[2014] WASC 187

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	MARSH -v- BAXTER [2014] WASC 187
CORAM	**:**	KENNETH MARTIN J
HEARD	**:**	10-20, 27 & 28 FEBRUARY 2014
DELIVERED	**:**	28 MAY 2014
FILE NO/S	**:**	CIV 1561 of 2012
BETWEEN	**:**	STEPHEN WILLIAM MARSH First Plaintiff SUSAN GENEVIEVE MARSH Second Plaintiff AND MICHAEL OWEN BAXTER Defendant

Catchwords:

Negligence - Duty of care - Pure economic loss - No physical injury to persons or property - Scope of liability - Causation of damage - *Civil Liability Act 2002* (WA), s 5B, s 5C

Nuisance - Private - Unreasonable interference with use or enjoyment of interest in land - Nature of interference - Whether *Civil Liability Act 2002* (WA) applies to cause of action in nuisance - Farmer grows and swathes genetically modified canola - Swathes blown to neighbour's land - Neighbour holds contract with organic certifying body - Certifying body decertifies neighbour's land

Legislation:

Civil Liability Act 2002 (WA)

Result:

Action dismissed

Category: A

Representation:

Counsel:

First Plaintiff	:	Mr R M Niall SC, Ms L M Nichols & Ms C M Pierce
Second Plaintiff	:	Mr R M Niall SC, Ms L M Nichols & Ms C M Pierce
Defendant	:	Ms P E Cahill SC & Ms F Vernon

Solicitors:

First Plaintiff	:	Slater & Gordon
Second Plaintiff	:	Slater & Gordon
Defendant	:	Bradley Bayly Legal

Case(s) referred to in judgment(s):

Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213; (2013) 45 WAR 379
Barclay v Penberthy [2012] HCA 40; (2012) 246 CLR 258
Bryan v Maloney [1995] HCA 17; (1995) 182 CLR 601
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13; (1994) 179 CLR 520
Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad' [1976] HCA 65; (1976) 136 CLR 529
Craig v State of South Australia [1995] HCA 58; (1995) 184 CLR 163
Deasy Pty Ltd v Montrest Pty Ltd (Unreported, Queensland Court of Appeal, BC96055947, 22 November 1996)
Donoghue v Stevenson [1932] UKHL 100; [1932] AC 562

Dovvuro Pty Ltd v Wilkins [2003] HCA 51; (2003) 215 CLR 317
Drexel London v Gove (Blackman) [2009] WASCA 181
Elston v Dore [1982] HCA 71; (1982) 149 CLR 480
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; (2002) 211 CLR 540
Hardie Finance Corporation Pty Ltd v Ahern (No 3) [2010] WASC 403
Hughes v Lord Advocate [1963] All ER 705; [1963] AC 837
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61; (2000) 205 CLR 254
Mount Isa Mines Ltd v Pusey (1970) 124 CLR 383
Oldham v Lawson (No 1) [1976] VR 654, 657
Perre v Apand [1999] HCA 36; (1999) 198 CLR 180
Rylands v Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330
Sedleigh-Denfield v O'Callaghan[1940] All ER 349; [1940] AC 880
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79; (2012) 42 WAR 287
Sutherland Shire Council v Heyman (1985) 157 CLR 424
Tame v New South Wales; Annetts v Australian Stations Pty Ltd [2002] HCA 35; (2002) 211 CLR 317
Toll Transport Pty Ltd v National Union of Workers [2012] VSC 316
Vaughan v Shire of Benalla [1891] VLR 129
Weller v Foot & Mouth Disease Research Institute [1966] 1 QB 569
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16; (2004) 216 CLR 515

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Acronyms List

ACL - Australian Consumer Law

ACCC - Australian Competition and Consumer Commission

ANZFA - Australia and New Zealand Food Standards Authority

AQIS - Australian Quarantine and Inspection Service

ASOC - Amended Statement of Claim

CCA - Competition and Consumer Act 2010 (Cth)

CLA - Civil Liability Act 2002 (WA)

DAFF - Department of Agriculture, Fisheries and Forestry

DFAWA - Department of Farming and Agriculture of Western Australia

FREAD - Further Re-amended Defence

FSANZ - Food Standards Australian and New Zealand

Gazette - Western Australian Government Gazette

GMCFAA - Genetically Modified Crop Free Areas Act 2003 (WA)

GM (Canola) – Genetically Modified (Canola)

GMO(s) - Genetically Modified Organism(s)

GTA - Gene Technology Act 2000 (Cth)

HRWR - Herbicide Resistant Wimmera Ryegrass

IFOAM - International Federation of Organic Agriculture Movements

NASAA- National Association of Sustainable Agriculture Australia

NCO - NASAA Certified Organic Pty Ltd

OGTR - Office of the (Australian) Gene Technology Regulator

QM - Quality Management

RR (Canola) - Roundup Ready Canola

TB - Trial Bundle

KENNETH MARTIN J:

Introduction

1 This is a conflicting land use dispute between rural neighbours at Kojonup, Western Australia, some 256 kilometres to the south-east of Perth. The feature of a dispute between (farming) neighbours immediately calls to mind Lord Atkin's now famous dictum in ***Donoghue v Stevenson*** [1932] UKHL 100; [1932] AC 562:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. (580)

2 This litigation advances a claim for wholly financial injury which is asserted by one of the neighbours who farms organically, against the other farmer - who lawfully worked his land to plant, then harvest a genetically modified vegetable seed crop, in 2010.

What the case is about

3 The plaintiffs, Mr and Mrs Marsh, claim from the defendant (Mr Baxter) damages and a permanent injunction against his future swathing of genetically modified (GM) canola on his land. This is on the basis of two asserted tortious causes of action, in either common law negligence or private nuisance, arising out of events occurring in 2010.

4 The Marshes conduct their organic farming operation as a partnership from a rural property bordering Kojonup in the south-west of Western Australia. The Kojonup property, known as Eagle Rest, is legally owned by Mr Marsh.

5 Eagle Rest has been farmed for years in the Marsh family and Mr Marsh is a career farmer.

6 Mr Baxter's larger farm, Sevenoaks, borders Eagle Rest - lying to the west. It operates as an orthodox, but advanced, cropping business.

7 Around 2002, the Marshes began taking steps towards becoming recognised as a fully organic farming operation at Eagle Rest. Essentially, they proposed to grow wholly organic produce, namely cereal crops - oats, spelt, rye and small amount of wheat, or to raise sheep for the purpose of sale as organic meat (dorper lambs). In practical terms, to sell their Eagle Rest produce under the label of 'organic' the Marshes required the endorsement of an Australian organic status conferral body – that

body being, in turn, required to be accredited by the Commonwealth, under Australia's export protection regime.

8 The need for the conferral of organic status certification for their produce led the Marshes into enter a private contract with the National Association of Sustainable Agriculture (Australia) Ltd (NASAA). NASAA is an Australian corporation limited by guarantee, usually referred to by that acronym (and not to be confused with the far better known American entity NASA - the National Aeronautics and Space Administration Agency, to which there is no connection). To assist the overall comprehension of a trial with many acronyms used, I have included that table at the commencement of these reasons - just after the table of contents.

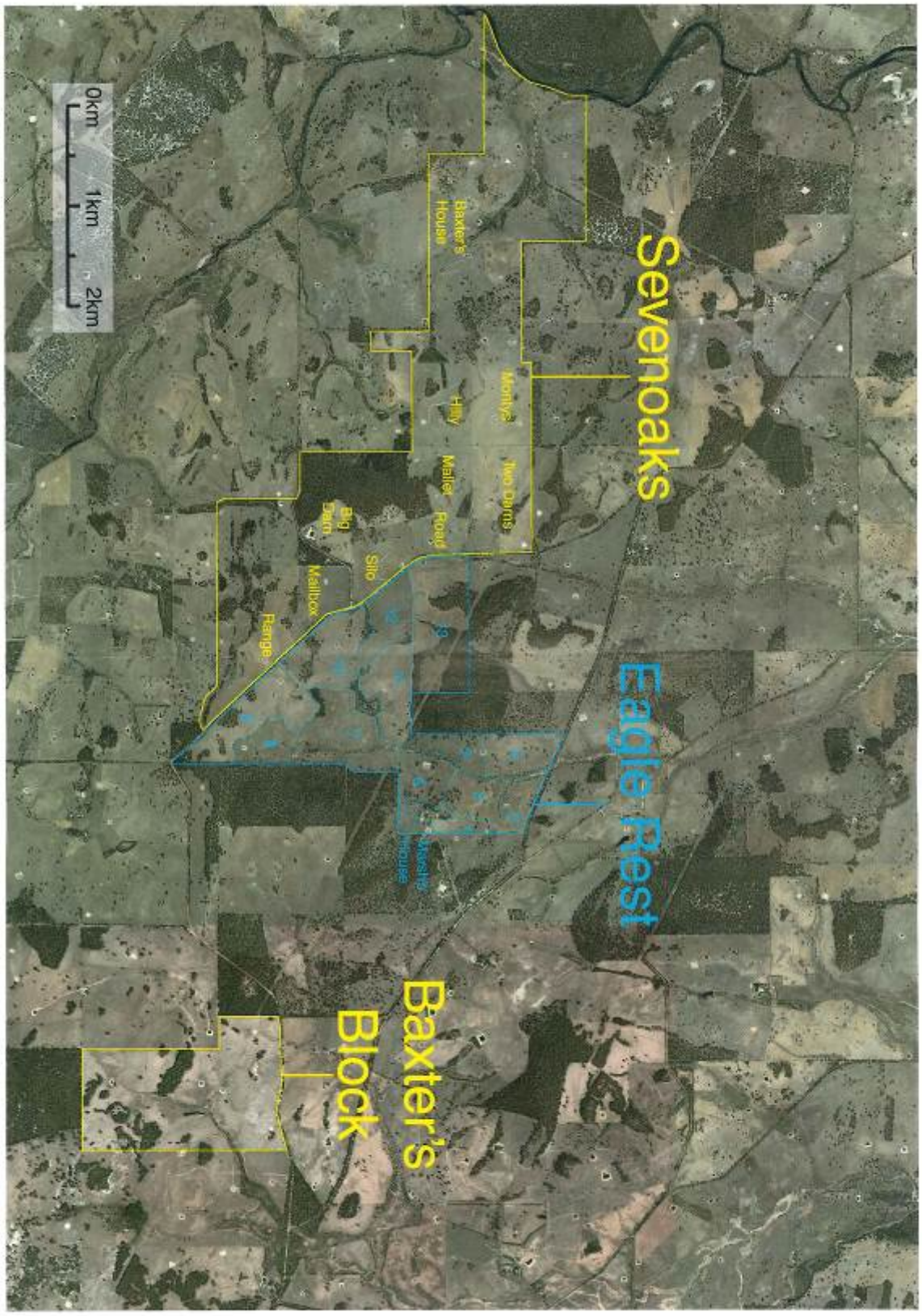
9 By 11 January 2006, Mr and Mrs Marsh had obtained organic certification from NASAA for 476 of their 477 hectares of Eagle Rest. (I will provide more details about NASAA, and its wholly owned subsidiary corporation NCO, in due course.)

10 Immediately to the western boundary of Eagle Rest is a 20.9 m road reserve. This is for the contiguous Glenorchy South and the Qualeup North Roads. To the western side of the road reserve is the 900 ha farming property Sevenoaks, which is owned by Mr Baxter.

11 Michael Baxter's family have farmed in the Kojonup area for generations. Hence, the Marsh and Baxter families have been farming neighbours at Kojonup for some years.

12 Like the Marshes, Mr Baxter, as a career farmer, works his land at Sevenoaks as a business to earn his living.

13 Since a picture tells more than a thousand words, I will incorporate, at this early point, an aerial photograph which was tendered at the trial (exhibit 6) which shows the two neighbouring Kojonup rural properties, Eagle Rest and Sevenoaks. The locations are divided by the roughly diagonal north-west to south-east running road reserve. Another property, also owned by Mr Baxter (Baxter's Block) can be seen lying to the east of Eagle Rest.



14 In 2010, the Eagle Rest property had been internally subdivided for operational purposes by the Marshes. It operated as a working farm of 13

different paddocks. Paddocks 9, 10, 12 and 13 at the west of Eagle Rest, are seen to be situated directly adjacent to the road reserve.

15 Sevenoaks, to the west of the road reserve, may also be seen as being internally subdivided by Mr Baxter for farming purposes into some distinctly named paddocks. The paddocks Range, Mailbox, Silo, Road and Two Dams paddocks lie adjacent to (ie, west of) the road reserve.

16 Mr Baxter conducts a broadacre mixed farming operation from both properties at Kojonup. This involves his sowing of cereal crops, vegetable seed crops (canola) and the running of some sheep.

17 Unlike the Marshes, Mr Baxter has never sought to grow organic produce, or to qualify Sevenoaks or Baxter's Block as an externally certified organic farming operation.

18 Mr Baxter had both planted and harvested more conventional canola crops across the various paddocks of Sevenoaks and Baxter's Block (on an annual rotational basis) for about 10 years, prior to the 2010 growing season. But it is his decisions in 2010, first to plant and then to harvest by swathing two of his eastern paddocks (Range and Two Dams) with the new variety of genetically modified (GM) canola (referred to alternatively as GM canola, Roundup Ready canola, or RR canola) which underpins the present litigation by the Marshes.

19 The controversy directs attention at Mr Baxter's key decisions in late April of the 2010 growing season to plant RR canola in his Two Dams and Range paddocks at Sevenoaks and then, in October 2010, his choice of a particular harvesting methodology (swathing) to gather his canola crop to collect that crop's matured canola seeds.

20 In 2010, Mr Baxter had decided to harvest by using the swathing methodology for the first time for any canola which he had grown at Sevenoaks.

21 Swathing is a well-recognised, indeed the preferred, agricultural harvesting technique used by canola growers. It involves, first, cutting the not yet fully matured canola plants at close to their base. The cut is made at a time before the canola seeds are fully ripened within the seed pods attached to each canola plant. There can be many seed pods on a canola plant – with small canola seeds to be found within each pod.

22 Once cut, the canola plants are pushed together into standing windrows in the paddock. There, the cut canola plants with their attached

seed pods will stand to ripen in the paddock - exposed to the natural elements (wind, sun, atmosphere) for about two to three weeks.

23 The last phase of a canola harvest using the swathing methodology sees the windrows of now much more dried-out canola plants and their attached pods, processed again by another agricultural machine (header) to harvest up the ripened canola seeds from each cut plant.

24 There are multiple agricultural advantages that support the swathing of a canola crop as the most commonly used and most efficient seed harvest method. This is both from a greater canola seed yield perspective, but also the earlier point of cutting, mitigating against potential crop losses from the elements in the paddock from a risk management perspective: see exhibit 14C, a joint expert conferral memorandum of the plaintiffs' expert, Mr Peter McInerney and the defendant's expert Professor Stephen Powles - answering (jointly) questions 2 and 3 concerning the agricultural advantages of swathing.

25 The swathing process stands in some degree of agricultural contrast to the alternative option of simply direct harvesting (heading) the fully matured canola seed pods from a ripened canola plant. Necessarily, a canola harvest by direct heading takes place at a later development stage in the maturity of a ripened canola plant. This will be roughly two to three weeks later than the first cut to a canola plant under a swathing operation.

26 Around November 2010, Mr Baxter harvested his RR canola crops which were then maturing in two of his eastern boundary paddocks (Range and Two Dams) by using the swathing technique.

27 RR canola also delivers the advantage to a grower of being able to spray an emergent canola crop with the herbicide (Glyphosate) more commonly known as Roundup, to kill off any weeds then growing with the canola.

28 Ordinarily, exposure to Glyphosate would be fatal to an emergent conventional canola crop. However, a deliberately engineered characteristic of RR canola is that this canola plant carries the (inbred) immunity to this herbicide - an inbred immunity characteristic which noxious weeds found growing in a canola crop, such as Wimmera rye grass, do not.

29 Because of this deliberately engineered trait delivering immunity to Glyphosate, RR canola growers who are experiencing seasonal weed

problems within their emergent crops may, prior to the harvest, derive an advantage by being able to better address late recognised weed problems in the emerged crop, using Glyphosate.

30 Swathing as a harvest process for canola also carries recognised advantages as regards longer-term weed control in a paddock. A canola crop's plants and any proximate weeds are cut earlier and stacked together. Hence, the potential for weed seed spread, out of more fully matured weeds, is reduced.

31 Mr Baxter, is an experienced Kojonup farmer. But in taking his business decisions in 2010, first to plant RR canola that season, then to harvest his emerged RR canola crop by swathing, he did not act unilaterally. He received supporting advice for both decisions from a local Kojonup agronomist, Mr Chris Robinson. The present case is not a situation of Mr Baxter unilaterally deciding in 2010 to grow, and then swathe, his RR canola crop on a whim. His decisions were agriculturally based and externally supported by professional advice he received.

32 But these were also business decisions in 2010 by Mr Baxter knowing the Marshes' adjacent Eagle Rest property to the east had been operated for some years by then as an organic farming operation. Mr Baxter knew that Mr Marsh had expressed to him in November 2008 some general concerns about GM canola possibly reaching Eagle Rest in future if it became lawful to grow a GM canola crop (as it did in 2010) and thereby causing Mr Marsh and his wife financial harm from their projected loss of their organic certification (ie, from NASAA).

33 Mr Baxter's growing of a RR canola crop on Sevenoaks in 2010 was lawful farming conduct on his part. This was in the wider context of some permissive legislative and executive events occurring in Western Australia during January 2010 which I will say more about in due course. None of the matters stated to this point present as controversial in the trial, in my assessment.

Trial materials

Uncontroversial evidence

34 There was a large measure of agreement between the Marshes and Mr Baxter upon many of the core underlying facts which are relevant to issues in this trial.

35 What are essentially uncontroversial, or agreed, facts emerge from three main sources.

36 First, a considerable level of factual admission arises from the face of the parties' respective pleadings. The present action was instigated by writ, on 3 April 2012. At that time Mr Marsh was the sole plaintiff. Mrs Susan Marsh was uncontroversially added as a co-plaintiff under amendments made, by my leave, on 4 February 2014 - shortly before the trial commenced.

37 The most contemporary versions of the pleadings, by reference to which this trial ran, were:

(a) the amended statement of claim (ASOC) of Mr and Mrs Marsh for 4 February 2014;

(b) Mr Baxter's further re-amended defence (FREAD), amended pursuant to my leave on 10 February 2014; and

(c) a brief response by the plaintiffs' amended reply of 28 January 2014.

38 A second repository of agreed facts is found in a consolidated statement of facts, submitted as being agreed between the parties (with also a few facts highlighted as not agreed) and tendered at trial by the plaintiffs as exhibit 1.

39 Exhibit 2 is a short supplementary statement of further agreed facts. It explains that $85,000 is the agreed figure for the net loss or sustained by the farming partnership of Mr and Mrs Marsh, arising by reason of the absence of NASAA certification (more correctly NCO certification, as I later explain) for approximately 70% of the area of the Eagle Rest farm - assuming that liability at this trial is ultimately established against Mr Baxter. That agreed sum has been derived as losses claimed across three successive financial years up to 30 June 2013, by the Marsh farming partnership.

40 The last major repository of agreed facts arises out of the parties' exchanged responsive chronologies of events, generating, in the end, one consolidated document. This document is, at most points, sourced by reference to the documents found in the trial bundle, or to witness statements. The ultimately agreed chronology of facts between the parties became exhibit 41 at the trial.

41 The next section of these reasons attempts to organise, consolidate and synthesise the various repositories of agreed facts towards a basic narrative, for what is essentially a commencing platform of relatively uncontroversial facts. At points I have, for coherency, augmented this narrative section with some further facts I have drawn out of a few uncontroversial documents tendered as part of the trial evidence.

42 I will also record that there was also a high measure of agreement at the trial between the six expert witnesses called in aggregate for both sides. The plaintiff called two experts - Mr Peter McInerney an agriculture consultant from Wagga Wagga, New South Wales and Professor Rene Van Acker, an academic specialising in agricultural science and weed control - who gave evidence by video-link from Canada.

43 Prior to the trial the parties, as is customary, had exchanged their respective expert reports for the trial. A conferral process between the rival experts generated a number of mutually agreed memoranda. These were ultimately tendered by the plaintiffs. They became exhibits at the trial, along with the various expert reports.

44 Joint memoranda as to common positions about various issues, as reached between Mr McInerney with three of the defendant's experts, Dr Patrick Rüdelsheim, Dr Christopher Preston and Professor Stephen Powles, became respectively exhibits 14A, 14B and 14C.

45 Professor Van Acker's conferral memoranda with Professor Powles, Dr Rüdelsheim and Professor Preston became, respectively, exhibits 17A, 17B and 17C.

46 Beyond this commencing edifice of largely uncontroversial facts between the parties, there are obviously some more contentious factual issues requiring my determination. I shall, in the main, render these required determinations in the running – during my analysis of either a particular witness's evidence, or in considering more important trial documents.

Documentary evidence at the trial

47 The parties between themselves prepared a nine-volume lever arch trial bundle. The content of the nine volumes of material is rendered explicable, by the trial bundle index, initially identifying 179 trial documents, across 3,009 pages of material. The status of documents in

the trial bundle was essentially an evolving work in progress during the trial.

48 By the end of the trial, however, the status of all trial bundle ie, TB) documents (which in aggregate are exhibit 4) had been fully resolved between the parties. The version of the trial bundle index, as finally agreed between the parties, was tendered as exhibit 3.

49 A handful of documents found in volume 2 of the trial bundle, namely documents 27 through 31 (essentially, fact sheets or farm notes, as issued by the Department of Farming and Agriculture Western Australia (DFAWA)) were admitted into evidence on the limited basis that the material was admitted, albeit not for the truth of its content. That was by reason of hearsay objections raised on the part of the defendant. That same status was also afforded to documents 40 to 45, as regards all newspaper advertisements (but for document 45) placed by Mr Marsh in newspapers in the Kojonup or surrounding districts, over a period between 25 October and 22 November 2010. There was no dispute over such material having been published in the local rural newspapers. The truth of some content was, however, clearly in issue from Mr Baxter's perspective.

50 TB document 45 is a Farm Note issued by the DFAWA. The note issued in May 2011, a time well and truly after the late November/early December 2010 airborne incursion of GM canola swathes into Eagle Rest (described by the Marshes in their pleadings and submissions in tendentious fashion as a 'contamination'). Again the objection was on the basis of hearsay. Hence this material was admitted and received as evidence, otherwise than for the truth of its content.

51 For convenience, throughout the course of the reasons I have usually just referred to the trial bundle (TB), then a volume number (of nine) followed by page number, in addressing a trial bundle document. By illustration, TB Vol 1, pages 216 - 218 is a reference to document 27 in trial bundle volume 1 formally tendered in evidence at this trial as exhibit 4.1.27).

Other documents sourced from witnesses

52 In the main, each of the parties' non-expert and expert witnesses gave their evidence-in-chief at the trial through the medium of a formal witness statement, prepared and exchanged between the parties before trial.

53 There were, as is now all too typical, a considerable number of evidentiary objections raised against components of the exchanged

witness statements. Most objections were resolved at the trial. Revised and corrected witness statements were then tendered as the evidence-in-chief of each witness as an exhibit.

54 To illustrate, Mr Marsh's evidence-in-chief is found across three exhibits. First, in the text of his interlocutory affidavit, sworn 12 April 2012 (exhibit 5(a)). Second, by his witness statement of 13 February 2013, elaborating upon that affidavit (exhibit 5(b)). Finally, is his short supplementary witness statement, signed on 15 January 2014 (exhibit 5(c)). Certain paragraphs of Mr Marsh's written evidence-in-chief can be seen to be cross-referenced to documents which are found within a volume of the trial bundle.

55 Mr Baxter's evidence-in-chief was by his witness statement of 18 February 2014 (exhibit 26A), plus a short (amended) supplementary statement (exhibit 26B), also of 18 February 2014.

56 Save for one of the plaintiffs' witnesses (Ms Janine Morton), all the witnesses attended trial in person, by video-link or telephone, and were cross-examined on their witness statements.

57 All the trial evidence was recorded, transcribed and unusually for this case openly published on this court's website. I will refer at various parts of these reasons to the transcript page (ts) of a witness's evidence. In the main, that will be a reference either to evidence given under cross-examination, or in re-examination.

58 Beyond this material there were some more documents which were tendered during the course of the trial, on an ad hoc basis.

59 In all, 41 exhibits were tendered during trial, inclusive of the nine-volume trial bundle (discretely received as exhibit 4).

Trial evidence from witnesses

Plaintiffs' witnesses at trial

60 At the trial the non-expert witnesses called on behalf of the plaintiffs comprised:

1. From the first-named plaintiff, Stephen William Marsh (Mr Marsh's evidence-in-chief by reference to an affidavit and two further witness statements which became exhibits 5(a), 5(b) and 5(c));

2. Mr Andrew Bishop, a senior public servant with the Tasmanian Government (Mr Bishop's witness statement became exhibit 12);

3. Ms Diane Gore (witness statement exhibit 15). Ms Gore is a former employee of NASAA's subsidiary corporation, NCO. She was engaged as regards the certification work of that body, conducted for NASAA. Ms Gore was based in South Australia. She would make certification assessment decisions concerning agricultural properties in Australia on the basis of written reports sent to her by local NCO inspectors. She made assessments in respect of the Eagle Rest property in 2011, after it had earlier been decertified in December 2010;

4. Ms Stephanie Goldfinch, another former employee of NCO and NASAA (witness statement exhibit 19). My reasons contain a distinct section dealing with the evidence of Ms Goldfinch. During her tenure with NASAA/NCO she was essentially the senior ranking decision maker for NCO. Ms Goldfinch was largely responsible for, first, a suspension decision as regards certain Eagle Rest paddocks (on 10 December 2010) then, the decertification decision, in respect of 70% of the area of Eagle Rest on 29 December 2010, and which remained in place until late 2013;

5. Ms Janet Denham, currently chairperson of NASAA and NCO. Ms Denham was the Chair of NASAA between 1996 to 2003, resuming that role again from October 2010, until now. Her evidence-in-chief is exhibit 20(a), 20(b) and 20(c);

6. Mr Sachin Ayachit, whose evidence was received by video-link from Mumbai. Mr Ayachit's witness statement is exhibit 21. Mr Ayachit is currently certification manager for NASAA Certified Organic Pty Ltd (NCO), NASAA's certification arm. Mr Ayachit has only held that position since August 2012 (exhibit 21);

7. Ms Janine Morton, exhibit 22. Ms Morton was not required for cross-examination;

8. Mr Jonathan Morton (exhibit 23) Ms Morton's husband. Mr Morton is sole director of the corporation Morton's Seed and Grain Pty Ltd. This corporation in the past had purchased grains organically grown by Mr and Mrs Marsh from Eagle Rest. The

Mortons' seed sale business is NCO certified, as meeting NASAA standards;

9. Mr Frederick Davies, whose evidence was received by telephone from Bathurst, Victoria (see evidence-in-chief exhibit 24). Mr Davies' brief evidence essentially concerned a market for, and the higher prices obtainable for, organically grown linseed oil.

61 The plaintiffs also called two expert witnesses. First, was New South Wales based (Wagga Wagga) agriculture consultant, Mr Peter McInerney. He provided three reports (exhibits 13A, 13B and 13C), plus a table (exhibit 13D) which was a worked example of a wimmera ryegrass seed bank running down over three years.

62 The plaintiffs' other expert was Professor Rene Van Acker taken by video-link from Canada. He provided three expert reports (exhibits 16A, 16B and 16C).

Defendant's witnesses at trial

63 For the defendant, non-expert trial evidence was received from:

1. Mr Baxter (his evidence-in-chief being exhibits 26A and 26B);

2. Kojonup based agronomist, Mr Christopher Robinson, who had initially provided agronomy advice to Mr Baxter in the period between 2003 to 2006 (Mr Robinson then being overseas in the years 2007 and 2008). In that first period, Mr Robinson worked for Kojonup Agricultural Supplies.

   Mr Robinson had returned to Western Australia at the end of 2008. He joined a new employer organisation on his return. This was the rural advisory organisation Farmanco. Mr Robinson now worked as an agronomist, based at Farmanco's Kojonup office, where he is still engaged. Mr Robinson returned to advising Mr Baxter as an agronomist from the commencement of the 2010 growing season. Mr Robinson's evidence-in-chief, given through his amended witness statement, is exhibit 30.

3. The defendant also led evidence from another local Kojonup farmer, Mr Digby Stretch. His evidence-in-chief became exhibit 29.

