop Management Plan set out strategies to "enable different production/market systems to concurrently operate in a profitable and sustainable way in response to change in market and non-market requirements".⁴⁴

³⁹ Roundup Ready Canola Comprehensive Information Guide; TB 1243-4.

⁴⁰ Baxter, T763.

⁴¹ Ibid, at T763; see also TB 1225.

⁴² Baxter Statement, exhibit 26A

⁴³ TB 1245.

⁴⁴ TBTB 1226.

31. Dr Rüdelsheim, an expert called by Baxter, agreed that the principles stated in the CMP to that effect were reasonable and appropriate to manage RUR canola.⁴⁵
32. Upon the issue of the exemption order DFAWA published detailed advice to farmers regarding the cultivation of GM canola.⁴⁶
33. In its factsheet published in January 2010 entitled “Organic farming and genetically modified crops”,⁴⁷ DFAWA stated, relevantly, that:
 - a) Worldwide, the area of land under certified organic management has increased to more than 31 million hectares in 2005 and continue to grow;
 - b) Organic farmers are certified to ensure that their farming methods comply with standards for organic production to reassure wholesalers, retailers and consumers that their produce is truly organic;
 - c) The Australian National Standard or Organic and Biodynamic Produce specifies the minimum requirements for organic certification. Any organic product destined for export must be certified organic by one of the seven AQIS-accredited organic certifiers. Reputable retailers also require organic certification to verify all products labeled organic are genuine.
 - d) Organic production [in Australia] was valued at \$623 million in 2007 when the total Australian retail turnover was valued at \$92.7 million. In WA, most organic farms are involved in horticulture, but livestock, grains, dairy and bees are also involved;
 - e) Throughout the world, standards for organic farming prohibit the use of GM materials in the production or processing of organic products. Australian standards also prohibit the use of GM material in organic products. Australian standards have no defined tolerance [for the accidental presence of GM material in organic product].
 - f) Some Western Australian organic producers are concerned that GM canola may lead

⁴⁵ Rüdelsheim, T881; see also the evidence of Baxter at T 767-8 as to his understanding that the reference in the CMP to alternative market systems included a reference to organic market systems.

⁴⁶ Factsheet – Organic farming and genetically modified crops (TB0216-0218); Farmnote – Roundup Ready Canola in WA (TB0226-0229); Farmnote – On farm segregation of GM and non-GM canola (TB0230-0231).

⁴⁷ TB0216.

to accidental presence of GM material in their farming systems and organic products.

- g) Organic certifiers assess GM contamination risk on a case-by-case basis. Under organic certification in Australia.
- h) Legal liability is a GM crop-related issue that was assessed independently in 2005-2006 during the review of the Commonwealth Gene Technology Act 2000. The outcome was that common law allows for effective remedies for persons incurring damage from GM crops.
- i) Talk to your neighbours. 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 details and procedures on how to manage any issues arising from both conventional and GM crops grown nearby. All producers have a duty of care towards their neighbours and the best way forward for all is to discuss issues and come to mutually agreeable solutions.

34. In its Factsheet published in January 2010 entitled, “Genetically Modified Crops and Farmer Liability”⁴⁸ DAFWA said relevantly that, liability for GM crop-related issues may occur if there is damage to another party ... for example if GM seed spreads from a GM farmer to non-GM farmer.

35. In its Farmnote entitled “Roundup Ready® canola in WA” published in January 2010⁴⁹ DAFWA stated, relevantly, that:

- a) 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.
- b) Most volunteer plants will germinate and emerge within three years.
- c) Using glyphosate on RUR canola may lead to glyphosate resistance. Annual ryegrass has already developed resistance in Australia (89 populations) due to its conventional

⁴⁸ TB219-221

⁴⁹ TB0226.

use. Several strategies to delay the build-up of resistant weed populations can be employed.

36. In that publication DFWA gave explicit advice about risks that swathed GM canola could be blown onto adjacent land. DAFWA warned –

“One 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 develop a plan to manage any resultant GM volunteer plants. The management plans should be discussed with neighbours when planning to grow GM canola in boundary paddocks.”⁵⁰

37. Baxter had DAFWA farm notes sent to him in the mail sometimes. He flicked through them, He did not take a lot of notice of them. He had access to the internet in 2010.⁵¹

38. Local agronomists anticipated the lifting of banning order prior in 2010. Employees of the agronomy firm, Farmanco, including Baxter’s agronomist Robinson, discussed the new technology in preparation for its release.⁵²

39. Farmanco provided advice to its farmers clients in the March 2010 issue of the “Farmanco Facts” monthly bulletin given to Farmanco clients.⁵³ Farmanco advised:

What is significantly different is the regulatory or licensing requirements that need to be adhered to and Monsanto has several risk management actions that are required to be met before growers can purchase seed of RR varieties ...

Where your crop is on a boundary fence you will need to discuss management options for this scenario and also for the possibility of strong winds moving swaths into your own and your neighbour’s paddocks.

THE REGULATION OF ORGANIC PRODUCTION AND CERTIFICATION

40. The NASAA Standards operate within a national regulatory framework prescribing minimum standards for the organic industry, from primary production to processing and labeling.⁵⁴ The Australian Quarantine and Inspection Service (**AQIS**, now DAF) has

⁵⁰ TB0231.

⁵¹ Baxter, T834-835

⁵² Robinson, T923 and T 929.

⁵³ Ibid, T928.

⁵⁴ TB 1409.

accredited NASAA as a certifier of organic produce.⁵⁵

41. AQIS regularly audits⁵⁶ the NASAA Standards to ensure that they adhere to the minimum requirements under the National Standard for Organic and Bio-Dynamic Produce (**the National Standard**). By doing so, AQIS relevantly ensures compliance with the requirements of the *Export Control (Organic Produce Certification) Orders* made pursuant to the *Export Control Act 1983* (Cth).⁵⁷
42. AQIS Administrative Arrangements⁵⁸ describe the relationship between the NASAA Standards and the National Standard. The Introduction to the Administrative Arrangement states:
 - 1.1 Australian Quarantine and Inspection Service (AQIS) is the competent authority for the Australian organic and biodynamic export sector. AQIS operates a co-regulatory arrangement with approved certifying organisations.
 - 1.2 Legislation, the National Standard for Organic and Biodynamic Produce as well as these Administrative Arrangements, underpin the AQIS export program for organic and bio-dynamic produce.
 - 1.3 Organic and bio-dynamic produce is deemed to be prescribed goods under the *Export Control (Organic Produce Certification) Orders 1997*. These Orders require AQIS to conduct audits of approved certification organisations to ensure ongoing compliance against legislation, the National Standard and importing country requirements.
 - 1.4 Where a certifying organisation satisfies these requirements, it is given the authority to issue export documentation on behalf of the Australian government.
43. NASAA certifies farms⁵⁹ and processing systems (such as grain handling facilities)⁶⁰ according to the NASAA Standard and, as such, to the National Standard.⁶¹
44. The National Standard is intended to provide a framework for the organic industry. The broad scope of the National Standard is apparent from the table of contents at CB1411-12.

⁵⁵ Exhibit 20A, Witness Statement of Denham dated 14 February 2013 at [23].

⁵⁶ The Administrative Arrangements, cl 19.1.

⁵⁷ *Ibid*, cl 1.3.

⁵⁸ Administrative Arrangements For Approved Certifying Organisations Operating Inspection and Certification Activities for Australian Organic and Biodynamic Produce, 26 November 2003 at TB 1292.1-1292.27 (**the Administrative Arrangements**).

⁵⁹ E.g., NASAA Certificate of Registration relating to Eagle Rest at TB 0054.

⁶⁰ Exhibit 22, Statement of Janine Maree Morton dated 13 February 2013 at [3-4].

⁶¹ Introduction to the National Standard at TB1409; Exhibit 20C, Further Supplementary Witness Statement of Denham dated 10 February 2014 at [9(c)]; evidence of Stephanie Goldfinch at T 522.

The introduction to the National Standard states that it:

aims to ensure conditions of fair competition in the market place by distinguishing those products produced according to this Standard from those produced by other means. Use of this Standard provides transparency and credibility for the industry and protects the consumer against fraud.

45. Janet Denham is the Chairman of the board of NASAA and NCO. Her evidence was that certification is, among other things, a means of informing the consumer of what an organic product is including by specifying how a product is to be grown and processed.⁶² Any proposed changes to the NASAA Standards are made available for public comment, not merely to NASAA members.⁶³

BAXTER'S KNOWLEDGE OF THE RISKS TO MARSH POSED BY GM CANOLA

46. Baxter had been growing conventional canola of various kinds on Sevenoaks since around 2002.⁶⁴ By 2008, he had decided that he would most probably plant GM canola on Eagle Rest should it become legal to do so.⁶⁵
47. Baxter had known from some years before 2010 that Marsh was farming organically.⁶⁶ He had heard that organic farmers were not permitted to use chemicals, drenches or artificial fertilisers.⁶⁷ He knew well before 2008 that there were rules associated with organic farming.⁶⁸
48. In November 2008 Marsh visited Baxter at Sevenoaks. It was Marsh's first visit in recent times.⁶⁹ Marsh brought with him a canola plant which he had found growing on Eagle Rest and showed it to Baxter.⁷⁰ Marsh told Baxter that the plant had come from seed that had

⁶² See also, evidence of Stephanie Goldfinch at T 591.

⁶³ Denham, T 619.

⁶⁴ Baxter, T 734.

⁶⁵ Baxter, T 759.

⁶⁶ Baxter, T753

⁶⁷ Baxter, T754

⁶⁸ Baxter, T754

⁶⁹ Baxter, T 756.

⁷⁰ Baxter T 758.

come over from Sevenoaks,⁷¹ and Baxter presumed that this was the case.⁷² Baxter had experience of the problem of canola volunteers, having previously seen them on Sevenoaks and on roadsides.⁷³

49. Baxter agreed that Marsh had a conversation with him in which Marsh told to the effect that if Baxter grew GM canola on Sevenoaks and it got onto Eagle Rest, Marsh's organic certification would be affected or lost because genetically modified organisms are not permitted in organic farming,⁷⁴ and that if GM canola came from Sevenoaks to Eagle Rest Marsh's certificate might be in jeopardy.⁷⁵
50. Baxter understood that Marsh was concerned about this.⁷⁶
51. At the time of this conversation with Marsh in November 2008 Baxter knew that Marsh was farming organically, and that organic farmers were subject to particular rules and standards, one of which was a rule prohibiting GMOs on an organic farm.⁷⁷
52. Baxter agreed that from what Marsh told him in 2008, he knew that one of the rules of organic farming, according to Mr Marsh, was that GM material was not permitted on an organic farm and that the presence of a GMO on an organic farm could jeopardise the farmer's organic certification.⁷⁸
53. What Marsh told Baxter about the impact that the presence of GMO's might have on Marsh's certification, did not deter Baxter from his decision to plant RUR canola.⁷⁹
54. In early 2010, during a working bee at the property of another Kojonup farmer, Mr Marinoni, Marsh and Baxter spoke again about Baxter's intention to plant GM canola on

⁷¹ Ibid.

⁷² Ibid.

⁷³ Baxter, at T 758.

⁷⁴ Baxter, T 756.

⁷⁵ Baxter, T 757

⁷⁶ Ibid, at T 757.

⁷⁷ Ibid, at T 759.

⁷⁸ Ibid.

⁷⁹ Baxter, T755

Sevenoaks. Baxter told Marsh that he intended to plant GM canola on the Range.⁸⁰

BAXTER PLANTS RUR CANOLA IN 2010

55. In May 2010, Baxter sowed RUR canola in the paddocks known as Range and Two Dams.

The stated purpose of planting RURC

56. The stated purpose for planting RURC in 2010 in Two Dams and Range was to deal with a “severe problem” of HRWR in those paddocks⁸¹.

57. The evidence about the existence, extent and nature of the resistance was very unsatisfactory. It supports a finding that the decision to plant in 2010 in those paddocks was cavalier and that Baxter has sought to justify the decision based on group A resistance after the event.

58. Baxter deposed that 9 paddocks⁸² were subject to HRWR leading to a reduction in yield of around 30% over a five year period to 2010. He identified⁸³ resistance to FOPS and DIMS, which are Group A herbicides.

59. Since 2003 Baxter had engaged a consultant agronomist, Christopher Robinson (formerly of Kojonup Agricultural Supplies⁸⁴ and, since 2009, of Farmanco⁸⁵) to assist him to devise crop rotation and weed management strategies for Sevenoaks.⁸⁶

60. Robinson stated in his first statement that “[p]rior to 2010 were signs that the wimmera ryegrass on Seven oaks had developed a resistance to ‘clethodim’ (a Group A chemical)”.

⁸⁰ Marsh 320; Baxter, T 822. Marsh’s evidence at T 320 was that Baxter told him that he intended to grow it on the Range and that he did not inform Marsh that he intended to grow it in Two Dams paddock. Baxter’s evidence at T 822 was that at the time he spoke to Marsh he was intending to plant both paddocks, Range and Mailbox. It was put to Baxter that he had described to Marsh the area that included both the Range paddock and Mailbox paddock (The Range). Baxter responded, “Well, Range is just the name of the paddock”.

⁸¹ Baxter Statement para [45]

⁸² Baxter Statement para [34(4)]: Range, Two Dams, Big Dam, Mailbox, Road, Mallet Hill, Hilly Paddock, Montys Paddock and Baxter’s Block

⁸³ Baxter Statement para [35(2)]

⁸⁴ Robinson, T 911.

⁸⁵ Ibid, at T 913.

⁸⁶ Baxter Statement at [19(2)] and [22]; evidence of Baxter at T 739.

61. Neither Mr Baxter nor Mr Robinson had a memory of what was planted and what herbicides were used on each of the 9 affected paddocks during the period between 2005 and 2010⁸⁷. The most reliable records are the paddock plans:
- a) Baxter said that he followed the Paddock Plans⁸⁸;
 - b) Although the Plans are prepared in prospect for the coming year, Baxter expected, and Robinson agreed that where changes were required they would have been picked up (for example to address resistance) in the succeeding year⁸⁹;
62. The evidence simply does not permit a finding that clethodim was used, let alone that it was used to a particular effect:
- a) With one exception, between 2005 and 2009 the Plans did not provide for any Group A including clethodim to be used⁹⁰. In 2008 clethodim was identified in the chemical summary, however, Baxter was unable to say on what paddocks it was used⁹¹. In other words, the Plans did not incorporate Group A herbicide into the cropping cycle.
 - b) Moreover, there is no evidence that the weeds were resistant to atrazine, a Group C herbicide, which was applied throughout 2005-2009. Given Baxter's evidence that there was no resistance to Atrazine and it was "effective" for controlling weeds there was no reason to apply clethodim during the cropping cycle⁹². And if there was a need, it would have been recorded as a proposed action in the following year.
 - c) There was no testing for resistance, despite Robinson's evidence that he "regularly" conducts such tests for clients⁹³; and
 - d) Clethodim was used on paddocks that were allegedly affected by HRWR in 2010: eg

⁸⁷ Baxter TS 750, Robinson

⁸⁸ Baxter TS 740, 745, 749, 751

⁸⁹ Baxter TS 752; Robinson TS 919

⁹⁰ TB 519, 577, 599, 619 and 627 Baxter TS 746-748

⁹¹ Baxter TS 748

⁹² Baxter TS 798 and 800

⁹³ Exhibit 30, Robinson Statement dated 29 August 2013 para [9(4)]

Montys⁹⁴ and Hilly.

63. Robinson was called to support the contention that there was a HRWR problem on Seven Oaks leading to the decision to select RURC in 2010.
64. In his August 2013 Statement he deposed that there were signs of resistance to clethodim prior to 2010.
65. It is clear that Robinson had no personal knowledge of what occurred in 2007, 2008 or 2009. He was not retained by Baxter in those years. The paddock plans, which did not record the use of clethodim at all in 2007 and 2009 would have provided no basis for any knowledge of clethodim resistance. He did not review the earlier paddock plans in any event⁹⁵.
66. Thus his statement in his original statement that there were signs of resistance was plainly unsupportable.
67. By way of an "Amended Statement" Robinson paragraph [27] was changed and a conversation between Baxter and Robinson was alleged, for the first time, in which Baxter is said to have advised Robinson that clethodim had failed to control rye grass. The alleged conversation that Baxter advised him of clethodim resistance was not the subject of evidence from Baxter. Baxter's own evidence about the use of clethodim (not supported by any documentation) was unpersuasive.
68. Robinson's Amended Statement makes specific reference to Range and Two Dams and says that he was informed by Baxter about those two paddocks. In cross examination he denied that Baxter had referred to those paddocks in the conversation⁹⁶.
69. The position is that Robinson had no personal knowledge of clethodim resistance in 2007 to 2009, he was reliant on what Baxter had told him but could not recall Baxter naming the

⁹⁴ TB 740 and 742

⁹⁵ Robinson, T 944

⁹⁶ Robinson, T 946

two paddocks Range and Two Dams. Tellingly his explanation for including the reference to Two Dams and Range in his statement, despite not recalling Baxter mentioning them, was that “otherwise we wouldn’t have put Round-Up Ready in those two paddocks”⁹⁷.

70. That is clear evidence of a working back to justify, after the event, the decision to plant RR canola in Range and Two Dams in 2010. The logic of Mr Robinsons account was that since Baxter planted RURC in Two Dams and Range therefore there must have been a problem with clethodim resistance. In the absence of any documentary record showing that clethodim was used between 2005 and 2009 on the affected paddocks the claimed basis for the decision to plant RURC in 2010 falls away.
71. Robinson sought to bolster his evidence about clethodim resistance by recalling some specific “observations” on the effect of clethodim in two paddocks (Back paddock and Silo) in 2005 and 2006. These observations were first recorded in the Amended Statement at [27(3)].
72. The specific reference in paragraph 27(3) to the use of clethodim on Back and Silo in 2005 and 2006 and the reduction in yield of 10-30% was not supported by any documentary record. Clethodim was not on the paddock plans for 2005 and 2006. Robinson accepted that he had no memory of what chemicals were used on Back and Silo in 2005 and 2006.
73. It is not clear why Robinson included it. At one point in his evidence, in reference to Back and Silo that he was “just asked...”⁹⁸ It is a fair inference that Robinson was asked by someone to mention two canola paddocks in which he could make observations about clethodim resistance.
74. What is clear is that there was no basis for the new evidence in paragraph 27(3). Robinson had no records to support the evidence and no memory that would enable him to attest to it.

⁹⁷ Robinson TS 947

⁹⁸ Robinson T 952

75. It follows that the evidence simply fails to establish that there was a problem with Clethodim resistance in Range and Two Dams in 2010.
76. The 2010 Monsanto PRAMOG sheets to Two Dams and Range are also inconsistent with the alleged problem of resistance. At TB 1263, in relation to Two Dams Mr Baxter instructed someone to state on the PRAMOG sheet that there were no herbicide groups for which resistance had been confirmed for Ryegrass in the Paddock.
77. In cross examination Baxter sought to fasten on the fact that the table referred to circumstances where resistance had been confirmed⁹⁹. However, that opportunistic evidence does not explain why he identified resistance for one group on the PRMOAG Sheet for Range¹⁰⁰. Nor does it reflect the instruction in the Monsanto Crop Management Plan where it describes the top margin of the relevant PRMOAG Table as relating to circumstances where resistance had been suspected or confirmed¹⁰¹.
78. At Step 1 in the PRAMOG Table, Baxter was required to identify previous glyphosate use and its context up to a period of 20 years. For both Range and Two Dams Baxter indicated that he had engaged in full cultivation in those paddocks. Yet his evidence was that his agronomy practice did not utilize cultivation¹⁰². He sought to explain the discrepancy as a misunderstanding¹⁰³.
79. The approach to PRAMOG, including the refusal to test for resistance, against the advice of Monsanto¹⁰⁴, demonstrates a decision to plant RURC regardless of the need to do so or the consequences in relation to resistance.

The Decision to Plant RURC in 2010

⁹⁹ Baxter T 807

¹⁰⁰ TB 1262

¹⁰¹ TB 1229

¹⁰² Baxter TS 739. Reexamination on the point at TS 841 was unconvincing

¹⁰³ Baxter TS 805-806

¹⁰⁴ TB 1227

80. The 2010 Paddock Plan¹⁰⁵ records that RURC was to be planted in three paddocks: Range, Two Dams and Mailbox.
81. The 2010 cropping plan was discussed by Baxter and Robinson. Baxter said it was in January but Robinson though late February early March. Given Robinson's holidays in January the latter is much more probable.
82. Robinson said that before meeting with Baxter he had not formed any view that RURC should be planted on Seven Oaks in 2010¹⁰⁶.
83. Baxter's account of the reason he planted RURC in the two paddocks in 2010 was to deal with a severe problem of HRWR in those two paddocks¹⁰⁷. For the reasons given above, this is an after the event justification not supported by the evidence.
84. He says that Robinson gave specific advice that Roundup could be sprayed after the canola crop had emerged, that it would achieve a superior yield and that Baxter would get better HRWR control¹⁰⁸.
85. In his Statement Baxter refers to Marsh coming to Seven Oaks in 2008 to discuss Marsh's concern that if GM canola were planted on Seven Oaks and produced volunteers on Eagle Rest his organic certification would be at risk¹⁰⁹. Notably, Baxter does not say in his statement that he told Robinson of the 2008 visit, Marsh's concern or the potential impact on organic certification.
86. In cross examination, Baxter said he told Robinson in January 2010 that Marsh had been to see him, that Marsh was concerned about GM canola and that "*if GM material of some sort gets onto Stephen's place he may lose his certification*"¹¹⁰. Baxter said that he told Robinson that we wanted to avoid canola going from Seven Oaks to Eagle Rest. He

¹⁰⁵ TB 723

¹⁰⁶ Robinson T 935

¹⁰⁷ Baxter Statement para [45]

¹⁰⁸ Baxter Statement para 45(2)-(4)

¹⁰⁹ Baxter Statement para [41]

¹¹⁰ Baxter T 760-761

explained his reason for telling Robinson that information was because of the risk that Marsh would lose his certification. Baxter then gave evidence that in the context of that discussion Robinson said that as long as Baxter followed the Monsanto protocols there shouldn't be any problem.

87. There are obvious reasons why Baxter was concerned to give that evidence. First, it would tend to show some concern on his part to avoid any impact on Marsh's certification. Having given evidence about the 2008 conversation, Baxter could hardly claim ignorance of the risks that Marsh faced.
88. Secondly, it would suggest a willingness on the part of Baxter to obtain advice on the risks to Marsh and how it might be avoided.
89. As submitted below, compliance with the Monsanto Protocols is not an answer to either cause of action, but more fundamentally the Court should reject the evidence of Baxter about the conversation in early 2010.
90. That is so for the following reasons.
 - a) First, there is no mention of the conversation in the Baxter statement. Had it occurred, given the reliance on the receipt of advice¹¹¹, it would have been included in the statement;
 - b) Secondly, the evidence of the conversation commenced on an entirely equivocal basis ("I might have discussed"...Not 100% sure",.....I would have presumed I would have discussed...")¹¹² yet later Baxter said he had no doubt about it;
 - c) Thirdly, and most importantly, Robinson said he was not told of these things and had he been told he would have given different advice¹¹³.
91. Robinson gave clear evidence that the discussion took place in late February or early March 2010.
92. By this time, Robinson had for some months been aware of the potential commercial

¹¹¹ See eg Amended Defence para 23(2) particular (e)

¹¹² Baxter T 760

¹¹³ Robinson T 941

release of RURC. He had followed the 2009 trials¹¹⁴, discussed with a group of his colleagues including Tim Trezise¹¹⁵ and had experience with canola over many years. He was keen to be in a position to advise clients on RURC¹¹⁶.

93. Robinson was aware that:

- a) canola produced volunteers after the movement of seed¹¹⁷;
- b) that volunteers could be found in adjacent paddocks¹¹⁸;
- c) that swathing provides an opportunity for seed to be moved by wind¹¹⁹; and that swaths containing pods could be caught and blown by the wind;¹²⁰

94. Robinson agreed with the Farmanco advice of March 2010 (which reflected his own knowledge and understanding by the end of 2009)¹²¹ that where a GM crop is on a boundary fence it would be necessary to discuss management options including for the possibility of strong winds moving swaths onto neighbour's paddocks¹²².

95. At this point Robinson had no knowledge of organic standards and "never needed to look at them"¹²³. His own belief was that canola volunteers were easy to manage and their presence would be unlikely to affect the status of non GM canola crops¹²⁴.

96. Returning to the conversation in early 2010, Robinson said that he was told that Baxter's neighbour was an organic farmer. However, he was not told, and did not know, that Marsh had complained about canola volunteers in 2008 and that he was concerned about losing his organic certification if GM canola was present on his farm. There was no discussion of

¹¹⁴ Robinson T 923

¹¹⁵ Robinson T 929

¹¹⁶ Robinson T 924

¹¹⁷ Robinson T 921

¹¹⁸ Robinson T 920

¹¹⁹ Robinson T 921-922

¹²⁰ Robinson T 921-922

¹²¹ Robinson T 934

¹²² Robinson T 933

¹²³ Robinson T 923

¹²⁴ Robinson T 922; 934

organic standards, and Baxter did not discuss or seek advice on organic certification¹²⁵.

97. Robinson specifically denied being told both about the 2008 canola volunteers and that if there was a GM canola volunteer on Marsh's property his organic certification would be placed at risk¹²⁶. Importantly, Robinson said that if he was told of those matters he would have told Baxter to be careful planting GM canola on the boundary and that there was a risk of swathing material moving on to Marsh's property¹²⁷.
98. That advice would have been consistent with Robinson's understanding of canola and of the importance of segregation. Moreover, Robinson had never had occasion to examine organic standards and the suggestion that volunteer canola might affect the status of non GM crops would have been new to him. It would have provoked the response that he said he would have given had Baxter informed him of all the facts.
99. Even if the fact that receiving advice from an agronomist were relevant to the defence, the failure of Baxter to seek advice on a proper factual basis disentitles him from relying on the advice of his agronomist. Rather than simply relying on the Monsanto protocol, Robinson would have advised Baxter to be careful planting and of the risks in swathing.

BAXTER SWATHS RUR CANOLA

100. Baxter harvested the RUR canola in November 2010. In all of the years he had planted canola since 2002, Baxter harvested his canola crop by "direct-heading" it.¹²⁸
101. The decision to swath the GM canola was made at the end of October 2010¹²⁹.
102. Swathing cuts the stem of the plant. The swather had a width of about 25 or 30 feet. The plants are then concentrated in windrows of about 1.5m width and 1m height¹³⁰. They are then exposed to the elements including sun and wind.

¹²⁵ Robinson T 936

¹²⁶ Robinson T 941

¹²⁷ Robinson T 941

¹²⁸ Baxter T 735.

¹²⁹ T826

¹³⁰ T827

103. Baxter is an experienced canola farmer. He had always direct harvested his canola crop¹³¹. He owned his own harvester, and could determine when to harvest without being reliant on contractors¹³².
104. He had not experienced a significant problem with pod shattering, and could achieve an evenly ripened crop¹³³. Two of the advantages of swathing over direct harvesting¹³⁴ were not of any significance to Baxter and were certainly not reasons for him to abandon direct heading either before or after 2010.
105. In 2011 Baxter planted GM canola on Baxters Block. There was no impediment to him swathing his crop but he decided to direct head the crop. The reasons given in evidence was that he decision to direct head because that's what he had always done with canola¹³⁵.
106. In late September or 1 October 2010, Marsh provided Baxter with a document titled "Notice of Intention to Take Legal Action"¹³⁶. It included an extract from the NASAA Organic Standards.
107. It was both proper and prudent for Marsh to provide Baxter with a further warning about the consequences of Baxter's conduct and the potential liability it involved. At this point, Baxter had not decided on the mode of harvest. The notice specifically referred to swathing.
108. Baxter said in cross examination that he "presumed nothing would get on [Marsh's] property" as a result of swathing on the basis that with the buffer zone and road and tree lines¹³⁷. The reference to buffer zone was a reference to the 5m buffer suggested by Monsanto.
109. It was important to Baxter's account that he did not believe that there was a real chance

¹³¹ T735

¹³² T736

¹³³ T 736

¹³⁴ McInnery

¹³⁵ T833

¹³⁶ TB 250

¹³⁷ Baxter T 829

that GM canola would be blown on to Eagle Rest. For the reasons given above he had precluded himself from getting any advice on the matter from Mr Robinson by failing to give an account of the 2008 incursion and the threat to Marsh's certification.

110. Recognizing the potential importance of the September 2010 document, and the danger of being seen to ignore it, Baxter gave evidence in cross examination that he showed the document to Robinson "to make him aware of the facts"¹³⁸. He further said that he discussed with Robinson the potential for the windrows to be blown from Seven Oaks to Eagle Rest¹³⁹.
111. Once again there is no mention in Baxter's statement of either showing the document to Robinson or discussing the risk of GM canola blowing on to Eagle Rest. Robinson denied ever having seen the document¹⁴⁰. He could not recall any discussion at the time of the decision to swath about Marsh or that he was an organic farmer.
112. The evidence of Baxter should not be accepted. Robinson would surely have remembered a document entitled "Notice of Intention to Take Legal Action" and, as he made clear in his evidence, had he been aware of the potential significance of GM canola to organic certification he would have warned Baxter about planting on the boundary and advised him of the risk of swathing¹⁴¹.
113. The fact is that by October 2010, Baxter had determined to swath the GM crop on Two Dams and the Range paddocks. Marsh's letter of warning had no influence on Baxter's decision at all, because he was indifferent to the potential harm that both the proximity of the crop and swathing might cause.

THE INCURSION OF GM CANOLA ON EAGLE REST

114. On 30 November 2010, Marsh observed canola swaths on each of paddocks 7, 8, 10, and 12

¹³⁸ Baxter T 825

¹³⁹ Baxter T 831

¹⁴⁰ Robinson T 955 and 956

¹⁴¹ Robinson T 941

of Eagle Rest,¹⁴² and observed a swath caught in the fence on the boundary between paddock 9 and paddock 7.¹⁴³ He did not attempt to count all of the swaths at that time.¹⁴⁴

Marsh observed that the pods of some of the canola swaths had shattered.¹⁴⁵ Marsh tested four samples of the swathed material using a Trait RUR test kit and each tested positive.¹⁴⁶

115. Marsh notified NASAA of the incursion of a facsimile to Stephanie Goldfinch of NASAA dated 1 December 2010, referring to contamination by swaths extending to 800 metres within the boundary of Eagle Rest.¹⁴⁷ Marsh sent another facsimile to Ms Goldfinch the following day, referring to the contamination of paddocks 7, 8, 9, 10 and 12 and noting that “there are hundreds of canola swaths and thousands of seeds spread across our land”.¹⁴⁸ At that time, paddocks 7, 8 and 9 were stocked with sheep¹⁴⁹ and Marsh observed the sheep eating the canola swaths.¹⁵⁰

116. Between 2 and 3 December 2010, Marsh began to map out the extent of the incursion of swaths onto Eagle Rest,¹⁵¹ and sent a map to Ms Goldfinch showing the extent of the contamination prepared on 3 December 2010.¹⁵²

117. On 4 December 2010, Kathe Purvis, an organic inspector employed by NASAA, inspected Eagle Rest. Ms Purvis recorded her observations in a pro forma NASAA Inspection Checklist and Report.¹⁵³ Ms Purvis completed the “Paddock and Infrastructure History” section of the form, noting:

Extensive incidents [sic] of canola swathe plants with full and broken seed head sighted in paddock 7, 8, 10 and 12. See photos taken on the day of the inspection.

Sheep were grazing in paddock 7. Here canola heads had obviously been

¹⁴² Marsh, T 258.

¹⁴³ Ibid.

¹⁴⁴ Ibid, at T 257.

¹⁴⁵ Ibid, at T 262-3.

¹⁴⁶ TB 291.

¹⁴⁷ TB 291.

¹⁴⁸ TB 292.

¹⁴⁹ Ibid, at T 287.

¹⁵⁰ Ibid, at T 265 and T 336.

¹⁵¹ Marsh, T 263.

¹⁵² TB 318.

¹⁵³ TB 293.

eaten with only stalks remaining in place.

In paddock 10, canola plants were noted in the fenceline and the paddock of origin could be seen across the road ...

A strong southerly wind was blowing at the time of the inspection. Samples of [the] canola material were collected and photographs taken to record what seemed extensive contamination across several paddocks. When it was compared with the map the issue seemed to affect around 50% of the property due to the volume of the plants material that were on site, the way it was moving along with the wind and the continuing strong wind that was blowing from the south.

118. Ms Purvis added a comment at the end of that section of the Inspection Checklist and

Report form as follows:

When I rang Steve after the inspection to confirm some details, he said he had noticed evidence of the incursion further into his property since the time of the inspection and that now paddock 13 was also affected. I suggested he take samples and photographs, and inform NASAA.

119. In section G of the Inspection Checklist and Report (Genetically Modified Organisms), Ms

Purvis wrote:

At inspection the following detail was noted in addition to the above:

- total paddocks affected are now amended to 7, 8, 9, 10, 12 with concerns for impact in paddock 11.
- In paddocks with sheep it was noted that seed heads had been eaten and only stalks remained.
- The AG Department visiting team included Rosalie MacCauley, Senior Biotechnology Development Officer, Mikes Davies Senior Seed Certification Officer ... and Bill Webb, Director of First Steps Planning and Development. The meeting took place after 9.50 am 3.12.10 and samples were taken by the group.
- During the inspection a strong southerly wind was blowing and some plants noted in paddock 10 were blowing like tumbleweed. Plant material was noted caught in the southern fenceline where the GM canola swathed crop could clearly be seen across the road.
- Some swath plant material was noted with seed pods cracked and numerous seeds scattered on the ground.
- The total of paddock 7 would be affected by manure drop as sheep have eaten the canola and have access to the whole paddock.
- Samples were taken by this inspector as marked on the aerial map and noted by GPS locations. The four samples taken were only a small proportion of the total canola material noted on the certified land

120. On 8 December 2010, Marsh prepared another map to show the additional contamination of Eagle Rest and sent this map to Ms Goldfinch.¹⁵⁴

¹⁵⁴ TB 320.

121. On 21 December 2010, Claire Coleman, a self-employed organic farm inspector engaged by NASAA, visited Eagle Rest.¹⁵⁵ Ms Coleman collected another batch of swath material for testing, after the sample collected by Kathe Purvis was mislaid in the post.¹⁵⁶ Ms Coleman also recorded her observations in the pro forma NASAA Inspection Checklist and Report and concluded:¹⁵⁷

... it would appear that the entire south and south-western section of the Marsh's property has been contaminated with canola from a neighbouring property. Paddocks 7, 8, 9, 10, 11, 12 and 13 have all had stems of canola found in them with the pattern of contamination extending along the road in paddocks 10, 12 and 13. A line drawn along the extent of the contamination to the north and east would amount to approximately one half of the property being knowingly affected.