64 The defendant also called four experts at the trial:

(a) Professor Stephen Powles, a University of Western Australia academic who holds an undergraduate and Masters degree and a PhD in plant and agricultural science, whose three expert reports of 6 August 2012, 4 November 2013 and 24 November 2013 respectively became exhibits 32(a), 32(b) and 32(c);

(b) Professor Patrick Rüdelsheim, a bioethics and biosafety expert whose evidence-in-chief through a report of 2 October 2014, became exhibit 24;

(c) Dr Christopher Preston, an internationally recognised seed expert, whose report of 4 December 2013 became exhibit 27. Dr Preston was cross-examined by video-link from South Australia;

(d) Mr Jonathan Slee, whose report of 18 November 2013 became exhibit 34. Mr Slee was heavily challenged under cross-examination by the contention that large parts of his written report looked to be direct quotations from non-attributed sources, mainly as regards international organic standards (ts 987 - 988). Mr Slee did not really contest the assertion (see exhibit 40, by way of contrast to exhibit 34). Nevertheless, the substantive content of what is found in Mr Slee's report concerning international organic standards, save in respect of one matter in relation to European tolerances to GM material, did not really appear to be all that controversial.

65 That comprised the witness evidence given in the trial.

Factual narrative

66 I move then to matters which were essentially uncontroversial at the trial.

67 Stephen Marsh, as I mentioned, is the registered proprietor of Eagle Rest, at Kojonup. His close neighbour, Michael Baxter, is the registered proprietor of Sevenoaks, which roughly adjoins the south-west boundary of Eagle Rest.

68 The two Kojonup farms are separated by the Qualeup North and Glenorchy South road, which runs in contiguous fashion from the southern-most tip of Eagle Rest, in (roughly) a north-westerly direction.

69 Measured from boundary fence to boundary fence, the two farms are separated by the road reserve of 20.9 m. Lines of trees grow on either

side of the road reserve (as seen on exhibit 6, see [currently page 7] as between Eagle Rest and Sevenoaks.

70 Paddock layouts within the two farms are also seen on the annotated and scaled aerial photograph tendered as exhibit 6.

71 Additionally, Mr Baxter owns and farms the discrete parcel of farming land, known as Baxter's Block, lying south-east of Eagle Rest. Baxter's Block is not contiguous with Sevenoaks. Nor does it border Eagle Rest.

72 An organic farming produce business conducted from Eagle Rest was operated by Mr Marsh with his wife, Susan, the second plaintiff, as a partnership. Using a process of paddock rotation, across yearly growing seasons, various of Eagle Rest's 13 paddocks were used by the Marshes to cultivate organic cereal crops. In other seasons the paddocks are rotated through a pasture phase, to carry sheep.

73 Organic cereal crops grown from Eagle Rest up to 2010 included wheat, oats, spelt and rye.

74 Likewise, from his two Kojonup farms, Mr Baxter also has run sheep and grown wheat, barley and oats. He has also grown conventional canola crops on Sevenoaks for at least 10 years prior to 2010.

75 The Marshes have never grown canola crops upon Eagle Rest (exhibit 5(a), affidavit Stephen Marsh, par 6). Nor, as I explain later, have the Marshes ever grown crops on Eagle Rest which are capable of cross-pollinating with canola, or GM canola.

76 In 2008, Mr Baxter had grown conventional canola on some paddocks of Sevenoaks. By 'conventional' is to say that the 2008 canola was not a genetically modified variety. Nor was this conventional canola attempted to be grown organically by Mr Baxter.

77 As I will explain in more detail, GM crops (including GM canola) could not lawfully be grown anywhere in Western Australia, before January 2010 (save for some approved and limited growing trials in 2009 - including a growing trial upon the property of another Kojonup farmer and witness at this trial - Mr Digby Stretch).

78 In about November 2008, Mr Marsh discovered 12 conventional (ie, not GM or organic) canola plants that had apparently self-sown (called volunteer plants) growing upon Eagle Rest (ts 202). He pulled out all the

conventional canola plants (ts 204). The unwelcome discovery of the plants led Mr Marsh to visit Mr Baxter at Sevenoaks. He took with him some of the plants to show to Mr Baxter.

79 What was passed between the two men at the 2008 meeting is an issue of some minor dispute. But many aspects of their conversation are agreed.

80 Mr Marsh told Mr Baxter he believed the volunteer canola plants had 'come from Sevenoaks' (adopting the language of exhibit 1, par 14(ii) consolidated statement of facts agreed; but which is not a direct quotation of the passing words). Mr Baxter apparently did not dispute this at the time, or thereafter (exhibit 41, par 9).

81 I will interpolate, given that the canola plants had apparently 'self-sown' on Eagle Rest, that this meant that some canola *seeds* must earlier have been moved to the soil at Eagle Rest, from Sevenoaks - in order to subsequently germinate as canola plants. What was said as to the mode of carriage of the canola seeds into Eagle Rest in the conversation of November 2008 is less clear.

82 Mr Marsh told Mr Baxter he was welcome to come over to Eagle Rest to look at the other (growing) volunteer canola plants. There appear to have been 12 such plants in 2008, see ts 202. Mr Baxter did not take up the offer to visit.

83 It is agreed that at the November 2008 meeting Mr Marsh also told Mr Baxter (I interpolate, no doubt with an eye to the future) that if the growing of GM canola ever became legal in Western Australia, and was grown by Mr Baxter upon Sevenoaks, and blown or carried on to Eagle Rest, that Mr Marsh's organic certification could be imperilled (see exhibit 41, par 9(iv)).

84 Genetically modified organisms (GMOs) were, Mr Marsh also told Mr Baxter at this time, not allowed in a certified organic system (exhibit 41, par 9(iv)).

85 Nevertheless, it is also accepted that Mr Baxter then responded to Mr Marsh at this meeting that he probably would grow GM canola, if it became legal to do so (exhibit 41, par 9(v)).

86 Despite the subject matter of the discussion and apparent disagreement of position, there is no suggestion put to me that this was

not a cordial meeting as between the two Kojonup neighbours in November 2008.

87 Just over a year later, around March 2010, following a January 2010 ministerial order issued under the *Genetically Modified Crops Act 2002* (WA) authorising the cultivation of GM canola in WA, Mr Baxter's agronomist, Mr Chris Robinson, met Mr Baxter at Sevenoaks.

88 The meeting was to settle upon that year's annual cropping programme for Sevenoaks and Baxter's Block. Mr Robinson now recommended that Mr Baxter plant Roundup Ready (RR) GM canola in three eastern paddocks of Sevenoaks. The three paddocks adjoined the road reserve. On the other side of the road reserve, as we have now established, lies the western paddocks Eagle Rest.

89 The same month, Mr Baxter attended a local Monsanto Australia seminar, concerning contractual requirements that needed to be met by farmers for obtaining RR canola seed in order to grow RR canola. One of the growing conditions was that any RR canola crop was only to be planted up to a distance of 5 metres from a paddock fence.

90 Between 14 and 17 May 2010, Mr Baxter sowed RR canola in his Range and Two Dams paddocks at Sevenoaks. However, he did not have enough RR canola seed to plant RR canola in the proposed third paddock (Mailbox). That paddock, in the end, was solely sown with conventional canola, in 2010.

91 In 2010, Mr Marsh had been verbally told by Mr Baxter of the proposed planting of GM canola in two boundary paddocks. A brief conversation took place at a 'busy bee' which both men attended, held early that year on the property of another Kojonup farmer, Mr Marinoni. There is little detail about this conversation in the evidence.

92 Mr Marsh described his crop rotation plan for Eagle Rest for 2010 in one of his witness statements (exhibit 5(b)). Table 1 attached to the statement records that for 2010, paddocks 1, 3 - 6, were to be used to grow organic oats. Paddock 2 was divided, with 6 ha for oats and 6.9 ha for hay. Paddocks 7 - 9 and 13 were to be used as pasture (for sheep). A part of paddock 11 was to be used to grow wheat. Mr Marsh's initial intention had been to grow organic wheat in western boundary paddock 10, closer to Sevenoaks. Mr Marsh's evidence clarified his move of that proposed crop to the more centrally located paddock 11 for that year's organic wheat crop. This was undertaken 'because Mr Baxter informed us he was going to go GM' (ts 219 - 220).

93 Eagle Rest paddock 11, slopes downwards at its southern end. The wheat crop was only sown on the northern, upper portion. This was, Mr Marsh said, a way of creating a 'buffer zone' (ts 223).

94 Boundary paddock 12 of Eagle Rest was used in 2010 to grow spelt and rye crops. However, the 2010 cereal crops in paddock 12 were never capable of being sold that season as certified organic produce. This was because Mr Marsh had earlier used paddock 12 to quarantine his sheep for a month, after a seasonal need to drench them with chemicals, to address parasite problems arising during 2009 (ts 222).

95 In September 2010, Mr Marsh had erected some new signs along the boundaries of Eagle Rest. The new signs said that the property was a 'certified organic farm' and 'GM free' (exhibit 41, par 6). A photograph of one sign, seen as carrying an endorsed date of September 2010, was tendered as exhibit 9.

96 About 29 September 2010, Mr Marsh hand-delivered to Mr Baxter a pro forma type document entitled 'Notice of intention to take legal action'. This document, along with its accompanying attached pages, is found at TB Vol 1, 246 - 252. By exhibit 1, the delivery of that document to Mr Baxter is agreed. However, the factual correctness of its content remains as heavily disputed.

97 The September 2010 notice document does not look to have been drafted by a layperson. Rather, it presents as a pro forma, quasi-legalistic document. Blank spaces of the document look to be filled out by Mr Marsh in his longhand - to identify his own specific details and also to direct the pro forma notice, once completed, to Mr Baxter particularly.

98 The notice says, among other things, that use of GMOs (meaning Genetically Modified Organisms) can cause 'catastrophic commercial losses' to farms not cultivating GM crops, particularly those accredited as organic farms (par 1). Such commercial losses are said, by the notice, to be caused as a consequence of organic farmers losing their certified status and being unable to charge the premium price which organic goods attract on the market (par 2). These losses would not, the notice continued, generally be covered by an insurance policy (par 3). Eagle Rest was identified as a certified organic farm (par 4).

99 The notice document proceeded to state, by reference to an asserted legal principle of strict liability, that a person would be responsible for losses 'caused by the escape of a dangerous thing from land even where there has been no fault or negligence' (par 7). The purported principle of

strict liability, as described in the notice, was said to apply to an escape of GMOs 'irrespective of the means by which the GMOs escape or the unexpected intervention of any person' (par 8).

100 The document concluded by advising that the Marshes intended to take legal action in such an event(s) and, as well, gratuitously advising that Mr Baxter should obtain comprehensive indemnity insurance for his financial protection (pars 10 - 11). Attached to the notice was Schedule A, setting out a list of hypothetical items of loss the Marshes may seek to recover. Also attached were extracts containing s 3.2 of NASAA Organic Standards. Section 3.2 is entitled 'Genetically Modified Organisms'.

101 On 25 October 2010, Mr Marsh caused to be published in the local West Arthur Shire community newspaper (*The Bleat*) notice declaring Eagle Rest a 'Genetically Modified Organisms {GMO} Free Area'. It was said that court action would be taken in respect of 'any Forfeiture of GM FREE ACCREDITATION or ORGANIC CERTIFICATION' (emphasis in original) in the event that the land 'becomes contaminated with GMOs'.

102 The newspaper's notice continued to say that it would be relied on as demonstrating the public was alerted as to the 'foreseeability of the losses and damages' incurred.

103 Notices in substantially the same terms were also caused to be published by Mr Marsh in the *Kojonup News* on 5 and 19 November 2010, and again in *The Bleat* on 8 and 22 November 2010. The series of notices placed by Mr Marsh may be seen at TB Vol 1, 259 - 284.

104 As earlier mentioned, the plaintiffs' introduction of these notices into evidence as part of the trial bundle (exhibit 4) was agreed to by the defendant -on the limited basis that the notices did not go to prove the truth of their contents. To that end, footnote 3 in exhibit 1 says that the 'defendant does not agree with the statement that Eagle Rest was declared GMO free'.

105 Nevertheless, the fact that 476 of the 477 hectares of Eagle Rest had been certified by NASAA (more correctly by NASAA's subsidiary corporation, NCO) as an organic farm before and up to late 2010, is uncontroversially accepted at this trial.

106 Between 8 and 10 November 2010, Mr Baxter's engaged swathing contractor, a Mr Meredith, cut the Range and Two Dams RR canola plants. The cut plants were then pushed together by the swather into

windrows and left standing in rows upon the two paddocks (see [21] - [23] above).

107 In contrast, the conventional canola crop growing in the adjacent Mailbox paddock of Sevenoaks was harvested some weeks later by Mr Baxter, using direct heading (ts 831 - 832).

108 From a report compiled by DFAWA (see TB Vol 2, page 349) it appears Mr Marsh first noticed some canola swathes outside Sevenoaks, on 29 November 2010. They were then observed on the road reserve between Eagle Rest and Sevenoaks. The following day, Mr Marsh found swathes within his Eagle Rest property.

109 By 1 December 2010 Mr Marsh had notified DFAWA of the presence of canola swathes upon Eagle Rest. The next day, Mr Marsh sent two faxes to NCO officer Stephanie Goldfinch in South Australia. NCO is NASAA's wholly owned subsidiary corporation (NASAA Certified Organic Pty Ltd). It deals with the organic certification status of operators such as the Marshes. Its operations were carried on from a base in South Australia.

110 Mr Marsh's first communication to Ms Goldfinch (TB Vol 2, page 291) told her there was 'substantial contamination' from 'neighbours swathed GM Canola crop … up to 800 metres inside the boundary'. His second fax (TB Vol 2, page 292) revised this to 'an area up to 1.2km from GM boundary into our property by 1.6km wide … approximately 160 Ha', including 'hundreds of swathed GM plants and thousands of seeds spread across our land'. Mr Marsh also said his sheep were eating the swathes.

111 Two DFAWA officers and one local grower inspected Eagle Rest on 3 December 2010. A report of that inspection (dated 17 February 2011) is found at TB Vol 2, pages 348 - 366.

112 The inspectors were taken by Mr Marsh to various locations on Eagle Rest. The inspection party noted a presence of canola swathes, taking photographs and five samples of plant material. Photographs were attached to the report. The swathe samples were sent to an independent testing laboratory. The presence of RR canola in the tested swathe samples from Eagle Rest was advised on 23 December 2010.

113 Albeit never formally admitted at the trial, there can be no doubt as to the origin of these canola swathes as being from Sevenoaks and I will now render that finding, which was otherwise not agreed.

114 Mr Marsh's reactions or inactions after discovering what he always strongly suspected to be, and which was later confirmed by the testing, to be RR canola swathes on Eagle Rest, raise some issues of controversy dealt with later. Importantly, I do note a comment, when Mr Marsh took the DFAWA inspectors to see a swathe which was then stuck in a boundary gate. The report comment was that the swathe 'was left stuck in the chicken wire as Mr Marsh told the Visitors he wanted the plant to remain there' (see TB Vol 2, page 349).

115 Further on in their report, the DFAWA inspectors comment that they '[r]ecommended to Mr Marsh he collect the canola plant material that he had pointed out to us to prevent them from shedding seed and moving further into his property. Mr Marsh advised that he would rather the plants remain where they were for the time being' (see TB Vol 2, page 350).

116 The DFAWA inspectors also had told Mr Marsh that DFAWA would provide 'technical advice to Mr Marsh to help him manage the presence of GM material on his property'. However, the report noted that more information was required on the NASAA recertification process. I return to this aspect later.

117 On 4 December 2010, there was the first of a series of inspections at Eagle Rest by a representative of NASAA's certification subsidiary, NCO. The first NCO inspection was conducted by a Ms Kathe Purvis. Her written report concerning her inspection of 4 December 2010 is at TB Vol 2, pages 293 - 309. The document was originally incorporated into the trial bundle on 13 February 2014, subject to some submissions as to the limited scope of its use. However, on 18 February 2014, I was told the document was, by consent, in evidence at trial for all purposes, albeit Ms Purvis was not called as a witness.

118 Ms Purvis recorded that the Eagle Rest 'operator', viz the Marshes, had been 'fully compliant' (meaning with NASAA Standards for their organic status, as I will later explain). However, through 'no fault' of theirs, there was assessed by Ms Purvis to be a 'major non compliance' manifesting in 'GM canola … scattered across a large area of [the] property'. This included Eagle Rest paddocks 7, 8, 10 and 12. Ms Purvis' report did not say whether it was the whole or part of a paddock where swathes were found or in what concentration. The sheep grazing in paddock 7, it was inferred, had eaten the heads of the swathes (ie, only partly eaten, not entirely eaten, some swathed plants).

119 It was recorded by Ms Purvis that (on 4 December 2010) a 'strong southerly wind was blowing at the time of the inspection'. The wind gave rise to her 'concerns for areas further into the property due to the volume of plants material [sic] on site, the way it was moving along with the wind and the continuing strong wind that was blowing from the south'. Indeed, Ms Purvis further recorded being told by Mr Marsh that between her inspection at Eagle Rest and a subsequent follow up phone call, that swathes had now blown into paddock 13.

120 At its conclusion, Ms Purvis' inspection report stated that Mr Marsh 'will not act until he has advice from NASAA on the status of his crops', due to be harvested at that time.

121 The DFAWA report and other evidence indicates Mr Marsh was holding off not only harvesting the crops on Eagle Rest paddocks 1 to 6 (oats), 11 (wheat) and 12 (spelt and rye), but also that he was holding off making any immediate efforts to gather up and remove the canola swathes which had blown into Eagle Rest, pending some outcome or advice from NASAA (or NCO).

122 Back on Sevenoaks, between 2 and 4 December 2010, Mr Baxter completed the last phase in the swathing process, by the harvesting the ripened seed pods of the swathed RR canola out of the windrows in the Two Dams and Range paddocks.

123 On 10 December 2010, NCO's Executive Officer Stephanie Goldfinch wrote to the Marshes. She now informed them that NCO's organic certification for Eagle Rest paddocks 7 - 10, 12 and 13 was being suspended. This suspension was pending 'further investigations' (see TB Vol 2, pages 323 - 324). This appears to be a reference to the awaiting of test results conclusively confirming the presence of GMOs (ie, RR canola) in the swathe samples from Eagle Rest.

124 A second post incident inspection of Eagle Rest, undertaken by another NCO local representative, took place on 21 December 2010. In this instance, the inspection was conducted by a Ms Clare Coleman. At this time, it was apparent the previously observed swathes remained. More photographs and samples were taken. Ms Coleman did not give evidence at the trial.

125 For paddock 11 (in the middle section of Eagle Rest), it was noted there was a wheat crop growing on the upper, northern portion of the paddock. Three canola swathes had been found in the lower, southern part of paddock 11 - ie, out of the wheat crop itself. That appeared to be

the extent of the NCO ascertained 'contamination' in paddock 11. From Ms Coleman's report, none of the three swathes identified were located within the wheat crop. Nothing suggests that the three cut plants could not have been physically collected and removed before seeds from their seed pods scattered, or were further scattered across Eagle Rest's paddocks. However, that collecting up did not happen until April 2011.

126 Ms Coleman's report concluded the wheat crop was 'free of contamination'. On the other hand, for paddock 12, some swathes had been found 'lodged within the [standing rye] crop'.

127 Samples of the canola swathes were again taken. Earlier samples taken by Ms Purvis had apparently been lost by the postal service. Samples were sent by Ms Coleman to a third party testing laboratory. The samples were eventually tested and proved positive for the presence of RR canola.

128 Results of that testing of the swathe samples were soon received by Ms Goldfinch for NCO in South Australia, on 29 December 2010.

129 The same day, Ms Goldfinch wrote again to the Marshes, informing them all of Eagle Rest's paddocks 7 - 13 were then being decertified - along with any crops growing thereon.

130 That left only Eagle Rest paddocks 1 - 6 (with their standing unharvested organic oats crop) remaining. Additionally, a small 6.6 ha area of Eagle Rest (Old Orchard, Well, House, Dam) was designated by NCO as a quarantine location for sheep which had been grazing on the canola swathes.

131 The 29 December 2010 NCO letter continued:

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

132 Ms Goldfinch's decertification letter to the Marshes did not set any timeframe for Eagle Rest's possible future organic recertification - beyond a somewhat open-ended benchmark of the RR canola being 'eradicated'.

133 The NCO letter continued to inform the Marshes of their 'rights of appeal':

> You may appeal any part of this Licence within 30 days of the date of this letter. Your appeal must be made in writing and it should include reasons

> for your appeal including any relevant documentation. NCO will consider your appeal carefully. If it is not resolved to your satisfaction, you have the right to ask NCO to constitute a formal appeal hearing to reconsider the matter.

134 How the Marshes might have had NCO's decertification decision altered or reversed is not apparent. For the time being, it may be noted that this NCO advice displayed, on its face, no reasons or explanation for the decertification decision.

135 The letter did not refer to any particular organic standards, either from the NASAA Standards or National Standards (both of which I will refer to later in more detail). Nor did it mention as relevant any clauses of the Marshes' NCO/NASAA contract as having possibly been transgressed or, at any rate, to identify a basis for the decision to decertify Eagle Rest's paddocks 7 to 13.

136 In the ensuing 2011 growing season at Kojonup, Mr Baxter did not sow any RR canola, or any other GM canola variety, upon his Sevenoaks' paddocks. He did, however, on some of his paddocks at Baxter's Block.

137 The position then, at the start of 2011, was that Eagle Rest's paddocks 7 - 13 stood as decertified by NCO. Paddocks 1 - 6 remained as certified organic. And a small area functioned, on a temporary basis, as a quarantine area for sheep. For the time being (ie, in 2011) there was no GM canola being grown in any of the paddocks of Sevenoaks.

138 During 2011, Mr Marsh discovered nine volunteer canola plants to be growing on Eagle Rest. One of these (found in paddock 5) tested negative for GM. The other eight plants tested positive to GM. Of these, four were found growing in paddock 10, after the summer rains from storms of January 2011. Later, three more cut canola plants were found by Mr Marsh growing in paddock 12. One more plant was found in paddock 13. This comprised the eight GM canola plants in total that were located by Mr Marsh on Eagle Rest during 2011.

139 Hence, only eight GM canola volunteer plants was the extent of the germinations of volunteer GM canola plants upon Eagle Rest in 2011 (see TB Vol 2, pages 374 - 376, 387 and ts 196 (Mr Marsh's examination-in-chief)).

140 After 2011, more GM canola volunteer plants were located at Eagle Rest before this matter proceeded to a trial, in February 2014.

141 I move to address some further, relatively uncontroversial, issues concerning canola and weeds.

More background to Canola and weeds

142 Canola is an oil seed vegetable plant grown commercially in many parts of Western Australia.

143 Kojonup agronomist Christopher Robinson (amended witness statement, exhibit 30) provides what is, I assess, uncontroversial background to the extent of canola grown in Western Australia and, in particular, in the Kojonup district. I mention also in this respect the evidence from local Kojonup farmer Digby Stretch, a witness at the trial called for the defence (exhibit 29).

144 As regards varieties of canola, Mr Robinson explained at par 15 that, generally speaking, there are four different types of canola. The varieties have different tolerances to weeds and to herbicides.

145 Mr Robinson explains (and I accept this evidence) as regards canola varieties and weeds:

> 15. There are four types of canola plants which have been grown in the shires, [the shires of Kojonup, Boyup Brook, West Arthur, Katanning, Tambellup, Wandering, Williams and Cranbrook] in which I work. These are:
>
> (i) Conventional canola which has tolerance to group A and Lontrel herbicides but is now rarely grown because wild radish plants cannot be controlled in a conventional canola crop, as the herbicides which remain lethal to wild radish are also lethal to conventional canola.
>
> (ii) Imidazoline tolerant canola. This is known as IT canola and has a tolerance to imidazoline type herbicides. Wild radish is developing resistance to group B herbicides including AMID and wimmera ryegrass has developed resistance to group B herbicides. Imidazoline is a group B herbicide.
>
> (iii) Triazine tolerant canola. This is known as TT canola. TT canola is the most common type of canola grown in the Shires in which I work. Triazine is a group C herbicide. HRWR [Herbicide resistant Wimmera ryegrass] is resistant to group A and group C herbicides.

> (iv) GM [genetically modified] canola has a tolerance to the glyphosate herbicide. Roundup Ready canola ('RR canola') is a variety of GM canola.
>
> (v) Paraquat and sprayseed are group L herbicides.
>
> (vi) Wimmera ryegrass is not resistant to paraquat and sprayseed [but] these herbicides are lethal to canola and cereal crops.
>
> (vii) Paraquat and sprayseed are commonly used as knockdown sprays to kill wimmera ryegrass before the canola crop or cereal crop is planted. This avoids the need to use Roundup Ready herbicide … [ie, glyphosate which is commercially known as Roundup] … as a knockdown and assists to prevent the development of herbicide resistance to Roundup Ready herbicide spray.
>
> (viii) Whilst the canola crop or cereal crop is growing, more wimmera ryegrass plants will continue to germinate if the paddock (if wimmera ryegrass seeds are present) and it is these late germinating wimmera ryegrass plants which [have] presented a serious problem to many growers.
>
> 16. All types of canola have a tolerance to group A herbicides which include clethodim and are used to selectively control the later germinating ryegrass.

146 Mr Robinson elaborates about the problematic weed known as wimmera ryegrass, or sometimes called Herbicide Resistant Wimmera Ryegrass (HRWR). At par 19 he explains:

> Wimmera ryegrass ripens in the spring and releases its seed in the late spring/early summer, ie, around the time cereal and harvesting operations are commencing. The seeds from these plants are spread by wind, animals and water runoff. A wimmera ryegrass plant can produce up to 500 seeds.

147 At par 21(3) Mr Robinson further explains the plant/weed relationship between canola and wimmera ryegrass. He says:

> (3) Canola is not a competitive plant. On the other hand, wimmera ryegrass is a very competitive plant and will out-compete canola for moisture, nutrition and growth. I have observed late germinating wimmera ryegrass when not adequately controlled to reduce crop yields by about 80% in severe cases.
>
> (4) If the wimmera ryegrass problem is not controlled its seed banks will build up on an increasing basis in the paddock and the problem will become more severe from year to year.

148 Mr Robinson's evidence explaining the nature of different canola varieties, as well as the problematic issue of weed competitiveness reducing the yields in a canola crop, particularly due to the adverse effects of wimmera ryegrass was, as I apprehend it, wholly uncontentious. I accept all this evidence.

149 I now need to say something about legislative and executive events in Western Australia which underpin what was a change in State government policy in early 2010 – to permit for the first time the lawful cultivation of a genetically modified (canola) crop in this State.

January 2010: it becomes lawful to grow GM canola in Western Australia

150 In 2003, the West Australian Parliament passed the *Genetically Modified Crop Free Areas Act 2003* (WA) (*GMCFAA*).

151 Sections 4 to 6 of the *GMCFAA* provide:

> **4. Designation of genetically modified crops free areas**
>
> (1) The Minister may, by order published in the *Gazette*, designate an area of the State as an area in which -
>
> (a) a genetically modified crop must not be cultivated; or
>
> (b) a genetically modified crop specified in the order must not be cultivated.
>
> (2) An order, or a combination of orders, may designate the whole of the State.
>
> (3) An order may be amended or revoked by further order published in the *Gazette*.
>
> (4) Section 42 of the *Interpretation Act 1984* applies to an order as if the order were a regulation.
>
> **5. Offence**
>
> (1) A person commits an offence if -
>
> (a) the person cultivates a genetically modified crop …
>
> (4) Subsection (1) does not apply to the cultivation of a genetically modified organism if the cultivation is covered by an exemption granted under section 6.

> **6. Exemptions**
>
> (1) The Minister may, by order published in the *Gazette*, exempt a person, or a specified class of persons, from the application of section 5(1) to a specified extent in relation to a specified area or in any other specified way.
>
> (2) An exemption may be granted subject to specified conditions.
>
> (3) The Minister may, by order published in the *Gazette*, vary the conditions to which an exemption is subject or revoke the exemption.
>
> (4) Section 42 of the *Interpretation Act 1984* applies to an order under subsection (1) or (3) as if the order were a regulation.
>
> (5) An exemption may be included in an order designating an area under section 4.

152 The Western Australia, *Government Gazette*, No 49 (22 March 2004) carried the Minister for Agriculture's Genetically Modified Crop Free Areas Order 2004 (see TB Vol 1, page 210).