122. Ms Coleman annexed to her Inspection Checklist and Report photographs and a map showing the locations where the photographs had been taken.¹⁵⁸

123. In early April 2011, Marsh recorded the locations of approximately 240 swaths lying on Eagle Rest with a GPS device.¹⁵⁹ He annotated an aerial photograph of Eagle Rest to show the locations of each swath and created a legend to show its precise location.¹⁶⁰ At that time, sheep were still being grazed on paddocks 7 and 8.¹⁶¹

124. The evidence shows that the conditions on Eagle Rest in December 2010 were dynamic: southerly wind were blowing canola swaths around the farm; livestock had access to and were moving around paddocks 7, 8 and 9. Some canola seed pods were observed by Marsh and Ms Purvis in early December 2010 to have shattered. Around that time, in early December, Marsh had attempted to contain swaths by fencing those he found,¹⁶² and considered that he might be able to remove the swaths and the soil surrounding them. However the swaths were too numerous to enable Marsh to continue to try to contain the

¹⁵⁵ TB 325.

¹⁵⁶ Goldfinch, T 546.

¹⁵⁷ TB 326.

¹⁵⁸ TB 328-331.

¹⁵⁹ T 286.

¹⁶⁰ Exhibit 10, map of Eagle Rest annotated with GPS locations and handwritten legend.

¹⁶¹ Ibid.

¹⁶² Marsh, T 273.

swaths in this way.¹⁶³

125. The incursion of GM canola on Eagle Rest was extensive by early December 2010. The evidence of the conditions on Eagle Rest during the first week of December alone compels a finding that no, or no meaningful, reduction in the extent of contamination could have been achieved had Marsh attempted to collect and remove the canola swaths prior to April 2011.
126. Moreover, the evidence of the incursion of RUR canola swaths onto Eagle Rest in November 2010 to the extent and in the circumstances observed by Marsh and by Kathe Purvis and Claire Coleman should be considered in the light of the expert evidence led by both parties relating to the viability and persistence of canola seeds and the persistence of volunteer canola plants. That sum of that evidence supports the following findings of fact:
- a) the GM canola swaths found on Eagle Rest in November 2010 were carried there by wind from windrows on the Range and Two Dams paddocks on Sevenoaks;
 - b) each seed pod on the swathed plant would hold between 20 and 80 canola seeds;¹⁶⁴
 - c) canola seed held within the seed pods would have been mature and germinable at the time when the swaths were carried onto Eagle Rest;¹⁶⁵
 - d) as a result of the movement of swaths from Sevenoaks onto Eagle Rest, a large, indeterminate volume of RUR canola seed would have been scattered on paddocks 7, 8, 9, 10, 11, 12 and 13;¹⁶⁶
 - e) it is unlikely that the seed distribution would have been uniform;¹⁶⁷
 - f) once the swaths had been carried onto Eagle Rest, they continued to be blown about the farm in the wind;

¹⁶³ Ibid at T 272.

¹⁶⁴ Powles, T 974.

¹⁶⁵ Ibid at T 975.

¹⁶⁶ Preston, T 791 (relating to "seed rain").

¹⁶⁷ Ibid at T 789.

- g) some of the canola material and seeds would have been spread by sheep treading upon and eating it;
- h) the scattered seed would have been difficult to detect on the soil due to its small size and dark colour;¹⁶⁸
- i) an indeterminate amount of seed would enter the seed bank;¹⁶⁹
- j) that seed would remain viable for at least 2 growing seasons;¹⁷⁰ and
- k) volunteer canola plants could have been expected to appear for around 3 years after the incursion of the seeds onto Eagle Rest.¹⁷¹

THE DECERTIFICATION OF EAGLE REST

127. On 10 December 2010, Ms Goldfinch reviewed the report of the Inspection Checklist and Report of Kathe Purvis. In her review¹⁷² she cited cl 3.2.9 of the NASAA Standard as the major area of non-compliance, noting:

Paddocks 7, 8, 9, 10, 11, 12 and 13 are contaminated with GMO canola plants and seed and/or sheep urine and droppings after sheep consumed GMO canola. Paddocks 7, 8, 9, 10, 12 and 13 are suspended. For this land to resume organic status, paddocks must be eradicated of GM material and verified by inspection during the cropping season.¹⁷³

128. Ms Goldfinch decided to suspend the certification of Eagle Rest. The suspension was notified by letter to Marsh on 10 December 2010.¹⁷⁴

¹⁶⁸ Powles, T 975.

¹⁶⁹ Rüdelsheim, p 19.

¹⁷⁰ Preston, T 785; Bishop, T362.

¹⁷¹ Monsanto 2010 Crop Management Plan at TB 1233; Exhibit 16A Report of Dr René van Acker dated 6 November 2012 at pp 8-9; Exhibit 16C Report of Dr van Acker dated 7 January 2014 at p 4; Exhibit 27, Report of Dr Preston dated 4 December 2013 at p 7.

¹⁷² TB 314.

¹⁷³ Ms Goldfinch gave evidence that the omission of a mention of paddock 11 in this note was an oversight at T 563.

¹⁷⁴ TB 323.

129. On 29 December 2010, DTS Food Laboratories provided the results of tests on the canola swaths found on Eagle Rest to NASAA.¹⁷⁵
130. On 29 December 2010, Ms Goldfinch decided to de-certify Eagle Rest, and took into account the following factors in reaching her decision:¹⁷⁶
- a) the extent of GM canola present on Eagle Rest;
 - b) at the time of Ms Purvis' inspection of Eagle Rest, a strong southerly wind was blowing and canola plants were being blown around in one paddock;
 - c) given the factors mentioned in (a) and (b) above, the risk of contamination by GM canola in parts of Eagle Rest appeared to be unacceptable; and
 - d) it was not practicable to de-certify only parts of each affected paddock on Eagle rest.
131. On 8 October 2011, after he and his wife had searched paddocks 11, 12 and 13, Marsh notified NASAA by email that volunteer canola plants had germinated in paddocks 12 and 13. Marsh had not yet searched paddocks 7-10.¹⁷⁷ Claire Coleman inspected Eagle Rest on 24 October 2011, and recorded her observations in a pro forma NASAA Inspection Checklist and Report. Ms Coleman observed that some canola volunteers had germinated in paddocks 11-13, and that Marsh had marked and fenced them so that they could be monitored.
132. On 30 March 2012, Diane Gore, a certification reviewer, formerly of NASAA, reviewed Claire Coleman's Inspection Checklist and Report. Ms Gore's review recorded the previous non-compliance (classified 'major') with cl 3.2.9 of the NASAA Standards. Ms Gore gave evidence about clauses of the NASAA Standards reflecting a five-year prohibition on organic certification in certain cases of GM contamination, and other clauses reflecting lesser periods of prohibition in cases where the contamination was not the fault of the

¹⁷⁵ TB 339.

¹⁷⁶ Exhibit 19, Goldfinch Statement dated 25 February 2013 at [26-7]; PD314.

¹⁷⁷ TB 383.

operator.¹⁷⁸ Ms Gore had noted these issues in her report for discussion by senior staff at NASAA. Ultimately, however, as 12 months had not yet passed since the time of that non-compliance, there was no occasion for Ms Gore or NCO to make any decision about recertifying Eagle Rest.¹⁷⁹

133. On 3 April 2012 a letter was sent by NASAA to Marsh commending him for his ongoing monitoring and notifying him that a reconsideration of the certification status of each of the de-certified paddocks on Eagle Rest would occur following the next inspection.¹⁸⁰
134. Following an additional inspection of Eagle Rest by Claire Coleman in April 2012,¹⁸¹ Ms Denham reviewed Ms Coleman's Inspection Checklist and Report.¹⁸² Ms Denham included in the report some feedback to Ms Coleman relating to cl 3.2.8 of the NASAA Standards, noting that the 5-year rule stipulated in that clause applied in the case of intentional sowing.¹⁸³ Ms Denham noted that Marsh should be informed, as per the 29 December 2010 letter notifying decertification, that Eagle Rest would be recertified following the eradication of GM canola, to be verified during the next cropping season.
135. Consistent with that decision, following another annual inspection of Eagle Rest on 18 October 2012 by Kathe Purvis,¹⁸⁴ reviewed in January 2013,¹⁸⁵ NASAA wrote to Marsh to inform him that recertification might be granted during the next flowering season upon certain conditions.¹⁸⁶

¹⁷⁸ Gore T 456.

¹⁷⁹ Gore T 428 and 452-3.

¹⁸⁰ TB 422.

¹⁸¹ TB 427; the report primarily relates to the parallel production systems in place (see TB 431).

¹⁸² TB 448.

¹⁸³ TB 451.

¹⁸⁴ TB 452.

¹⁸⁵ TB 476.

¹⁸⁶ TB 480.

136. Mr Ayachit, then in charge of certification at NCO reviewed Ms Purvis' report of that inspection and, in November 2013, decided to re-certify Eagle Rest and notified Marsh accordingly.¹⁸⁷

137. As the chronology discloses, the relevant decision makers in respect of the de-certification and subsequent re-certification of Eagle Rest were Ms Goldfinch and Mr Ayachit.

NASAA WAS ENTITLED TO DECERTIFY EAGLE REST

138. Baxter seeks to put in issue the legal entitlement of NASAA to decertify Eagle Rest. That question turns on the construction to be given to the NASAA Standard. Before coming to that question there are two anterior questions that need to be exposed.

139. First, what is the relevance of the construction to the causes of action pleaded. Secondly, what is the nature of the process the Court undertakes when it comes to construe the NASAA Standard.

The relevance of the construction of the NASAA Standard

140. Baxter admits that NASAA gave notice of the decertification and that the relevant portion of Eagle Rest remained decertified until 25 November 2013¹⁸⁸. There is no issue that the land was in fact decertified and that the loss of decertification resulted in loss.

141. In paragraph 25 of the Amended Statement of Claim, it is pleaded that as a result of the presence of GM canola and consequential loss of certification the Marsh's could not use Eagle Rest to grow or raise certified organic produce. Baxter pleads to that paragraph by alleging that certification was lost because of the NASAA decision and that NASAA was not acting reasonably in making the decision¹⁸⁹. Baxter thus positively pleads that certification was lost because NASAA was not acting reasonably and this is repeated in paragraph 27

¹⁸⁷ TB 513.

¹⁸⁸ Amended Defence para 13 and 14

¹⁸⁹ Amended Defence para 15(4) and (5)

which adds as a ground of unreasonableness that, to the extent it permits decertification, the NASAA standard is itself unreasonable.

142. Baxter does not specifically plead that NASAA were not authorised or entitled to decertify a portion of Eagle Rest in the circumstances that obtained in November and December 2010. Rather, questions of construction are mixed up with the allegation that in making its decision, NASAA did not act reasonably.
143. To describe the NASAA decision and the NASAA Standard as unreasonable does not describe a legal standard to which any particular consequence attaches. There is no occasion for the Court to determine whether the decision of NASAA was correct or preferable or whether it was reasonable.
144. To the extent the construction is relevant it can only be in the context of causation: whether Baxter's liability extends to the Marshes' loss of certification pursuant to s 5C(2) of the *Civil Liability Act* (considered in detail below). As the plurality of the members of the High Court held in *Medlin v State Government Insurance Commission*:¹⁹⁰

The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect cause of the intervening act or decision.

The approach to construction

145. The relationship between the Plaintiffs and NASAA is contractual. The Standards are incorporated into the contract and provide the basis on which the decision to certify is grounded. NASAA is bound pursuant to its contracts with operators to certify their farms,

¹⁹⁰ (1994-1995) 182 CLR 1 (**Medlin**) at 6 per Deane, Dawson, Toohey and Gaudron JJ; see also the discussion of "the relevant question" in terms of reasonableness at 11.

production and processing facilities against the NASAA Standards (see, e.g., NASAA's contract with Marsh).¹⁹¹

146. In *Pacific Carriers Ltd v BNP Paribas*¹⁹² the High Court reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].
147. In *McCann v Switzerland Insurance Australia Ltd*¹⁹³ Gleeson CJ observed "Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure".
148. When construing the Standards it is also relevant that a primary purpose is the protection of the integrity of the organic market and the protection of consumers. In that sense an analogy can be drawn with the construction of the constitution of companies on which third parties rely.

¹⁹¹ TB 0040.

¹⁹² (2004) 218 CLR 451 at 461-462 [22]

¹⁹³ (2000) 203 CLR 579

149. Addressing the statutory contract between a company and its shareholders constituted by the Memorandum and Articles Finn J has observed¹⁹⁴:

Nonetheless, [the statutory contract] is not a contract which in all respects attracts those principles which are applicable to contracts in general or to commercial contracts in particular. The reason for this is that corporate constitutions historically have served public purposes going beyond the mere delineation of the rights and obligations of the contracting parties for their benefit.

150. That approach, which is apt to apply to the Standards, reinforces the need to avoid consideration of the subjective considerations and assumptions to particular individuals, be they farmers or employees of NASAA as to the meaning of the Standards.

151. It also reinforces the view that the Standards are not primarily about the interests of individuals operators whose own position is subordinated to the objective of delineating and protecting the organic market and consumers within it.

152. Baxter devoted much time at trial to cross-examining Marsh and witnesses from NASAA (Sachin Ayachit, Janet Denham, Stephanie Goldfinch and Diane Gore) about the meaning of the term 'contamination'.¹⁹⁵ The question of the meaning of the term "contamination" is one of contractual construction, having regard to the NASAA Standards as a whole.¹⁹⁶ Individual interpretations of the meaning of "contamination" NASAA Standards by those witnesses cannot assist the Court to construe the term. Ultimately, the construction of that term bears upon the question (discussed above) of NASAA's entitlement to decertify Eagle Rest in accordance with the NASAA Standards.

153. The same can also be said of the hypothetical scenarios to which Baxter also devoted much time at trial when cross-examining NASAA witnesses. The scenarios included one swath

¹⁹⁴ *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1812; (2005) 56 ACSR 263; approved on appeal *Lion Nathan Australia Pty Ltd (ACN 008 596 370) v Coopers Brewery Ltd (ACN 007 871 409) and Others* [(2006) 156 FCR 1; see also *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207.

¹⁹⁵ E.g., cross-examination of Denham at T 630-1; cross-examination of Goldfinch at T 511; cross-examination of Ayachit at T 683; cross-examination of Gore at T 430.

¹⁹⁶ *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.

lying on a sheep's back;¹⁹⁷ someone laying a GM canola swath gently on the ground and walking away;¹⁹⁸ only one swath on a paddock;¹⁹⁹ swaths blown without seeds;²⁰⁰ a sheep breathing in pollen from a GM canola plant.²⁰¹

154. Baxter apparently sought to test whether, in the witness's view, the various scenarios might amount to contamination within the meaning of the NASAA Standards. Again, the individual views of NASAA witnesses in response to hypothetical scenarios (unrelated to the facts upon which their decisions were in fact based) are not relevant to the question of whether or not NASAA's decision (made by the responsible decision maker) to decertify Eagle Rest was reasonable having regard to the terms of the NASAA Standards.
155. It is also relevant that Baxter is not a party to the contract. Both parties to the contract maintain that it was correctly applied by NASAA. Baxter attacks the decision of NASAA under the cloak of reasonableness. The decision of NASAA is not subject to judicial review as if it were an administrative decision.
156. In order to succeed in his claim that NASAA was not entitled to decertify²⁰², Baxter would have to persuade the Court that Marsh would have had a successful claim against NASAA for breach of contract. Such a contention would be bound to fail.
157. Further, as explained below, NASAA relied on cl 3.2.9 as the basis for the decision of 29 December 2010 to decertify portions of Eagle Rest. It was open to it to do so. However, the question that Baxter raises is whether NASAA had the power to decertify, not whether it correctly identified that power. It is submitted that in addition to cl 3.2.9, cl 3.2.1 was also available as a basis for the decision.

¹⁹⁷ E.g., at T 511; T 627; 629.

¹⁹⁸ T 627.

¹⁹⁹ T 574.

²⁰⁰ T 535; T 626.

²⁰¹ T 631.

²⁰² Defendants opening T 120

THE CORRECT CONSTRUCTION OF THE NASAA STANDARDS

158. In construing the NASAA Standards, it is necessary to view them in their entirety. Taking a single word, such as contamination, out of context is likely to distort the meaning of the Standards as a whole.
159. The NASAA Standards include both general principles and specific standards. The stated purpose of the NASAA certification is to supply a total quality management system for organic production: cl 1.3 of the NASAA Standards.
160. The aims and principles of the NASAA Standards are premised on the notion that “[o]rganic agriculture is a holistic system built upon natural ecological processes” (cl 1.4). It is a condition of organic certification by NASAA that “an operator can demonstrate that the have achieved a farming system that is compliant with the relevant sections of this Standard.”
161. The NASAA Standard is self evidently concerned with a system of production and not just the physical condition of the products that are produced. There are many examples, such as crop rotation, compliance with which may not be physically measurable in any particular crop or livestock.
162. The NASAAA Standard is also expressly permissive²⁰³, in the sense that it identifies products which may be used within the system of production. That which is not expressly allowed is prohibited.

Prohibition of GMOs in the NASAA Standards

163. Part 3.2 of the NASAA Standards relates to GMOs. The general principle of part 3.2 is in absolute terms (at CB 1317), that GMOs “have no place in organic production and processing systems. Even where evidence of GMOs is not detected in the finished product,

²⁰³ see definition of “prohibited”

the deliberate or negligent exposure of organic production systems or finished products to GMOs is outside organic production principles.”

164. In light of that principle, presumably as a means of enabling operators to comply with the standards which follow, part 3.2 includes the following recommendation (at CB 1317):

Every potential source of GMOs in the supply and input chain, and any sources from historic or adjacent usage, should be identified and operators should familiarise themselves with the vectors and modes of potential transfer of material with modified DNA to avoid contamination.

Clause 3.2.9

165. Clause 3.2.9 provides:

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

166. There are a number of critical features of cl 3.2.9.
167. **First**, it provides a source of power as well as stipulating the criteria on which the power can be exercised. Given the protective nature of the power there is no reason to read the provision as subject to the specific powers in relation to sanctions.
168. **Second**, the criterion of operation does not depend on any conduct or default on the part of the operator. The provision operates where NASAA considers there to be an unacceptable risk of contamination. It identifies the type and extent of risk: namely that it be unacceptable and be a risk of contamination but it is silent on its causes.
169. The standard of unacceptable risk imports a broad evaluative judgment and gives that judgment to NASAA.
170. In its own immediate context, that feature must be seen to be deliberate. In other parts of part 3.2, the NASAA Standards identify obligations on the part of operators.
171. **Third**, clause 3.2.9 operates where there is a risk of contamination. It does not require contamination to be established or even likely. In the context of the Standards as a whole, and the express recognition that GMOs have no place in organic production systems, the clause is entirely protective of the integrity of the system and the interests of the consumer.

172. The existence of a risk of contamination is not negated because, after the event, the operator had options to address the contamination.
173. A construction that advances that protection should be adopted. No purpose would be served by Baxter's construction that would advance the purpose of the Standards. The dichotomy between a risk of contamination of the product, and a risk of contamination of the land on which the product is produced is not reflected in the language actually used nor its purpose.
174. **Fourth**, the relevant risk is "*contamination from GMOs or their derivatives*". The clause identifies the contaminant but not the thing that is at risk of being contaminated.
175. In the context of a system that is permissive and which describes a system of production as much as its products, contamination means the presence of prohibited substances within the production system including in the case of an agricultural system: the land, inputs, livestock and produce.
176. Given the scope, structure and purpose of the NASAA Standards there is no reason to give a narrow construction to the concept of contamination by limiting it to genetic contamination or contamination of product.
177. Textual features of the Standards demonstrate that a narrow construction of contamination is not warranted.
- a) first, in cl 3.2.11, contamination is specially confined to contamination of "organic product". That express limitation strongly suggests that the unconfined use of contamination in cl 3.2.9 is broader.
 - b) further, on the Defendant's construction, the words in cl 3.2.11 "contamination of organic product" would be superfluous. On the other hand cl 3.2.10 refers to a risk of contamination of an organic production area.

- c) second, when consideration is given to how clause 3.2 contemplates that GMOs might be introduced or used on a certified organic farm, it is clear that contamination cannot be limited to end product.
- d) cl 3.2.1 refers to the introduction or use of GMOs as seed, feed, propagation material, inputs, vaccines, crop protection materials; cl 3.2.3 refers to use as ingredients, additives, processing aids; cl 3.2.5 refers to “explore” to GMOs; and cl 3.2.10 refers to a risk of contamination of a “certified production area”. Given the breadth of the non exhaustive list of means by which GMOs might be used or introduced to a production area, many of which may not finding physical reflection in final product, it would be a striking construction of cl 3.2.9 to limit contamination to genetic contamination of the final product.

178. On the proper construction of the Standards, it was open to NASAA to conclude that by reason of the incursion of hundreds of GM canola swaths and the concurrent dispersal of an unknown number of viable canola seeds that there had been a contamination of Eagle Rest from GMOs and that the continued presence of viable GM seeds on Eagle Rest supported a conclusion that there was an unacceptable risk of contamination until the material had been removed.

179. The breadth of the terms of the prohibition on introducing GMOs into an organic system, and the absolute terms of the stated incompatibility of GMOs and organic farming, weigh against a narrow interpretation of “contamination” as meaning either genetic transfer or admixture within the end product.

Clause 3.2.1

180. Clause 3.2.1 prohibits the “deliberate use and or the negligent introduction of genetically engineered organisms or their derivatives to organic farming systems or products.” There is nothing in the language of this standard, or in the general principles which inform its construction, to confine it to deliberate conduct or negligence on the part of the operator.

181. NASAA certification entitles the certified farmer to advertise that status domestically (by advertising and labeling), and gain access to an export market for the farm produce (by obtaining an Organic Produce Certificate). It would be an inadequate protection of that status to exclude negligence or deliberate conduct of a third party resulting in contamination of the land.
182. Once GMOs have been brought (negligently or otherwise) onto land, it would be impermissible for a farmer to integrate the contaminant into the land. In a context where part of the land is used as pasture (both as a source of feed and for the enrichment of the soil) should GMO plant material be incorporated into the sward²⁰⁴ an operator would be prohibited by cl 3.2.1 from using that pasture as part of the organic system. Further, by using the pasture as feed the farmer would also be in breach of cl 6.5.1 of the NASAA Standard.
183. Given the prohibition on the deliberate or negligent use of pasture comprising GM plants found in cl3.2.1, Marsh could not both use the pasture and demonstrate compliance with cl 3.2.1 at least for so long as viable seeds remained incorporated in the sward.
184. Such conduct would constitute a deliberate use of GMOs as part of the pasture.

The meaning of contamination in the NASAA Standard

185. To define “contamination” solely with reference to the “end product” ignores the fact that the term “organic” (as defined in the National Standard and the IFOAM Norms) describes a both system, and its holistic aspect. Support for this broader interpretation of the term “contamination” can also be found in the prefatory words of the general principle set out at 3.2 (“even where evidence of GMOs is not detected in the finished product”).
186. The broader definition of “contamination” for the purposes of the NASAA Standards for which Marsh contends accords with the evidence of Andrew Bishop. On the evidence of Mr Bishop, there is no basis for confining the meaning of contamination to genetic transfer or,

²⁰⁴ Exhibit 32A, at question 4.

alternatively, admixture. According to Mr Bishop, contamination with GM crops includes the presence of seeds in land,²⁰⁵ the movement of seed or plant material to non-GM areas²⁰⁶ and within crops²⁰⁷ and the contamination of seed source.²⁰⁸ Mr Bishop identified the particular concerns of the Tasmanian Government relating to the co-existence of GM and organic farms, stating that there is nil tolerance for the organic production system.²⁰⁹

187. It is important to have regard to the purposes and organising principles of the National Standard and the IFOAM Norms²¹⁰ because those rules reflect the intention that lay behind the drafting of the NASAA Standards, in that the NASAA Standards are intended to comply with them.²¹¹ The National Standard sets out both general principles and standards giving effect to them (see the reference to “distinct components” in the Introduction at CB1409).

The National Standard

188. The construction of the NASAA Standards described above is consistent with the National Standard.

189. Clause 1 of the National Standard defines its scope relevantly as follows:

- 1.1 This Standard stipulates the minimum criteria that must be met by operators before any certified product can be labeled as in-conversion, organic or bio-dynamic.
- 1.2 A product that complies with this Standard may be described by the terms organic, bio-dynamic (or words of similar intent), in the labeling, advertising material and/or commercial documents.
- 1.3 This Standard applies to the following products:
 - (a) unprocessed products from plants, animals and other cultured organisms;
 - (b) processed products derived mainly from (a) above.
- 1.4 Paragraph 1.3 (above) does not apply where these terms clearly have no connection with the production method.
- 1.5 Products or by-products that:

²⁰⁵ At T 365.

²⁰⁶ At T 364.

²⁰⁷ At T 356.

²⁰⁸ At T 357.

²⁰⁹ At T 364.

²¹⁰ International Federation of Organic Agriculture Movements (IFOAM) Basic Standards for Organic Production and Processing at TB 1575 (the IFOAM Norms).

²¹¹ NASAA Standards, cl 2.11 at TB 1311.

- (a) are derived from genetic modification technology ...
- (e) are not compatible with the principles of organic and biodynamic agriculture and therefore are not permitted under this Standard.

The definition of “organic” in the National Standard

190. “Organic” is defined in cl 1 as a method, not as ingredients:

[organic] means the application of practices that emphasise the:

- use of renewable resources;
- conservation of energy, soil and water; and
- recognition of livestock welfare needs; and
- environmental maintenance and enhancement, while producing optimum quantities of produce without the use of artificial fertiliser or synthetic chemicals.

191. Thus, the term “organic” describes both a method or system informed by certain agricultural practices and principles, and the product of such a system. The system aspect cannot therefore be ignored when considering the meaning of that term. This applies equally in the case of a definition of “organic” as a labeling term. The use of label here does not abstract the term “organic”. Instead refers to the qualities the label connotes, which may be gleaned from other provisions of the NASAA Standards and from the National Standard and the IFOAM Standard.

192. A construction of the National Standard or the NASAA Standards which ignores contamination of the system and focuses instead on the constituents of the product deprives the term “organic” of meaning. It introduces an unreality and artificiality into the Standards, which, incidentally, achieves the mischief that the National Standard is designed to avoid (by creating conditions of inequality in the market concealed by labeling expedients and removing transparency and credibility). Clause 1.4 of the National Standard supports this view in that it provides that the label organic cannot apply to products with no connection to an organic method of production.

193. The importance of the farming system in the National Standard is evident from the regime for conversion set out in part 3.2. The label “organic” cannot be used by the farmer who intends to farm organically in future because the conversion process takes three years from

the time when the farmer begins to manage the farm organically: cl 3.2.3. Only the label “in conversion to organic” can be used to advertise goods produced by the farmer during the conversion period.

Risks to certification under the National Standard

194. The National Standard relating to farms and their management is set out in cl 3.1 under the umbrella heading of “Production Requirements”. The National Standard contains prohibitions on the use of certain products (e.g., cll 3.1.4, and 3.1.5). It operates such that only named, permitted products may be used. The National Standard mandates vigilance on the part of the organic farmer to address risks of potential contamination. Notably, it expressly contemplates consequences for a farmer’s certification if such risks cannot be contained. For instance, cll 3.1.7 and 3.1.8 provide:

- 3.1.7 The operator must address the potential risks from prior operations and consequences of external contamination with substances not permitted by this Standard. This may require the implementation of buffer zones/barriers and withdrawal of contaminated product/land from certification.
- 3.1.8 In case of reasonable suspicion of land and/or product contamination, the certified operator shall advise their certification organisation, and provide all factual evidence to support this.

195. In cl 3.1.7, the withdrawal of certification is both a means of mitigating against a contamination risk and a consequence of the presence of that risk. Clause 3.1.7 contemplates a situation in which a risk of contamination to land is incompatible with the maintenance of organic certification. In such a situation, the farmer has no agency. Similarly, cl 3.1.8 is not expressed as a means or contractual condition of avoiding sanctions: i.e., a farmer cannot avoid de-certification simply by providing his or her certification organisation with evidence of contamination.

196. Thus, cll 3.1.7 and 3.1.8 support a construction of the National Standard as designed for the protection of a system where the maintenance of the system confers a status on land and the produce derived from it. Clauses 3.1.7 and 3.1.8 do not evince a “bifurcated” regime directed only to regulating the make-up of the end product. Such a regime would be

incongruous with the definition of the term “organic” in the National Standard, and would be inadequate to protect the organic system if it did not provide for consequences attaching to the risk of contamination, such as the withdrawal of certification in cl 3.1,7.

Prohibition of GMOs in the National Standard

197. Part 3.3 of the National Standard relates to genetic modification. The National Standard prohibits the use of GMOs or their derivatives (cl 3.3.1), in accordance with the general principle of incompatibility of the principles of organic farming with products of genetic modification.
198. Consistent with that general principle of incompatibility, cl 3.3.2 is directed to managing the risk of the incorporation of GMOs into an organic farm, and provides:

Operators shall implement a risk management process to assess how they will avoid the accidental introduction of genetically modified organisms to the organic farm. These actions may include, but are not limited to:

- (a) knowing about contaminant risks
- (b) implementing distances / buffer zones from potential contaminants
- (c) implementing special handling, transport and storage arrangements
- (d) maintaining samples
- (e) testing a crop perceived at risk.

199. Like clause 3.1.8, mentioned above, cl 3.3.2 is not expressed as a contractual defence against the imposition of sanctions by the certification organisation. Rather, consistent with the aims described under the “general principles” of farming in 3.1, on its proper construction, this clause describes a farmer’s obligation of vigilance to protect the integrity of the organic system.

The IFOAM Norms

200. The IFOAM Norms are intended to provide a framework for organic certifying bodies to assist them in the development of their own certification standards.²¹² The Norms are comprised of general principles, recommendations and standards (as well as permitted derogations from the standards). The standards address the required content of standards

²¹² TB 1588.

relating to a particular subject matter. For instance, under the general principle of “diversity in crop production”, clause 4.3.1 of the IFOAM Norms provides: “The standards shall require that ... Diversity in crop production and activity shall be assured by minimum crop rotation requirements and/or variety of plantings.”

Prohibition of GMOs in the IFOAM Norms

201. Part 2.3 of the IFOAM Norms sets out the general principle of the exclusion of genetic engineering from organic production and processing. The standards derived from that principle are required to provide, among other things, the use of genetically engineered organisms or their derivatives is prohibited (3.2.2); deliberate use or negligent introduction of genetically engineered organisms or their derivatives to organic farming systems or products is prohibited (3.2.1).

1.1.1 Part 7 of the IFOAM Norms is directed to labeling of organic products. The standard in clause 7.1.7 specifies that organic products are not to be labeled GMO-free in the context of these standards. It is instructive to note that clause 7.1.7 refers back to part 2.3 of the Norms, expressing the exclusion of GMOs from organic production.

NASAA’S DECISION WAS CONSISTENT WITH THE NASAA STANDARDS

202. NASAA had power to decertify Eagle Rest pursuant to the clause 3.2.9 of the NASAA Standards, the clause identified in its suspension notice of 10 December 2010 (also identified in the Review Sheet completed by Ms Goldfinch on 10 December 2010).²¹³ It was not a condition of the NASAA Standards that Marsh or any other person be responsible for creating an unacceptable risk of contamination. On the evidence of the extent of the contamination of Eagle Rest in December 2010 (outlined above - the incursion evidence), NASAA was entitled to deem the risk of GMO contamination unacceptable:

²¹³ Goldfinch T 581.

203. Ms Goldfinch gave evidence of the significance of the potential spread of seeds from a canola swath.²¹⁴

Every decision for decertification is made on a case by case basis. And if we are talking about one stem of canola, I assume you mean it's in the context of being blown there by wind ... it's not going to be a question of just one stem; it's not possible to be able to determine how much seed is on that paddock. It's a question of risk.

204. On its proper construction (discussed above) NASAA's decision also fell within the scope of cl 3.2.1 of the NASAA Standards. As Ms Goldfinch explained, if, after the accidental or unintended incursion of GMOs onto a farm, the farmer then ploughed the land, he or she would be ploughing GM material, and this would amount to "use" within the meaning of the NASAA Standards.²¹⁵ The ploughing on the land in this example would amount to the introduction of GMOs (in the form of seed, alternatively farm inputs) into the farming system²¹⁶ for the purposes of cl 3.2.1.

205. Ms Goldfinch relied upon all of the information contained in the Inspection Checklist and Reports prepared by Ms Purvis and Ms Coleman, as well as the maps sent to her by Marsh.²¹⁷ The number of swaths blown onto the Eagle Rest was not the only factor she considered when making her decision to decertify Eagle Rest. Ms Goldfinch said:²¹⁸

All the information about all the paddocks and all the seed and all the swaths and where it is and where it isn't, and the sheep and the wind; all that is what's taken into account.

206. The evidence shows that NASAA's decision in 2011 to continue decertification was reasonable inasmuch as that decision was informed by:

- a) the extent of the contamination in 2010;

²¹⁴ Goldfinch T 575. Compare the evidence of Denham relating to the severity of the contamination at T 635.

²¹⁵ Goldfinch T 594.

²¹⁶ Compare the evidence of Denham at T 629 and see also the evidence of Bishop at T 365 relating to the contamination of land.

²¹⁷ T 533 and 570.

²¹⁸ T 552.

- b) the absence of a practical and reliable means of ascertaining the extent of a GM canola seed bank within the decertified paddocks of Eagle Rest;²¹⁹
- c) evidence of the likely persistence of a canola seed bank for two growing seasons;²²⁰
- d) evidence of the likely appearance of canola volunteers for between 2 and 3 years;²²¹
and
- e) the appearance of canola volunteers in Eagle Rest.²²²

The reasonableness of the NASAA Standards

207. For the reasons identified above, the question of the reasonableness of the NASAA Standards does not bear upon any issue in the case, including the issue of legal causation. Rather, the relevant question is whether, assuming that Baxter's negligence occasioned the decertification of Eagle Rest, decertification was a permissible sanction in accordance with the Standards, such that Baxter's negligence can be regarded as a factual and legal cause of it.
208. In any event, on their proper construction, the NASAA Standards are consistent with the National Standard and with the IFOAM Norms. The NASAA Standards are required to be consistent with the National Standard inasmuch as a National Standard supplies the minimum content of the National Standards.
209. There is no basis for implying into the NASAA Standard a tolerance for GMOs, whether to a 0.9% or some other threshold. Nor is there any basis on the evidence to support the assertion that the NASAA Standard is unreasonable in the absence of such a threshold. Moreover, that absence is not pleaded by Baxter as a ground of unreasonableness. However, Baxter led evidence from Jonathon Slee apparently to justify a 0.9% threshold for adventitious presence of GMOs in organic produce.