153 This order of the Minister designated the whole of the state of Western Australia as an area where genetically modified crops could not be cultivated. I note, particularly, cl 3 is expressed to be for the purpose of preserving the identity of non-genetically modified crops for marketing purposes.

154 Just under six years later, on 25 January 2010, then Minister for Agriculture, Mr Redman, issued his exemption order, pursuant to s 6(1) of the *GMCFAA* (see exhibit 5A, [41]). This order now exempted any person cultivating GM canola in any part of Western Australia (see s 5(1) of the *GMCFAA*), if the GM canola in question was licensed for international release into the environment under the *Gene Technology Act 2000* (Commonwealth) (the *GTA*). Section 5 of the Commonwealth legislation provides:

> **5. Offence**
>
> (1) A person commits an offence if -
>
> (a) the person cultivates a genetically modified crop;
>
> (b) the crop is cultivated in an area that is designated in an order under section 4;

> (c) if the order is made under section 4(1)(b), the crop is specified in the order; and
>
> (d) the person knows, or is reckless as to whether or not, the crop is a genetically modified crop.
>
> Penalty: $200 000.
>
> (2) Subsection (1) does not apply to the cultivation of a genetically modified organism under a GMO licence if —
>
> (a) the licence authorises release of the genetically modified organism into the environment but only to the extent of release for the purposes of a field trial; and
>
> (b) the cultivation is a field trial that complies with the licence.
>
> (3) Subsection (1) does not apply to the cultivation of a genetically modified organism if the cultivation does not involve the intentional release of the organism into the environment.
>
> (4) Subsection (1) does not apply to the cultivation of a genetically modified organism if the cultivation is covered by an exemption granted under section 6.
>
> (5) Proceedings for an offence against subsection (1) are to be dealt with by a court constituted by a magistrate.

155 There is no dispute in this trial that the variety RR canola, that was planted and harvested on Sevenoaks by Mr Baxter during 2010, was not licensed for international release. In other words, persons growing RR canola were exempted under the WA Minister's exemption order of 25 January 2010 under s 6(1) of the *GMCFAA*.

156 Earlier, there had been some limited GM canola trials in WA during 2009. These were carried out in accord with other exclusions issued under the Western Australian Act. One 2009 trial was conducted on Mr Digby Stretch's Kojonup property.

157 It is now necessary to notice some definitions from the *GMCFAA* and the *GTA*. I will refer to three. The significance of these definitions emerges as background later in the reasons, in a context of evaluating issues relating to the asserted 'contamination' and 'genetic contamination' of Eagle Rest by the presence of GM canola swathes from Sevenoaks.

158 First, by s 3 of the *GMCFAA*, the term '*Gene Technology*' has a meaning taken from s 10(1) of the *Gene Technology Act 2000* (Cth). This in turn is ultimately seen to be defined as:

> ***gene technology*** means any technique for the modification of genes or other genetic material, but does not include:
>
> (a) sexual reproduction; or
>
> (b) homologous recombination; or
>
> (c) any other technique specified in the regulations for the purposes of this paragraph.

159 Second, under s 3 *GMCFAA*:

> '***Genetically modified crop***' means a crop that consists of or includes plants that are genetically modified organisms.

160 Third, under s 10(1) of the *Gene Technology Act 2000* (Cth) and s 3 of the *GMCFAA*:

> '***genetically modified organism***' means:
>
> (a) an organism that has been modified by gene technology; or
>
> (b) an organism that has inherited particular traits from an organism (the *initial organism*), being traits that occurred in the initial organism because of gene technology;
>
> …

161 There was no suggestion made in this trial, nor could there reasonably have been, that the conduct of Mr Baxter in planting GM canola (ie, RR canola) on two of his eastern boundary paddocks at Sevenoaks in 2010, contravened any law of this State, or of the Commonwealth. Mr Baxter's conduct in planting GM canola in 2010 in the two paddocks of Sevenoaks was entirely lawful conduct.

162 So, after January 2010, an opportunity for West Australian farmers to lawfully grow GM canola as a commercial exercise arose as a consequence of two key events. First, the actions of the Western Australian Legislature in 2004, in initially permitting exemptions by s 5 of the *GMCFAA*. Second, by the executive order issued under s 6 of the *GMCFAA* as published in the *Government Gazette* of 25 January 2010, by which the State Minister of Agriculture exempted GM canola that was licensed for international release from the prohibitions of the *GMCFAA*.

163 The next two sections in these reasons address scientific evidence at the trial that was essentially uncontroversial.

Scientific evidence at trial concerning the properties of genetically modified (GM) canola

164 The plaintiffs' expert, Rene Van Acker is Associate Dean of the Ontario Agricultural College, as well as a Professor in the department of Plant Agriculture at the University of Guelph, Canada. Professor Van Acker is an expert in crop science and weed management, holding a doctorate in crop weed ecology.

165 Professor Van Acker's research areas include weed seedling recruitment biology, ecology and the co-existence of GM and non-GM crops.

166 Professor Van Acker is a widely published author of many articles, as identified within his reports for the plaintiffs (exhibits 16A, 16B and 16C).

167 At page 5 of his report (exhibit 16A) Professor Van Acker explains the nature of genetic engineering or genetic modification. It is convenient to adopt his explanations:

> Genetic engineering (GE) and genetic modification (GM) both refer to the techniques that allow for specific pieces of DNA to be moved from one organism and inserted into another. The intention of GM is that the piece or pieces of DNA that are transferred between organisms are a specific gene (or genes – the transferred genes are referred to as transgenes) that in code for a desired trait (ie herbicide tolerance). That is then expressed in the receiving organism. The novelty of GM is:
>
> (1) that very specific pieces of DNA can be moved between organisms (ie a single gene); and
>
> (2) that the technique allows DNA to be moved between any organisms (ie DNA movement is not limited by species boundaries and/or sexual compatibility requirements). GM allows DNA transfer between organisms that could not occur in nature and would not be possible via traditional plants or animal breeding techniques. As such, the possibilities in terms of what genes (or DNA) may be transferred into an organism are almost endless and profoundly beyond what would be possible naturally...
>
> Roundup Ready canola is an example of a GM crop with the trait of herbicide tolerance (tolerance to the herbicide glyphosate) is achieved in canola by transferring two new genes into canola using GM techniques. One gene produces a version of the target enzyme of the glyphosate

> herbicide (EPSP synthase) that is insensitive to the herbicide (does not bind the herbicide and so is not affected by it) and a second gene which expresses a protein that metabolises (breaks down) the glyphosate herbicide into constitute chemicals that do not have any herbicidal affects. The action of these two genes makes the GM Roundup Ready canola tolerant to the glyphosate herbicide (exhibit 16A, page 5).

168 At trial there were minimal, if any, differences as between Professor Van Acker and the defendant's bioethics and biosafety expert, Professor Patrick Rüdelsheim, of the Universities of Antwerp and Ghent in Belgium. Professor Rüdelsheim's report, dated 2 October 2013, became exhibit 28.

169 Section 3.2 of Professor Rüdelsheim's report addresses the issue of the release in Australia of GM canola. At page 15, he quotes from a statement of issues made by the Office of the (Australian) Gene Technology Regulator (OGTR) of 2003. At that time, the OGTR had just issued a licence to Monsanto permitting the commercial release in Australia of its RR canola GT73 (see page 11 in section 2.3 of Professor Rüdelsheim's report). The report said:

> In a subsequent communication OGTR confirmed that the RR canola can be used in the same manner as conventional canola, including the use as stockfeed. At the same time the Australian Pesticides and Veterinary Medicines Authority (APVMA), which is responsible for the registration of agricultural chemicals, concluded an extensive assessment of the herbicide and approved the use of it for weed control in RR canola crops.

170 Specifically concerning the public safety of RR canola, Professor Rüdelsheim then refers to and adopts what is said in a report by the Australian New Zealand Food Authority (ANZFA) (now called Food Standards Australia New Zealand) (FSANZ) which said:

> ANZFA concluded that no potential public health and safety concerns had been identified in the safety assessment of food derived from this RR canola [referring to a 1999 draft risk analysis report identified in footnotes 6 on page 15]. Based on the data submitted by the applicant, food derived from RR canola GT73, was regarded to be equivalent to food derived from conventional canola in respect of its composition, safety and end use. Similarly, following rigorous assessment (Office of Gene Technology Regulator, 2003), the Gene Technology Regulator considered that the risks posed by the proposed commercial release of RR canola to human health, safety and the environment (were) no greater than those posed by conventional (non-GM) canola (page 15).

171 Page 15 of Professor Rüdelsheim's report addresses the residual presence of RR canola vegetative plants and seeds. Another observation cited from the OGTR's 2003 publication in that respect was:

> The emergence of volunteer plants subsequent to the cultivation of a crop, and their control or removal prior to the next season's planting, is an integral part of normal agricultural practice that is not in any way restricted or peculiar to either canola or GM crops... It will not pose any greater risks to human health and safety or the environment than can conventional canola. Therefore no risk management conditions are proposed in relation to weediness.

172 An experts' pre-trial conferral conference between Professor Van Acker and Professor Rüdelsheim of 22 January 2014 generated their joint agreed memorandum, tendered at trial as exhibit 17B. Three main topics were identified by that memorandum as having been discussed between them. After discussion there were no points of remaining difference. Point two from the conferral memorandum addressed 'the possibility of cross pollination between Roundup Ready canola pollen and plants other than canola plants'. To that issue, the two experts had agreed in these terms:

> It is known for canola that there is outcrossing potential first to other canola plants, secondly to related *Brassicaceae* species. For the latter, however, it is typically rare as we each have shown in our respective reports. For the species that Mr Marsh typically has been farming including cereal crops such as oats, barley and wheat **there is no possibility of outcrossing from canola**. In all cases, the outcrossing potential would be the same for RR canola as it would be for non-RR canola. (my emphasis in bold)

173 I accept all this expert evidence as now mentioned from Professors Van Acker and Rüdelsheim. There was minimal, if any, controversy as between them in relation to their respective reports. Both were impressive witnesses in my assessment.

174 With the benefit of that uncontroversial expert evidence, I can turn to address scientific evidence at the trial concerning the physical impacts (if any) of the 2010 GM canola swathe incursion by wind to Eagle Rest.

Scientific evidence as to the modes of possible GM trait transference concerning RR canola

175 The scope of Mr Baxter's alleged duty of reasonable care owed to his neighbours, Mr and Mrs Marsh, was controversial at the trial. To his accepted knowledge, the Marshes had been running a wholly organic

farming operation at Eagle Rest for some years. In that context it should first be asked whether, in 2010, an escape of some GM canola material from Mr Baxter's paddocks at Sevenoaks posed any physical dangers to persons, animals or property at Eagle Rest (as opposed to purely economic consequences).

176 To that first question, it must be recorded at an early point in these reasons that there was no evidence at all adduced at this trial of any physical dangers, toxicity or risks of harm to persons, animals or property, by reason of contact with GM canola (or RR canola specifically) from Sevenoaks.

177 To that issue, Professor Van Acker had been asked by the plaintiffs' solicitors, on 19 October 2012:

> Is the existence and extent of any risks to human health or the environment from GM crops presently a matter of debate amongst relevantly qualified scientists? (ts 478 - 479)

178 Professor Van Acker disclosed under cross-examination that he did not answer that question in his reports - see:

> Yes, I do recall that question and, again, I didn't answer that question in my report.
>
> Were you asked by Slater & Gordon not to answer it?---I think I said that I wouldn't answer that (ts 479).

179 As regards the issue of a possible unintended spread, transference or dissemination of GM traits from GM canola, Professor Van Acker's primary expert report (exhibit 16A) once again is helpful. I adopt what he says at pages 6 - 7, particularly his explanation of transgene movement, under a heading, 'Pollen Mediated GM Material Movement' (page 7). Professor Van Acker explains that there are only two known methods of GM material movement, being either a transfer by pollen or by seed. I note and accept these observations:

> The two vectors of GM material movement are pollen and seed. Gene flow via pollen tends to occur over shorter distances, generally, but pollen can be carried long distances by wind or pollinators (of some species) and Rieger et al 2002 have shown in Australia, that the potential for very long distance (over 2 kilometres) pollen mediated gene flow is possible in canola. The distance for effective pollen mediated gene flow (PMGF) depends on many factors including, to what extent the species will outcross, the size and weight of its pollen, the size of the pollen source and the weather (in relation to movement of the pollen as well as effects on the receptivity of the female), (7).

180 The point was revisited during Professor Van Acker's cross-examination. He explained:

> Now, to be specific, what you are focusing upon here is the movement of GM traits from one plant organism to another. Is that right?---Yes. Yes, that's right.
>
> Not simply the movement of GM plant material in the air or without actually - the movement of GM traits into another organism that previously did not have them?---Well, I go on to talk about pollen mediated gene flow and seed mediated gene flow, so that does involve pollen flow and seed movement.
>
> Yes, but can I put it to you this way, there is [sic] only two ways, isn't there, in which there can be a movement of GM traits from one plant organism to another. One is via pollen - - -?---Right.
>
> - - - and the other is via seed. Is that right?---Yes, right.
>
> And in relation to the seed, the way in which you have the movement of GM traits from one plant organism to another is **because volunteers can grow and they in themselves become a source of the movement of pollen, which enables cross-pollination and therefore the transfer of GM traits into another organism.** Is that right?---That's right (ts 479 - 480). (my emphasis in bold)

181 So, in terms of the issues presently relevant to the present litigation, it is clear from this evidence from the Marshes' own expert witness at trial that there was no possible risk of a pollen-mediated GM movement from Sevenoaks to Eagle Rest - at any relevant time. Mr Marsh's evidence was that at no stage had he ever sought to grow or harvest any variety of canola on Eagle Rest. Accordingly, there was zero potential for a pollen-mediated transfer of GM traits from a GM canola crop grown at Sevenoaks in 2010 to another plaint species on Eagle Rest. That is my finding on the evidence led at this trial.

182 Hence the only transference mode remaining as a possible risk of GM gene transfer from Sevenoaks to Eagle Rest was the *mode* of a seed mediated movement, involving necessarily the germination of a volunteer GM canola plant in the soil of Eagle Rest.

183 As to this, Professor Van Acker deals with the issue at page 8 of his expert report (exhibit 16A) under a heading, 'Seed Mediated GM Material Movement'. To be clear, the context is a GM canola seed movement to another location and which seed then germinates in the soil at that secondary location. The germinated canola (ie, volunteer) plant must then grow, so as to itself produce its own pollen, thereby later creating over

time the risk of transference by a pollen-mediated GM trait transfer. The GM trait transference to another species would then arise, in effect, at one (or more) stages removed from a direct pollen to pollen transference. At some point, however, pollen needs to be produced from the volunteer plant to effect a cross-fertilisation. I note this from Professor Van Acker's report (8).

> Seed movement is another means of GM material movement and admixture of seed can occur at many points within farming and grain handling operations ... . Genes (GM material) may travel great distances when crops seeds are transported by humans either knowingly or unknowingly ... and with the assistance of the seed and grain movement infrastructure, transgene movement can potentially occur at a global scale ... . In addition, because seeds may be persistent, seed movement can facilitate GM material movement and gene flow over time.
>
> **Relatively little research has been done on the nature of seed mediated GM material movement.** What has been acknowledged in relation to seed mediated GM material movement is that it is often related to human involvement or human error in regard to handling or managing crops or seeds ... . In terms of seed movement, certainly complete separation of operations (eg farming and grain handling) is acknowledged as a prudent means of working towards successful co-existence between GM and non-GM crop production and towards the goal of preventing GM material from ending up where it is not intended, expected or wanted ... . Starting with absolutely clean seed (seed free from GM material) is critical ... and the stringent separation of GM free seed production from any sort of GM crop farming or handling, and frequent testing is required in this regard.
>
> In Western Canada, my own research group ... tested certified canola seed lots for the adventitious presence (AP) of unintended GM traits (transgenes) and found that AP levels varied significantly among the companies whose seed lots we tested ... . Our studies suggested that approaches and protocols likely differed among companies with respect to preventing AP and some companies demonstrated an ability to maintain AP of unintended transgenes at very low levels (zero or near zero levels in certified seed lots of canola). It was obvious to us that some companies make a systematic effort to achieve consistently low AP levels. ...
>
> **The persistence of seeds of GM crops is an important consideration for transgene escape and movement.** After a crop has been harvested, volunteer and feral GM crop populations can appear in subsequent years and act as a place for the transgenes to come from or escape to. In this sense, for crop species which have large and robust volunteer and feral populations, and especially for crops that produce very persistent seed (or propagule) banks (like canola) a meta-population for a given transgene may arise within a given region ... . The persistence of volunteer canola has been studied extensively. Canola is known to be an effective and persistent volunteer in part because its seed has the ability to enter into

> secondary dormancy ... . In Western Canada, the average persistence of volunteer canola is 2 - 5 years ... and volunteer canola presence in farmers [sic] fields has been shown to decline rapidly after the first one or two years ... . However, many researchers have measured longer persistence of canola at low levels ... . The implication here is that even if one controls all volunteer plants and prevents any further seed entry it could take many years (and possibly more than a decade) to eliminate an escaped canola population if it has had a chance to establish a seed bank. (my emphasis in bold)

184 Again, Professor Van Acker was questioned in cross-examination about this aspect of his report. This exchange followed:

> So in an organic farm context, where the ability to rely upon herbicides and other means of eliminating volunteers is much more restricted, you would accept that nevertheless organic farmers have available to them one of the primary means of reducing the persistence of volunteers and that is the removal of those volunteers physically?---Yes.
>
> And as long as that's done before seeds set, that is a very effective - one of the primary means of reducing persistence?---Yes.
>
> ...
>
> And where you have a canola plant growing as a volunteer in a paddock, before seeds set, it has no biological significance, does it, in terms of whether it's GM or not?---No, not particularly. I mean, if it doesn't - if nobody cares about whether it's GM or not, it has no other - there are no other issues necessarily. That's right.
>
> **Because - and that's because before seeds set, it has no possibility, that volunteer, of enabling or facilitating the movement of a GM trait into another plant organism. That's so, isn't it?---That's right.**
>
> Thank you?---**Well, it can produce pollen. I mean, it can produce pollen** so - - -
>
> So that's a - - -?---- - - it would be best if - - -
>
> Yes?---Yes, it would be best if you had it controlled before flowering but, I mean, as long as there is nothing else around to receive the pollen, that doesn't matter either then (ts 481 - 482). (my emphasis in bold)

185 Most relevantly then to the present case, is the issue of a seed-mediated GM transference by the subsequent germination of the moved seed as a volunteer GM canola plant or plants upon Eagle Rest and the production of pollen by that volunteer plant which is the relevant transference risk for GM canola. This risk would present, necessarily, by the possible germination of GM canola seeds which reached the soil of

Eagle Rest and then flowered producing pollen. But the same road block to a possible cross-fertilisation at Eagle Rest arises as before - if there is no compatible canola or weed species at Eagle Rest for the GM canola pollen to cross-fertilise with.

186 That explains a significant issue as regards the absence of any likely transgene movement of GM canola traits at Eagle Rest. There existed no scientific basis for a concern about a spread of GM canola genetic traits from Sevenoaks so as to possibly impact negatively against the adjacent neighbouring organic farming operation of the Marshes at Eagle Rest.

187 I will return to further aspects of Professor Van Acker's and Professor Rüdelsheim's evidence in later parts of these reasons.

188 I can now proceed to examine the trial evidence as to the contractual relationship between the plaintiffs and their organic certifier.

NASAA's contractual relationship with Mr and Mrs Marsh

189 Mr and Mrs Marsh are party to a contractual agreement executed on 14 September 2007 with NASAA and NCO (TB Vol 1, pages 40 - 50).

190 The document is entitled 'NASAA Contract'. It looks to be executed on behalf of NASAA pursuant to s 127 of the *Corporations Act 2001* (Cth) on 24 September 2007. There had been an earlier contract between the parties that was superseded by the 2007 agreement.

191 The 2007 contract identifies the parties as being the Marshes, NASAA, as well as (by the expression and/or) another corporation referred to as a wholly owned subsidiary of the first, namely, NASAA Certified Organic Pty Ltd. Somewhat confusingly, the NASAA contract refers to this wholly owned subsidiary as NASAA. To avoid confusion, I continue to refer to the subsidiary corporate entity as NCO. This subsidiary is effectively a discrete certification arm of its parent.

192 Pursuant to cl 1.2 of the 2007 contract, Mr and Mrs Marsh, by reference to what is designated as schedule 1, are referred to as 'the Licensee'. There is confusion arising here. There would actually appear to be only one schedule in the NASAA contract. This is found at the 11th page of an 11-page document. Within that schedule can be seen (within a box) the reference to 11 different items, ranging from item 1, 'the Licensee', to item 11, 'Fees'. Page 11 then displays the reference to an item 12, under the heading 'Additional Condition[s]: non-optional

standard inclusion for licensees with labelled use', followed by items 12.1 and 12.2.

193 Throughout the 2007 contract, there are ongoing references to different schedule numbers (1 through 11, as the case may be). Sensibly understood, however, these must be read as intended references only to item numbers 1 through 12, as found within the sole schedule to the 2007 contract.

194 From the 2007 contract, I mention items 2.4 - 2.6, particularly the grant of a non-exclusive licence to use licensed items, to Mr and Mrs Marsh as licensee, pursuant to cl 3.

195 Bearing in mind references in the contract to NASAA are, in fact, references to its subsidiary, NCO, I mention aspects of the following clauses:

196 Clause 2.4, in effect, reads:

> 2.4 [NCO] has certified [Steven and Sue Marsh trading as Eagle Rest Farm] land and/or facilities specified [in item 4 of the schedule] to the NASAA contract. (Item 4 identifying the licensees' facilities as 476 ha/s of the 477 ha property known as Eagle Rest Farm in Kojonup, Western Australia - excluding private residence).
>
> Under the certification program specified in [item 5 of the schedule] to this contract (see reference at item 5 of the schedule to Certification program identifying 'AQIS/IFOAM [these being by reference to cl 24 identifiable references to the Australia Inspection Service and to the International Federation of Agriculture Movements) in respect of the products or processes specified in [item 6 to the schedule to this Contract the product specified under item 6 being 'mixed grain, barley, oats, wheat, spelt, lupins, sheep (meat), wool']. ('**The specified products or processes**') to the level specified in [item 7 to the schedule] to this contract [item 7 of the schedule showing a reference to level of certification as 'ORGANIC'].

197 See also:

> 2.5 The purpose of this contract is to authorise [Mr and Mrs Marsh] to use certain logos, labels and names in association with the certification granted by NASAA of [Mr and Mrs Marsh's] land, facilities, products and/or processes.
>
> 2.6 The purpose of this contract is also to identify [Mr and Mrs Marsh's] obligations and entitlements in relation to that certification.

198 By cl 2.4 - 2.6 the certification program by NCO is tied to a licensing regime in respect of products or processes, nominated as specified products or processes: see item 6 of the schedule.

199 Clause 2.5 nominates the purpose of the 2007 contract as an authorisation, by way of non-exclusive licence, to use nominated logos, labels or names in association with the certification from NCO.

200 The grant of the licence to the Marshes is by cl 3. I refer to subclauses 3.1, 3.2, 3.3 and 3.4. Correctly understood, they read:

> 3.1 [NCO] grants to [Mr and Mrs Marsh] the non-exclusive licence to use the licensed items specified [in item 8 of the schedule - this being a reference to what appears to be a registered trademark found substantively within a rectangle] namely the trademark

201 I will also set out what is referred to in item 8 of the schedule as the 'Licensed Item[s]'.

> In respect of the specified products or processes in [item 6 of the schedule] [namely the products already mentioned essentially mixed grains, including barley, oats, wheat, spelt, lupins and meat and wool from sheep].
>
> Subject to [Mr and Mrs Marsh's] strict compliance with all the terms of this Contract;
>
> 3.2 The licence commences on the date specified in [item 9 of the schedule (namely 2 April 2007)] 'the Commencement Date', and

> will continue in perpetuity unless terminated by either party in accordance with this contract.
>
> 3.3 If the Licensee [Mr and Mrs March] is granted the right to use the licensed items set out in [item 8 of the schedule - namely the trademark NASAA certified organic] the licensed items may only be used if they appear in conjunction with the name of the licensee [Mr and Mrs Marsh trading as Eagle Rest Farm] and the registration number which are specified in [items 1 and 10] of the schedule to this contract respectively. (Item 1 identifying Mr and Mrs Marsh trading as Eagle Rest Farm as the licensee and item 10 specifying the registration number as 6204) [see also the reference to the right to use licensed items mentioned at item 7 of the schedule to the contract at subclause 3.4 and subclause 3.5(ii)].

202 The 2007 contract is expressly stated to be governed by the law of South Australia, cl 17.1. Again the reference to multiple schedules seen at cl 23.1, appears to be in error.

203 With regard to possible contractual sanctions by NCO against an organic operator that such as the Marshes, cl 9.1 addresses NCO's ability to immediately suspend a licensee's use of licensed items and/or their certification, in the nominated circumstances under subclauses (i) and (ii).

204 Clause 9.1(ii), also in relation to suspension, uses the terminology 'if [NCO] reasonably believes that there has been a breach of the compliance of the licensee with the relevant Standard of this contract'. Reference to 'the Standard' appears to the 'Relevant Standard'. This is then explained at cl 24.2 as 'the Standard referred to in [item 2 of the schedule] of this contract [item 2 finally identifying the relevant standard as the 'NASAA Organic Standard']. The 'NASAA Organic Standard' is referred to in cl 2.3(i).

205 'Suspension of certification' is again addressed under subclauses 9.2, 9.3, 9.4, 9.5 and 9.6. But, as I later explain, there is no observable reference in cl 9 (or for that matter anywhere else in the 2007 contract I can find, to imposing a sanction against an operator beyond suspension. In other words, there is no reference to an operator's potential decertification, for a breach of the 2007 contract.

206 Clause 10 of the 2007 contract deals expressly with the subject matter of breaches and terminations. Subclause 10.4 allows any contracting party, without reason, to terminate the 2007 contract by either party giving one month's written notice to the other.

207 It was not suggested during the trial that Mr and Mrs Marsh's contractual relationship with NASAA (and NCO) had been ended - by a termination event, under a notice given pursuant to cl 10.4, or otherwise.

208 Hence, a basis for NCO to decertify approximately 70% of the area of Eagle Rest (as opposed to merely suspending the Marshes' certification for a period) is not, at least directly, found in the words of the 2007 contract itself.

209 Hence, NCO's capacity to decertify an operator's area of land must emerge from provisions in the NASAA Standards - incorporated by reference into the 2007 contact.

210 Finally, I note the definition under cl 24.2 of the 2007 contract for the word 'organic'. The defined meaning as is there seen is, 'a labelling term that refers to an agricultural product produced in accordance with the NASAA Organic Standard'. The linkage by that definition of 'organic' to the subject matter of agricultural produce (as opposed to the term being applied to rural land) is to be noted.

211 There was no controversy at trial that the relevant NASAA Organic Standard (referred to in item 2 of the schedule as the 'Relevant Standard') was, at material times, for the purpose of evaluating all issues arising in this action, the NASAA standards as are found in TB Vol 5, pages 1293 - 1407.

212 These standards, on their face, are stipulated to be printed in December 2004 and amended 13 May 2008.

213 I can now turn to the NASAA Standards, as incorporated by reference into the Marshes' 2007 contractual arrangements with NASAA/NCO as the 'Relevant Standard'.

The NASAA standards: Eagle Rest's suspension and decertification: December 2010

214 NCO's suspension (on 10 December 2010) of paddocks 7 - 10, 12 and 13 of Eagle Rest, was followed (on 29 December 2010) by the decertification of those same paddocks plus paddock 11 (in all, approximately 70% of the area of Eagle Rest). This contractual sanction was imposed by NCO, on the basis of Eagle Rest's then asserted 'contamination by [Genetically Modified Organisms]' (see TB Vol 2, pages 337 – 338). Unhelpfully, there is no definition of 'contamination' or of 'genetic contamination' found in the NASAA standards or, for that

matter, in the National Standards, upon which the NASAA standards are based.

215 There was no controversy that NCO's reference to GMOs found upon Eagle Rest was an intended reference to the many cut GM canola plants (swathes) which blew into the western paddocks of Eagle Rest from Sevenoaks, on or around 30 November 2010.