²¹⁹ Denham T 657; Preston T 795.

²²⁰ E.g., Exhibit 16A p 9; Exhibit 27 at p 4 (Denham relied upon research consistent with that indication: T 652 and 657).

²²¹ Bishop T 361; Exhibit 27 at p 4; Monsanto 2010 Crop Management Plan at TB 1233.

²²² TB 387.

210. The evidence of Mr Slee in this context should be disregarded. Mr Slee has had no qualification or experience in the application of organic standards or obtaining organic certification in Australia or elsewhere.²²³ It became apparent during his cross-examination that he conducted no research and did no reading to verify the assumptions made in his report as to the application of an adventitious GM presence threshold by overseas certifying bodies.
211. For instance, Mr Slee acknowledged that the regulations promulgated by the EC (834 of 2007)²²⁴ operate as a bare minimum standard.²²⁵ Mr Slee then said that he looked at three or four EU country standards by doing an internet search. Although he was aware that there were around 80 certifying bodies in Europe, he made an assumption, which he did not seek to verify, that the standards applied by those 80 organisations would be consistent with the EC Regulation.²²⁶ Mr Slee was unable to find any European certifying standard containing a tolerance for adventitious presence of GM material.²²⁷ Mr Slee had read part but did not bother to read all the EC Recommendations of 13 July 2010 on guidelines for the development of national coexistence measures, and so did not consider it necessary to refer to them in his report.²²⁸
212. Mr Slee referred to the UK Soil Association Standards²²⁹ but he could not see whether or not it allowed for any tolerance for GMOs in organic production or processing.²³⁰ Again, he made an assumption based on one clause (he did not cite it) referring to animal vaccine which, he said, led him to believe that there was some tolerance level (he did not say what level) within those standards.

²²³ T 983-4.

²²⁴ TB 1791.

²²⁵ T 989.

²²⁶ T991.

²²⁷ T 989.

²²⁸ T 991.

²²⁹ TB 2042.

²³⁰ T991.

213. On the proper construction of the NASAA Standards, the sanction of decertification may be applied both to a farming system and to farm produce. In Marsh’s case, his organic certification was granted expressly in respect of his farming land. The withdrawal of that certification was therefore referable to the land; by extension, the produce of that land was unable to be sold as certified organic. However, even if the NASAA Standards could be construed as Baxter contends, such that it would be possible for Marsh to clean his seed and sell it in compliance with Standards, there was no evidence that seed cleaning could be relied upon to remove 100% of intermingled grain.
214. In contrast, the evidence showed that it is likely to be impossible to clean seed in order to comply with the NASAA Standard.²³¹ NASAA had referred to the possibility of seed cleaning and testing “to cover all bases”.²³² NASAA subsequently removed seed cleaning from its list of requirements for re-certification.²³³ Moreover, the evidence of the cost to Marsh of having seed professionally cleaned prior to delivery to his customers, including Morton’s Seed & Grain and private buyers, would, be prohibitive.²³⁴

PART C – LEGAL PRINCIPLES AND APPLICATION

NEGLIGENCE

215. The elements of the claim in negligence are that:
- a) Baxter owed the plaintiffs a duty to take reasonable care to ensure that GM canola was not blown or carried from Sevenoaks onto Eagle Rest and that the plaintiffs did not suffer loss including economic loss as a result of GM canola being blown or carried onto Eagle Rest.²³⁵
 - b) The duty alleged is not a duty to prevent harm absolutely; rather it is a duty to take

²³¹ Bishop T 365; Exhibit 16C at p 8; Goldfinch T 592.

²³² Goldfinch T 538.

²³³ Ayachit T 702-3.

²³⁴ Marsh T 334.

²³⁵ Amended Statement of Claim (**ASOC**), [35]

reasonable care to avoid the harm materialising. The relevant risk of harm against which Baxter is said to have been under a duty to take reasonable care to avoid, is the risk that GM canola would be blown or carried onto Marsh's property and that the plaintiffs would suffer loss (in particular, economic loss) as a result. The loss claimed is economic loss.²³⁶

- c) In breach of the duty Baxter failed to take reasonable care to avoid the harm in two respects. First, he grew GM canola close to Eagle Rest, when he reasonably could have refrained from doing so (he could have grown conventional canola in locations close to Eagle Rest, and reasonably could have grown RUR Canola elsewhere on his farm). Second, Baxter harvested his GM canola by swathing when he reasonably could have harvested it by direct heading.²³⁷
- d) By reason of Baxter's breach of duty of care GM canola was present in substantial quantities on Eagle Rest, part of Eagle Rest (paddocks 7 to 13) was decertified and the Marshes have suffered loss in that they have not been able to sell as "certified organic", crops or livestock grown or raised on that part of Eagle Rest which was decertified.

Duty of Care

216. The existence of a duty of care is to be ascertained by reference to common law principles.²³⁸

Reasonable Foreseeability of the Risk of Harm

217. Reasonable foreseeability is a necessary but not sufficient criterion for the recognition of

²³⁶ ASOC, [37]

²³⁷ ASOC, [36]

²³⁸ Part 5B of the Civil Liability Act 2002 (W.A.) (**the CLA**), although it is contained within Division 2 which is entitled, "Duty of Care", is directed to questions of breach of duty: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, [13] (per French CJ, Gummow, Hayne, Heydon and Crennan JJ). In *Adeels* the court was considering the cognate provisions of the Civil Liability Act 2002 (NSW) which for the present purpose was identical. In *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 (per McLure P, at [71]) the Court of Appeal implicitly accepted the reasoning of the court at first instance, to that effect.

the existence of a duty of care.²³⁹ The class of injury must be foreseeable, not the particular injury sustained by the plaintiff. It matters not that the extent of the loss suffered by the plaintiff was not reasonably foreseeable.²⁴⁰ The test is an undemanding one.²⁴¹

Reasonable foreseeability

218. The kind of injury that was foreseeable to Baxter had two elements, namely:

- a) the risk that if GM canola was grown on Sevenoaks it may be blown or carried onto Eagle Rest;²⁴² and
- b) the risk that the Marshes would lose their certification on all or part of Eagle Rest if GM canola was blown or carried onto Eagle Rest.²⁴³

219. Before planting RUR canola on Range and Two Dams paddock in 2010 Baxter had actual knowledge, personally given by Marsh, of both aspects of the risk (see above at paragraphs 47-52.

220. The notice was reiterated to Baxter before he swathed his RUR canola, by Marsh's delivery to him of the 2010 Notice of Intention to Take Legal Action.

221. Reasonable foreseeability is established.

Relationship between the parties - Salient features

222. There is no accepted unifying principle that identifies what more (beyond reasonable foreseeability) must be present in the relationship between plaintiff and defendant in order to establish the existence of a duty of care in cases of economic loss.

223. The proper approach (having regard to what is set out below) is to closely examine the circumstances comprising and bearing on the relationship between the parties with regard to the features of the relationship between plaintiff and defendant that have been

²³⁹ *Perre* at [27], [70], [329]

²⁴⁰ *Chapman v Hearse* (1961) 106 CLR 112; *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383. 390

²⁴¹ *Hardie Finance Corporation Pty Ltd v Ahern* (NO.3) [2010] WASC 430, [357]

²⁴² ASOC [29], [30], [31]

²⁴³ ASOC [29], [30], [31]

considered in decided cases as being relevant to the recognition of a duty of care, without applying those features as a definitive list or formula. It is also necessary to consider whether the recognition of a duty will impose on the defendant indeterminate liability, and whether it will interfere with existing rights, freedoms or obligations.

224. *Perre v Apand*²⁴⁴ is the seminal case that is closest on the facts to this case. There, the respondent supplied from Victoria to potato growers in South Australia, seed for a new variety of potatoes. In so doing it introduced a form of potato disease (bacterial wilt) onto the land of one of the growers (Sparnon). The plaintiffs grew and processed potatoes on land close to (and within a 20 km radius of) Sparnon's land. Bacterial wilt did not affect the land on which the plaintiffs ran their business and did not affect the plaintiffs' crops.²⁴⁵ The plaintiffs had been selling their potatoes into Western Australia. Western Australian regulations prohibited the importation into that state of potatoes grown on land infected with bacterial wilt and also of potatoes grown within a 20km radius of a known outbreak detected within the previous 5 years, or without regulatory approval, of potatoes processed with equipment or in premises within which potatoes grown within such an area had been handled. Potatoes could be sold more profitably from South Australia into Western Australia than into other available markets. It was held that the respondent owed a duty of care in the circumstances to the plaintiffs (each of whom had differing interests in the affected business).²⁴⁶

225. In *Perre* the members of the High Court identified two control mechanisms that must be applied where questions of a duty to avoid economic loss arise, namely:

- a) the need to avoid imposing 'indeterminate liability' on the defendant; and
- b) the concern not to render 'ordinary' business conduct tortious by interfering with

²⁴⁴ (1999) 198 CLR 180

²⁴⁵ *Perre* at [24]

²⁴⁶ *Perre*, see the summary in the headnote.

existing rights and freedoms that have been conferred on the defendant.²⁴⁷

226. Those control mechanisms were identified both as being expressed in the recognition of the features of the parties' relationship said positively to support a duty of care (per Gleeson CJ at [15]), and as factors which negative the existence of a duty (per McHugh J at [102]).
227. Their Honours each identified the features of the relationship between plaintiff and defendant that warranted the recognition of the existence of a duty of care. Those features were:
- a) The interference with the use, ownership and enjoyment of land by the plaintiffs which was in close physical propinquity of that land to the land that had been affected by the defendant's activity (Sparnon's land).²⁴⁸
 - b) Actual foresight by the defendant of the likelihood of harm, including harm to the plaintiffs as members of an ascertainable class.²⁴⁹
 - c) The exercise by the defendant of control over the activity that caused the harm.²⁵⁰
 - d) The fact that the plaintiffs' business was vulnerably exposed to the defendant's conduct because it was not reasonably open to the plaintiffs to protect themselves against the effects of negligence.²⁵¹
228. The significance of those features (and control mechanisms) is discussed below in the context of the facts of this case. They were identified in *Perre* despite the differences between the members of the court on the question of the principles said to constitute the conceptual framework within which the relationship of the parties should be analysed.

²⁴⁷ per Gleeson CJ at [12], [15]; Gaudron J at [31]-[33]; McHugh J at [102]; Gummow J at [160]; [169]; [183]; [201], [211]; Kirby J at [200]; Hayne J at [329], [335-334], [351]; Callinan J at [421]

²⁴⁸ per Gleeson CJ at [3]; [14], [15]; Gummow J at [191]-[196]; Callinan J at [410]-[411]; Kirby J at [295]

²⁴⁹ per Gleeson CJ at [13]; McHugh J at [50]; Gummow J at [211]; Kirby J at [289- 299]; Hayne J at [325], [341-342], [353], Callinan J at [409]

²⁵⁰ Per Gleeson CJ at [15]; Gummow J at [216].; Callinan J at [408]

²⁵¹ per Gleeson CJ at [38]; Gaudron J at [104]; McHugh J at [118], [129]; [216]; Hayne J at [289-290]; Kirby J at [326]; Callinan J at [409]; [416].

229. Gleeson CJ in *Perre* identified the considerations that would remain influential in restraining acceptance of a duty of care in particular cases, namely that the duty to avoid economic loss needs to be constrained by some intelligible limits to keep the law of negligence within the bounds of common sense and practicability, the fact that to permit recovery of economic loss may interfere with freedoms, controls and limitations established by the common law or statute, and that loss in particular situations would be governed by contract.²⁵² His honour agreed with the reasons of Gummow J for recognising a duty.²⁵³
230. Gummow J said there that the task was to identify the ‘salient features’ which combine to constitute a sufficiently close relationship to give rise to a duty of care and which allow for the operation of ‘control mechanisms’, which His Honour said was the approach taken by Stephen J in *Caltex Oil*.²⁵⁴ His Honour said that in determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties, and that there is no simple formula which can mask the necessity for examination of particular facts.²⁵⁵ Gummow J rejected as a governing methodology the incremental development of the law by analogy to established categories cases in which a duty of care to avoid economic loss has been recognised.²⁵⁶ In *Woolcock Street Investments Pty Ltd v CGD Pty Ltd*²⁵⁷ the plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) referred to Stephen J’s judgment in *Caltex Oil* (apparently with approval, but without stating a unifying principle), observing that His Honour had “isolated a number of salient features which combined to constitute a sufficiently close relationship to give rise to a duty of care.”²⁵⁸
231. McHugh J adopted as a conceptual framework, the reasoning by analogy with established categories of case, in which the duty problem is first to ascertain whether the case comes

²⁵² *Perre* at [5]

²⁵³ *Perre* at [12]

²⁵⁴ *Perre* at [201]; *Caltex Oil Australia Pty Ltd v The Dredge ‘Willemstad’* (1976) 136 CLR 529

²⁵⁵ *Perre* at [198]

²⁵⁶ *Perre* at [199]-[200]

²⁵⁷ [2004] HCA 16 (*Woolcock Street*)

²⁵⁸ *Woolcock Street* at [22]

within an established category. If it does not, the next question is whether the harm suffered was a reasonably foreseeable result of the defendant's conduct. A positive answer requires further enquiry and an examination of analogous cases where courts have found that a duty does or does not exist. His Honour said that as far as possible the reasons or upholding or denying a duty in particular cases should be regarded as principles to be applied in determining whether a duty exist within that category.²⁵⁹ McHugh J (alone) said that the principles concerned with reasonable foreseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability to risk and the defendant's knowledge of the risk and its magnitude are relevant in determining whether a duty exists in *all* cases of liability for pure economic loss.²⁶⁰ In *Woolcock Street* McHugh J again said that "the principles concerning these five categories must always be considered", but that in particular cases, other policies and principles may guide and even determine the outcome of the case.²⁶¹

232. Gaudron J said that it was possible to discern another category of case in which a duty of care would be recognised – namely where a person is in a position to control the exercise of enjoyment by a another of a legal right, that position of control and by corollary, the other's dependence, were special factors giving rise to a relationship of proximity of neighbourhood.²⁶²
233. Kirby J adopted a three stage test of foreseeability, proximity and policy.²⁶³
234. Hayne J said to search for a unifying principle lying behind what has been historically described as a relationship of proximity was to search for something that could not be found.²⁶⁴ His Honour's reasons turned on the identification and satisfaction of two control mechanisms – the avoidance of indeterminate liability and the concern not to establish a

²⁵⁹ *Perre* at [94]-[95]

²⁶⁰ *Perre* at [105]

²⁶¹ *Woolcock Street* at [74]-[75]

²⁶² *Perre* at [38]

²⁶³ *Perre* at [289]-[298]

²⁶⁴ *Perre* at [330]

rule that would render 'ordinary' business conduct tortious.²⁶⁵

235. Callinan J said that the principle stated in *Caltex Oil*²⁶⁶ (that damages for pure economic loss may be recoverable in a case in which the defendant has knowledge or the means of knowledge that a particular plaintiff would be likely to suffer economic loss as a consequence of the defendant's negligence²⁶⁷) and subsequent cases in the High Court should be applied 'to the various factual situations as they arise in the courts.'²⁶⁸ His Honour said that there was much to commend the view that factors identified in the cases should not operate as some sort of mechanical guide as to how a novel case would be decided in the future.²⁶⁹

236. In *Woolcock Street* the High Court considered the question whether those involved in the design or construction of commercial premises owe a duty to subsequent purchasers of the premises to take reasonable care to ensure that the building is free from defects so as to prevent pure economic loss to those purchasers.²⁷⁰ In that case the plurality said that the vulnerability of the plaintiff had emerged as an important requirement in cases where a duty of care was held to have been owed, and that vulnerability was to be understood as a reference to the plaintiff's inability to protect itself from the consequences of the defendant's want of reasonable care, "either entirely or at least in a way which would cast the consequences of the loss on the defendant".²⁷¹ Their Honours went on to say that it was not necessary to attempt to identify or articulate the breadth of any general proposition about the importance of vulnerability. The case could be decided without doing so.²⁷²

²⁶⁵ *Perre* at [335], [351]

²⁶⁶ *Caltex Oil Australia Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529

²⁶⁷ *Perre* at [387]

²⁶⁸ *Perre* at [325]

²⁶⁹ *Perre* at [404].

²⁷⁰ *Woolcock Street* at [37]

²⁷¹ *Woolcock Street* at [23]

²⁷² *Woolcock Street* at [24]. We note for completion that in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 Allsop P (with whom Simpson J agreed) said that in cases where the posited duty of care is a 'novel' one, the proper analysis was to undertake a close analysis of the facts bearing on the

Application – The Relationship between Marsh and Baxter

237. Baxter owed to the Marshes a duty of care in the terms alleged, for the following reasons.

Baxter's Knowledge

238. That Baxter had actual knowledge of the risk of harm to the plaintiff individually is a factor of considerable weight and supports a finding that Baxter owed Marsh a duty of care (see paragraphs 47-52 above).

Interference with the use of property by an emanation from a neighbouring property

239. The Marsh and Baxter properties are virtually contiguous.

240. Baxter's conduct (of which Marsh complains) involved the use by Baxter of his land. That use resulted in the presence of GM canola swaths and seed, on Marsh's land. That circumstance caused de-certification of Marsh's land and interfered with the Marshes' use and commercial exploitation of that land.

241. Both the cause of the loss and the nature of the loss are inextricably bound to the physical propinquity of the parties by their use and occupation of land.

242. That very particular relationship which is embedded in the use and ownership of adjoining land constitutes a very close connection between Baxter and Marsh. That connection is a special circumstance that warrants the recognition of the existence of a duty of care.

243. The relationship between the parties in that connection is even closer than the relationship between the parties in *Perre*, where the plaintiffs' exploitation of land was affected by the defendants' introduction of bacterial wilt on to a property owned by a third party which was close to the land on which the plaintiffs' business was conducted.

relationship between the parties by reference to the 'salient features' or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury. His Honour articulated seventeen factors (among them the features identified in *Perre*), observing that 'there is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features ... [n]or should the list be seen as exhaustive.'²⁷² The question before the NSW Court of Appeal in that case was whether a wife who suffered from malignant mesothelioma contracted as a result of exposure to asbestos dust and fibres on her husband's work clothes and in the family home, was owed a duty of care. The damage was personal injury, not economic loss.

244. The geographical proximity of the parties (occupation of neighbouring land), the character of the plaintiffs' interest (in businesses which sought to exploit the affected land) and the effect of the conduct on the land used by the plaintiffs were each relevant to the determination in *Perre* that a duty of care was owed. Geographical proximity answered any concern about indeterminate liability. The nature of the affected interest was identified as the kind of interest that the law would protect.

245. On the nature of the plaintiff's interest Gummow J said that,

*There should first be identified those interests which are sufficient to attract the protection of the law in this field. ... Various members of the Perre family own what was identified as the Warruga land and the Rangara land. ... The Warruga land at its closest point was about 3km from the Sparnon's property and the Rangara land was about 2km distant. ... The business activities of those parties depended in varying degrees upon the occupation and utilisation of land and the turning of the produce thereof to economic account. The substance of their complaints is that the continued pursuit of those activities was significantly impeded by the denial of access to the principal and lucrative market for that produce. ... The point of importance at this stage is that interests in the nature I have identified are susceptible of protection by the tort of negligence against injury, albeit economic in nature. Such injury is recognised as a kind of detriment which, if negligently caused, may attract compensation.*²⁷³

246. On the characterisation of the loss Gleeson CJ said that,

*Although the appellants ... owned or had other interests in land which was in the neighbourhood of land directly affected by the respondent's negligent conduct, no property belonging to, or used by the appellants suffered any physical harm. The loss allegedly suffered by each appellant was of a kind conventionally described as pure economic loss, although the utility of considering such loss without further categorisation has been questioned by some judges and commentators.*²⁷⁴

247. Callinan J said, of the effect of the conduct on the plaintiff's use of their land that,

What happened to the properties (the lands, the plant and equipment, and the leaseholds or tenancies) of the appellants here may not have been actual physical damage but it came very close to that. "Blight" is a familiar concept in compensation and town planning cases. In a sense, the amenity of a property is very much akin to a physical attribute of a property. A particular activity on parcel "A" may adversely affect the amenity of parcel "B" although the two parcels do not adjoin each other. ... Such effects are very similar to actual physical damage and are not logically readily distinguishable from

²⁷³ *Perre* at [191-195]

²⁷⁴ At [3]

*physical damage. Absent negligence or infringement of legislation the causing of blight will not ordinarily be actionable. Such effects are very similar in impact to the negligently caused effects upon the appellants' properties of the outbreak of bacterial wilt on the Sparnons' property leading to the Western Australian embargo, and consequentially, in a real sense, involve the imposition of a blight upon their properties by way of a significant reduction in the utility and productivity of them, and accordingly their value. I regard this too therefore as a relevant consideration.*²⁷⁵ (emphasis added).

248. On the physical proximity between the land occupied by the Perre interests and the land affected by the defendant's conduct (Sparnon's land) Kirby J said that:

*[E]ach of the Perre interests carried on their activities within extremely close physical proximity to the Sparnon's property. ... Although it is true that the evidence as found did not establish actual physical damage to the property of the Perre interests, that consideration as well as the identification of a risk to a known and identified party can now be seen as 'control devices' which the law adopted in its attempt to limit the ambit of liability and avoid its extension to an indeterminate class. There was no risk of indeterminacy in this case. The ambit of reasonably foreseeable, indeed known vulnerability was measured by precise considerations of geographical proximity." Perre's vulnerability arose 'from an almost contiguous physical propinquity to a farm to which Apand decided to introduce ... uncertified seed.*²⁷⁶

249. Each of those considerations applies in this case with even greater force and each militates in favour of the recognition of a duty of care. The Marshes' loss was not property damage but sufficiently close to it, to operate as a relevant and sufficient control. The relationship between the parties, tied as it was to the use and occupation of almost contiguous land, could hardly have been closer.
250. Consideration of property interests in this context may raise the question of the relationship between the torts of negligence and nuisance. The question is one of theoretical interest only in that the High Court has determined that the same facts may establish liability both in nuisance and negligence.²⁷⁷

Control and Vulnerability

251. Baxter was in exclusive control of what he planted on his property, where he planted it and

²⁷⁵ At [423]

²⁷⁶ At [295-296]. See also Callinan J at [410-411]

²⁷⁷ Brodie v Singleton Shire Council; Ghantous v Hawkesbury [2001] HCA 29 per Gaudron, McHugh and Gummow JJ at [126]. See also Gummow J in *Perre* at [196]

the method of harvest.

252. The Marshes were in a relevant sense vulnerable to the risk of which Baxter had control.

The Marshes had no ability to control or influence what Baxter planted on his land or where he planted it. They had no ability to control or influence the method by which Baxter harvested his crop. Because of the geographical proximity of the Marsh's land to Baxter's land, the Marshes were vulnerable to the consequences of Baxter's planting and harvesting.

253. On the question of the use of isolation distances (spatial segregation) to prevent the movement of plant material from one property to another:²⁷⁸

- a) Assessed prospectively, the risk to the Marshes was to the entirety of their farm.
- b) The Marshes used all of the land organically (save for necessary periods of quarantine that might affect parts of the land from time to time). The Marshes observed the 'crop rotation' requirement in NASAA Standard 4.1, which provided that annual crops of the same species, family or of similar characteristics shall not be planted more than 2 years out of 5 in a given field and that (subject to some exceptions) in any three year period at least one year is to be used for a pasture of ley phase, a green manure crop or an annual legume. Mr Marsh's evidence was that crop rotation allowed the land to regain lost fertility and provided the opportunity to break pest and disease cycles and to manage weeds. Crop rotation is a fundamental principle of the agriculture practiced by Mr Marsh.²⁷⁹ The Marshes implemented this requirement by dividing the arable land on Eagle Rest into three blocks, each of three paddocks of about the same acreage. Block 1 comprised paddocks 1 to 6, block 2, paddocks 7 to 10 and block 3, paddocks 11 to 13.²⁸⁰ It was also necessary to feed certified stock using certified feed. The Marshes therefore had to dedicate part of

²⁷⁸ Exhibit 16B, Van Acker second report at page 8

²⁷⁹ Exhibit 5B, Statement of Steven Marsh, 13 February 2013, [22]

²⁸⁰ Exhibit 5A, Affidavit of Steven Marsh, 12 April 2012, [83]

their land to feeding the sheep that they raised.²⁸¹ The Marshes cropped three years out of six, rotating their crops and pasture phases through paddocks and blocks.²⁸²

- c) The risk to the Marshes was therefore a risk to all of their land, whether used for growing crop or for pasture.
- d) Marsh could not himself implement 'spatial segregation' on his own land without notionally contributing parts of the land to a 'buffer'. To have done so would have amounted to accepting the risk to that part of the land rather than protecting it against the risk. A further consequence of carving out part of the land to serve as a buffer would be to diminish the utility of the remaining land to operate in a crop rotation program. That is what occurred when part of Eagle Rest was de-certified.²⁸³

254. There is insufficient evidence to permit the conclusion that the Marshes could have protected against the risk by planting a tree buffer or constructing some other kind of buffer. The evidence is that the extent of the effectiveness of physical barriers to protect against the physical movement of plants or plant parts or canola seed from one place to another, is not known.²⁸⁴ No suggestion that Marsh could have planted or erected a buffer (whether effective or not) was put to Mr Marsh in cross examination.

255. Once it is accepted that the conduct of Baxter in failing to take reasonable care to ensure that GM canola was not blown or carried onto Eagle Rest was the legal cause of the loss (see below on causation) the contention that Baxter was not in control of the risk because he could not control NASAA's decision making,²⁸⁵ falls away.

Control Mechanisms - 'Autonomy'

256. No question of indeterminate liability arises in this case.

²⁸¹ Exhibit 5A, Affidavit of Steven Marsh, 12 April 2012, [85].

²⁸² Exhibit 5B, Statement of Steven Marsh, 13 February 2013, [26]; [87], 88]

²⁸³ Exhibit 5A, Affidavit of Steven Marsh, 12 April 2012, [82]-[88]; Exhibit 5B, Statement of Steven Marsh, 13 February 2013, [93]-[98]

²⁸⁴ Exhibit 16B, Van Acker second report at pages 9-10.

²⁸⁵ Defendant's outline of opening submission, [30]

257. The remaining control mechanism articulated in *Perre* (interference with existing rights, freedoms and obligations) is not a principle to the effect that provided a defendant is not acting unlawfully (in breach of a statute or a duty owed to another person) he may pursue his own interests unimpeded by considerations of impingement on others. Acceptance of that view would entail two difficulties.
258. First, if the pursuit of commercial or personal interest were to be permitted provided there was no breach of statute there would be no room for the application of tort law outside of statute. As Gummow J said in *Perre*,
- 'The presence of [a] regulatory regime, whether or not breach of it actually occurred, is a matter relevant to the existence and scope of a duty of care However, whilst relevant, the presence of such a regime cannot be determinative of these common law questions. Legislative values may influence but do not necessarily determine dictate the content of the common law values which are in play. If this were not so, there would be no recovery for negligently inflicted economic loss unless there was some breach of statute which justified placing a stigma of unacceptable business conduct upon the defendant's alleged tortious conduct.'*²⁸⁶
259. Second, the identification of an existing duty owed to another person depends arbitrarily upon the time at which one asks whether a duty is owed – whether before or after the defendant has engaged with another person in different circumstances that are deemed to give rise to some other kind of duty. That is not a principled basis on which to determine whether or not in a given case a duty of care is owed to avoid causing economic loss.
260. It may be that on the facts of a particular case (as in *Perre*) no question of inconsistency or interference with existing rights and freedoms arises because the defendant happens already to be under a positive legal duty to refrain from the activity that posed a risk of harm to the plaintiff.²⁸⁷ That the question does not arise on facts of that kind does not supply or delineate the principle.
261. The question of interference with the pursuit of commercial or other interests involves consideration of whether the permitting recovery of economic loss will *interfere with*

²⁸⁶ at [160]

²⁸⁷ *Perre* at [211] per Gummow J

freedoms, controls and limitations established both by common law and statute,²⁸⁸

whether there would be *inconsistency* between the recognition of a duty of care and what would otherwise be the legitimate pursuit by the defendant of its own interests including economic interests,²⁸⁹ and whether to hold the defendant to a legal duty of care would be to interfere *unreasonably* with its economic freedom.²⁹⁰

262. A finding that Baxter owed the Marshes a duty to take reasonable care to avoid the risk of GM canola being blown or carried onto Marsh's land would not interfere with any autonomy, rights or interests invested in Baxter and would not be inconsistent with Baxter's legitimate pursuit of those. On the contrary, to so hold would be consistent with the regime that has permitted Baxter to grow RUR Canola.
263. Baxter's 'freedom' to grow RUR canola was conditional. He had no right to grow it except in compliance with the Monsanto LSA and CMP. A clear objective of the CMP was to manage risks to the integrity of grain crop supply-chains and the sustainability of agricultural production. To that end, the Crop Management Plan set out strategies to "enable different production/market systems to concurrently operate in a profitable and sustainable way in response to change in market and non-market requirements".²⁹¹
264. The regulatory regime that included as an end-point the Monsanto LSA with growers, evidently did not intend to confer on RUR canola users absolute freedom in the permitted use, in particular, freedom from civil claims.
265. On the lifting the banning order by the Minister for Agriculture, the minister's department (**DAFWA**) communicated its expectations that RURC growers would take care to avoid harm to organic growers that could occur if GM material was transferred onto their land.
266. It is true that growers were not legally bound to observe the DAFWA guidance. However

²⁸⁸ *Perre* at [5] per Gleeson CJ

²⁸⁹ *Perre* at [211] per Gummow J

²⁹⁰ *Perre* at [300] per Kirby J; [421] per Callinan J

²⁹¹ TB 1226.

the DAFWA publications and the Monsanto CMP provide content to the notion of 'legitimate' interests by growers in RUR canola technology, and inform the question of what was reasonable conduct in the relevant market. Growing and harvesting RUR canola without reasonable regard to the interests or organic neighbours, as Baxter did, was not the pursuit of a 'legitimate personal interest', or pursuit of an otherwise absolute right or freedom.

Breach of Duty

267. Whether Baxter breached the duty of care he owed to the Marshes is to be determined by application of s.5B *Civil Liability Act (CLA)* which provides:

General principles

- (1) A person is not liable for harm caused by that person's fault in failing to take precautions against a risk of harm unless-
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) —
 - (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.

Risk of harm

268. As a first step the plaintiff must identify the risk of harm against which he or she alleges a defendant would be negligent in failing to take precautions. The three elements of the section must then be considered.²⁹²

269. The risk of harm may be described as the risk of the class, kind or type of injury which the plaintiff suffered, as distinct from the particular injury.²⁹³

²⁹² *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 437 (French CJ, Gummow, Hayne, Heydon and Crennan JJ); *Southern Properties* at [89].

In this case risk of harm had two elements, namely:

- a) the risk that if GM canola was grown on Sevenoaks it may be blown or carried onto Eagle Rest;²⁹⁴ and
- b) the risk that the Marshes would lose their certification on all or part of Eagle Rest if GM canola was blown or carried onto Eagle Rest.²⁹⁵

Foreseeability of the risk of harm – section 5B(1)(a)

270. Having identified the risk of harm, the first question under s 5B(1) is whether the risk was foreseeable. This requires the plaintiff to establish that the defendant’s actual or constructive knowledge of the risk of harm.²⁹⁶

271. The precise manner in which the loss or damage occurred need not be reasonably foreseeable. Rather it is the nature of the particular harm which must be foreseeable.²⁹⁷

272. Where it is alleged that the defendant “ought” to have known of the risk, relevant considerations will vary from case to case but may include the common knowledge and experience of others in the similar position of the defendant, public notoriety of the risk, publications and academic knowledge which might be expected to be read by people in the defendant’s position; and the obviousness or likelihood of the event happening when using common sense.²⁹⁸

273. Before planting RUR canola on Range and Two Dams paddock in 2010 Baxter had actual knowledge, personally given by Marsh, of both aspects of the risk (above).

²⁹³ *Gunnensen v Henwood* [2011] VSC 440 at [361] (per Dixon J considering substantively identical provisions contained in Part X of the *Wrongs Act 1958* (Vic); *Ultra Thoroughbred Racing Pty Ltd v Those Certain Underwriters* [2011] VSC 589 at [282] (**Ultra Thoroughbred**))

²⁹⁴ ASOC [29], [30], [31]

²⁹⁵ ASOC [29], [30], [31]

²⁹⁶ *Ultra Thoroughbred* at [283-4].

²⁹⁷ *Chapman v Hearse* (1961) 106 CLR 112, 120-121, cited in *Ultra thoroughbred* at [284] (per J Forrest J) in the context of Part X of the *Wrongs Act 1958* (Vic)

²⁹⁸ *Benic v New South Wales* [2010] NSWSC 1039 (per Garling J), [92]

274. Even without the November 2008 conversation with Marsh Baxter ought to have known of the risk because he had access to the DAFWA publications which were directed to farmers in his position, and to which he had access (above).

Risk not insignificant – section 5B(1)(b)

275. The second element, which is cumulative on the first, is whether the alleged risk of harm was “not insignificant”. This must be judged from the perspective of a reasonable person in the defendant’s position, and in prospect not in retrospect.²⁹⁹

276. In New South Wales the Court of Appeal (considering the relevantly identical provisions of the Civil Liability Act 2002 (NSW)) has held that the ‘not insignificant’ test has been found to set the threshold higher than the common law ‘not far-fetched or fanciful’ test, “but not much higher”.³⁰⁰

277. A reasonable person in Baxter’s position, knowing that Marsh farmed organically and was subject to some restrictive rules, having been informed specifically by Marsh that he could lose his certification if GM material was present on Eagle Rest and having been presented with evidence of canola having likely travelled from his property to Eagle Rest, would have regarded the risk to Marsh as not insignificant.

Whether a reasonable person would have taken precautions - section 5B(1)(c)

278. The final question posed by s.5B is whether in the circumstances a reasonable person in Baxter’s position would have taken precautions against the risk of harm. Section 5B(2) provides that -

In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)-

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm.