216 As now explained, these intruding canola swathes were harmless to people, animals and property. This case then is not a situation involving the escape, spread or breakout of some dangerous or toxic substance. From a possible risk of transference of genetically modified material perspective, the only live transfer mode was by the longer term work of seeds - if any GM canola seeds ever propagated in the soil at Eagle Rest, then grew to produce pollen and thereby facilitated a subsequent genetic transference with another comparable species. There was no risk of that happening at Eagle Rest. There was no canola or compatible weed species to breed with pollen from a GM canola plant that flowered on Eagle Rest.

217 Hence, it was only the canola seeds found within GM plant seed pods, attached to the plants, which could pose a later GM material transference threat. The threat would arise only if the seeds within the pod spilled onto the soil of Eagle Rest paddocks 7 and 10 - 13 and later germinated to produce pollen which could cross-fertilise with a compatible plant.

218 From that negligible risk perspective as regards both physical harm and possible genetic transference, I can turn to provisions of the National Standard which sets minimum requirements for the export of Australian organic labelled produce, including standards as regards prohibiting GMOs in Australian export produce. I will then examine some particular provisions within the NASAA standards, which follow and apply the National Standards.

219 According to documentation produced in December 2010 by the senior executive certification decision-maker for NCO (Ms Stephanie Goldfinch), NASAA standard 3.2.9 was invoked to support first the initial suspension, then the decertification of Eagle Rest paddocks 7 - 13. Those paddocks were assessed by NCO as being 'contaminated' by GMOs, raising the underlying question as to what actually had constituted the 'contamination,' for the purposes of the National Standard and the NASAA standards.

220 NASAA standard 3.2.9 reads:

> Organic certification shall be withdrawn where NASAA considers there is an **unacceptable risk** of contamination from GMOs or their derivatives. (my emphasis in bold)

221 The proper meaning of that provision needs to be viewed and assessed in overall context. It can be viewed against the surrounding context of provisions in the National Standards, as regards genetic modification and GMOs.

222 I first refer to National Standards 3.3.1 - 3.3.5 - noting that the NASAA standard 3.2.9 terminology of 'unacceptable risk' cannot be found (see TB Vol 5, page 1421).

223 For a meaning of 'genetic modification' the National Standard, by general principle 3.3.1, says:

> Products or by-products that are derived from genetic modification, are not compatible with the principles of organic and bio-dynamic agriculture.

224 I note the National Standards reference to products derived products or to by-products.

225 National Standard cl 3.3.1 reads:

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

226 Then I note National Standard cl 3.3.5:

> The certification of organic crops, livestock or agricultural products will be withdrawn where genetically modified crops, livestock or agricultural products are grown or produced on the same farm.

227 Again, the National Standard's reference is to products, livestock or crops being withdrawn from certification, not land.

228 Next, I note the National Standard definition for 'genetically modified organisms' (GMOs) by cl 2. 'Genetically modified organisms' means:

> Materials produced through the modern engineering methods of bio-technology; specifically gene technology 'recombinant DNA (rDNA)' and all other techniques using molecular and/or cell biology for altering the

> genetic makeup of living organisms in ways or with results that do not occur in nature or through traditional breeding.

229 There are further definitions in the National Standards for the words or phrases 'organic', 'natural' and 'prohibited substance/material'.

230 The significant phrase 'adventitious contamination' is found in the National Standards as meaning 'contamination that has come from outside, accidental or occurring in an unusual place'. I note again that the word 'contamination' is not otherwise found defined in the National Standards. The phrase 'adventitious contamination' does not appear to have been used in the NASAA standards.

231 I note National Standard 1.5, concerning the scope of the standard in reference to 'products or by-products that are derived from genetic modification technology', and which are said (by subpar 1.5(e)) to be 'not compatible with the principles of organic and bio-dynamic agriculture and therefore are not permitted under this standard'.

232 The underlying National Standards' genesis is the intended protection of the Australian export market's integrity concerning the sale of organically labelled Australian produce as organic and bio-dynamic products. It is readily apparent then that there is an immediate incompatibility of definitions with using that label for products which have been derived by GM technology, or which contain GMOs. The incompatibility arises simply as a matter of the definition of the exported subject material. If the genetic makeup of a living organism has been deliberately altered, using science in a way that does not occur in nature, then axiomatically such an organism could not be called 'natural'. The word 'natural' means something formed by nature. Correlatively, any product that is altered as a result of the scientific intervention of man cannot be a natural product. Hence, it cannot truthfully be termed or labelled as an 'organic' product.

233 From an Australian product export and financial perspective, these distinctions are almost self-evident. From a labelling perspective. in the context of an export sale, the distinction can be accepted as protective of the integrity of Australian products marketed overseas as 'natural' or 'organic' produce. Financial benefits for producers of exported Australian organic produce can be accepted to flow from preserving the overseas market integrity of the terms 'natural' and 'organic', when used as sale labels on Australian export produce.

234 But recognising this historically accepted distinction in the nature of how Australian export produce is labelled when sold overseas says nothing, of course, about the actual merits or demerits from a health perspective of organic products in contrast to parallel non-organic products. A definitional distinction which is applied to export produce services a financial objective tied to preserving market integrity for a particular product.

235 Over and above protecting export market integrity and related financial objectives of what is a labelling distinction, there are undoubtedly some genuine and strongly held philosophical and ideological commitments held in certain quarters towards the perceived benefits of naturally grown produce. No doubt there are also in certain quarters strong views as to superior health and environmental benefits of naturally grown produce. I point out that in this trial there was no empirical evidence presented to me about any such benefits in organically grown produce – other than the possibly higher prices it might achieve when sold on that labelled basis. The trial must be resolved on the basis of the evidence adduced and nothing else.

Australian organic products

236 In 2008 then chair of NASAA, Mr Rod May, introduced the revised NASAA Organic Standards with an acknowledgment. He recorded

> … [His] pleasure therefore to introduce the latest revision of the NASAA Organic Standard which reflects changes to edition 3.3 of the National Organic Standard for Organic and Biodynamic Produce and incorporates the launch of the new NASAA Health and Beauty Care Products Standard … (TB Vol 5, page 1299).

237 Historically, there has been strong linkage between the two standards. The NASAA Standards have striven to be comparable with the National Standards. But subject to an overriding comparability, the NASAA Standards at points go further, to apply even higher requirements to operators seeking certification status from NCO.

238 The NASAA Organic Standards are significant in this trial. They, and not the National Standards, deliver the invoked rationale for the 2010 decertification of 70% of the area of Eagle Rest. That decision delivered the consequent contractual denial to Mr and Mrs Marsh of the labelling use of the NCO trademark for Eagle Rest produce grown or raised from 70% of that land, from 29 December 2010 and maintained into late 2013.

239 It is necessary to examine particular clauses within the NASAA standards and their meanings more closely at a later point in these reasons.

240 Next, however, it is necessary to explore where the NASAA Standards and NCO sit as questions of law, in relation to a somewhat murky environment applying to a use of terms such as 'organic', or 'certified organic', for Australian agricultural produce sold for domestic (ie, non-export) Australian consumption.

241 To cut a long story short, the Commonwealth of Australia's labelling integrity export regime for organic produce leaving Australia has indirectly delivered a number of 'spillover' consequences for the sale of organically labelled produce in the Australian domestic market.

The regime for the labelling of produce domestically sold as 'organic', or 'certified organic' in Australia

242 My examination begins with s 7 and s 23 of the *Export Control Act 1982* (Cth). The journey then proceeds to reg 3 of the *Export Control (Orders) Regulations 1982* (Cth) and, finally, to *Export Control (Organic Produce Certification) Orders* (Cth), issued pursuant to the aforementioned reg 3.

243 There was no controversy about the Commonwealth export protection regime at the trial. Clearly, the regime was first conceived for Australian produce that was to be exported as labelled organic produce.

244 In passing, I refer to aspects of the *Export Control (Organic Produce Certification) Orders*:

Order 1.02 - object

> The object of these orders is to ensure that produce exported under the trade description 'organic, bio-dynamic, biological, ecological' or any other words of similar indication is properly so described.

Order 1.03 - declaration of prescribed goods

245 For the Act, 'organic produce' is declared to be prescribed goods.

Order 1.04(2)

> In reference to the description of produce for export being 'described as organic, bio-dynamic, biological, ecological or by any other word of similar indication'.

Order 1.05 - prohibition of export …

> For subsection 7(1) of the Act, the export of organic product is prohibited unless an organic produce certificate has been issued under these Orders for the produce.

246 By Order 1.06, I note the definition of 'organic produce' as 'produce that, for the purpose of marketing, is described as 'organic, bio-dynamic, biological, ecological or by any other word or similar indication'.

247 The definition of 'organic produce certificate' applies in relation to organic produce intended to be exported.

248 A Quality Management (QM) certificate, by Order 3.04, is issued to an organic certifying organisation. A 'QM System' is defined under Order 1.06 as meaning the 'organisation or structure, responsibilities, procedures, processes and resources for implementing quality management'.

249 Part 2 div 1 of the *Export Control (Organic Produce Certification) Orders* deals with the issue of organic produce certificates, which can be applied for by an exporter of produce to 'an approved certifying organisation'.

250 In turn, 'approved certifying organisation' is defined by Order 1.06 as an organisation in respect of which a QM certificate is in force under Order 3.04.

251 By Order 2.02, an approved certifying organisation must issue to an applicant (ie, to an exporter of produce) an organic produce certificate in relation to a quantity of organic produce that is intended to be exported, if:

(a) the produce has been subjected to the organisation's QM system; and

(b) the production and preparation of the produce has complied with the QM system; and

(c) the produce and its preparation satisfy the organic produce importing requirements of the relevant importing country authority.

252 Part 3 of the *Export Control (Organic Produce Certification) Orders* regulates the issue of QM certificates to certifying organisations: see Order 3.01(1).

253 Within this Commonwealth export regulatory framework, it finally emerges that NASAA (more correctly its wholly owned subsidiary NCO) had become one of seven different approved Australian certifying organisations, for the purposes of the *Export Control Orders* of the Commonwealth.

254 NCO's accreditation as a recognised certifying organisation was conferred by the Australian Quarantine and Inspection Service (AQIS), now known as the Department of Agriculture, Fisheries and Forestry (DAFF).

255 In turn, DAFF administers the National Standard for organic and bio-dynamic produce to which I have already referred (see edition 3.4, TB Vol 5, pages 1408 - 1480).

256 I would note the following introduction in the National Standards (TB Vol 5, page 1409), in a context of Australian export standards for products labelled as 'organic' or 'bio-dynamic':

> The Standard stipulates **minimum requirements** for products placed on the market with **labelling** which states or implies they have been produced under organic or bio-dynamic systems. (my emphasis in bold)

257 From the National Standards, it is also clear that production procedures for organically grown produce is an intrinsic part of the identification labelling of such products, and:

> Certifying organisations which have been accredited by the Australian competent authority, apply this standard as a **minimum requirement** to all products produced by operators certified under this system. This standard therefore **forms the basis of equivalency agreements** between approved certifying organisations and importing country requirements. Individual certifying organisations **may stipulate additional requirements** to those detailed here. (my emphasis in bold)

258 Clearly then, the National Standards were and remain a template for the NASAA standards - as explained by Mr May in his acknowledgment in the NASAA Organic Standards (TB Vol 5, page 1299).

259 Equally, however, the National Standards' originating context is a Commonwealth legislative control regime - conceived in the context of providing protection for the integrity of Australian organically grown produce destined for export - by a labelling regime appropriately applying the terminology 'organic', but targeted, axiomatically, at 'export produce'.

260 It might now be better discerned that NCO's position as a certifying organic status organisation towards an organic operator in Australia has its genesis in the context of a regime set up to protect and regulate the integrity of the export market for Australian organic produce - exported on a claimed basis (by label) of being organically produced. Hence, as the defendant's expert Mr Slee explained in his report (exhibit 34), and uncontroversially on this point it seems, it would be illegal to export Australian agricultural produce labelled as 'organic' without an organic product certificate. However, there is no such mandatory requirement applicable to Australian domestic sales of 'organic' produce (page 5).

261 For the sale of Australian domestic organic produce, the real underlying constraint against products being misleadingly sold under a label of 'organic' or 'certified organic' (when, in truth, they are not organically grown in Australia) is that such sales may be assessed as constituting misleading or deceptive conduct. Such domestic conduct, in trade or commerce, would be a potential breach of the *Competition and Consumer Act 2010* (Cth) (CCA), relevantly, against the *Australian Consumer Law* (ACL) (sch 2 to that Act). Such conduct, in particular, may violate cl 18 (prohibiting misleading and deceptive conduct in trade or commerce - reflecting the content of the former s 52 of the *Trade Practices Act 1974* (Cth)). See also cl 3 of the ACL (cl 29(1)(a) and (b)).

262 To sell agricultural produce in Australia on a misleading basis of being labelled 'organic' produce - when it is not, in truth, organically grown - would be highly problematic conduct. Likewise, for a domestic seller to label their product as 'certified organic', if it was not organically grown and had not been certified as organic by an entity holding the competence or qualifications to deliver such an assessment.

263 Mr Slee also explains (page 5 of his report, 'Executive Summary'), that the Australian Competition and Consumer Commission (ACCC) is responsible for policing the CCA. He notes the ACCC's website identifies AS 6000-2009 as the reference point to enable the ACCC to determine if a product is organic or not. That is a reference to the Australian standard for organic and bio-dynamic products.

264 That is the background to the accredited certification delivery standing of NCO, in the context of NCO's and NASAA's contractual arrangements with the Marshes by their private contract perfected on 24 September 2007, but expressed (item 9 of the schedule) to commence on 2 April 2007.

NASAA standards text and meanings

265 The NASAA organic standards as at 13 May 2008 (TB Vol 5, pages 1293 - 1407) are framed by reference to the National Standard for organic and biodynamic produce (TB Vol 5, pages 1408 - 1480).

266 As an accredited certifier NCO (NASAA's wholly owned subsidiary corporation) operates a quality management system audited and approved by AQIS (DAFF).

267 A regime of standards compatible with the National Standards is obviously an essential part of maintaining NCO's accreditation with AQIS/DAFF. That is not to say the NASAA Standards merely replicate the National Standards. The NASAA Standards, at points, can legitimately build upon the National Standards to impose even higher organic thresholds for NCO's accredited organic operators.

268 Nevertheless, it is expected that there will manifest a broad degree of underlying consistency, and certainly not inconsistency, as between the NASAA standards and the National Standards. Clearly, the National Standards provide the genesis for the NASAA Standards. Here I would specifically note again that the term 'contamination' is not explicitly defined under either standard. Nor, I note, are the terms 'genetic contamination' or 'GMO contamination'.

269 I have already observed there is no counterpart to NASAA Standard 3.2.9 to be found within the National Standards. Hence, terminology of 'unacceptable risk' resides uniquely in those NASAA Standards.

270 Three distinct components of the National Standards (TB Vol 5, pages 1408 - 1480) differentiate between '**general principles**', '**specific conditions**' which 'must be met by an operator of an organic or bio-dynamic unit' and then '**exceptions**' to the National Standards which appear under the heading 'Derogation'.

271 Like the National Standards, the NASAA Standards draw an in principle distinction between what are referred to as '**general principles**' and the standards themselves. In addition, the NASAA Standards contains '**recommendations**'.

272 The National Standards (TB Vol 5, page 1409) are expressly identified as minimum requirements for products placed on the market with labelling that states or implies they have been produced in an organic or biodynamic system. The National Standard continues:

> In this Standard, the production procedures are an intrinsic part of the identification and labelling of, and claims for, such products.

273 As regards sanctions, cl 6.3 of the National Standard says that, as a general principle, breaches against certified operators and consequent sanctions are to be assessed on a case by case basis.

274 Sanctions under the National Standards may range from an instruction to correct a minor discrepancy to suspension or decertification.

275 But a decertification under the National Standards is a sanction imposed 'where the infringement is significant'. See also National Standard 6.3.3 concerning a suspension, if the 'integrity of the product' is compromised.

276 Decertification is dealt with under National Standard 6.4.

NASAA Standards

277 The introduction to the NASAA standards (TB Vol 5, pages 1293 - 1407) recognises the internal distinction between general principles, recommendations (which should be followed where appropriate), standards (being the minimum requirements which must be met) and derogations (TB Vol 5, page 1300).

278 It is stated in the introduction that the NASAA standard outlines practices and materials that are allowed, restricted or prohibited for use - in order to be certified by NASAA. The NASAA standards set minimum conditions for certification under NASAA's/NCO's organic certification programme, which is accredited jointly by AQIS and the International Federation of Organic Agricultural Movements (IFOAM).

279 Under s 1.1, I note in particular the key definitions for 'certified', 'certification', 'crop rotation', 'decertification', 'farm unit', 'input', 'labelling', 'licensee', 'natural', 'operator', 'organic', 'pasture', 'prohibited', 'restricted', 'sanctions' and 'suspension'. Clause 1.2 explains that AQIS is the Australian Quarantine and Inspection Service.

280 The purpose of the standards is identified at cl 1.3 as:

> NASAA certification is a total quality management system developed for organic production. NASAA certification allows the operator, who is inspected and approved by NASAA, to advertise and label their produce/products as meeting the NASAA Organic Standard.

281 I mention also NASAA Aims and Principles at cl 1.4 and Pre-Certification Requirements under cl 2.1, particularly standard 2.1.1, concerning a minimum 12-month period to demonstrate compliance prior to certification and conversion to organic level. Further, see also organic certification under standard 2.3.1, and a minimum three-year period of compliance with the NASAA Standard between pre-certification and conversion to organic requirements.

282 NASAA Standards 2.11 and 2.12 deal with inspection and sanctions respectively. I note a further definition in general principles, particularly for 'decertification', namely:

> Termination of certification as a result of ongoing non-compliance with the Standard, following a period of suspension.

283 NASAA Standard 2.12.1 addresses '[M]anifest non-compliance'. Standard 2.12.3 concerns '[O]ngoing failure to observe contract conditions', resulting in decertification. The lesser sanction of suspension is dealt with under standard 2.12.2, as regards a '[F]ailure to observe contract conditions … until compliance is demonstrated'.

284 NASAA Standard 2.20 addresses labelling. Of some relevance is standard 2.20.12 stipulating:

> Organic products shall not be labelled as GMO free in the context of this Standard. Any reference to genetic engineering on product labels shall be limited to the production and processing methods themselves not having used GMOs.

285 Of greater relevance is NASAA Standard 3. Of significance is reference in the recommendations to 'contamination', a term not defined within either the National Standards or the NASAA Standard - but defined in IFOAM standards as:

> Contact of organic product or land with a substance prohibited for organic production or handling (TB Vol 7, page 1936).

286 It is noted in NASAA's s 3 recommendations that:

> Contamination that results from circumstances beyond the control of the operation does not necessarily alter the organic status of the operation.

287 NASAA Standards 3.1.1 through 3.1.5 deal with operational responsibilities to take measures to prevent contamination. Standard 3.1.2 refers to the certification of a 'whole farm'. Standard 3.1.6 sees a reference to 'zero tolerance' as regards chemical substances in

circumstances where there is no maximum limit specified. That is the only reference in the NASAA standards to 'zero tolerance'.

288 Standard 3.12 renders it plain that where there has been an application by the operator of a prohibited substance applied 'directly and intentionally' to a certified product 'decertification will follow'. The same consequence for an operator applies where there has been 'a demonstrable failure to take reasonable precautions against contamination'. For convenience, I will set out the text of certain NASAA standards later in the reasons, including general principles, recommendations and standards.

289 I can now turn back to the two causes of action raised by the Marshes against Mr Baxter in this litigation.

The Marshes' causes of action against Mr Baxter

290 Mr and Mrs Marsh invoke two common law causes of action against Mr Baxter. Their financial grievance arises from their loss of organic certification from NCO for approximately 70% (area) of Eagle Rest in the period between 29 December 2010 and November 2013. As mentioned, the Marshes' grievance is not over any physical damage said to have been caused to any person, animal or property at Eagle Rest or anywhere for that matter. The character of the loss claimed by the Marshes is entirely financial. An accepted amount of $85,000 is claimed to have been lost by the Marshes, by them not being able to obtain higher prices for produce grown or raised at Eagle Rest between 2010 and 2013 - by selling that produce under the attached label 'NASAA certified organic'. NCO denied them that right under their 2007 contract.

291 The first cause of action invoked by the Marshes' ASOC is for common law negligence, otherwise referred to as the breach of a duty of (reasonable) care.

292 In the common law negligence context, a precise formulation of the relevant duty of care relied upon, including the scope of the duty, is of critical importance. It is the asserted breach by a defendant of that duty which delivers the relevant act or omission constituting negligence. Damage is the essential ingredient of this tortious cause of action and the damage must be caused by the negligent act or omission.

293 The reach of the law of negligence in Australia has been developed over time under an incremental, or case by case, approach. Accordingly, there are now some very well recognised factual categories of case - where the law has been thoroughly considered, developed and is now

reasonably clear. For instance there are well travelled areas of tort law involving medical negligence, road traffic collisions, fire damage cases, or the like. Not so here.

294 For well-established areas of negligence case law the underlying formulations for an applicable duty of care and its scope, are usually settled. But there remain novel factual scenarios involving an attempted invocation of the law of negligence by plaintiffs which seek to traverse into areas less settled by earlier case precedent. This is such a negligence case, not least because of the absence of any identifiable physical injury to persons, animals or to property arising from the conduct of this defendant, Mr Baxter.

295 There are a number of leading cases in which Australian courts have allowed plaintiffs to recover for what is a purely financial loss. But here the law has developed slowly and cautiously. Even in such cases there is usually detectable somewhere some physical damage of some kind suffered by persons or to property. This is generally seen somewhere on the surrounding landscape, be it damage to an undersea pipeline, a deteriorating previously owned house or dwelling, or some physically diseased potatoes. Whilst the claimant plaintiff in these cases may not themselves have personally suffered a physical injury, usually there is someone else or some property that has and that is identifiable upon the surrounding factual canvas. But here no person or property has suffered a physical injury of any kind. This is also not a case in the genus of a complaint about negligent advice, causing a financial loss when relied upon by a plaintiff. Hence, this is a wholly novel negligence case.

296 The orthodox remedy where common law negligence is made good against a defendant, is compensatory damages. For the present case, the parties have agreed that the level of the Marshes' economic loss, assessed across three growing seasons (2011 - 2013) amounts to $85,000. That assumes, of course, that the Marshes do otherwise make good all other elements of their negligence (or private nuisance) causes of action against Mr Baxter.

297 I would add, in the context of the Marshes' common law negligence action, that such actions in Western Australia have been rendered more difficult for plaintiffs by the introduction of the *Civil Liability Act 2002* (WA) (*CLA*). Particularly relevant to this litigation are the *CLA*'s provisions applicable to a plaintiff when proving breach (s 5B) of an ascertained duty of care and, its dual provisions relating to the proof of

causation (s 5C) of damage. I will examine these provisions of the *CLA* later in the reasons.

298 Strategically, however, it is overall undeniable that the *CLA*'s application to the elements of the Marshes' negligence action, renders their case against Mr Baxter a more difficult challenge.

299 The alternate cause of action as invoked by the Marshes is via the common law tort of private nuisance.

300 The essence of this tort is that a tortfeasor has engaged in a use of land and, in the process, has substantively and unreasonably interfered with the enjoyment of the land of a neighbouring (plaintiff) owner or their business.

301 In private nuisance the recoverable damage claimed can be physical or purely financial. Hence, the constraints of a negligence action, in pursuing a pure economic loss which must be faced by the Marshes, does not present equivalent conceptual difficulties for them under their alternate cause of action.

302 Furthermore, private nuisance as a tort can also be established by a plaintiff without the need to necessarily prove any fault in a defendant. In that sense, the action is more a tort of strict liability. Common law compensatory damages will be obtained where the tort of private nuisance is made out. In addition, where a private nuisance is proven, an abatement of a continuing prospective nuisance, may be redressed by the equitable remedy of an injunction.

Relief sought: Perpetual injunction for private nuisance

303 The Marshes' ASOC against Mr Baxter is framed on the dual basis of alleged negligent breach of a common law duty of care and, second, upon private nuisance. Both are common law causes of action. However it is the private nuisance cause of action which precedent shows can conceptually support the grant of equitable relief by way of a perpetual injunction, directed against the nuisance tortfeasor, by way of abatement.

304 For the present action, a perpetual injunction is the significant remedy that is claimed against Mr Baxter, bearing in mind the $85,000 damages claimed is, in the context of the costs of Supreme Court litigation these days, a demonstrably uneconomic amount of money to be litigating over.

305 It will be necessary to closely examine evidence in support of, as well as the terms of the claimed injunction sought by the Marshes as perpetual relief against Mr Baxter.

Early strategic evaluations: relative strengths

(a) Nuisance

306 I pause to observe that the plaintiffs' task manifests conceptually as far less onerous, under the alternative cause of action for private nuisance. That is, of course, the plank upon which it seeks to obtain the perpetual injunction against Mr Baxter.

307 Given that, it was more than a little surprising that the strong emphasis of the plaintiffs' written and verbal submissions at the trial was their negligence challenge against Mr Baxter. Clearly, the common law negligence traverses into legally unchartered territory, and carries far greater conceptual obstacles and pitfalls for the plaintiffs - comparatively with the private nuisance case arguments. Hence, I have focused particular attention towards the stronger private nuisance arguments in these reasons.

(b) Causes of the 2010 swathe incursion

308 From a causation of loss perspective, it is clear from the way in which the plaintiffs ran this case at trial, and on analysis, that their true grievance about how their financial loss happened was not so much against the mere growing of GM canola on Sevenoaks by Mr Baxter. Rather, the true grievance looked to me to be over how numerous cut GM canola plants (swathes) came to blow into Eagle Rest at the end of November 2010. Essentially, this is on analysis, a grievance against the cutting, stacking and harvesting of the GM canola crop on Sevenoaks in the Range and Two Dams paddocks by Mr Baxter. Obviously, if the GM canola crop had not been so cut, then left to dry out in the elements, the subsequent intervention by the wind is of far lesser moment (as regards an unharvested GM canola crop that is still rooted in the soil).

309 In other words, the Marshes' true causative grievance presents on the facts as being better targeted against the swathing process under which the canola crop growing on Sevenoaks was cut and left stacked in windrows in two paddocks. In particular, such a grievance presents where there was available to Mr Baxter, another (less problematic) method of canola harvesting, from the perspective of limiting any unexpected wind blown spread event of RR canola seeds.

310 Harvesting a ripened canola crop by direct heading would not carry the same wind dispersal risks, as does swathing.

311 Towards a more causatively persuasive mode of spreading GM canola seeds to Eagle Rest, by an as chosen swathing process, the cross-examination of Mr Baxter by senior counsel for the plaintiffs (ts 829 - 831) was, I thought, both significant and revealing. I will set out the exchanges between senior counsel and Mr Baxter:

> Well, you knew it was going to dry out and you knew what the swather was going to do to the crop. (indistinct) in a long windrow and you were going to leave it there for a couple of weeks or longer?---Yes.
>
> And it would have been obvious to you, wouldn't it, that by leaving the windrow crop in that way that it might get blown about by the wind?---Well, it's not obvious but there's always some little chance it can move a bit.
>
> Well, move a bit. You knew then that one of the things that could happen would be that the windrow would be disturbed by the wind and that the swathes would be blown?---Well, they can always move a little bit, the swathes, with a bit of wind blowing.
>
> Yes, and once they're dislodged, you knew that they could be blown further?---There's always a chance.
>
> Yes, and given that the Marsh property was next-door, you knew that there was a chance that the – over the weeks that it's left there, that the windrows would be dislodged by the wind and blow on to Eagle Rest?---Well, with our buffer zones and our road and the tree lines, I expected we had a further enough distance.
>
> You knew that there was a real chance that the windrow canola swathes would be blown from your property, across the road, on to Eagle Rest, wasn't there?---No, there was a real chance.
>
> There was a real chance that it would blow off your property?---No.
>
> You didn't think there was a real chance that it would blow off your property?---No.
>
> Why is that?---Well, I had never swathed before. It's the first time I had swathed. I hadn't noticed in previous years windrows blowing around with the buffer zones and the borderlines I left between Mr Marsh, I presumed nothing would get on his property.
>
> Now, certainly, **if you direct harvested in 2010, the risk of it** being of any canola – GM canola **being blown** from Sevenoaks on to Eagle Rest would be very much reduced, wouldn't it?---**It could possibly be reduced**.

> Well, there would be no doubt about that in your mind?---There's always some doubt. It doesn't have a certainty.
>
> **Well, pretty close to a certainty if you direct harvested, the chance of any canola blowing on to Eagle Rest would be substantially reduced?---There would be less - - -**
>
> Sorry?---There would be less - - -
>
> Yes. You could have – in order to avoid that chance that swathed canola had blown on to – from your property on to Eagle Rest, you could have directly harvested those paddocks, Range and Two Dams, in 2010?---**I could have direct harvested by direct harvesting, I couldn't have had as much weed control management as I would have liked …** (my emphasis in bold)

312 That cross-examination of Mr Baxter, particularly the last exchanges, was, on my assessment, logical and appropriate on the evidence. But the clear, underlying premise of senior counsel's questioning, however, was that the risk of GM canola swathes being blown from Sevenoaks into Eagle Rest would have been 'very much reduced' (to pretty close to a certainty) by an adoption of a different harvesting method, namely direct harvesting (see also senior counsel's opening at ts 63 - 65).

313 I would agree with and accept that logical premise in the questioning. Indeed, on the plaintiffs' case (from the evidence led at the trial) that premise was overwhelming as I conclude.

314 I note that this was a very important exchange. But I would also accept Mr Baxter's evidence in his answers given under these exchanges with senior counsel, particularly his response concerning a lesser degree of weed control for him, had he chosen to direct harvest, rather than to swathe his GM canola crop.

315 There was little, if any, evidence in the trial concerning the likelihood of a single GM canola seed or seed pod, or as a part of a GM canola swathe with its attached seed pod, being blown by wind for any particular distance. Here what travelled upon the wind from Sevenoaks into Eagle Rest, was the whole canola plant, which had been cut at its base (ie, when swathed). The comparative potential aerodynamics and travelling distances on the wind of a cut plant, by contrast to a bare canola seed, or of a seed pod, were scarcely explored at the trial.

316 Acceptance of the cross-examination premise as to direct heading, undermines from a causation perspective, what is the temporally anterior attack also made by the ASOC against Mr Baxter's mere 'growing' of GM

canola. See particularly the term 'factual causation', used in s 5C(1)(a) of the *Civil Liability Act 2002* (WA). In other words, merely growing a GM crop in the first place is not the true causative issue, as regards the subsequent travel by air of parts of cut canola plants whilst blowing into a neighbouring farm. True the GM canola had to be grown first to be there, in order to travel on the wind, many months later. But that is just an historical requirement to create a subject matter for the wind event. The real causative issue, from a spreading perspective, is how the GM canola crop was harvested, in order to create the indispensably required conditions for cut plants to present unattached in a paddock, to then be blown somewhere else.

317 Therefore, both towards the plaintiffs' cause of action in common law negligence, as well as for private nuisance, the grievances grounded upon the mere conduct of Mr Baxter in electing to plant a GM canola crop in 2010, present as causatively misdirected. Without the swathing harvest methodology being deployed in 2010, there presents no legitimate factual foundation in evidence to conclude that any part of Mr Baxter's growing GM canola crop would have moved on the wind into Eagle Rest.

318 That leaves the plaintiffs, from a strategic perspective, essentially with a core grievance directed against Mr Baxter's chosen mode of harvesting his GM canola crop by swathing on Two Dams and Range paddocks, at or around the end of November 2010.

319 The plaintiffs' true causative grievance then can be seen to be against the chosen technique of 'swathing', as adopted in 2010, in circumstances where an alternative mode of harvesting by 'direct heading' or 'direct harvesting' of the head of the canola seed pods, had been available to Mr Baxter, yet he had resolved instead, to swathe.

Observations on the law - *Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180

320 Both parties from their different perspectives, placed either heavy positive, or heavy negative reliance upon this case in their respective submissions. ***Perre v Apand*** [1999] HCA 36; (1999) 198 CLR 180 was, by unduly simplistic summary, a case where economic loss was, in the end, successfully recovered by a potato growing family (from South Australia), in the aftermath of diseased potato seeds - originating from Victoria - causing a potato blight and then an ensuing inability of the plaintiffs to sell their wholly unaffected potato crop at higher prices into the West Australian market. The facts of this leading negligence decision concerning recoverable economic loss for common law negligence in

Australia, are more comprehensively summarised and explained by Buss JA in the Western Australian Court of Appeal in ***Apache Energy Ltd v Alcoa of Australia Ltd [No 2]*** [2013] WASCA 213; (2013) 45 WAR 379 [108] - [179].

321 In ***Perre***, the plaintiffs' 'vulnerability' to an economic loss, emerged in McHugh J's reasons as an important evaluative factor in allowing that claim: see ***Apache Energy*** [127]. However, I am not at all comfortable that the vulnerability concept extends to catch what is a different and essentially self-inflicted contractual vulnerability to NCO of Mr and Mrs Marsh, generating their claimed economic losses. That is especially so when the conduct of contracting party A, which generates the economic harm to party B vis-à-vis their contract might be assessed (objectively) to have been unreasonable conduct, or even conduct in breach of their contractual terms.

322 Looking at the underlying facts in the leading pure economic loss cases decided by the High Court of Australia (comprehensively collected and summarised by Buss JA in ***Apache*** [108] - [174]) there does seem to me to have been shown in all of them at least at some point in surrounding facts some physical injury to a person or to property such as pipeline damage, damage to a house, or damage (disease) to a potato crop: see ***Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*** [1976] HCA 65; (1976) 136 CLR 529; ***Bryan v Maloney*** [1995] HCA 17; (1995) 182 CLR 601; ***Woolcock Street Investments Pty Ltd v CDG Pty Ltd*** [2004] HCA 16; (2004) 216 CLR 515; ***Dovvuro Pty Ltd v Wilkins*** [2003] HCA 51; (2003) 215 CLR 317 ; ***Barclay v Penberthy*** [2012] HCA 40; (2012) 246 CLR 258 and ***Perre***.

ASOC causes of action of the plaintiffs

323 I turn briefly to the parties' pleadings. First is the amended statement of claim of the plaintiffs (ASOC) last amended before trial, on 4 February 2014.

Negligence

324 As regards common law negligence the relevant ASOC paragraphs are pars 21, 25, 31, 35, 36 and 37. I set these out:

> 21. On and shortly after about 30 November 2010 many swathed canola plants were blown from Sevenoaks onto paddocks 7, 8, 9, 10, 11, 12 and 13 of Eagle Rest.

Particulars

The swathed canola plants were too numerous to count. Marsh inspected and recorded the GPS location of as many of the plants as was possible. GPS locations will be provided in due course. Paddocks 9 and 10 at Eagle Rest are situated on the Qualeup Road North boundary of the property. Paddocks 7, 8, 11, 12 and 13 adjoin paddocks 9 and 10.

25. As a result of the presence of GM canola on Eagle Rest and the consequential loss of certification of 325 ha of Eagle Rest, that land could not be used to grow or raise 'certified organic' crops or livestock in 2010, 2011 or 2012.

Particulars

Crops harvested in each of those years, and livestock grown in 2011 and 2012, on that land could not be sold under the label 'certified organic' without certification.

…

31. By reason of the matters alleged at paragraphs and 28 to 30 it was reasonable foreseeable to Baxter, at all material times prior to Baxter first sowing GM canola on Sevenoaks, that if Baxter did not take reasonable care to ensure that GM canola was not blown or carried from Sevenoaks on to Eagle Rest:

    (1) the Marshes would be at risk of losing their ~~his~~ organic certification on all or part of Eagle Rest; and

    (2) the Marshes would be at risk of suffering loss and damage, including economic loss.

35. By reason of the matters alleged at paragraphs 3 and 28 to 34 Baxter owed ~~Marsh~~ the first and second plaintiffs a duty to take reasonable care:

    (i) to ensure that GM canola was not blown or carried from Sevenoaks onto Eagle Rest;

    (ii) to ensure that the ~~Marsh~~ did not suffer loss, including economic loss as a result of GM canola being blown or carried from Sevenoaks onto Eagle Rest.

36. In breach of the duty of care alleged at paragraph 35, Baxter failed to take reasonable care:

    (i) to ensure that GM canola was not blown or carried from Sevenoaks onto Eagle Rest;

(ii) to ensure that they ~~Marsh~~ first and second plaintiffs did not suffer loss, including economic loss as a result of GM canola being blown or carried from Sevenoaks onto Eagle Rest.

Particulars

Baxter grew GM canola on the eastern side of lot 100 of Sevenoaks which adjoins Qualeup North Road and in the north-east corner of lot 5 of Sevenoaks. Baxter could reasonably have grown it further away from Eagle Rest, on lot 4407 of Sevenoaks, but did not do so. Baxter swathed his GM canola crop. He could reasonably have harvested it instead, but did not do so. Alternatively, Baxter could have grown conventional canola instead of GM canola.

37. By reason of Baxter's breach of duty of care as alleged:

(i) GM canola was present in substantial quantities on Eagle Rest (as alleged at paragraph 21);

(ii) 325 ha of land comprising Eagle Rest was de-certified;

(iii) The Marshes have ~~Marsh has~~ suffered loss and damage, which is continuing.

Particulars

a) Land on Eagle Rest which is de-certified cannot be used to grow crops or raise livestock that can be sold as 'certified organic'.

b) ~~Since~~ Between December 2010 and November 2013 the Marshes were ~~has~~ not ~~been~~ able to sell crops grown or livestock raised on paddocks 7 to 13 of Eagle Rest as 'certified organic'. The sale of crops and livestock as conventional produce has achieved lower prices than sale of the same crops would have achieved as 'certified organic'. Further particulars will be provided in due course.

325 As regards an existence of a duty of reasonable care as is contended to reside in Mr Baxter by the Marshes, attention must focus upon par 35 and the plaintiffs' formulation of the duty and scope, as there seen.

326 I will render some observations concerning the nature of the common law duty of reasonable care as contended for. First, as is now established, it has not been shown from any evidence led at this trial that GM canola per se is in any way physically dangerous or injurious to persons, animals or to property. Hence, there arises here no basis as regards the contended

duty to equate, as a matter of logic, GM canola to some dangerous phenomenon akin to a lethal or toxic substance - such as to fire, or to a disease such as foot and mouth - the escape of which is well appreciated to potentially carry calamitous consequences for neighbours (cf ***Burnie*** (fire), ***Weller v Foot & Mouth Disease Research Institute*** [1966] 1 QB 569 (foot and mouth disease)).

327 This is not a case then, in my view, for an application by analogy of some of the earlier negligence duty of care cases reflecting an underlying policy in the law imposing strict controls for the uses of premises, where dangerous substances have been introduced, or dangerous activities are carried on. For such classes of case, high degrees of (reasonable) care have been imposed. Depending upon the magnitude of the danger, this can result in a degree of diligence required of a defendant in such a case to be so stringent as to 'practically amount to a guarantee of safety': see ***Burnie Port Authority v General Jones Pty Ltd*** [1994] HCA 13; (1994) 179 CLR 520, 554 citing ***Donoghue v Stevenson*** per Lord MacMillian. In that case the old rule in ***Rylands v Fletcher*** (1866) LR 1 Ex 265; (1868) LR 3 HL 330 was discarded by the High Court of Australia and assimilated into the global common law of negligence.

328 Correlatively then, the duty to take (reasonable) care, seen formulated under pars 35(1) and (2) of the ASOC, must be viewed as novel. A duty formulated in such terms cannot be accepted as generally arising out of a relationship between two neighbouring farms or farmers. No such earlier case precedent was cited to me. There is no well-known, well-established or well-accepted duty of reasonable care at common law, for the presenting circumstances of this litigation: see ***Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*** [2012] WASCA 79; (2012) 42 WAR 287 [88] McLure P (with whom Buss JA agreed, save for one reservation).

329 Upon that appeal, McLure P and Pullin JA both rendered observations concerning the common law duty of care in novel cases. They reached differing conclusions about the contended duty of care, in the facts there presenting - a case of physical damage to grapes by smoke: see McLure P at [88] and Pullin JA (dissenting) at [222] - [228].

330 Here, by my assessment, the character of the contended for duty of care 'to ensure' absolute negative results, by par 35 ASOC towards the Marshes' economic damage from GM canola, given their organic status, presents as being entirely novel.

331 Third, in novel factual scenarios, such as this, the analysis as to the contended duty of care can be assisted by an examination of the damage a plaintiff claims to have suffered, and the particular want of care alleged against the defendant: see again ***Southern Properties*** (Pullin JA) [225] (referring to Hayne J in ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** [2000] HCA 61; (2000) 205 CLR 254 [105]) and McLure P [89] and also Gleeson CJ in ***Modbury*** [14].

332 In the present case, I am dealing with a scenario of wholly economic loss, based on lower prices obtained for produce grown and raised at Eagle Rest by reason of that produce being denied, when sold, the marketing advantage of a label 'NASAA Certified Organic'. Denial of the use of that label arose out of the workings of the terms of the private contractual relationship voluntarily entered into in 2007 between Mr and Mrs Marsh and NCO/NASAA.

333 Fourth, it will be seen by both limbs of ASOC par 35 that the nature of the duty of reasonable care contended for against Mr Baxter is '**to ensure**' that certain states of affairs did not ever arise (ie, GM into Eagle Rest and economic losses to the Marshes). By my assessment, an absolute level for the duty is set far too high, especially in circumstances involving a large scale, broad acre crop-farming scenario which is necessarily exposed to the uncontrollable seasonal weather events.

334 This case is not about an urban neighbourhood clash. Pitching the duty of care at a level of absoluteness (as is connoted by the word 'ensure'), even if then moderated (as senior counsel for the plaintiffs submitted) by a (necessary) use of the phrase 'reasonable care', by my assessment, is simply not justified, either by case precedent or in principle. That is especially so where this is not a case about the failure to control some physically dangerous phenomenon. Bearing in mind that the weather and the elements are all ultimately uncontrollable, at best, the scope of any duty of reasonable care should have been pitched at a less absolute level. For example, a duty to take reasonable steps to 'reduce' or 'minimise' the risk(s) of something happening.

335 Fifth, the par 35 ASOC phrase 'blown or carried' reinforces my last point in terms of a defendant's inability to absolutely control a climatic event. 'Blown' is a clear reference to the wind. 'Carried' might embrace a range of potentialities such as carried by human, animal or mechanical means. Illustrative of this is the events of November 2008 where Mr Marsh visited Sevenoaks and spoke there to Mr Baxter about 12 volunteer canola plants he had discovered growing on Eagle Rest. In that

conversation the assumed 'carriage' of (conventional) canola seeds from Sevenoaks into Eagle Rest (which had then germinated as the 12 volunteer plants on Eagle Rest subsequently pulled out by Mr Marsh) was more likely then attributed, by Mr Marsh (I would find, as I later explain) to a carriage of canola seeds into Eagle Rest by rabbits (in their droppings) and so, not by the wind. A mode of seed carriage into Eagle Rest from Sevenoaks by rabbits is a very different seed transfer mechanism to the subsequent windblown events tied to the swathing of Mr Baxter's GM canola, in late November 2010.

336 Sixth, there is, on the current state of the law, a real conceptual problem for a common law negligence action seeking the recovery of purely financial loss, even for a foreseeable financial harm, in the ordinary course. In ***Tame v New South Wales; Annetts v Australian Stations Pty Ltd*** [2002] HCA 35; (2002) 211 CLR 317 [6] Gleeson CJ (referring to ***Perre v Apand Pty Ltd*** [4] - [5]) explained the problem this way:

> One of the reasons for the rejection of a general rule that one person owes to another a duty of care not to cause reasonably foreseeable financial harm is that the practical consequence of such a rule would be to impose an intolerable burden upon business and private activity. Furthermore, such a rule would interfere with freedoms, controls and limitations established by common law and statute in various contexts. Unscientific as may be the distinction between 'pure economic loss', 'parasitic economic loss' and 'damaged property', the care which the law requires people to show for the person or property of others is not matched by a corresponding requirement to have regard to their financial interests. The distinction is not based on science or logic; it is pragmatic, none the worse for that.

337 Buss JA acknowledged this negligence obstacle in ***Apache*** [109] (referring to ***Caltex Oil (Australia) Pty Ltd*** (555, 558 - 559, 592, 598)), and Buss JA at [135] referring to the dissenting judgment of Brennan J in ***Bryan v Maloney*** (632) and ***Woolcock Street Investments Pty Ltd*** at [21].

338 For present circumstances, the width of the proposed duty of care contended for, in circumstances where the underlying scenario is one for the recovery of pure economic loss, is an area where the law has traditionally been cautious about expanding. This presents a considerable conceptual obstacle for Mr and Mrs Marsh. Their case presents, as regards the law of negligence, as an excursion into significantly uncharted economic loss territory, as I assess it.

339 Seventh and correlatively, par 35(ii) as framed, looks to elevate the duty of reasonable care applied to Mr Baxter (by the word 'ensure') to the

avoidance for the plaintiffs of economic losses, up to a level akin to that of an underwriter. This, I would assess, is unprecedented, as regards an economic claim.

340 Eighth, assessing a contention of breach of the duty by the Marshes, as seen under ASOC par 36, the plaintiffs' formulation of the scope of the duty of (reasonable) care, if accepted, would tend to automatically deliver the outcome of breach. This shows that the contended duty in its application would, in effect, circumvent a touchstone assessment of reasonableness, at the next (breach) stage of the negative analysis: see ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [191] - [192] (Gummow & Hayne JJ); ***Tame*** [99] and ***Southern Properties WA Pty Ltd*** [88] (McLure P) and [227] (Pullin JA). See also ***Drexel London v Gove (Blackman)*** [2009] WASCA 181 [330(i), (k) (m)] (K Martin J).

341 Ninth, looking solely now at Mr Baxter's choice of harvesting methodology (ie swathing) for his 2010 GM canola crop, as the plaintiffs' most viable negligence grievance, causatively delivers a far better focus to any pragmatic evaluation of the defendant's (reasonable) responsive obligations. Particulars under ASOC par 36 finally reach that key issue only now identifying a concept of a suitable buffer distance. In part, the particulars read:

> Baxter could reasonably have grown it further away from Eagle Rest, on lot 4407 of Sevenoaks, but did not do so. Baxter swathed his GM canola crop. He could reasonably have harvested it instead, but did not do so. Alternatively, Baxter could have grown conventional canola instead of GM canola.

342 But the particularised grievance over not growing GM canola 'further away' presents as still very imprecise, especially measured for the 2010 growing season. How far away? What linear distance is contended for and should there be any equivalent buffer zone distance reasonably expected to be in place at Eagle Rest? Such questions are not answered.

343 As formulated, this all rather smacks again of an absolute duty being imposed against Mr Baxter (ie, not to grow) rather than a lesser duty of taking reasonable care.

344 Tenth, it is not for this court during a trial to attempt to rehabilitate 'on the run' an unacceptably imprecise or inadequately framed duty of care.

345 As regards Mr Baxter's pleaded defence, it is unnecessary to do any more than to note his responses. Essentially, he takes issue against all aspects of the asserted duty of care against him, denies any acts of negligence or, indeed, his causing of any of the economic damage that is asserted by the Marshes.

346 As regards swathing, rather than direct harvesting, I also specifically note, however, defence par 23.2, especially particulars C to F.

347 I now turn to the plaintiffs' pleaded case, invoking private nuisance.

The ASOC private nuisance cause of action

348 The pleas in the ASOC, invoking private nuisance, proceed on an accepted premise that Mr Baxter was the owner and occupier of Sevenoaks. I refer to the following paragraphs of the ASOC:

> 41. In November 2010 substantial numbers of GM canola plants were blown from Sevenoaks on to Eagle Rest (as alleged at par 21)
>
> 42. Since November 2010 GM canola seeds have remained on Eagle Rest, as a result of the swathed canola plants being blown from Sevenoaks on to Eagle Rest.
>
> 43. The presence of GM canola plants and seeds on Eagle Rest:
>
> (i) constitutes an unlawful interference with the use and enjoyment of land by the Marshes;
>
> (ii) was, and remains, a nuisance.
>
> Particulars
>
> Since 2004 and until the nuisance occurred, the Marshes used the land comprising Eagle Rest to raise and cultivate certified organic produce. As a result of the presence of GM canola on Eagle Rest and the consequential loss of certification of Eagle Rest, they cannot use that land to cultivate or raise 'certified organic' crops or livestock.
>
> 44. Baxter caused a nuisance.
>
> …
>
> 46. The Marshes have suffered and will continue to suffer loss and damage in the form of unlawful interference their [sic, 'to their'] the use and enjoyment of Eagle Rest, as a result of the nuisance.

Particulars

The plaintiffs refer to and repeat the particulars provided under par 37.

47. Baxter intends, unless restrained, to continue to commit the nuisance.

349 I can render the following observations about the private nuisance cause of action as pleaded. In the first place, this component of the ASOC is seen to focus, more appropriately, in my view, on the event of the movement out of Sevenoaks on the wind of GM canola swathes and specifically their seeds into Eagle Rest, rather than upon the mere growing of GM canola generally: see ASOC pars 42 and 43.

350 Second, the harvest methodology of swathing (par 40), followed by intervention of the wind (by the word 'blown' in par 41) are the significant components of this alleged private nuisance. That, in my view, is an appropriate truncation of the scope of the challenge, as well as an indication of a conceptually more viable cause of action than under common law negligence.

351 Thirdly, the Marshes are seen to complain of 'interference with the use and enjoyment of land' (namely, Eagle Rest) solely owned by Mr Marsh, but used by the Marshes together as land for their farming partnership. There are two strands of authority as to the nature of the proprietary interest in land required to ground a claim in nuisance. The older strand of authority requires the claimant to be an owner of the land subject to the interference in order to have a valid private nuisance claim: see, eg, ***Oldham v Lawson (No 1)*** [1976] VR 654, 657. A more recent line of authority suggests that lesser proprietary interests, such as a licence, will be sufficient to ground a claim: see ***Vaughan v Shire of Benalla*** [1891] VLR 129, cited in ***Toll Transport Pty Ltd v National Union of Workers*** [2012] VSC 316 [28]; see also ***Deasy Pty Ltd v Montrest Pty Ltd*** (Unreported, Queensland Court of Appeal, BC96055947, 22 November 1996) (Pincus JA).

352 Mr and Mrs Marsh, as business partners, held a licence to use the land from Mr Marsh as the owner. I make the assumption of law that the Marshes may both legitimately claim for an unreasonable interference with the use and enjoyment of Eagle Rest land.

353 Fourth, the plaintiffs are seen to deploy the word 'unlawful' at ASOC pars 43(i) and 46. However, no breach of any statute law has been contended for, let alone identified in this trial. In fact, as was always

clear, the growing of GM canola by Mr Baxter in 2010 was an entirely lawful activity. So also was his chosen mode of harvesting by swathing, in 2010.

354 The plaintiffs look then to be using the word 'unlawful' in a wider sense - of a tortious wrong. The use of 'unlawful' is potentially presumptive, indeed self-fulfilling. More helpful terminology towards alleging a private nuisance grievance would be a 'substantial and unreasonable interference with the beneficial use of the [plaintiffs'] land'. I proceed on the basis that this is what is contended.

Private nuisance: some case law

355 As regards the tort of private nuisance, it is convenient to canvass some superior court case authority. I turn first to the High Court of Australia in ***Elston v Dore*** [1982] HCA 71; (1982) 149 CLR 480. There, Gibbs CJ, Wilson and Brennan JJ (Murphy J generally agreeing) discuss the House of Lords' decision, ***Sedleigh-Denfield v O'Callaghan***[1940] All ER 349; [1940] AC 880 and speeches of Lords Atkin and Wright therein. This passage from Lord Atkin's speech in ***Sedleigh-Denfield v O'Callaghan*** is cited in ***Elston v Dore***:

> For the purpose of ascertaining whether, as here, the plaintiff can establish a private nuisance, I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or, in some cases owned, by oneself. The occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, which is connoted in my definition by the word 'use' (487).

356 In ***Elston v Dore***, Gibbs CJ, Wilson and Brennan JJ observed of this passage:

> Lord Atkin's judgment suggests that an interference with the enjoyment of lands can be described as 'wrongful' if it was deliberate or negligent (487).

357 Their Honours moved to examine the speech of Lord Wright in the same case: see ***Sedleigh-Denfield v O'Callaghan*** (903) and ***Elston v Dore*** (487 – 488). Lord Wright had said:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable

> according to the ordinary usages of mankind living in society, or more correctly in a particular society (487 - 488).

358 Towards these words, Gibbs CJ, Wilson and Brennan JJ in ***Elston v Dore*** observed:

> In our respectful opinion, that is the proper test to apply in most cases. Although, as was pointed out in ***Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound [No 2])*** [1966] UKPC 10; [1967] 1 AC 617 at 639, the wide and uncertain boundaries of the law of nuisance include cases in which negligence in the narrow sense is not essential, fault of some kind is almost always necessary. In the present case the action of the respondent was deliberate, but in our opinion it will only have been wrongful if it was not reasonable in the sense to which Lord Wright refers (488).

359 Locally, the tort of private nuisance was both recently and closely examined by the Western Australian Court of Appeal in ***Southern Properties (WA) Pty Ltd***. I mention first McLure P's observations commencing at [115]. Her Honour said [118] - [119]:

> 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 …

360 McLure P (with whom Buss JA agreed on this issue) concluded the facts presenting in ***Southern Properties (WA) Pty Ltd***, where the physical damage from smoke (by reason of a prescribed burn which interfered with the plaintiff's use of their land for grape growing for the purpose of

producing wine) did not in the end constitute an unreasonable interference with the grape producer's land: see [120].

361 By his dissenting conclusion on that appeal, Pullin JA looks to have concluded the appellant should have succeeded in establishing a claim of private nuisance, as well as under common law negligence: see [333].

362 Pullin JA looks to have reached the same conclusion concerning non-applicability of the *CLA* to a cause of action in tort for private nuisance, [329]. His Honour said:

> The essence of a claim in nuisance is a pleading of material facts revealing a substantial and unreasonable interference with the beneficial use of the appellants' land [315].

363 Further:

> An action in nuisance does not involve a failure to exercise reasonable care. Nuisance is a cause of action directed at the harm caused, rather than the conduct causing it. Because proof of nuisance does not involve a failure to exercise reasonable care, the CLA does not apply to a cause of action in nuisance [329].

364 I propose to follow that approach regarding the *CCA* and the private nuisance action of the Marshes.

365 At [125] - [126] the President also expressed the preliminary view that the *CLA* did not apply to the private nuisance cause of action:

> … it is not sufficient that fault may (not must) be relevant in an assessment of whether interference is unreasonable or that proven absence of fault is a material element of a defence to the nuisance claim [125] - [126].

Mr Baxter's response to the Marshes private nuisance cause of action

366 Mr Baxter, as defendant, essentially contends that any financial losses sustained by the Marshes arising as a consequence of a loss of Eagle Rest's organic status labelling certification from NCO, for (approximately) 70% of the area of Eagle Rest (in the period between December 2010 and June 2013) is a private contractual matter arising just between the Marshes and NCO/NASAA. Mr Baxter says any financial losses of the Marshes were not caused by him. He says he cannot be held responsible for financial harm caused to the Marshes arising out of the private workings of a contract, he had and has, no part of. He also says there was no negligent or unreasonable conduct on his part.

367 Rather, Mr Baxter goes even further to say that any financial losses suffered by Mr and Mrs Marsh were a direct result of the unreasonable actions of NCO/NASAA, by unwarranted decertification decisions against 70% (approximately) of the area of Eagle Rest and the produce grown from such areas.

368 Mr Baxter argues that the denial of organic certification status to Mr and Mrs Marsh was conduct by NCO/NASAA without any legitimate or reasonable justification.

369 By reason of such unsupportable decertification conduct by NCO/NASAA against the Marshes, Mr Baxter says that he is not to be held causatively responsible for that loss, in the eyes of the law. Inferentially, this submission must be that the Marshes should look more appropriately to NCO/NASAA, for any financial relief for their losses, not to him.

370 Mr Baxter says he can only be held responsible under the prevailing law of private nuisance for adverse financial outcomes at Eagle Rest, if there had been a substantial and unreasonable interference by himself against Mr and Mrs Marsh's use and enjoyment of Eagle Rest. That, he says, could hardly be so where he has simply chosen to grow, then harvest in an orthodox fashion, an entirely lawful GM canola crop in 2010.

371 To assess the existence of a private nuisance under the common law necessarily requires a balancing exercise by this court as between what Mr Baxter legitimately may do on his rural land in terms of his GM canola cropping, against his nearby rural neighbours' rights not to have their use and enjoyment of Eagle Rest unreasonably interfered with. Lord Wright's test from ***Sedleigh-Denfield v O'Callaghan*** concerning what is reasonable, according to the ordinary usages of mankind living in a particular society, must be applied.