²⁹⁹ Benic, [93]

³⁰⁰ *Shaw v Thomas* [2010] NSWCA 169 [44]

279. The court may therefore consider any matters it considers relevant to the question whether a reasonable person in the position of the defendant would have taken precautions against the harm, but must also take into account the factors set out in s5B(2)(a)-(c).
280. A reasonable person in Baxter's position would have taken precautions against the risk of harm to Marsh, by refraining from planting RUR canola in Range and Two Dams paddocks (paddocks close to the boundary of Eagle Rest) and in addition (or alternatively) would have not exposed his canola crop to the elements and the risk of being carried by wind onto Eagle Rest, by swathing it. A reasonable person in Baxter's circumstances would instead have direct-headed his RUR Crop planted on Range and Two Dams in 2010. The evidence strongly supports that finding, for the following reasons.

The probability that the harm would occur if care were not taken (s.5B(2)(a))

281. There was a real risk that if the crop was planted close to Eagle Rest it would be blown onto Eagle Rest. The risk was increased when the crop was swathed. Objectively assessed in 2010, that risk could not reasonably have been discounted as improbable.
282. The evidence of Robinson, Baxter's agronomist was that canola produced volunteers after the movement of seed³⁰¹; volunteers could be found in adjacent paddocks³⁰²; swathing provides an opportunity for seed to be moved by wind³⁰³ and that swaths containing pods could be caught and blown by the wind.³⁰⁴ Robinson agreed with the Farmanco advice of March 2010 (which reflected his own knowledge and understanding by the end of 2009)³⁰⁵ that where a GM crop is on a boundary fence it would be necessary to discuss management

³⁰¹ Robinson, T921

³⁰² Robinson, T920

³⁰³ Robinson, T921-922

³⁰⁴ Robinson, T921-922

³⁰⁵ Robinson, T934

options including for the possibility of strong winds moving swaths onto neighbour's paddocks³⁰⁶.

283. Professor Van Acker's un-contradicted evidence was that during harvest there are two opportunities for canola seed to move. If the canola is swathed and left in the swath to allow seed to mature before swaths are combine-harvested then there is known opportunity for canola swaths to be moved by the wind. The second is in relation to grain handling, which can result in movement of seed.³⁰⁷
284. Dr Rüdelsheim (the defendant's expert) considered that "seed movement can be an important factor in overall spatial (typically over shorter distances) and temporal (through survival in the seed bank for several years) gene movement. The main mechanisms for spatial seed dispersal include wind, humans ... and animals."³⁰⁸
285. Having regard to the fact that the NASAA and National Organic standards do not permit the presence of GM material in organic farming systems (see on the Standards, above), and the risk of GM canola being blown onto Eagle Rest if it was planted close to Eagle Rest and further, if it was swathed, there was in 2010 a real risk that Marsh's organic certification would be lost if care was not taken by Baxter. Objectively assessed in 2010, that risk could not reasonably have been discounted as improbable.

The likely seriousness of the harm

286. The consequences of the harm to Marsh were likely serious, if the risk materialized. The harm was loss or curtailment of Marsh's livelihood.

Robinson's Position

287. Had Robinson been told of about the 2008 canola volunteers and that the presence of GM canola volunteers on Marsh's property would place his certification at risk he would have

³⁰⁶ Robinson T 933

³⁰⁷ Exhibit 16B, report of Van Acker 30 May 2013, page 6

³⁰⁸ Exhibit 28, Report of Dr Rudelsheim, p16

told Baxter to be careful planting GM canola on the boundary and that there was a risk of swathed material moving onto Marsh's property.³⁰⁹ His evidence about what he would have done was consistent with the Farmanco advice of March 2010 (which reflected Robinson's own knowledge and understanding by the end of 2009)³¹⁰ that where a GM crop is on a boundary fence it would be necessary to discuss management options including for the possibility of strong winds moving swaths onto neighbour's paddocks³¹¹. Robinson's evidence on this point is inconsistent with a conclusion that what Baxter in fact did was reasonable.

The Burden of taking precautions (s5B(2)(c)) and the reasonableness of not doing so

288. When considering "the burden of taking precautions" (as required by the CLA), it is convenient to consider at the same time, the defendant's positive claims that he was acting reasonably in not taking precautions against the harm. Being deprived of an identified benefit could be described as a burden, although it is not necessary to adopt that characterisation in order to take into account an asserted benefit of not acting. It is also convenient to consider at the same time, the defendant's positive assertions of reasonableness.

289. Baxter asserts that he was acting reasonably in planting and swathing the RUR canola that he grew on Sevenoaks in 2010 because:

- a) he planted the RR crop in order that he could use glyphosate in the paddocks on which the RR canola was grown, in order to manage the weeds in those paddocks, in particular Wimmera Rye Grass that Baxter had observed to demonstrate resistance to some other herbicides;³¹²

³⁰⁹ Robinson, T941

³¹⁰ Robinson, T934

³¹¹ Robinson, T933

³¹² Amended defence, [23](2), particulars at (d)

- b) “Planting RR canola was a reasonable use of the land in accordance with the ordinary usage of farmers in the Kojonup Region”;³¹³
- c) Swathing of canola including RR canola was and in in accordance with accepted farming practices in the Kojonup region;³¹⁴
- d) Baxter planted and swathed RR canola after being advised to do so by an agronomist engaged by Baxter to advise him on the management of Sevenoaks.³¹⁵

Weed Control

290. For the reasons given above the evidence fails to establish that Baxter needed to plant RUR canola on Range and Two Dams paddocks in order to deal with a weed resistance problem. Further, for the reasons give above, the evidence supports a finding that Baxter had decided to plant RUR canola regardless of the need to do so or the consequences in relation to the resistance.
291. A separate but relevant consideration is that Baxter did not himself act reasonably in planting RUR canola in 2010 in Range and Two Dams paddocks because, for the reasons given above, he did not do in in accordance with the Monsanto CMP.

Ordinary Usage – RUR Canola and Swathing

292. The ultimate question for the court is not whether the defendant’s conduct accords with an industry or professional standard but whether it conforms to the standard of reasonable care required by the law. That question of the role of common practice commonly arises in cases concerning alleged professional negligence, where professional or industry practice is considered relevant to the assessment of the adequacy of the response of the defendant to

³¹³ Amended defence [23](2), particulars at (a)

³¹⁴ Amended defence [23](2), particulars at (f)

³¹⁵ Amended defence [23](2), particulars at (e).

the perceived risk. In that context, evidence of general practice may raise an evidentiary presumption that arises from complying with common practice.³¹⁶

293. That paradigm is inapt here. The contention that planting swathing RUR canola was in accordance with 'ordinary usage' does not deal with the seminal question of response to the risk. It is not said (nor could it reasonably be said) that planting and swathing RUR canola was evidence of common practice intended to respond to the relevant risk.
294. Evidence concerning the general benefits of swathing does not advance the point because:
- a) It had been Baxter's practice to direct head his canola crop up until 2010, a practice which he continued after that time (above);
 - b) It does not deal with the question of response to risk. On that question, the DAFWA and Farmanco publications (above) are clear in warning against the risk of wind-transfer when swathing.

Acting on Advice

295. Circumstances in this case are readily distinguishable from a situation in which a contractor is engaged to discharge an obligation for a principal on whom the obligation rests.
296. The question of 'reliance on advice' does not arise on the evidence. The advice of Robinson was not directed in any real sense to the avoidance of the risk to Marsh.
297. Robinson was not told, and did not know, that Marsh had complained about canola volunteers in 2008 and that he was concerned about losing his organic certification if GM canola was present on his farm. There was no discussion of organic standards, and Baxter did not discuss or seek advice on organic certification³¹⁷.
298. Robinson specifically denied being told both about the 2008 canola volunteers and that if there was a GM canola volunteer on Marsh's property his organic certification would be

³¹⁶ F v R (1983) 33 SASR 189, 194; Rogers v Whitaker (1992) 175 CLR 479.

³¹⁷ Robinson T 936

placed at risk³¹⁸. Importantly, Robinson said that if he was told of those matters he would have told Baxter to be careful planting GM canola on the boundary and that there was a risk of swathing material moving on to Marsh's property³¹⁹.

299. That advice would have been consistent with Robinson's understanding of canola and of the importance of segregation. Moreover, Robinson had never had occasion to examine organic standards and the suggestion that volunteer canola might affect the status of non GM crops would have been new to him. It would have provoked the response that he said he would have given had Baxter informed him of all the facts.
300. Even if the fact that receiving advice from an agronomist were relevant to the defence, the failure of Baxter to seek advice on a proper factual basis disentitles him from relying on the advice of his agronomist. Rather than simply relying on the Monsanto protocol, Robinson would have advised Baxter to be careful planting and of the risks in swathing.

Social Utility

301. The "social utility of the activity that creates the risk of harm" adds nothing to the application of the s 5B(2) calculus to this case.
302. The concept of "social utility" entails the notion of trading off a risk of harm for a greater (social) good.³²⁰ No such question arises here. Baxter's use of RUR canola was for his own benefit. There is no evidence of a greater social benefit served by *Baxter's* use. Nor is there any rational connection between Baxter's use of RUR canola and any general societal benefit created by the introduction of RUR canola technology to Western Australia.
303. Even if there were such a connection, to the extent that the defendant sought establish the existence of a general social benefit it proffered no relevant Australian data on that

³¹⁸ Robinson T 941

³¹⁹ Robinson T 941

³²⁰ *Southern Properties (WA) Pty Ltd –v- Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 at [256]-[265] per Pullin J.

question, whatsoever, let alone any data supported by a transparent process of reasoning.³²¹

304. Further, the function (the agricultural purpose) of RUR canola is to permit the use of glyphosate in a standing canola crop, for the purposes of weed control. It may only be of benefit when used in accordance with appropriate weed management practices, in particular integrated weed management.³²² In fact, its use otherwise puts the utility of glyphosate at risk, by selecting for resistant weeds. Unrestrained use may increase weed resistance not only on the user's property but more widely.³²³ Resistance to glyphosate has already been reported in Australia in Wimmera rye grass.³²⁴ The evidence is not consistent with Baxter having used the glyphosate he applied to RUR canola in a manner that was consistent with prudent weed management. In the circumstances Baxter cannot sustain a claim that his use was in aid of greater social good.
305. Finally, Baxter's permission to use RUR canola has always been predicated on his observing the principles of co-existence, as set out in the Monsanto CMP. Taking care to avoid harm to his organic neighbor was consistent with the social values identified in that permission. Failing to take care was not.
306. Stretch's evidence that he achieved containment by planting in a paddock away from neighbours simply but powerfully demonstrates what Baxter could have done. Accommodation between farmers in this way is ordinary practice observed by them when spraying their crops with herbicide.³²⁵

Causation

Principles

³²¹ Rüdelsheim, T 885-6; 889; 891-2.

³²² Exhibit 13A McInerney, First report; Rüdelsheim T 876; 890.

³²³ Rüdelsheim, T877-879

³²⁴ Exhibit 13A; Exhibit 14A Joint Memorandum of Conferral between Dr Rüdelsheim and Mr McInerney, 28 January 2014.

³²⁵ Stretch, T 902.

307. The issue of causation is governed by s 5C of the *Civil Liability Act*, which provides relevantly:

5C. General principles

- (1) A determination that the fault of a person (the 'tortfeasor') caused particular harm comprises the following elements -
 - (a) that the fault was a necessary condition of the occurrence of the harm (***factual causation***); and
 - (b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused (***scope of liability***).
- (2) In determining, in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of the harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) -
 - (a) whether and why the responsibility for the harm should, or should not, be imposed on the tortfeasor; and
 - (b) whether and why the harm should be left to lie where it fell.
- ...
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor.

308. The section treats factual causation and scope of liability as separate and distinct issues.³²⁶

309. Factual causation is to be determined “usually”³²⁷ by reference to the “necessary condition” test in s 5C(1)(a), which itself requires a “but for” analysis: but for the negligent act or omission, would the particular harm suffered by the plaintiff have occurred?³²⁸ In practical terms, has it been shown to be more probable than not that but for the negligence the plaintiff’s particular harm would not have occurred?³²⁹

310. There may be more than one set of conditions necessary for the occurrence of particular harm. If so, a defendant’s act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation.³³⁰

³²⁶ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48 (**Adeels Palace**) at [43], considering the equivalent provision (s 5D) of the *Civil Liability Act 2002* (NSW).

³²⁷ *Gunnensen* at [393(d)].

³²⁸ *Adeels Palace* at [45].

³²⁹ *Adeels Palace* at [53].

³³⁰ *Strong v Woolworths Limited trading as Big W & Anor* [2012] HCA 5 [32] (French CJ, Gummow, Crennan and Bell JJ) (**Strong**) at [20].

Section 5C(1)(a): factual causation

311. The question arising for determination under this provision is whether Baxter's failure to take reasonable care to ensure that RUR canola was not blown or carried from Sevenoaks onto Eagle Rest was a necessary condition of the decertification of Eagle Rest. In answering that question, it is necessary to determine as a matter of fact whether the RUR canola swaths present on Eagle Rest in November 2010 originated from Sevenoaks. As to that question:

- a) the exposure of the RUR canola swaths to sun and wind in windrows on the Range and Two Dams paddocks;
 - b) the time when Marsh found swaths on Eagle Rest relative to the time when Baxter swathed his crop;³³¹
 - c) the prevailing wind conditions observed by Kathe Purvis of NASAA during her inspection of Eagle Rest;³³²
 - d) Ms Purvis' observation that "[d]uring the inspection a strong southerly wind was blowing and some plants noted in paddock 10 were blowing like tumbleweed. Plant material was noted caught in the southern fenceline where the GM canola swathed crop could clearly be seen across the road";
 - e) the fact that testing of the swaths found on Eagle Rest revealed them to be GM and displaying a genetic profile consistent with RUR canola;³³³ and
 - f) the distance and location from Eagle Rest of the only other farm in the Kojonup region known to have planted GM canola at the same time,
- compel the finding that the swaths found on Eagle Rest were blown or carried there from Sevenoaks.³³⁴

³³¹ Exhibit 5A at [68].

³³² TB 0293.

³³³ Exhibit 19, Goldfinch Statement at [25]; and Amended Defence at [12(2)].

312. The Court should find that the “necessary condition” element of s 5C(1)(a) is made out, since, but for Baxter’s failure to take reasonable care to ensure that RUR canola was not blown or carried from Sevenoaks onto Eagle Rest, NASAA would have had no occasion to decertify Eagle Rest on 29 December 2010. There was no other factor occasioning that decision: Baxter has been prepared to concede as much in relation to the “necessary condition” test.³³⁵

Section 5C(1)(b): legal causation

313. If “the necessary condition” test for factual causation is satisfied, a finding of “legal causation” nonetheless depends on the “scope of liability” requirement in s 51(1)(b), in respect of which:

the ultimate question to be answered is a normative one, namely, whether the defendant ought to be held liable to pay damages for that harm. It is in this context that the concept of causation as a matter of commonsense is most often expressed, and there is no suggestion that the application of common sense is in any way foreign to the statutory task. The appropriateness of the scope of liability extended from the relevant causal connection is determined according to common sense ideas, taking into account any relevant policy considerations.³³⁶

314. Cases where factual causation is established but legal causation is denied by reference to the scope of liability test are likely to be rare. In such cases the relevant harm is only remotely connected to the defendant’s conduct.³³⁷

315. Noting that the presence of GM canola swaths on Eagle Rest occasioned NASAA’s decertification of that land, the question becomes whether NASAA was entitled to impose that sanction in December 2010 pursuant to the NASAA Standards. Legal causation can be assessed with the benefit of hindsight: *Wallace v Kam*.³³⁸ It is helpful therefore to consider how NASAA’s decision to decertify Eagle Rest in December 2010, and to continue to impose

³³⁴ Exhibit 5A at [68].

³³⁵ Baxter’s Outline of opening submissions dated 6 February 2014 at [48].

³³⁶ *Gunnensen* at [387] applying *Zanner v Zanner* [2010] NSWCA 343 [80].

³³⁷ *Gunnensen* at [393(h)]

³³⁸ (2013) 297 ALR 383.

that sanction until the end of the 2012 growing season, has been borne out by the evidence (outlined above) of:

- a) the incorporation of canola seeds into the soil;
- b) the likely persistence of a canola seed bank; and
- c) the likely persistence of canola volunteers.

316. The decision to decertify Eagle Rest was both open and reasonable. The significance of NASAA's for the question of legal causation was described by the High Court in *Medlin v State Government Insurance Commission*.³³⁹

For the purposes of the law of negligence, the question whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience. And that remains so in a case such as the present where the question of the existence of the requisite causal connection is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the "but for" test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connection would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. *The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage.* Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. [Our emphasis in italics.]

317. So long as NASAA's decision was open to it pursuant to the Standards, alternatively, was reasonable, the decision should, as a matter of common sense, be regarded as legally causative. For the reasons discussed earlier, on the proper construction of the NASAA Standards, and in light of the extent of the contamination of Eagle Rest by canola swaths and seeds in December 2010, NASAA was entitled to decertify Eagle Rest. Liability for the

³³⁹ (1994-5) 182 CLR 1 at 6.

loss flowing from that decertification therefore must attach to Baxter in accordance with s5C(1)(b).

Section 5C(2)

318. The function of the New South Wales equivalent of s 5C(2) (in which the only difference in the language of the statute is the use of the word “exceptional” rather than “appropriate”) was considered by the High Court in *Adeels Palace*. The Court stated:

Section 5C(2) makes provision for what it describes as "an exceptional case".