372 Mr Baxter contends that the balancing exercise required in rendering a private nuisance evaluation, draws into focus, as one factor to be weighed overall, the contractual conduct of NCO/NASAA concerning the Marshes. This Mr Baxter asserts to be a wholly disproportionate and unreasonable decertification response, to an unintended incursion by wind to Eagle Rest of physically benign GM canola swathes blown from Sevenoaks into Eagle Rest in late November/early December 2010.

Private nuisance: is it open to look at what happened under the contract between the Marshes and NASAA?

373 Does an overall assessment as to whether there has been an 'unreasonable interference' in a private nuisance action, allow the contractual relationships and consequent events occurring on the Marshes' property to be examined? The answer must be 'yes'.

374 My view is that it is both appropriate and necessary in this case to examine the workings of the private contractual relationship between Mr and Mrs Marsh and NCO/NASAA. The scrutiny should extend to the conduct of NCO/NASAA in terms of compliance with or derogation from contractual provisions, including the NASAA standards, which were incorporated by reference to apply, in that 2007 contract with the Marshes.

375 A part of the plaintiffs' case is founded upon Mr Baxter's asserted knowledge of a risk of Eagle Rest decertification under the NASAA organic standards, a risk which then materialised in December 2010.

376 The plaintiffs' submissions tend to suggest that a wholly private contractual relationship is inappropriate for the court to scrutinise, regarding what had transpired under the contract. NCO and NASAA are, of course, not parties to the present litigation. The contractual parties, it was said, had accepted the contractual outcomes under that relationship in 2010 and thereafter. Therefore, what had transpired under the 2007 contract was essentially an issue just between those parties. I reject that approach as artificially blinkered.

377 If accepted this submission, in effect, brings down an 'iron curtain' against a court's uninhibited scrutinisation of what actually occurred under the workings of the plaintiffs' contract with NCO/NASAA. For a truly fair and realistic assessment of the conduct of each party in a private nuisance action, there is an unavoidable need for the court to fully view the reasonableness of all relevant conduct. An unconstrained overall perspective of the facts is essential towards deciding whether or not there has been any unreasonable interference with the use and enjoyment of the plaintiffs' Eagle Rest land.

378 Being shut out from looking at what happened under the Marshes' 2007 contract with NCO/NASAA would artificially distort the perspective of a just analysis.

379 Idiosyncratic contractual arrangements, consensually reached between accepting parties, might nevertheless prescribe what might more widely be assessed as a wholly unreasonable status quo from the broader community perspective.

380 For a contracting party to impose its adverse contractual outcomes arising from a private relationship upon outsiders to the contract as being off limits to scrutiny and effectively non-negotiable, is not an acceptable approach for the law to follow, in my view. A court, in unfettered fashion, needs to conduct an objective and holistic analysis, when assessing what are reasonable standards of conduct as between neighbours.

381 But I accept that a court should not conduct any full blown judicial review of the decisions taken by NCO/NASAA under the private contract: compare in the public law arena, ***Craig v State of South Australia*** [1995] HCA 58; (1995) 184 CLR 163, 179 - 180. Nevertheless, some degree of high level analysis for the workings of the 2007 contract is inescapable in circumstances such as the present.

382 From that perspective, the blamelessness of the Marshes as regards the GM canola swathe incursions into Eagle Rest of late November 2010, the NCO decertification decision, expressed as it was with reluctance but otherwise as an unavoidable outcome that was necessarily delivered by NASAA Standard 3.2.9 raises factors to be weighed in the overall private nuisance evaluation.

383 I now turn back to evaluate some of the more controversial evidence adduced in the trial.

Trial evidence of principal witnesses: Mr Marsh, Mr Baxter and Mr Robinson

(a) Stephen Marsh (first-named plaintiff)

384 At this point, I am now dealing with aspects of trial evidence going somewhat beyond agreed or uncontested facts I have earlier found as being established. Even though I focus here upon Mr Marsh I will also address some issues concerning Mr Baxter and Mr Robinson, where they intersect with Mr Marsh's evidence, to achieve a resolution of some differences between them.

385 As I mentioned, Mr Marsh's evidence-in-chief emerged from three sources:

(a) his 2012 affidavit, exhibit 5(a);

(b) a 2014 witness statement, exhibit 5(b); and

(c) a short supplementary witness statement, exhibit 5(c).

386 These materials explain how Mr Marsh came to farm at Eagle Rest at Kojonup; the farming operation in partnership with his wife, Susan; their decision to commence organic farming around 2002; and Mr and Mrs Marsh's certification and private contracts (of 2003 and 2007) with NASAA and NCO.

387 This evidence shows Mr Marsh's increasing concerns about a prospect of the legalisation in Western Australia of GM crops in the future. His concerns seem to have intensified throughout 2008 into 2009, prior to the growing of GM canola being made lawful in WA from mid-January 2010.

388 Mr Marsh then describes the asserted 'contamination' of a number of the Eagle Rest paddocks in late November/early December 2010, by a discovered presence of some 245 cut GM canola swathes which he found scattered across some Eagle Rest paddocks.

389 Going back somewhat in time, Mr Marsh contends (exhibit 5(a), par 22) that he had written to Mr Baxter at about early August 2002, notifying him of an intention to obtain organic certification. He says that his letter asked Mr Baxter to avoid 'contaminating' Eagle Rest by using chemicals, or GMOs.

390 At the trial Mr Marsh sought to prove the existence of this 2002 written communication to Mr Baxter by inference to that end, drawn from a 2002 letter which Mr Marsh had sent to his parents in what he said was likely to be the same terms (exhibit 5(a), par 23). The letter he says he sent to Mr Baxter was not otherwise produced or identified at the trial.

391 Mr Baxter was questioned about this (unproduced) 2002 written communication from Mr Marsh, in cross-examination. His evidence was that he had received no such communication in 2002 (ts 753).

392 A 2002 communication issue looks to me to be relatively insignificant, in the overall scheme of the subsequent events of 2010 and thereafter. Nevertheless, on the basis of the overall trial evidence I must find that it is not proven, on the balance of probabilities, that any letter, in

the terms as was sent to Mr Marsh's parents, was received by Mr Baxter during 2002.

393 Next, Mr Marsh says (exhibit 5(a), par 27) that around 2004, he erected some signs (displaying the terms of what became exhibit 8) at places on the external boundaries of Eagle Rest (including on the western boundary, which abuts the road reserve separating Eagle Rest from Sevenoaks - to the west). The content of these signs, Mr Marsh said gave public notice of the asserted organic status of Eagle Rest from that time (ie 2004).

394 Mr Marsh says (exhibit 5(a), par 29) that during 2010, he replaced the old signs with more detailed signs (see exhibit 9 showing on its face a September 2010 date). Mr Baxter's evidence was that he had only noticed the new signs - erected along the western boundary of Eagle Rest - in 2010 (exhibit 26A, par 58). That, at the earliest, would be at September 2010. That is my finding.

395 By exhibit 5(a), Mr Marsh describes the person to person meeting he had with Mr Baxter at Sevenoaks, in November 2008. Mr Marsh relates that he visited Mr Baxter at Sevenoaks and:

(a) showed Mr Baxter some conventional canola plants (volunteers) Mr Marsh took with him and said had self-sown on Eagle Rest (the plants had been pulled out of the ground by Mr Marsh);

(b) told Mr Baxter he believed the volunteer canola plants had originated from Sevenoaks. This was on the basis Mr Marsh inferred that Mr Baxter's canola crop of late 2008 was growing alongside the (eastern) boundary of Sevenoaks and hence, the (western) boundary of Eagle Rest; and

(c) says he told Mr Baxter that if (in future) Mr Baxter ever grew GM canola on Sevenoaks, which blew or was carried into Eagle Rest, that Mr Marsh's organic certification could be affected or lost. He says that he told Mr Baxter GMOs were not allowed in an organic system.

396 The expected level of detail as to what passed between the two men at this oral meeting was rather sketchy, I thought viewed from both sides of the case. But what is set out above can be accepted.

397 By November 2008, it would seem Mr Marsh was a somewhat infrequent visitor to Eagle Rest. In November 2008, of course, the

growing of all GM crops in Western Australia was prohibited. However, it seems there had been general industry talk about relaxing in Western Australia this absolute prohibition, at least in relation to allowing the commercial growing of GM canola crops.

398 There was also a trial of growing GM canola which was conducted at Kojonup, on Mr Digby Stretch's property, planned for 2009 to Mr Marsh's knowledge. This appears to be part of the context for his November 2008 visit to Sevenoaks and the discussion with Mr Baxter at that time.

399 Mr Marsh had expressed to Mr Baxter his economic concerns about GM canola being grown on Sevenoaks in the future. However, Mr Baxter apparently responded along the lines that if it did become lawful in the future to grow GM canola, that Mr Baxter would probably grow it. Yet there does not appear to arise on the evidence any suggestion of hostility, or even tension during this meeting. That is despite the different views expressed and although Mr Marsh was obviously troubled by then and had expressed his future economic concerns about GM canola to Mr Baxter.

400 Arising out of the November 2008 conversation seems to emerge a suggestion, put to Mr Baxter in cross-examination, that he had, at that point, reached an implacable decision to grow GM canola in the future on Sevenoaks and further, that Mr Baxter was resolved to do that irrespective of, and in disregard for, Mr Marsh's concerns as an organic farmer and neighbour. The suggestion as put to Mr Baxter in cross-examination was rejected by him. I accept Mr Baxter's evidence (ts 759).

401 I find Mr Baxter, in 2008, in concept was attracted in principle to a future prospect of growing GM canola in the future upon Sevenoaks, if it ever became lawful in Western Australia to grow such a crop. However, whether or not Mr Baxter would ever grow GM canola upon Sevenoaks (as he ultimately did, for the 2010 growing season) was still dependent upon Mr Baxter's much more considered overall agricultural assessment of the merits of planting such a crop in any particular growing season on Sevenoaks. His final decision would involve the consideration of many seasonal factors as a part of his overall seasonal cropping plans, made and reviewed annually. This process would annually evaluate all of the Sevenoaks (and Baxter's Block) paddocks, in terms of their presentations and how they should be most viably worked in any particular season, well before the planting of a crop.

402 Hence, I reject suggestions of any fixed, unalterable or, for that matter, uncaring stance adopted by Mr Baxter from late 2008, about the

future growing of GM or RR canola, before the 2010 season. He took a commercial view of his overall farming interests and the best use of his broadacre farming lands. That is hardly surprising or unreasonable.

403 I would assess Mr Baxter as open minded about the future prospect of planting GM canola - and something he would evaluate in greater detail - if and when it ever became lawful to grow a GM canola crop in Western Australia, from the perspective of evaluating all the economic and associated considerations the growing of such a crop might present, as part of running a viable, overall commercial farming business.

404 Moving to 2010, by exhibit 5(a), par 52 Mr Marsh relates how he hand delivered a notice document to Mr Baxter, at about 1 October 2010. The notice document set out a number of financial losses Mr Marsh foreshadowed he may suffer, should Eagle Rest become 'contaminated' by GMOs. Of course at that time Mr Baxter's GM canola crop was already growing in two paddocks of Sevenoaks and would soon be ready for harvesting.

405 Mr Marsh says that at this time he also gave Mr Baxter a copy of parts of the NASAA standards, in particular s 3.2 concerning the prohibitions against GM material. There is no real disagreement of substance about this.

406 There appears little disagreement that the notice document was handed by Mr Marsh to Mr Baxter. Mr Baxter's evidence was it was given to him by Mr Marsh on the Glenorchy South Road, not faxed. That is my finding.

407 The document is at TB Vol 1, pages 246 to 252. It carries a heading Notice of Intention to Take Legal Action and is dated 29 September 2010 (see [96] - [100] above).

408 The notice is a longish document, the last two pages of which contain photocopies of what can be, uncontroversially, identified as part of the NASAA Standards dealing with GMOs, containing the general principles, recommendations and the NASAA Standards 3.2.1 through 3.2.12.

409 As mentioned, by early October 2010 when the document was delivered, there was, of course, a well-developed canola crop observable as growing in two of Mr Baxter's eastern paddocks. Mr Baxter's evidence was that at about this time his canola crops were flowering (ts 823 - 824).

410 The content of the Notice presents as rather clumsy. Clearly, the Notice was not drafted by Mr Marsh. It was obviously given to him by someone to fill out the blanks at various places and deliver. The content of the pro forma document presents as being drafted in cumbersome fashion by someone holding a modicum of legal training - small, as I would assess it (see the further copy of the document at TB Vol 1, pages 253 to 257.)

411 Some statements within the Notice present as being extravagant or legally misconceived. For instance, par 7 refers to an asserted legal principle for Australia referred to as 'strict liability'. This looks to be an intended reference to the old rule in ***Rylands v Fletcher*** (as regards liability for the escape of a dangerous thing from land, even where there has been no fault or negligence giving rise to or causing the escape). That old rule was abolished for Australia by the High Court some 16 years earlier before this Notice was given: see ***Burnie Port Authority v General Jones Pty Ltd*** [1994] HCA 13; (1994) 179 CLR 520.

412 The content of this Notice (bearing in mind Mr Baxter at the time had a flowering canola crops visible in the ground at Sevenoaks almost ready for harvest) renders only the most fleeting and aggregated of references to the harvest methodology for canola of swathing - see par 5, referring globally to 'directly or indirectly involved in the seeding, transportation, swathing, harvesting or storage of GMOs and/or GM canola'.

413 The Notice also provides some gratuitous legal advice about a suggested need to obtain public risk insurance (see cl 3 and 11).

414 Schedule A (TB Vol 1, page 250) sets out (by 10 dot points) costs, damages or economic losses that would be claimed (cl 12). These also present as being of an exorbitant character in their overall assembly.

415 Mr Baxter's evidence was that he looked at the document but did not otherwise give it closer scrutiny. Clearly, he was not intimidated.

416 The delivery of this rather curiously worded document on 1 October 2010 I would attribute to the influences of others, rather than to the decision of Mr Marsh alone.

417 From their content and overall construction, I take the same view towards a series of 2010 newspaper advertisements Mr Marsh caused to be placed in the local district newspapers, during October and November 2010. See, for instance, notice in the classifieds of the *Kojonup News*

page 14 (TB Vol 1, page 273), threatening court action and seeking compensation, if farmland (Eagle Rest) 'becomes contaminated with GMOs resulting in any forfeiture of GM-free accreditation or organic certification'.

418 In the same newspaper issue, a Mr Grantley Phillip Marinoni of Kojonup also appears to have placed a similarly drafted notice.

419 Clearly, the content of these notices were prepared by someone with a some modest amount of legal training, as their concluding references to foreseeability of loss and damages, would seem to convey. Again, there would appear to be some unseen hands at work here.

420 At par 68 of his affidavit, Mr Marsh says that he had a conversation with Mr Baxter in March 2010, during which Mr Baxter told Mr Marsh he was proposing to plant GM canola in paddocks adjacent to Eagle Rest. This appears to be the 'busy bee' conducted at Mr Marinoni's property.

421 That early 2010 meeting then led Mr Marsh to move his proposed planting of an organic wheat crop to the northern part of paddock 11 (leaving a buffer distance at the south of the paddock). This was further away from the Eagle Rest western boundary paddocks (ie, east of paddock 10, as Mr Marsh had initially proposed). Paddock 11 lies more towards the middle of Eagle Rest (see exhibit 6).

422 At par 61 of his 2012 affidavit, Mr Marsh relates how he discovered on or shortly after 30 November 2010, numbers of swathed canola plants, across paddocks 7 - 13 of Eagle Rest.

423 In April 2011, Mr Marsh created a printout of the individual GPS locations where these swathes had been found and identified. He then plotted these locations upon an aerial photograph of Eagle Rest. This key document became exhibit 10 at the trial. It has some accompanying further notes made by Mr Marsh. Subsequent DNA testing through the Department of Agriculture determined the canola swathes carried GM (RR canola) material.

424 Mr Marsh relates at par 69 of his affidavit how he notified NASAA of the presence of the swathe material by faxes sent on 2 December 2010. These tested positive for RR canola (see TB Vol 2, page 291).

425 At pars 80 and 81 of his affidavit Mr Marsh relates that subsequently, in 2011, some volunteer GM canola plants had germinated on paddocks 10, 12 and 13. The evidence at the trial revealed there were

nine canola volunteer plants in total, found in 2011. Eight of the nine volunteer plants tested positive for the identification of RR canola.

426 Mr Marsh says, in effect, that he did everything he could to have Eagle Rest ready to resume certified organic production by a future NCO recertification. His efforts included, as discussed at par 86 of his affidavit, applying to NCO for an exemption against the application of NASAA Standard 4.1.2 (crop rotation) in respect of paddock five (in 2011) and in paddocks one, two, three, four and six (in 2012): (see TB Vol 2, pages 422 - 424).

427 Mr Marsh used exemptions obtained from NCO to grow crops for seed and feed, so he could continue to farm organically, if and when the organic status was reinstated to all of Eagle Rest.

428 The process of Mr Marsh's cross-examination across day two and into day three of the trial, exposed Mr Marsh as particularly anxious about a possible future adventitious entry of GMOs to Eagle Rest. From about late 2008 ongoing concerns manifested in Mr Marsh becoming, as I assessed his evidence, increasingly fatalistic and anxious about GMOs reaching Eagle Rest and allied financial losses this would cause to him and his wife.

429 Assessing his evidence overall, I thought that there presented in Mr Marsh what I would see as an almost self-fulfilling, high level anxiety from GMOs. This anxiety was increasingly observable up to late 2010, in his correspondence and interactions with people, including the Minister for Agriculture (Mr Redman) and in communications to NASAA and NCO (mostly to Ms Goldfinch).

430 A letter from Mr Marsh to the Shires of Kojonup and West Arthur in April 2009 highlights intensifying concerns held by Mr Marsh (TB Vol 1, pages 212 and 214):

> G M O DELARATION
>
> Shire of Kojonup
>
> To Mr Stephen Gash, Ceo,
>
> This letter is to formally Notify the Shire of Kojonup that the property of Eagle Rest - locations 3411, 3530, 3531, 3165, 3234, 5638 and Lot 101 Part Location 853 are formally declared Genetic Modified Organism Free.
>
> If GMO's are introduced the following paragraph shall take effect his property is certified Organic with NASAA - certification Number 6304

> and has zero acceptance of GMO's. Any entity contaminating this property with GMO's accepts full Liability for all damages and costs incurred, which are attributable to GMO contamination.
>
> Proprietor Stephen W Marsh

431 Mr Marsh's anxiety about GMOs had also manifested by his asking NASAA/NCO to write to him, in April 2009, about the potential risks of a decertification. I note a written response authored by Ms Goldfinch (exhibit 11). Ms Goldfinch's cross-examination at ts 503 - 506 subsequently showed that there was no Australian Standard in the terms she purported to cite in that communication to Mr Marsh.

432 In April 2009, Ms Goldfinch by her letter for NCO, advised Mr Marsh:

> The issue of contamination from GMO is a risk to your certification. The Australian National Standard for Organic and Biodynamic Produce is quite clear, '**products known to be contaminated with GM cannot be sold as organic …'**
>
> NASAA Certified Organic is necessarily compelled to follow this standard. As such when a risk analysis reveals close proximity of GM crops with known pollen dispersal patterns we would have the necessary tests conducted at grower expense.
>
> If levels of GM material above the limits of detection were found, then decertification of the relevant crop or product would follow. This would prevent selling the crop as organic.

433 Nevertheless, it is the case, and I would find, that Mr Marsh was told by Ms Goldfinch over the telephone on 20 August 2010, that 'the definition of contamination is genetic contamination' and further, that '[w]e doubt that canola will contaminate wheat' (TB Vol 2, page 289). Ms Goldfinch made this file note of her telephone conversation with Mr Marsh at this time:

> SG called to say that the definition of contamination is genetic contamination. We doubt that canola will contaminate wheat. Discussed the current situation. Growers want certainty in standards to aid in suing if necessary.
>
> I advised him that Tim Marshall, Rod May and Andre Leu would be meeting in Sydney and there would also be a meeting in September at the time of the AS 6000 Standards meeting.

434 So, Mr Marsh had been told in August 2010 (see Ms Goldfinch's cross-examination, ts 506, 510, 513, 514) that contamination meant

genetic contamination (and see Mr Marsh's cross-examination, ts 243 and 257).

435 But that information appears to have done little to assuage his concerns. At this point I can say that I would agree with that meaning of a GM 'contamination' as was advised by Ms Goldfinch - seemingly after she received some higher level (Marshall, May and Leu) advice upon the point from NASAA officers: (see again TB Vol 2, page 289).

436 Mr Marsh's cross-examination revealed he sometimes found it convenient to forget, or to not recall, when faced with an inconvenient question: see, eg, ts 207 - 208) regarding his letter to the Shire of Kojonup (TB Vol 1, page 212). That makes me cautious about unconditionally accepting all his evidence, which was shaky at times, under a close cross-examination. Nevertheless, factual disputes and credibility issues in this trial, in the main, were not that significant, in my view.

437 Some other matters of concern emerged during his cross-examination. It was put to Mr Marsh that he was opposed to GM farming. Initially, he denied this. I assessed his initial denial to be coy. It was unconvincing, given his expressed concerns discernible in contemporaneous documents of around 2009 and as GM canola was being trialled in WA preceding possible future general cropping release (ts 205 - 206).

438 Mr Marsh also gave evidence about how he responded to the discovery of the 245 canola swathes he had found upon Eagle Rest. Surprisingly, it appears to have taken Mr Marsh until April 2011 to gather up and remove all the swathes and their (attached) canola seed pods. The gathered swathes then filled two drums (see ts 193 - 194, 273). But between late November 2010 to April 2011, the swathes just appear to have been left in situ, whilst photographed, plotted and even fenced off. Surprisingly, nothing timeous happened about getting rid of them, so as to inhibit any wider dispersal of canola seeds from their shattered seed pods across Eagle Rest's paddocks. In this period the 245 swathes appear to have been rather afforded the status of infamous celebrities - fenced off and then made the subject of media releases or general publicity.

439 Asked in cross-examination why it took so long to gather up and remove the canola swathes, Mr Marsh, I thought, gave a very unconvincing response for the inertia. He said that he had been 'too busy' (ts 297 - 299). Part of what supposedly occupied his time appears to have

been issuing media statements in liaison with NASAA. That is hardly an acceptable explanation. If there was a serious incursion problem of GM material at Eagle Rest to be dealt with, as Mr Marsh evidently felt there was, clearly it ought to have been addressed immediately, as a matter of high priority, rather than the swathes just being left to blow around in the paddocks of Eagle Rest for a period of about five months (ie, December 2010 to April 2011).

(b) Michael Baxter: the defendant

440 Mr Baxter's evidence-in-chief is found in his two witness statements, exhibits 26A and 26B.

441 I can say, at the outset, that I assessed Mr Baxter overall to be a knowledgeable and experienced farmer. He was as well, I thought, a straightforward and essentially reliable witness.

442 I was impressed by Mr Baxter's direct and no-nonsense answers to questions and, in particular, his willingness on occasion to make concessions against himself. I have already mentioned a key aspect of his evidence under cross-examination by senior counsel at [311] above.

443 I mention the following further aspects of his evidence. Again, this may intersect on occasion with the evidence of others.

444 At par 39 of his witness statement Mr Baxter accepts he was aware for some years before 2010 that Mr Marsh was conducting an organic farming operation on Eagle Rest. At par 42(2) he accepts he had heard that organic farmers were not permitted to use 'chemicals, drenches or artificial fertilisers'. However, Mr Baxter says at par 41(3), that the only information he had before 2010 as to risks GM canola might pose to an organic farmer was from his conversation with Mr Marsh at Sevenoaks, of November 2008.

445 I have already mentioned this conversation in a context of reviewing Mr Marsh's more controversial evidence: see [395] above.

446 That November 2008 conversation, of course, was about the conventional canola volunteer plants which Mr Marsh had just found growing up on Eagle Rest. As I have said, the evidence about the content of this conversation was somewhat threadbare (see ts 200 - 201 and 330 - 331, TB Vol 1, page 211).

447 TB Vol 1, page 211 displays the content of a written communication sent by Mr Marsh to the Minister for Agriculture, Mr Redman, of

10 February 2009. It contains a photograph of one of the canola volunteers found growing by Mr Marsh on Eagle Rest paddock 10 in 2008. The date of the photograph is said to be 18 November 2008. Mr Marsh's communication to the Minister had said:

> Farm contaminated - EAGLE REST - Certified organic with NASAA Paddock - 10
>
> Crop contaminated - Organic spelt
>
> Source of contamination - **Rabbits**
>
> Distance from contaminating source - 75 to 150 metres across a road number of plants - 12
>
> Regards SW Marsh
>
> (my emphasis in bold)

448 Given what Mr Marsh wrote to Minister Redman in February 2009 as regards rabbits being the 'source of contamination', my assessment is that it is more than likely that this same attributed contamination source, (ie rabbits), was likely mentioned in the earlier Marsh/Baxter conversation at Sevenoaks of November 2008.

449 I find that 'rabbits' as the source of a transfer of canola seeds from Sevenoaks to Eagle Rest is the view Mr Marsh had held up to at least February 2009 and it is more likely than not he expressed that same opinion about rabbits to Mr Baxter in their November 2008 meeting.

450 What is significant about this conversation is the mode of carriage into Eagle Rest around 2008 (ie, by rabbits carrying canola seeds into Eagle Rest). Mr Baxter does not appear to have taken issue with Sevenoaks being the source of the canola then, or at any subsequent time.

451 Carriage of a canola seed from one neighbouring rural property across a road into another property by the work of rabbits, and their subsequent excrement containing canola seeds, which subsequently germinate in the neighbouring soil, is one thing. However it is a totally different mode of transfer, in contrast to an incident of airborne canola swathes being blown from Sevenoaks into Eagle Rest after a harvest of the canola crop by the process of swathing in 2010. Swathing as a mode of transference by wind intervention of GM canola seeds into Eagle Rest, was not discussed I would find between the two men, in November 2008, or thereafter.

452 The November 2008 conversation between Mr Marsh and Mr Baxter was in a context of the present movement of canola seeds into Eagle Rest from Sevenoaks, by the work of rabbits. Nothing was said, I would find, in that conversation more specifically about concerns held by Mr Marsh against the swathing of a future GM canola crop grown on Sevenoaks. A general and non-specific reference to the wind (by use of the word 'blew') does not focus specifically enough upon a concern over swathing.

453 Paragraphs 29 and 34 - 36 of exhibit 26A explain Mr Baxter's rationale for his 2010 planting of GM canola, as an effective method of managing a weed problem, namely wimmera ryegrass that had developed a resistance to herbicide

454 Mr Baxter explained difficulties which he had encountered at some paddocks of Sevenoaks with a problem of HRWR. Mr Baxter said, and there was no reason not to accept this evidence (given that he, as the owner/farmer, is in the best position to know) that some of his paddock yields were being reduced by up to about 30% due to the problem of HRWR, in a five-year period before the 2010 cropping season.

455 Mr Baxter explained that certain post-emergent herbicides had been lethal to HRWR. But, when applied on his paddocks prior to 2010, they were achieving poor results in killing off, or controlling his HRWR problems. This was particularly when the ryegrass weeds had germinated late and were growing up in the paddock with his crops.

456 Mr Baxter explains (exhibit 26A, par 45.1) that the main reason he decided to grow RR canola in 2010 was his problem with HRWR in his paddocks. He related, at par 45.2, that when planning for the 2010 cropping season, in conjunction with his agronomist, Mr Chris Robinson, he was advised the herbicide Roundup (glyphosate) could be safely sprayed onto an emerged RR canola crop. This could have been done without harming the emergent crop, and at the same time, delivering the benefit of controlling the HRWR.

457 At par 76.3, Mr Baxter gave an estimate that his HRWR problem on Sevenoaks had been reduced by 80%, for paddocks where RR canola had been grown and Roundup sprayed in conjunction.

458 Mr Baxter said, at par 59, he had not swathed any canola crops previously grown on Sevenoaks, before 2010. But for that year Mr Robinson had recommended that he swathe the RR canola growing on the Range and Two Dams paddocks.

459 Mr Baxter said that the seed pods in canola tended to crack, if there was late rain and hot winds, before direct harvesting. Mr Baxter related, in pars 57 and 59(2), that the 2010 growing season had been unusually dry. Rains had stopped around August 2010. The process of swathing would, he explained, reduce risks of canola seed pod shattering and thereby help reduce his overall seed losses, by allowing for an earlier harvesting event. This earlier harvesting would hasten the drying process, lessening the duration of canola seed pods being exposed to the elements (before being cut).

460 Mr Baxter said, at par 59(6), that the presence of some late germinating wimmera ryegrass also played a part in his decision to swathe the RR canola grown on his Two Dams and Range paddocks in 2010. Using swathing would enable the ryegrass to be cut before (weed) seeds set, addressing that problem in part.

461 Mr Baxter said that RR canola had produced superior yields, in comparison with conventional canola (particularly by reference to the HRWR problem being addressed) by the application of glyphosate.

462 At par 76 Mr Baxter said that in paddocks where HRWR was not a problem, RR canola would yield 5 to 10% higher than Triazine Tolerant (TT) canola and in paddocks where there was a ryegrass problem that RR canola would yield about 30% higher. RR canola would also produce a superior yield to Invertix Tolerant (IT) canola.

463 In a supplementary witness statement (exhibit 26B), Mr Baxter addressed the 2013 growing season. He said that paddocks planted with RR canola that year yielded .98 tonnes canola per hectare more compared with paddocks in which he had grown IT canola that year.

464 By exhibit 26A, Mr Baxter provided some more evidence about the swathing and harvesting of the Range and Two Dams paddocks in 2010: see pars 60 to 65, 67 and 69.

465 Mr Baxter stated, at par 73, that he observed yellow flowering canola plants on Eagle Rest. They had been, he saw, marked with two or three sets of star pickets during the spring of 2011.

Mr Baxter's cross-examination

466 A significant focus of Mr Baxter's cross-examination concerned his decision, in 2010, to grow GM canola, once it became lawful to do so in Western Australia in mid-January that year.

467 In Mr Baxter's witness statement he had made reference to what he perceived to be the inadequate performance of two other herbicides he said had been used to control weeds. These herbicides were colloquially referred to as 'FOPs' and 'DIMs', shorthand for the chemical families to which their active ingredient belonged (ts 749). For example, DIMs may include clethodim, which herbicide appeared within Mr Baxter's cropping plan for 2008, under its trade name, 'Select'. Essentially, Mr Baxter was saying that weeds were becoming resistant to these herbicides, and that this was an underlying factor in his decision to use Roundup to combat weeds in paddocks affected, and the correlative decision to grow RR canola in some of those paddocks, to obtain the inbred immunity in his crop to the glyphosate herbicide, when used.

468 A line of cross-examination directed at Mr Baxter about this evidence, essentially put to him that his as expressed reasoning for the 2010 decision to use the herbicide Roundup and grow the GM canola was false - and was manufactured reasoning - constructed after the event. The cross-examination on this line then proceeded by a minute scrutiny of earlier years' crop management plans for Eagle Rest, all found in volume 3 of the trial bundle (TB Vol 3, pages 516 - 769).

469 By reference to Mr Baxter's annual nomination of each year's required chemicals, as identified within the cropping programme documents for 2005 and following years, it was suggested to Mr Baxter that no 'FOPs' or 'DIMs' were seen and hence, had not actually been purchased: see, for instance, the 'chemical summary' at TB Vol 3, page 577 for the 2006 cropping programme - which Mr Baxter did acknowledge under cross-examination did not record any 'FOPs' or 'DIMs' (ts 746) being nominated for acquisition in that year's plan.

470 Likewise, for 2007, by reference to the 'chemical summary', seen at TB Vol 3, page 599, it was once again acknowledged by Mr Baxter that the document did not identify any 'FOPs' or 'DIMs' (ts 747).

471 The 2008 Sevenoaks agronomy plan likewise contains a 'chemical summary' at TB Vol 3, page 619. But only clethodim, identifiable under its trade name, Select (ts 748), is mentioned.

472 Likewise, the chemical summary for the 2009 growing plan shows no 'FOPs' or 'DIMs', as Mr Baxter acknowledged (ts 749).

473 A series of questions was directed at Mr Baxter seeking to undermine what he had put at pars 34 and 35 in his witness-in-chief statement (exhibit 26A) namely:

34.

> [1] An integral part of my crop rotation programme involves weed control, including the control of a particular type of Wimmera ryegrass known as herbicide resistant Wimmera ryegrass ('HRWR').
>
> …
>
> [3] In my observation crop yields in some paddocks on my farm were reduced by around 30% by HRWR over the five-year period leading up to 2010.
>
> [4] These paddocks were Range, Two Dams, Big Dam, Mailbox, Road, Mallet Hill, Hilly Paddock, Monty's Paddock and Baxter's Block.

35.

> [1] Herbicides such as paraquat and sprayseed remain lethal to HRWR but these herbicides are also lethal to canola and can only be used as pre-emergent sprays, ie they can only be applied before the canola crop or cereal crop germinates.
>
> [2] Other post-emergent herbicides such as FOPs and DIMs can be sprayed onto the canola crops but my observation was that, by 2010, they were not killing the HRWR plants which germinated as the crop was growing.
>
> [3] Hoegrass can be sprayed on to cereal crops but by 2010 I had noticed it was not killing HRWR on Baxter's Block.

474 Minute scrutiny of Mr Baxter's annual cropping plans from 2005 to 2009 by cross-examination and showing the absence of any nominated 'FOPs' and 'DIMs' chemicals (save for Select in 2008) was designed to undermine Mr Baxter's evidence about his reasons for using Roundup and RR canola, in paddocks of Sevenoaks, in 2010. However, I assessed Mr Baxter's responses to this line of questioning to be frank and convincing. Mr Baxter in response, in effect, made, I thought, a valid point, namely that any cropping plan conceived at the start of a growing season is just that: a plan. The annual cropping plan is then usually settled with the agronomist, generally Mr Robinson, before the actual planting of a crop, at the beginning of each new growing season. However, ongoing decisions about the use of herbicides, particularly as to using post-emergent herbicides (once a crop had germinated and was up) would be made reactively - to address particular presenting weed problems, as identified during a growing season.

475 In other words, the content of an annual cropping plan as to its non-identification of nominated chemicals to be purchased for use at the start of a season, did not inhibit the later use of other or different herbicides during a season, as needed.

476 The inherently provisional nature of seasonal cropping plans is illustrated by what became the ultimate planting, in 2010, of RR canola in only two of the three initially identified Sevenoaks paddocks – as had first had been planned. This outcome shows how things may change and is discussed further, below.

477 I accept Mr Baxter's evidence given in answering this attack against his credibility. In my view, the responses provided were coherent and convincing. They negated this strong attack against his evidence at par 35(2) of his witness statement and I would accept that evidence.

478 RR canola had been initially chosen for planting on three of Mr Baxter's eastern paddocks, bordering the South Glenorchy Road, to the west of the Eagle Rest boundary (see aerial photo, exhibit 6). It will be seen that the Two Dams paddock is at the north-eastern corner of Sevenoaks. Range paddock is at the south-eastern corner of Sevenoaks. A third paddock, Mailbox (or, as it was also sometimes referred to at the trial, Lyall's Mailbox) is seen lying immediately to the north of Range. An initially planned rotation of RR canola in all three paddocks, appears at TB Vol 3, page 723.

479 Mailbox, however, was not in the end sown with GM canola in 2010. It was planted with conventional canola. This was due to the unavailability of sufficient RR canola seed for planting. Hence what was originally planned, for Mailbox paddock did not, in the end, proceed.

480 The Mailbox paddock was at the end of season 2010 harvested for its conventional canola crop by direct harvesting, rather than by swathing. In 2010, swathing was only used as Mr Baxter's utilised harvesting methodology, in respect of his RR canola crops growing on Range and Two Dams.

481 At the opening of the trial something was sought to be made of the fact that the conventional canola crop in the Mailbox paddock had not been swathed. At the time I was uncertain about what was meant to be pejoratively inferred against Mr Baxter, if anything, by that observation. In any event, the issue was addressed in the cross-examination of Mr Baxter (see ts 831 - 832):

> Now, in 2010 you planted conventional canola in Lyall's Mailbox, didn't you?---Yes.
>
> And that's an adjoining paddock. That's next to Range, isn't it?---That's right.
>
> And that was a paddock that you had identified – that you identify in your statement in paragraph 34(4) as a paddock that had problem – herbicide resistant ryegrass, wasn't it?---34(4).
>
> Yes?---Sorry, I'm in the wrong one. Yes, Mailbox was used – Lyall's Mailbox. It has got 'Mailbox' written there.
>
> …
>
> And the position was this, was it, that that's a paddock that you were concerned about herbicide resistant ryegrass?---That's correct.
>
> That's a paddock that you had been identified as one to plant Roundup Ready canola?---Yes.
>
> You had intended to plant up Roundup Ready canola in 2010 in that paddock?---That was the plan, yes.
>
> You had run out of seed?---Yes.
>
> So you planted a conventional canola?---Yes.
>
> And you direct harvested that, didn't you?---I did.
>
> And you used your own harvester to do that?---Yes.

482 This was the very limited extent of the cross-examination of Mr Baxter in relation to his choice of direct harvesting in 2010 of the conventional canola on the Mailbox paddock. Given the opening on this issue against Mr Baxter, I assessed the main event to be somewhat underwhelming.

483 The issue was revisited however, at the end of Mr Baxter's re-examination. See below (ts 843):

> Why did you direct harvest Mailbox rather than swath [sic] it in 2010, Mr Baxter?

484 The question, asked in re-examination, was not objected to.

> ---With the Mailbox paddock, I could desiccate the paddock before I harvested, which you can't do with RR canola.
>
> …

> Desiccate it?---Which is you can spray it out about the same time as you swath [sic]. And by spraying it out you can kill all the weeds under your crop, which is another method of controlling your weeds, and the crop will tend to harden up and not shatter.
>
> Okay?---Whereas you couldn't do that with the GM canola because you can't apply another Roundup.

485 As now indicated, I generally assessed Mr Baxter as a reliable witness in this trial. Once again, I accept his evidence on this issue. I do not infer anything pejorative against Mr Baxter out of the trial evidence as regards his decision to swathe the RR canola paddocks, in contrast to his choice of direct harvesting (heading) of the conventional canola crop grown in the Mailbox paddock.

486 Another distinct series of questions was asked of Mr Baxter (see TB Vol 4, page 1262) about a 'Paddock Risk Assessment Management Option Guide, or the 'PRAMOG' documentation he had filled out in 2010, in order to obtain his supply of Roundup. The documentation includes a herbicide resistance table for Range and Two Dams, for 2010. This was part of an overall line of attack against Mr Baxter, to contend at a distance that he was overusing glyphosate and had a poor overall weed management strategy at Sevenoaks, or both. However, I assessed that this attempted second guessing of the farmer over his lands and crops from time to time, fell flat. It was a somewhat artificial attempt to second guess 2010 agricultural decisions by persons not as intimately familiar as Mr Baxter with his Sevenoaks' land and paddock conditions, local Kojonup farming conditions and the history of farming practices in Kojonup.

487 As well as his own very respectable degree of successful prior farming experience at Kojonup, Mr Baxter had also relied upon and paid for the expert advice of a local and well-qualified agronomist. This agronomist visited Sevenoaks regularly in person, witnessed seasonal crop and weed conditions for himself, and advised Mr Baxter about seasonal cropping plans, appropriate herbicides and the like. Mr Chris Robinson visited Sevenoaks regularly from 2003 to 2007, and then again in 2010, to the present day. Mr Robinson was very familiar personally with Mr Baxter's farming practices and the state of the paddocks at Sevenoaks from time to time: see exhibit 30, pars 5 - 8.

488 One final aspect of Mr Baxter's cross-examination I would mention was the series of questions put to him concerning his asserted lack of care, as regards the late November 2010 escape of GM canola swathes from

Sevenoaks to Eagle Rest. This attack focused at Mr Baxter's decisions: (a) to grow GM canola in 2010, once it had become lawful to do so; and (b) to swathe as his chosen harvesting method for the GM canola crops that year.

489 These challenges were directly and, in my view, persuasively answered by Mr Baxter. Mr Baxter did not accept that he was unconcerned, uncaring or dismissive of Mr Marsh's adjacent organic farming operation. He said he took those concerns into account (ts 757) and I accept that evidence. Their prioritisation is however a matter for this court's evaluation.

490 Mr Baxter, like the Marshes, made a living from successfully working his agricultural lands as a commercial farming proposition. He was, on my assessment, as entitled as Mr and Mrs Marsh to act in his own interests and make appropriate and reasonable commercial decisions in his own commercial interests as regards the lawful uses of his land.

Mr Christopher Robinson

491 I have already mentioned at [142] - [149] some of Mr Robinson's uncontroversial evidence-in-chief, under his amended witness statement (exhibit 30).

492 As regards the issue of swathing, his par 23, states:

> [1] Canola is swathed by many growers to reduce pod shattering and canola seed loss to the ground. The canola pod is brittle and prone to cracking when ripening particularly if there is late rain and hot winds. These factors cause the pod to swell and shrink and crack allowing the seed to spill to the ground. Herbicide may be applied behind the swather to control late season germinating weeds, including wimmera ryegrass.
>
> [2] The vast majority of my farmer clients have swathed their canola crops over the past 10 years.
>
> [3] The swathing is carried out when the canola seeds in the pod are turning from green to brown and when the pod is not brittle. Swathing in the Kojonup District is carried out around early November in most years. When swathed the severed section of the plant, including the head is laid by the swather machine in windrows in the paddock.
>
> [4] The swathing causes the canola to ripen evenly across the crop and to ripen earlier.

> [5] If swathing is not done, the canola remains standing in the paddock and the ripening of the crop is generally uneven across the paddock and some of the pod becomes brittle as it dries out with further ripening. The pod is then prone to fracture following rain, hail and hot winds and is at risk of spilling seed to the paddock before harvest. Such spillages can be extensive to the tune of more than 50% of the seed within the pod.
>
> [6] I have seen evidence in the field of a standing canola crop being damaged and shattered by the path of a willy-willy.
>
> [7] I have also seen a willy-willy lift swathed canola material high into the air and carry it hundreds of metres before scattering it over the ground and I have seen canola material hanging from electricity lines running through the paddocks.
>
> [8] Generally, the canola is harvested about two weeks after swathing when it has dried.
>
> [9] The harvester picks up the plant material from the windrow. The plant material is thrashed and screened in the harvester and the canola seed is collected in the harvester bin.
>
> [10] Swathing brings forward the harvest by about two weeks when compared to direct harvesting. This reduces the farmer's risk of crop loss by wind, hail, rain or fire because the canola is removed from the field and not at risk two or three weeks earlier than would be the case if the crop was direct harvested.

493 I would accept this evidence.

494 Mr Robinson was strongly cross-examined. Considerable attention was directed to some late alterations Mr Robinson requested to his witness statement over the weekend just prior to his giving evidence. In particular, close attention was given to a change which Mr Robinson had made to his par 27(1) and to some insertions by way of augmentation to his statement, at par 27(3). Mr Robinson's credibility was heavily challenged during the phases of his cross-examination focused at this aspect of his evidence (ts 950 - 954).

495 Nevertheless, I assess Mr Robinson as a basically honest witness, doing his best. In 2010 he was as a local agronomist for Farmanco, servicing approximately 35 different farmers in the region. He gave them all his separate agronomy advice, on the basis of personal visits of approximately five to seven times per annum to each farm. Given his many clients, I do not expect Mr Robinson to hold as clear or as detailed a level of knowledge (without notes) about the state of an individual

farmer's paddocks. This is particularly so when compared to the farmer, who usually holds a direct and daily familiarity with their own land. Apart from contributing to the production of an annual cropping plan for each client farmer, at the commencement of each growing season, Mr Robinson did not keep any greater level of notes about particular visits to his clients' properties or particular paddocks.

496 The line cross-examination directed at Mr Robinson, suggested he was not being truthful about actually observing an emergence of HRWR on Sevenoaks' paddocks - and thereby prompting his advice to Mr Baxter to use Glyphosate, in combination with growing RR canola, in 2010. In an absence of notes by him, it was suggested to Mr Robinson that all evidence identifying the Range and Two Dams paddocks as suffering an HRWR problem, was false and manufactured. It was suggested Mr Baxter's evidence had been invented to assist his case by falsely offering up a more plausible basis for the growing of RR canola, in three (later two) paddocks, in 2010. I do not accept this pejorative characterisation of these aspects of Mr Robinson's evidence. Whilst he was (understandably) a little vague or uncertain at times upon such points without notes to assist, overall I assessed Mr Robinson's evidence to be honestly given and, in the circumstances, the best he could do.

497 In any event, this issue hardly matters that much, since I have earlier assessed Mr Baxter to hold, as would be expected, a much more detailed memory about the state of weed problems manifesting in his particular paddocks at Sevenoaks from time to time. Mr Baxter's strong evidence upon the issues does not need the corroboration of Mr Robinson, since it is reliable in its own right, on my assessment. It does not surprise me at all that there are some differing aspects in the recollections towards 2008 or 2010 conversations between Mr Baxter and Mr Robinson. I assess them both as honest witnesses, but with my observation that Mr Baxter, understandably, holds a more detailed and reliable recollection of events concerning his Sevenoaks paddocks and their weed issues from time to time. To the extent that there was inconsistency, or a lack of recollection arising in Mr Robinson's evidence, then I will prefer and accept Mr Baxter's versions of the events as the more reliable.

498 It was then sought to undermine the advice Mr Robinson gave in 2010 to Mr Baxter, as to his advocating the swathing of the GM canola crops, in or around October 2010. This challenge was put on the basis that it was not reasonably open to Mr Baxter to accept or follow Mr Robinson's affirmative advice to swathe, as Mr Baxter had inadequately briefed Mr Robinson. This, it was suggested, was because

Mr Robinson had not been told by Mr Baxter about the expressed concerns of Mr Marsh as a neighbouring organic farmer. These concerns were expressed in the November 2008 conversation at Sevenoaks and later in the notice of intention to take legal action that Mr Baxter had received from Mr Marsh around 1 October 2010. Mr Robinson was closely cross-examined over this issue (ts 835 – 841). He said he had not been told of Mr Marsh's notice of intent document or that had Mr Baxter been told by Mr Marsh that Mr Marsh could lose his organic certification, if RR canola ever reached Eagle Rest. Given that Mr Robinson accepted that he may have given different advice. He accepted as to swathing there is a 'small risk' of swathes moving onto a neighbouring property (ts 940 - 941). But what this different advice about swathing from Mr Robinson to Mr Baxter would have been did not really ever emerge, either in cross-examination or re-examination.

499 The trial evidence concerning what Mr Robinson was told by Mr Baxter about the notice of intention to take legal action document differed. Mr Baxter's evidence under his cross-examination was that he actually had shown the document to Mr Robinson, at a time when Mr Robinson had visited Sevenoaks and prior to their decision to swathe (ts 824 - 825). However, in contrast, Mr Robinson had no recollection of being shown the notice document (ts 955 - 956). There was a discrepancy as between the witnesses over this point. But, in the circumstances, I do not find a differing aspect in recollections between the two witnesses to be either sinister or, for that matter, all that surprising. The thrust of the attack had a premise of significance in these events about which it was suggested Mr Robinson should have been aware. That premise is controversial.

500 The intention of the cross-examination of Mr Robinson sought to suggest that Mr Baxter and Mr Robinson, in reaching strategic decisions as to how Sevenoaks would be harvested, ought to have taken into account the expressed concerns of the Marshes as neighbours who were running an organic farm in any discussion about seasonal growing and cropping plans for Sevenoaks. I disagree.

501 This elevated priority premise of that line of challenge, by my assessment, is questionable. A farmer is entitled to put his or her own commercial interests at the forefront of their priorities when making agricultural decisions about how to best farm their land. Whilst the expressed concerns of a neighbouring organic farmer might need to be weighed as well as one consideration, that would be just one amongst the

multiple considerations to be addressed concerning proper seasonal crop management and the harvesting of crops each year.

502 On my overall assessment, neither Mr Robinson nor Mr Baxter were undermined as to the legitimacy or genuineness of Mr Baxter's decision, in around October 2010, in respect of their choice of a harvest by swathing process for the harvesting of the 2010 GM canola crops then growing on the Two Dams and Range paddocks of Sevenoaks.

503 Before discussing the remaining evidence from the other witnesses in the case, it is necessary to divert back briefly to render some further observations about the NASAA Standards. The meaning of some of those standards, especially concerning GMOs, bears upon and assists in understanding the evidence from some remaining non-expert and expert witnesses at the trial.

Interpretation of key NASAA standards concerning GMOs

504 I return to analyse a number of additional key provisions, noting again the key distinction in the NASAA Standards as between General Principles, Recommendations, Standards. To assist the evaluation of the evidence from subsequent witnesses, particularly the NCO/NASAA related evidence, it is necessary to have some greater insight about the NASAA Standards and meanings.

505 I propose to set out 3.2 of the NASAA Standards out in full. An extract of these provisions was handed to Mr Baxter by Mr Marsh accompanying his notice document at 1 October 2010.

> **3.2 GENETICALLY MODIFIED ORGANISMS**
>
> GENERAL PRINCIPLES
> Organisms, which are derived from recombinant DNA technology, are genetically modified organisms and have no place in organic production and processing systems.
> Even where evidence of GMOs is not detected in finished organic product, the deliberate or negligent exposure of organic production systems or finished products to GMOs is outside organic production principles.
>
> RECOMMENDATIONS
> 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.
>
> STANDARDS
> 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.

STANDARDS

3.2.1 The deliberate use and or the negligent introduction of genetically engineered organisms or their derivatives to organic farming systems or products are prohibited. This includes, but is not limited to:

- seed
- feed
- propagation material
- farm inputs such as fertilisers and compost
- vaccines
- crop protection materials

3.2.2 Operators using input materials at risk of containing GMOs must obtain signed statements from the suppliers of these materials that they do not contain GMOs or their derivatives, backed up by laboratory analysis where NASAA deems it necessary.

3.2.3 The certification of organic crops will be withdrawn where genetically engineered crops are grown on the same farm.

3.2.4 Operators must not use ingredients, additives or processing aids derived from GMOs in certified products. Processing operations that handle GMOs in conventional products will need to notify NASAA and detail a risk strategy for prevention of contamination of certified product.

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

3.2.6 Inputs, processing aids or ingredients shall be traced back one step in the biological chain to the direct source organism from which they are produced to verify that they are not derived from GMOs.

3.2.7 Operators must conduct an assessment of risks from contamination with GMOs and take action where appropriate. These actions include, but are not limited to:

- knowing about contaminant risks
- implementing distances/buffer zones from potential contaminants

• implementing special handling, transport and storage arrangements

• maintaining samples

• testing of crops perceived at risk

3.2.8 Planting or sowing for organic production will not take place until 5 years after the harvest (or removal) of any genetically engineered crop that may have been planted on the land.

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

3.2.10 Any certified production area within ten (10) kilometres of a site used to grow genetically engineered crops is perceived to be at risk of contamination and certified operators must inform NASAA of any such sites known to be within that radius.

3.2.11 Contamination of organic product by GMOs that results from circumstances beyond the control of the operator may alter the organic status of the operation.

3.2.12 Under the National Standard, NASAA will decertify any products that are tested and reveal the presence of GMOs.

506 I will make some brief observations about interpretation of these standards where relevant. I do so in the context of providing a platform to assess the certification and suspension decisions made by NASAA in December 2010 in respect of Eagle Rest.

507 Reference to GMOs having 'no place in organic production and processing systems' would appear to be in direct correlation to National Standards general principle 3.3(i), see the phrase '[GMOs] are not compatible with the principles of organic and biodynamic agriculture'. As I have earlier observed, that outcome would seem to follow, merely as a matter of definition, given the man-made derivation of a GMO.

508 The second paragraph of NASAA Standard general principle 3.2 is expressed on a basis that even a non-detection of GMOs in a finished product is not decisive. This principle is expressed on the qualified basis that there has been 'deliberate or negligent exposure' of the organic production systems or finished product - to GMOs. This is an obvious reference to a 'deliberate or negligent' exposure by the organic operator. By contrast, a situation where there has been an innocent (sometimes referred to as an adventitious) exposure is not addressed by general principle 3.2.

Recommendation 3.2

509 As regards this recommendation, an exhortation for operators to identify every potential source of GMOs in a supply and input chain would be a recommendation applicable to Mr and Mrs Marsh as organic operators. On the trial evidence, there can be no suggestion the Marshes did not fully embrace or meet that recommendation, in relation to Mr Baxter's growing of RR canola at Sevenoaks in 2010 and then the swathe incursion events to Eagle Rest of late 2010.

NASAA Standard 3.2.1

510 Standard 3.2.1 sees reference to the 'deliberate use' or 'negligent introduction' of GMOs to organic farming systems as being prohibited. Plainly, this would refer to conduct by an organic operator, in reference to the following as specified dot point items, including seed and feed. The chosen terminology of 'deliberate use' and 'negligent inhabitation' echoes the second paragraph of general principle 3.2 above. This is clearly a reference to intentional or negligent conduct on the part of the organic operator. Plainly, it does not address the scenario of an introduction of GMOs under unintended circumstances, assessed as either not deliberate, or not negligent, vis-à-vis the organic operator.

NASAA Standard 3.2.3

511 Standard 3.2.3 refers to the withdrawal of certification of organic 'crops', in circumstances where genetically engineered crops are grown on the same farm. There is no scope for this clause to hold any relevance or potential application, other than contextually, as to the overall understanding of these clauses, towards Mr and Mrs Marsh's organic farming operation at Eagle Rest in 2010. The Marshes did not ever grow and did not ever contemplate growing a genetically engineered crop upon Eagle Rest.

NASAA Standard 3.2.5

512 Clause 3.2.5 sees another reference to deliberate (by the word 'knowingly') conduct on the part of an operator, by the operator permitting an exposure to GMOs, or failing to take action against an 'application of' or exposure to GMOs. Again I highlight the now current drafting emphasis upon intentional or negligent conduct - as the basis for this standard. Again there is no reference seen to blameless conduct from an operator as regards any unintended exposure to a GMO. Hence, standard 3.2.5 is wholly inapplicable to the present litigation, other than

contextually towards an assessment of the proper meaning of other provisions found in standard 3.2.

NASAA Standard 3.2.7

513 Standard 3.2.7 deals with the obligations of operators to conduct an assessment of risks by contamination from GMOs and to take appropriate preventative risk management actions. Again, on the trial evidence, there is and will be no suggestion that Mr or Mrs Marsh ignored or infringed this standard in the circumstances which prevailed at Eagle Rest during 2010. Recall, for instance, the shifting by Mr Marsh of his intended organic wheat crop to another paddock 11 (from boundary paddock 10) more centrally within Eagle Rest and allowing another buffer zone in the south of paddock 11, where a crop was planted.

NASAA Standard 3.2.8

514 Standard 3.2.8 refers to the planting or sowing for organic production being inhibited in a five-year period after a harvest of a 'planted' genetically engineered crop. Such a five-year exclusion period might therefore potentially be applicable, say, to Mr Baxter, should he ever seek to become organically certified from NASAA in future. However, a five-year bar had no possible application to Mr and Mrs Marsh in or after 2010. The Marshes had never planted, let alone attempted to grow a genetically engineered crop upon Eagle Rest. Consequently, this standard had no application to their circumstances in the aftermath of the 2010 swathe incursion.

NASAA Standard 3.2.9

515 Standard 3.2.9 presents as the most relevant NASAA standard in this litigation. It was invoked by NCO to support the 2010 decertification of paddocks 7 to 13 of Eagle Rest. I put it aside temporarily, to return after first considering the balance of its surrounding provisions within NASAA standard 3.2.

NASAA Standard 3.2.10

516 Standard 3.2.10 applies a requirement for an organically certified production area (such as Eagle Rest in 2010) within 10 kilometres of a site (such as Sevenoaks in 2010) that is used to grow genetically engineered crops. The standard refers to such a GM site creating a perception that the organically certified production area is at 'risk of contamination'.

517 Notably, the subclause does not use the Standard 3.2.9 terminology of 'unacceptable risk of contamination'. Rather, Standard 3.2.10 sets down a notification requirement to NASAA (NCO) as regards a GM site within the organic operator's 10-kilometre radius.

518 Again, there is no suggestion on the trial evidence that Mr and Mrs Marsh did not fully comply with that standard as regards informing NCO or NASAA of the GM canola crop planted and growing on Sevenoaks during 2010.

NASAA Standard 3.2.11

519 Standard 3.2.11 is of interpretative significance, in my view, to ascertaining the true meaning of Standard 3.2.9. It only says clearly that **contamination** of organic **product** that results from circumstances '**beyond the control**' of the operator '**may** alter the organic status of the **operation**'.