But the Act does not expressly give content to the phrase "an exceptional case". All that is plain is that it is a case where negligence cannot be established as a necessary condition of the harm; the "but for" test of causation is *not* met. In such a case the court is commanded "to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party". But beyond the statement that this is to be done "in accordance with established principles", the provision offers no further guidance about how the task is to be performed.

319. On the premise (which, as submitted above, is established on the evidence) that Baxter’s failure to take reasonable care to ensure that swaths were not blown or carried onto Eagle Rest was the occasion for NASAA’s decertification of Eagle Rest, factual causation under s 5C(1)(a) is made out. Consequently s5C(2) has no application to this case. But if it did, the matters relating to the scope of Baxter’s liability in negligence under s 5C(1)(b) would apply equally to s5C(2).

NUISANCE

General principles

320. In addition to a duty of care in negligence, Marsh, in partnership with his wife Sue, claims that the presence of GM canola plants and seeds on Eagle Rest constitutes a nuisance.³⁴⁰

Nuisance, like negligence, forms part of the law of neighbourhood in Australia; and it has not yet been subsumed into the tort of negligence.³⁴¹

321. The interests and rights protected by the tort of nuisance relate to the use and enjoyment

³⁴⁰ SOC at [38]ff.

³⁴¹ *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation & Land Management* [2012] WASCA 79 at [117] per McLure P.

of land.³⁴² Accordingly, the duty to be discharged to avoid liability in nuisance is a duty not to create an *unreasonable* interference in the plaintiff's use or enjoyment of its interest in land.³⁴³

322. The elements of the tort were summarised by McLure P in *Southern Properties*:³⁴⁴

Nuisance protects a claimant's interest in the beneficial use of land. It is not confined to the actual use of the soil but extends to the pleasure, comfort and enjoyment which a person normally derives from occupancy of land. Thus, nuisance covers physical damage to property and non-physical damage. To constitute a nuisance, the interference must be unreasonable. In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the hypersensitivity (if any) of the user or use of the claimant's land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.

This exercise involves weighing the respective rights of the parties in the use of their land to make a value judgment as to whether the interference is unreasonable. Although the 'fault' of the defendant may be a relevant consideration in an assessment of whether the interference with the claimant's enjoyment of land is unreasonable, the duty not to expose one's neighbours to nuisance is not necessarily discharged by the exercise of reasonable care. Liability in nuisance is strict. Once a prima facie case has been established, it is for the defendant to prove its defence.

323. McLure P proceeded to state in passing that as proof of negligence is not an element of the cause of action in nuisance, the provisions of Part 1 of the *Civil Liability Act* probably do not

³⁴² Compare the discussion of the "law of neighbourhood" in England by Hope LJ in *Hunter v Canary Wharf Ltd* [1997] AC 655. "The tort of nuisance is an invasion of the Plaintiff's interest in the possession and enjoyment of land. It is closely linked to the law of property and is often regarded as part of the law of neighbourhood.... The law of negligence is also, in very real sense, connected with the relationship between neighbours. But, as can be see clearly since the development of this branch of the law in *Donoghue v Stevenson*, the answer to the question "who in law is my neighbour?", is a different one from that which would be given in the context of property law.... In the present case it is helpful to see how the two torts may overlap in relation to each other. In some cases they may provide concurrent remedies, although the tort of nuisance is a tort of strict liability in the sense that it is no defence to say that the defendant took all reasonable care to prevent it. It is concerned only with the mutual duties of adjoining or neighbouring landowners of which trespass and nuisance are congeners. Where it is available it will be unnecessary to rely also on the tort of negligence. In other cases it may be necessary to rely on the tort of negligence, because the person who is affected by the act or omission on the neighbouring property has no interest in land where he or she happens to be at the time. Mere presence on land, in circumstances where a duty in law to those present there is owed by the owner or occupier of the neighbouring property, is enough to enable the person to sue in negligence."

³⁴³ *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty; The Wagon Mound (No 2)* [1967] 1 AC 617; *City of Richmond v Scantelbury* [1991] 2 VR 38; *Premier Building and Consulting Pty Ltd v Spotless Group Limited* [2007] VSC 377 at [401].

³⁴⁴ At [118ff].

apply to a claim based on that tort.³⁴⁵

324. Foreseeability (either of the interference, or its unreasonableness) is not an element of the cause of action although it may provide the element of “fault” that some authorities suggest that the tort requires.³⁴⁶ Where the defendant has created a nuisance, there is no requirement that he or she either knew or had the means of knowledge of the nuisance. In that sense, as for the notion of reasonableness referred to by *McLure P*, liability is strict.³⁴⁷ (Even if foreseeability were an element of the cause of action of nuisance, in this case, for the reasons already given relating to Marsh’s claim in negligence, it would be made out on the evidence.)

Standing to sue in nuisance

325. The weight of authority supports the proposition that a licensee in occupation of property for business purposes is entitled to bring a claim in nuisance.³⁴⁸ As has been noted above, Marsh is the registered proprietor of Eagle Rest. He his wife, Sue, conduct their business from Eagle Rest in partnership: they occupy Eagle Rest and use it to grow crops and graze livestock.
326. In the case of *Vaughan*, the plaintiff was the holder of a grazing licence entitling him to enter and graze sheep on land. The plaintiff sued the defendant for polluting a waterhole on the land such that the sheep were unable to drink from it. Higinbotham CJ and Hood J delivered the opinion of the Court on a special case stated from a judge of the County

³⁴⁵ At [126].

³⁴⁶ Considerations of foreseeability might arise, however, in the assessment of damages. If the damage was not foreseeable, then although a nuisance might have been committed the damage may be too remote and therefore not recoverable: *The Wagon Mound (No.2)*; *Trindade Cane & Lunney* “Law of Torts in Australia” 4th Ed. at 4.1.7.3 (p.188.5).

³⁴⁷ There are recent statements of principle in Australian cases that some fault is required for liability in a nuisance claim, however what constitutes ‘fault’ has been said to generally be that the harm was foreseeable: see e.g., *Sutherland Shire Council v Becker* [2006] NSWCA 344; and *Premier Building and Consulting Pty Ltd v Spotless Group Limited* [2007] VSC 377.

³⁴⁸ See *Vaughan v Shire of Benalla* (1891) 17 VLR 129 (**Vaughan**), cited in *Toll Transport Pty Ltd v National Union of Workers & Ors* [2012] VSC 316 per Ferguson J. See also *McLeod v Rub-A-Dub (Malvern) Wash Pty Ltd* (Unreported, 29 February 1972, Stephen J, Supreme Court of Victoria), cited in *Toll* and in *Wilson v New South Wales Land & Housing Corporation* [1998] ANZ ConvR 623; and *Deasy Pty Ltd v Montrest Pty Ltd* (Queensland Court of Appeal, 22 November 1996, Unreported, per Pincus JA) citing *Ruhan v Water Conservation and Irrigation Commission* (1920) 20 SR(NSW) 439.

Court. The Court found that the plaintiff's grazing licence gave him no interest in the land, and no right to possession or exclusive occupation (at 131, per Higinbotham CJ). The Court then held: "where the licence is one that can readily be given, though it be revocable at pleasure, it is, against a wrongdoer, a sufficient title to enable the licensee to successfully sue for an unauthorised interference with the proper enjoyment of the licence" (at 135, per Hood J).

327. In this case, it is reasonable to infer, and the Court should find, that the partnership occupies Eagle Rest for these purposes pursuant to a licence from Marsh in his capacity as the owner of the land. Marsh and his wife, in partnership, as licensees cultivating the land on Eagle Rest, are entitled to bring a claim in nuisance to protect an unreasonable interference with their use and enjoyment of the land pursuant to that licence.

Unreasonableness of the interference in the Marshes' use of Eagle Rest

328. In nuisance, the unreasonableness for Marsh of the interference is the relevant consideration, not unreasonableness in the conduct of Baxter. This is because, as McLure P noted in *Southern Properties*, negligence on the defendant's part is not an element of the cause of action.

The nature of the interference with the Marshes' use of Eagle Rest

329. As was noted above in the context of the question of standing to sue, the Marsh used the land on Eagle Rest to farm organically pursuant to the NASAA Standards. In other words, the organic status of the land derives from Marsh's use of it according to organic farming principles. That use of the land is Marsh's livelihood: the mode of use gives him access to a market for certified organic products. Accordingly, the interference of which Marsh complains is the physical presence on Eagle Rest of RUR canola swaths and seeds³⁴⁹ because that presence led to the loss of the certified organic status of the land.

³⁴⁹ SOC at [43].

330. The use and enjoyment of agrarian land to cultivate and conduct farming operations is a well established use that is protected by an action in private nuisance. It is not necessary to show damage to property but interference with its use or enjoyment.
331. In *Perre*, Callinan J compared a case of the prevention of a particular use of land to physical damage to the land ³⁵⁰ (see under duty of care, above).
332. The Marshes' use of Eagle Rest is a use according to a particular method, giving that land a certain status. Baxter's planting and swathing of RUR canola, short of causing physical damage, nonetheless interfered with that use.
333. Recognition of differing uses of land and the status and economic benefits which derive from such uses as requiring legal protection can be found in the Recommendations of the European Commission on "guidelines for the development of national coexistence measures to avoid the unintended presence of GMOs in conventional and organic crops".³⁵¹ The recitals to the Recommendations acknowledge the diversity of "farm structures and farming systems and natural and economic conditions under which farmers in the European Union operate".³⁵² The Recommendations include (at 1.3) that: "Strategies and best practices for GMO cultivation may need to be developed and implemented at national or regional level, with the participation of farmers and other stakeholders and taking account of national, regional and local factors."³⁵³

Unreasonableness of the interference

334. Viewed, as it must be, from the Marshes' perspective, the interference with their use of Eagle Rest is unreasonable: it prevented their pursuit of organic farming pursuant a system certified under the NASAA Standards, and so denied them access to a specialised market for their farm produce.

³⁵⁰ At [423]

³⁵¹ TB 1814.

³⁵² Ibid.

³⁵³ TB 1817.

335. As McLure P explained in *Southern Properties*, a finding of unreasonableness will be the product of an evaluative judgment based on various factors. In this case, the characteristics of the neighbourhood in which the dispute has arisen must inform that evaluation. In *Elston v Dore* the High Court held that where a defendant's act injures the interests of a neighbour, it will be wrongful if it was not reasonable according to the ordinary usages of mankind living in a *particular society*.³⁵⁴
336. Kojonup is an established farming region where broad acre crops are cultivated and livestock grazed. The local farmers include both organic and conventional farmers.³⁵⁵ GM technology was brand new and had only just been legalised in Western Australia when Baxter decided to use it. Farming with that particular technology was not, therefore, common or an established use in the region. Its introduction was the subject of protocols by Monsanto, and cautions and recommendations by DFAWA and local agronomists.
337. Those protocols and cautions, such as the cautions against swathing in the DFAWA Farmnote³⁵⁶ and the March 2010 Farmanco Factsheet,³⁵⁷ were directed to protecting the interests of farmers within the region using the land according to farming practices potentially incompatible with that new technology. In the circumstances, the notion of "give and take", which infuses the law of nuisance,³⁵⁸ is not apt to extend beyond the natural or inevitable consequences of established uses, so as to cover the consequences of the use of a brand new technology.
338. It is instructive to compare the present case involving new farming technology with a case involving the natural consequences of ordinary land use. See, e.g., *Jeffrey v Honig*, in which the Court was required to consider whether one landowner's use of a public roadway to

³⁵⁴ (1982) 149 CLR 480 at 488.

³⁵⁵ Stretch T 900-1.

³⁵⁶ TB 0231.

³⁵⁷ Exhibit 31.

³⁵⁸ See, e.g., *Victoria Park Racing* per Rich J.

shift cattle interfered with the amenity of his neighbour's property.³⁵⁹ In *Gartner v Kidman*³⁶⁰ the Court referred to the general rule of riparian law requiring the holder of low lying land to accept the natural flow of water from the higher land. The Court held, however, that the owner of the higher land may be liable in nuisance for concentrating the flow of water, where a more concentrated flow does not occur simply as the result of the "natural" (ordinary) use of the land.³⁶¹

339. Taking reasonable precautions is not a defence to an unreasonable interference with a plaintiff's interests but may feature in an analysis of whether an interference is unreasonable so as to constitute a nuisance in the first place.³⁶² Baxter took no precautions. Despite being aware of the risk that canola seed might move from Sevenoaks to Eagle Rest, and the consequent threat to his neighbour's livelihood, he did not contemplate or seek advice from his agronomist about any means to abate the risk. Instead, he swathed the canola plants, removing them from their tethering roots, knowing that those swaths, concentrated in windrows would be dried and exposed to movement by wind.³⁶³
340. Baxter bears the onus of justifying or excusing the conduct – the planting and swathing of GM canola - which created the nuisance. The evidence discloses the absence of a coherent explanation from Baxter of his decision to plant and swath RUR canola on the Range and Two Dams paddocks and the absence of any precautions considered or taken by Baxter in order to abate the risk that the swathed material could be carried onto Eagle Rest. As such, the evidence provides no basis for Baxter to discharge his onus.

³⁵⁹ [1999] VSC 337.

³⁶⁰ (1962) 108 CLR 12.

³⁶¹ At 49.

³⁶² See e.g. *Challen v The McLeod Country Golf Club* (2004) Aust Torts Reports 81-760; [2004] QCA 358 [39] (Mullins J with McPherson and Davies JJA agreeing).

³⁶³ Exhibit 26A at [62[2]], [67] and [69]; Exhibit 5A at [59].

RELIEF

341. In addition to damages in an amount which has been the subject of agreement between the parties, Marsh seeks a permanent injunction in the following terms to restrain the nuisance occasioned by the planting and swathing of canola on Sevenoaks in future:

Baxter be permanently restrained from planting genetically modified canola on his land (which is the whole of the land comprised in certificates of title volume 1344 folios 1 and 2, volume 1300 folio 362, volume 1213 folio 216 and volume 1099 folio 992 (**Sevenoaks**)), within 1km of the plaintiffs' land (which is the whole of the land comprised in certificates of title volume 1725 folio 197 and volume 1900 folio 363, which is located in Kojonup in the State of Western Australia(**Eagle Rest**)).

The defendant be permanently restrained from swathing any genetically modified canola which is planted on Sevenoaks within 1km of Eagle Rest.

342. The injunction sought is confined and clear in its terms. It achieves a balancing of the respective interests of Marsh and Baxter because it enables each farmer to continue to rotate crops, whether according to the cycles adopted to date or some other cycle. Baxter has continued to plant RUR canola in certain of his paddocks on Baxter's Block. There is no evidence that he would not once again plant and swath GM canola in paddocks proximate to Eagle Rest.

343. In *Grasso v Love*, the Full Court of the Supreme Court of Victoria stated in passing that an applicant for a *quia timet* injunction must be able to show that there is a real probability that the activities of the respondent are imminent. The Court added that the degree of probability of future injury is not a fixed or absolute standard but must depend on the circumstances of the case.³⁶⁴

344. In this case the evidence of Baxter's crop rotation cycles and weed management practices was, for the reasons identified earlier, not sufficiently clear coherent as to enable Marsh,

³⁶⁴ [1980] VR 163 at 167.

when crafting a form of injunction, to anticipate precisely when the threat of nuisance might arise in future. For instance, it is not possible to predict crop rotation or chemical usage based on the paddock plans in evidence. The evidence of both Baxter and Robinson was that these plans were not strictly adhered to. In addition, both said in cross-examination that alterations to the plans were made ad hoc; Robinson also gave evidence that he did not consistently record such alterations in the paddock plan developed for the following growing season.

345. Consequently, the injunction anticipates the fact that the cycle of crop rotation may involve Baxter planting and harvesting GM canola in paddocks which are proximate to Eagle Rest, and becomes operable at the point where planting or swathing would occur within 1 km of Eagle Rest.
346. The consequences for Marsh of a future incursion of GM canola on to Eagle Rest are dictated by the terms of his contract with NASAA. NASAA has articulated the factors which led to its decision to de-certify Eagle Rest in 2010. The contractual consequences for Marsh of another incursion of GM canola material onto Eagle Rest can be predicted with relative confidence, having regard to the 2010 precedent, and to the subsequent learning about persistence of a canola seed bank and volunteer survival.
347. On the other hand, the monetary consequences are likely to be severe for Marsh because they will be reflected by the loss of premium prices payable for his produce, however they will be less easy to predict with precision. Those consequences will necessarily depend upon the extent of the contamination, the duration of any sanction imposed pursuant to the contract and the market or markets for his certified organic produce (such as oats and linseed) lost to Marsh. For that reason, damages are an inadequate substitute for injunctive relief. Damages will usually be adequate where an injury is capable of estimation in money terms and can be compensated by a small monetary sum.³⁶⁵

³⁶⁵ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 278.

348. The Court in *Grasso v Love* held that in determining whether or not to grant injunctive relief, the probability of the harm occurring must be weighed with its gravity and likely consequences. The Court went on to state that “the greater the injury or distress which would be caused by the apprehended injury, if it occurred, the more readily the Court will intervene despite uncertainties and deficiencies of proof.”³⁶⁶
349. The proposed form of injunction is an equitable, workable means of regulating the relationship between Marsh and Baxter.³⁶⁷ By allowing both Marsh and Baxter to continue to farm as they have done, subject to the management of crop rotations and minimum distances, the proposed injunction fairly distributes between the two farmers the advantages and burdens of their distinctive farming methods as they continue to pursue them.

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26 February 2014

³⁶⁶ At 167.

³⁶⁷ Compare *Jeffrey v Honig*, *supra*.