520 The interpretative significance of this provision, first, is that it identifies a contamination of an organic '**product**' by GMOs. In some contrast to the other standards that precede it, standard 3.12 then identifies its intended work at GMO contamination 'circumstances beyond the control of an operator'.

521 The situation of an organic operator's faultless exposure to a product GM contamination at their organic operation stands in stark contrast under these standards to the situation of either knowing, or negligent conduct by an operator - as regards matters which they can control. Situations of deliberate or negligent conduct as regards the use of or exposure to GMOs are dealt with by the general principle 3.2, by Standard 3.2.1 and in Standard 3.2.5.

522 The use in Standard 3.2.11of the word 'may', seen in the phase '**may** alter the organic status of the operation' as a matter of interpretation, grates against any suggestion that circumstances delivering an adventitious presence of GMOs to an organic operation **must** occasion the automatic loss of 'certified organic' status for that organic operation. Moreover, the clear focus of Standard 3.2.11 appears to be at a (genetic) contamination of an organic 'product' by GMOs in the first instance, rather than the whole organic farming operation itself.

NASAA Standard 3.2.12

523 The interpretation I would afford Standard 3.2.11 is confirmed in Standard 3.2.12, which says '[U]nder the National Standard, NASAA will

decertify any **products** that are tested and reveal the presence of GMOs' (emphasis added). The designation of decertified products which reveal the presence of GMOs (in contrast to an entire organic farming operation being decertified) is a different thing. This is mandated where the presence of GMOs is confirmed by testing. This standard looks to mirror National Standard 3.1.9(b). It is possible at this point to envisage an adventitious situation under standard 3.2.11, which could result in actions to address a contaminated product.

524 I note also the National Standards contain an explicit definition of 'adventitious contamination' as:

> [C]ontamination that has come from outside, accidental, or occurring in an unusual place (see TB Vol 5, page 1414).

525 That same definition is not found in the NASAA Standards but there is no reason to conclude as a matter of meaning that the NASAA Standards take any different approach to the adventitious presence of GMOs.

Concluding observations NASAA Standard 3.2.9

526 I return to standard 3.2.9, which, I repeat, states:

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

527 Towards understanding the correct meaning of NASAA Standard 3.2.9, there is some interpretative significance from the surrounding text in Standard 3.2. First, plainly there is use of the noteworthy provisions identifying a deliberate or negligent use of GMOs by an operator contrasted to what follows under Standard 3.2.11 concerning circumstances beyond an operator's control.

528 Although the unique (ie, not found in the National Standards) term 'unacceptable risk' is not otherwise defined, the overall surrounding context of NASAA Standard 3.2 is relatively clear. A failure by NASAA/NCO to recognise and then apply the distinction between a case of the deliberate or negligent presence of GMOs in an organic operator's system, as opposed to an adventitious presence of GMOs, would be, in my view, a serious misapplication of the language of the standards – which clearly mandate this necessary differentiation be respected.

529 On the evidence adduced at this trial, I would conclude that Standard 3.2.9 was inappropriately invoked as against Eagle Rest and Mr and

Mrs Marsh by NCO on 29 December 2010. The GM canola swathe circumstances which prevailed were clearly adventitious from the perspective of the Marshes. The NASAA Standards which governed them vis-à-vis their certification, properly understood, recognised this. In these incursion of swathe events by wind, the Marshes were wholly blameless, as indeed was recognised by Ms Goldfinch on 29 December 2011 and by other NCO employees later.

530 An early clause of recourse for in December 2010 should have been standard 3.2.12. That subclause calls for an assessment as to whether any organic **product** had been contaminated by GMOs at Eagle Rest. However, there was no such identifiable contaminated product, potentially capable of altering the organic status of the Eagle Rest operation. The sheep at Eagle Rest were decertified for wholly extraneous reasons, namely their chemical drenching in 2009.

531 The wheat crop standing unharvested on part of paddock 11 had, a most, three GM canola swathes lodged around the paddocks southern edge and not in the wheat crop itself. The three swathes could have been picked up and removed. But that only happened in April 2011 (see exhibit 10). There can be no suggestion any canola seeds spilled onto Eagle Rest soil from the seed pod of a GM swathe had time to germinate to become a volunteer GM canola plant before the 2010 paddock 11 organic wheat crop might have been harvested. Likewise, as regards a future germination of a volunteer GM canola plant, amongst the spelt and rye crops growing on paddock 12. But these crops suffered from extraneous quarantine issues in 2010 in any event and could not have been sold off labelled as organic.

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

533 At best, the Eagle Rest swathe incursion and possible spread of GM canola seeds situation might have been monitored and kept under review by NCO once all the swathes were gathered up and removed (preferably long before April 2011). There was a required NCO annual inspection in any event as regards all NASAA certified farming operations.

534 A 2011 inspection of Eagle Rest by NCO would have revealed that only eight volunteer GM canola plants ever germinated on Eagle Rest (TB Vol 2, pages 374 - 376, 387). These plants were easily identified and

eventually pulled out by Mr Marsh. But even these eight volunteer GM canola plants posed no genetic contamination threat to any other crop or plant species at Eagle Rest as the scientific evidence earlier discussed makes very clear. Nor, if the volunteer plants had been eaten by sheep on Eagle Rest, did they pose any genetic threat to the meat or to the wool of the sheep. At worst, a GM canola seed might have passed through the consuming sheep's digestive system over time and, in due course, from there possibly germinated in the Eagle Rest soil to produce another volunteer plant. But there was nothing at Eagle Rest for the pollen from any of these volunteer plants (if they developed to a flowering stage) to cross-fertilise with.

535 The decertification of Eagle Rest by NCO on 29 December 2010, and then ongoing throughout 2011 to 2013, manifests as having been unsupportable under a proper application of the NASAA organic standards. In this context, I have already observed that the 2007 contract between Mr Marsh and NCO (found in TB Vol 1, pages 40 - 50) does not directly mention decertification. The repeated emphasis of those contractual provisions (see page 42) as has been seen, is in respect of either a suspension, or a termination of the contractual relationship.

536 As regards the presenting GM swathe situation at Eagle Rest at the end of 2010, there might have been a short period of suspension imposed by NCO, as regards the organic wheat crop, once it was harvested from paddock 11 in early 2011. The harvested wheat might then have been examined, to evaluate whether any GM canola seeds were present therein. It may be recalled that there were only three GM canola swathes ever detected in that paddock - and even then, well away from the crop. The harvested wheat (if necessary) could have been machine cleaned and any offending GM canola seeds could then have been removed. However, there was no evidence of a presence of any GM canola seeds in the organic wheat crop eventually harvested from paddock 11 by the three swathes as detected to the south of the crop.

537 No swathes appear to have been found on paddocks 8 and 9 (see again exhibit 10).

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

Remaining non-expert trial witnesses

Ms Stephanie Goldfinch

539 NCO's relevant decision-maker at the operative time during December 2010, as regards the decertification of paddocks 7 - 13 at Eagle Rest, was Ms Stephanie Goldfinch. Ms Goldfinch was a witness called on behalf of the plaintiffs at the trial. Her evidence-in-chief was tendered by her witness statement, which became exhibit 19. I will evaluate her evidence lest it be considered significant in other quarters at a later time.

540 In the period 1991 - 1996, Ms Goldfinch had been employed by NASAA as a Certification Officer. She rejoined NASAA in 2008, to be employed as a Technical Manager, then acting Executive Officer.

541 In 2009, after NASAA hived off and then transferred its organic certification business to its subsidiary corporation NCO, Ms Goldfinch now became employed by NCO. Her responsibilities as executive officer substantially remained the same.

542 Ms Goldfinch's employment with NCO spanned the period early 2009 to 2011.

543 She says at par 3 of her statement that as executive officer of NASAA/NCO she had 'general responsibility for management of [both companies]', including for matters such as liaison with the board, staffing matters, budgetary and financial matters, service delivery to clients, responding to complaints and so on. She continues, '[I]n particular, I was responsible for the management and oversight of the certification business'.

544 On the evidence before me I could not ascertain if Ms Goldfinch had ever personally visited Kojonup or Eagle Rest.

545 At par 4 of Ms Goldfinch's witness statement, she explains NASAA's organic certification system and, at par 5, the process involved, leading up to the making of a certification decision. I refer to pars 5(a) - (e).

> 5. While I was employed as EO [executive officer] at NCO, the process leading up to the making of a certification decision usually involved several persons who performed different roles.
>
> a. The Inspection Coordinator (an employee of NCO) would arrange for an inspector (a contractor, rather than an employee of NCO) to inspect the farm and provide an

inspection report to NCO. The Inspector would then conduct an inspection and provide their report.

b. A Certification Officer [CO] (an employee of NCO), or in some cases two COs, would make an initial assessment of whether the operation complied with (or continued to comply with) the Standards, based on the information in the inspector's report and other relevant sources. The CO would record their assessment in a 'post inspection review sheet'.

c. In a simple case, the CO assessment would determine whether NCO certified or decertified the operation, as relevant. As EO, I would sign off on the CO's assessment, and would sign a letter to a farmer recording the decision of NCO, but I would not otherwise be involved in the assessment process.

d. However, in a complex or unusual case, I might become more involved in the assessment process. Sometimes, the Board, Standards Committee or some of its members might also be consulted regarding whether operations comply with the Standards.

e. In light of the assessment results, a contract officer (an employee of NCO) would communicate with the farmer about any necessary amendments to their contract with NASAA/NCO.

546 I note by par 5(d) above Ms Goldfinch's potential involvement in complex or unusual cases and, on that scenario, her potential greater role in an assessment process. That, on the evidence, is what appears to have transpired, as regards Mr and Mrs Marsh and Eagle Rest, during December 2010.

547 Ms Goldfinch received the written inspection report, dated 5 December 2010, from Ms Purvis, the local organic status inspector engaged by NCO.

548 In the period between 8 and 10 December 2010 Ms Goldfinch, along with another certification officer from NCO, a Mr Luke Wenpeng You, reviewed Ms Kathe Purvis' inspection report, plus some further information provided directly to them by Mr Marsh.

549 Ms Goldfinch conducted a review of the certification of Eagle Rest. She says at pars 14 and 15 of her statement:

> I considered that the case was unusual because the contamination of Mr Marsh's operation appeared not to have been due to any actions of the certified farmer. That is why two people were involved in the review process.
>
> As a result of this review process NCO decided to suspend certification of the affected paddocks on Eagle Rest. I signed off on that decision for NCO, on the basis of the information supplied by Mr Marsh and [Ms Purvis]..

550 Suspension of the Marshes' certification allowed time for further investigation (for example whilst waiting for sample test results or any further contamination developments).

551 By her letter of 10 December 2010, Ms Goldfinch informed Mr Marsh of NCO's suspension decision (see TB Vol 2, pages 323 - 324).

552 The inspection report of Ms Purvis is at TB Vol 2, pages 293 - 309. The inspection review document by Mr You and Ms Goldfinch is at TB Vol 2, pages 314 - 317.

553 Examination of this document seen at page 315 mentions paddocks 7 - 13 at Eagle Rest described as being:

> [c]ontaminated 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 (315).

554 Other areas of Eagle Rest were the subject of NCO non-compliance observations - said to be major non-compliances, by reference to NASAA standards 6.10.4, 6.12.5, 6.5.1 and 6.6.6. Those observations at 6.5.1 and 6.6.6 related to the chemical drenching in 2009 and 2010 of Eagle Rest sheep by Mr Marsh and the sheep being consequently quarantined (for 12 months) in paddocks 8 and 12, by reason of the need to drench with chemicals to deal with parasites in the sheep (see ts 264).

555 Page 316 of their review document indicates Mr You spent 1.5 hours conducting his review work, on 8 December 2010. Ms Goldfinch records expending 3.0 hours on 10 December 2010, the date of her two communications to Mr and Mrs Marsh.

556 TB Vol 2, pages 323 - 324 sees Ms Goldfinch's letter to the Marshes, making reference to NASAA standard 3.2.9, as regards the suspension of

paddocks 7, 8, 9, 10, 12 and 13, said to be 'contaminated' (in the same terms as the review document, already mentioned above).

557 On 10 December 2010, Ms Goldfinch sent a further communication to Mr Marsh now advising that 'NASAA has amended the Schedule of your contract with NASAA'. That revised schedule was to come into effect immediately.

558 No copy of a revised schedule as then sent to Mr and Mrs Marsh, under cover of that letter, is found in the trial materials held by the court. However, there is every reason to infer such a schedule would have been in terms similar to the schedule that was attached to the subsequent decertification communication of Ms Goldfinch, on behalf of NCO, to the plaintiffs on 29 December 2010, as NCO's decertification decision (see TB Vol 2, pages 333 - 335, amended schedule at page 335). The schedule as at 10 December 2010 would not have been identical; clearly, some items would have differed. For example, item 4 in the 29 December 2010 schedule entitled 'The Licensee's Facilities' refers to paddocks 7 - 13 as 'decertified'. As of 10 December 2010 that schedule would more likely have referred to those paddocks as being 'suspended', or by some like term, given the actual NCO decertification decision had not then been made. The schedule that is before the court needs to be read in juxtaposition to the original schedule in the NASAA contract of September 2007 with Mr and Mrs Marsh (TB Vol 1, pages 40 - 50) at page 50 noting, particularly, all December 2010 alterations as made to items 4, 6 and 9 of the original contract schedule.

559 Samples of swathe material taken from Eagle Rest, as collected by Ms Purvis on 5 December 2010, was sent for testing via Australia Post. However, these samples were lost (see pars 18 - 20 of Ms Goldfinch's statement).

560 On 21 December 2010, another local NCO inspector, Ms Clare Coleman, conducted her inspection of Eagle Rest. The second inspection was described by Ms Goldfinch as 'principally to collect a further sample of canola for testing' (exhibit 19, par 21).

561 Ms Coleman prepared and forwarded her report of the inspection to Ms Goldfinch in South Australia. More canola swathe samples were taken. Testing of these samples confirmed the presence of genetically modified (ie, RR) canola.

562 A report by Ms Coleman concerning her inspection of Eagle Rest on 21 December 2010, was completed on 23 December 2010. It is found in TB Vol 2, pages 325 - 331.

563 Ms Goldfinch's decertification letter on behalf of NCO to Mr and Mrs Marsh, 29 December 2010, is found at TB Vol 2, pages 333 - 336. The decertification decision by NCO appears to have been completed without any further review sheet being completed - in the fashion as had preceded the suspension decision.

564 By her 29 December 2010 communication to the Marshes for NCO, Ms Goldfinch wrote (TB Vol 2, pages 333):

> Dear Steve and Sue,
>
> As a result of investigations and testing following the contamination of your farm with GM Roundup Ready Canola, the attached contract schedule amendment outlines the changes to the certification.

565 That schedule (TB Vol 2, page 335 under item 4) indicates that only 128 hectares (namely paddocks 1 - 6) of Eagle Rest remained characterised as 'organic'.

566 The remainder of Eagle Rest was either 'quarantined' (as to 6.6 hectares) or 'decertified' as regards paddocks 7, 8, 9 10, 11, 12 and 13 (around 325 hectares).

567 After advising Mr and Mrs Marsh that they enjoyed a right of appeal within 30 days, and that NCO would 'consider your appeal carefully', Ms Goldfinch concluded:

> We regret the circumstances leading to the change certification status which are beyond your control and acknowledge you have complied with all aspects of the Standards to the best of your ability.

568 Whilst not explicit, this NCO communication (in an absence of any underlying review sheet) suggests that the principal basis for the decertification decision was the assessed non-compliance with NASAA Standard 3.2.9, as was previously assessed on 10 December 2010. In other words, it was assessed by NCO that there was an 'unacceptable risk' of GM contamination on Eagle Rest.

569 Ms Goldfinch did not ever personally visit Eagle Rest in 2010 and 2011. She was wholly dependent upon the written reports submitted by the two NCO inspectors (Kathe Purvis and Clare Coleman) or upon

information supplied directly from Mr and Mrs Marsh concerning what had occurred.

570 Ms Goldfinch identified in her trial witness statement the actual factors relevant to the NCO 29 December 2010 decertification decision, at exhibit 19, par 27. At par 27(c), she says:

> Because of those facts I concluded there was an **unacceptable risk** of contamination of parts of the property from the GM canola. (my emphasis)

571 That is an unmistakeable reference to NASAA standard 3.2.9 and its unique terminology, 'unacceptable risk'.

572 Ms Goldfinch continues at par 28:

> I considered there was really no option but to decertify the affected paddocks given those facts.

573 She concluded, at par 30:

> In my experience at NASAA/NCO and otherwise, I am not aware of any case similar to what occurred on Eagle Rest. That is to say, I am not aware of any case where an operation has been contaminated by GM material otherwise than due to the actions of the relevant farmer.

574 By par 2 of Ms Goldfinch's statement, I note that she obtained a degree in applied science (natural resource management) from the University of Adelaide in 1999, a certificate of first-line management from TAFE in South Australia in 1996, and a diploma of quality auditing from what appears to be a private organisation (SAI Global) in 2010.

575 Ms Goldfinch, having left the employment of NCO in 2011, now works as a food safety and organic auditor with a corporation known as AUS-QUAL Pty Ltd.

576 Ms Goldfinch was extensively cross-examined, particularly about the two NCO decisions in December 2010, first to suspend, then to decertify various paddocks - concerning, in all, about 70% of the Marshes' Eagle Rest farm.

577 From the start of her cross-examination Ms Goldfinch, to my observation, presented as decidedly prickly in answering questions. Transcript examples mentioned below highlight some deficiencies. But the transcript does not really do justice to her icy glares at senior counsel

and the haughty tone of her responses to many questions put to her (see, for example, ts 507).

578 What her close cross-examination exposed, most significantly, was a rather proudly and frequently proclaimed stance of 'zero tolerance' against GMOs, even as against (GM) plants that did not contain any seeds (ts 625 - 626).

579 Ms Goldfinch gave evasive answers in response to probing questions about the 23 April 2009 letter she wrote (exhibit 11) to Mr Marsh - which purports to contain a quotation from the National Standards. But her quoted source could not be located in the National Standards, notwithstanding a very fair opportunity for Ms Goldfinch to find her attributed quote (ts 503 - 506).

580 What I conclude from Ms Goldfinch's responses overall is her fundamental misunderstanding and misapplication of the National and NASAA Standards against the Marshes. That misunderstanding effectively became the position of NCO, as the decision-maker, as regards the suspension, then decertification of Eagle Rest.

581 Much of the difficulty for Ms Goldfinch (and for that matter for Mr Marsh) seemed to stem from the fact that the term 'contamination' is not defined in the National Standards or in the NASAA standards. Hence, a hypothetical example put to Ms Goldfinch of a GM canola swathe transiently landing on a sheep's back as effectively a source of contamination of the sheep produced interesting evidence as regards Ms Goldfinch's perceived contamination of the sheep's wool, effectively by the mere touch of a GM canola swathe, but also of the sheep itself, if any part of the canola swathe was consumed by the sheep (ts 507 - 508).

582 Ms Goldfinch proclaimed herself as someone who preferred to take a scientific approach (ts 532, 547, 574). Her science qualifications (see exhibit 19, par 2) provide some basis for that claim. Regrettably, her evidence shows otherwise as her decisions for NCO as regards Eagle Rest.

583 I assess it to be the case that Ms Goldfinch found it convenient to proffer, on behalf of NCO, absolutist positions wholly against GM canola. This is surprising as, given her science background, she should have known that any sensible assessment of a potential genetic-trait transfer risk from a GM canola swathe at Eagle Rest in December 2010 was unsupportable. That absolutist negative stance is all the more surprising, given she had been (correctly, in my view) advised, probably by the then

chairman of NASAA, Mr Rod May, as to the correct meaning of contamination in the context of contact with GM material meaning a 'genetic contamination' (see TB Vol 2, page 289). She then proceeded to relay that information by telephone to Mr Marsh on 20 August 2010 (see ts 509 - 510). Yet later that advice to her appears to have been ignored in her decisions of December 2010.

584 One of Ms Goldfinch's most memorable responses to a question was, 'I'm looking you straight in the face.' This was addressed to senior counsel for the defendant, in response to a series of questions about the potential significance of the number of swathes in each paddock - concerning Ms Goldfinch's decisions for NCO to decertify the Eagle Rest paddocks 7 - 13 (ts 53 – 554). The responses to questions regarding her communications to Mr Marsh were also unconvincing (ts 510 - 511).

585 I also mention, in particular, a line of cross-examination culminating in the NCO disqualification decision being accepted by Ms Goldfinch as predicated upon her view that, 'one seed is enough' (ts 572). I note also the assertion by Ms Goldfinch that 'suspension is not a decision; it's a sanction' (ts 578).

586 There was also a fairly long series of questions and answers in regard to false negatives as regards testing for the presence of GM canola seeds in a crop. This culminated in Ms Goldfinch's as expressed view that there must be not even a remote, undetectable risk of GMOs at all in any product (ts 590 - 592).

587 Ms Goldfinch was also asked about the relationship between the National Standards and the NASAA Standards. She responded with an incoherent series of answers to that line of questioning (ts 594).

588 She was asked about her contribution to a NASAA press release in which she is identified (see TB Vol 2, pages 343 - 344) and there emerged more evasive and unsatisfactory answers (ts 597 - 598).

589 All in all, there seemed to manifest an implacable resistance in Ms Goldfinch to accepting any degree of personal accountability as regards her NCO decision making in December 2010 concerning the Marshes and Eagle Rest. To that end, she resorted on occasions to what I assessed as a deliberate refusal to respond properly to questions put.

590 Confronted with uncomfortable questions, Ms Goldfinch often sought to shift responsibility for what was said to other officers or organisers of NASAA or NCO, such as Mr Rod May, Ms Janet Denham,

the 'NASAA Standards Committee' or to an 'Organic Advisory Board'. Ms Denham was a subsequent witness and testified that she never received any questions about Eagle Rest as the Organic Advisory Board was, effectively, inoperative at the relevant time (ts 649 - 650).

591 All in all, Ms Goldfinch's evidence in cross-examination was unsatisfactory. I would not accept it in any contentious area of this trial, unless it was reliably and independently supported.

Andrew Christian Bishop

592 The plaintiff called Andrew Christian Bishop, a public servant with the Government of Tasmania. Mr Bishop's evidence, by his witness statement, became exhibit 12.

593 Mr Bishop's evidence dealt with a policy position by the Tasmanian Government, in respect of not allowing GM canola in that State. Evidence was given concerning GM canola trials which had been run under permit by various farmers in Tasmania.

594 There was some limited cross-examination of Mr Bishop by reference to a Tasmanian Policy Statement (ts 354 - 355) Gene Technology and Tasmania Primary Industries 2009 - 2014 (see TB Vol 9, pages 2893 - 2904). The evidence is of minimal relevance, in circumstances where the policy of the WA Government as regards GM canola crops was different, since January 2010.

595 A second aspect of Mr Bishop's evidence concerned growing trials in Tasmania and the sowing of GM canola in various cropping scenarios (see exhibit 12, pars 12 - 26). The question of a subsequent clearance for GM canola paddocks, on the basis of testing to ensure that there were no volunteer plants was explored. However, this evidence addressed situations in which a GM canola crop had been intensively sown in one or more prior seasons, then that paddock over time assessed subsequently for any residual presence of volunteer canola plants (ts 357). That situation elicited some evidence in terms of a two-year monitoring period to reliably ascertain in Tasmania that no canola volunteers were present. That evidence is interesting, but it addresses a factual situation of the aftermath of intensive canola cultivation very distinct from the present Kojonup scenario of seed movement on the wind and volunteer GM canola plants possibly germinating on other properties, where there has never been a prior GM canola crop ever sown.

Diane Gore

596 Ms Diane Gore until recently was an inspector employed with NASAA and NCO.

597 Her witness statement became exhibit 15. Ms Gore was cross-examined over her post 2010 certification decisions concerning Eagle Rest. Like Ms Goldfinch, Ms Gore, being based in South Australia, would review written reports sent to her by local inspectors of the Eagle Rest property, from time to time.

598 Ms Gore was cross-examined over her understanding and applications of the NASAA standards to Eagle Rest. In particular, she was questioned over aspects of the standards she (wrongly) thought dictated that if any GMO canola material so much as ever touched upon Eagle Rest that there was an automatic disqualification of certification for Eagle Rest for five years (ts 424).

599 Ms Gore presented as a basically decent witness. But she was repeatedly exposed by cross-examination in terms of a rote application of the NASAA standards, as she applied them. There is no doubt Ms Gore was influenced in terms of Eagle Rest's ongoing decertification - predicated upon a GMO presence by GM canola seeds spilt to the soil from swathes in 2010, upon her misreading of the National Standards as regards plenary 12-month, two-year or even five-year disqualification periods she thought she was bound to apply against Eagle Rest.

600 I assess Ms Gore to have artificially and unnecessarily fettered herself (and thereby NCO) by her erroneous interpretations when they did not apply to the circumstances of the adventitious arrival of the GM canola swathes and their seeds to Eagle Rest at and after November/December 2010.

Janet Denham

601 I have already mentioned the evidence of Ms Denham who, apart from a short hiatus, was and remains the chairperson of NASAA. She held that position between 1996 and 2003 and from 2010 until now. Ms Denham has also been a long-serving member of the NASAA Standards Committee, responsible for developing and maintaining the NASAA Organic Standard (see exhibit 20A, pars 4 - 6).

602 At par 18 of her witness statement (exhibit 20A) Ms Denham explains that NASAA currently has approximately 80 members and 830 certified operators, with land the subject of NASAA certification currently

covering 7 million hectares. Ms Denham also explained that in about 2008, NASAA decided to conduct its certification operations separately through its wholly owned subsidiary NCO (exhibit 20A, par 12). NCO is the 'certification engine room'. NASAA is NCO's 'public interface' (exhibit 20A, par 14).

603 Again, however, in the area of GMOs and possible risks of a genetic contamination, Ms Denham expressed a 'zero tolerance' plenary negative position for NCO/NASAA against GMOs. Ms Denham said this stance was reflected under NASAA's rules. But that 'zero tolerance' stance, examined in Ms Denham's cross-examination, did not present to me at all supportable when measured against the adventitious swathe incursion by wind circumstances applicable to Eagle Rest from November/December 2010 and thereafter.

Sachan Ayachit

604 Sachin Ayachit has been the Certification Manager for NCO since August 2012. His witness statement became exhibit 21.

605 Mr Ayachit's evidence was largely directed in respect of a January 2013 decision to recertify Mr Marsh's farm, but only commencing in October 2013 and subject to certain requirements as identified by Mr Ayachit in his statement (exhibit 21, par 29).

606 Mr Ayachit gave his trial evidence by video-link from India. He had only joined NCO in August 2012, so the extent of his involvement with Eagle Rest issues was rather limited, although he said he had read the preceding inspection and review reports on the file.

607 On the whole, I found Mr Ayachit's evidence satisfactory. His answers to questions were concise and direct, on my assessment.

608 The significance of Mr Ayachit's involvement really concerned a reinstatement of Eagle Rest's certification in 2013. There is a subtle timing issue lurking here, in regard to Mr Ayachit signing off on a February 2013 witness statement indicating the likelihood of the Marshes and Eagle Rest getting their certification back. But that actually did not happen until October 2013.

609 In the end, the significance of his evidence really comes down to whether there was an obligation in NCO to disqualify a farm by reason of GM, for any fixed period under the NASAA rules, be it five years (as Ms Gore had seemed to think), three years or some lesser period.

610 The ultimate three-year decertification period imposed on Eagle Rest looks to be based on the amount of time it takes for an applicant to obtain organic certification from scratch. I assess no logic in applying that standard to somebody who had already established and maintained a certified organic operation for a number of years, but who has experienced a transient GMO incursion incident, plainly not their fault and in respect of which they had done everything possible to avoid the GM exposure.

611 In the end, a rationale for decertification of parts of Eagle Rest seems to be tied to the expressed need by NCO to allow three uneventful growing seasons to pass after the December 2010 swathe incursion incident - in order to review the position as regards residual GM canola seeds and volunteer plants. There were, of course, only nine volunteer plants ever detected during the 2011 growing season. Of these, eight tested positive for GM. The evidence was that there were no volunteer GM canola plants on Eagle Rest during 2012/2013, nor in 2013/2014. Given that, the NCO three-year stance taken presents as something of an overreaction. Close monitoring for any problematic scenario of volunteer plants could have achieved the same protective result.

Ms Janine Morton and Mr Jonathan Morton

612 Evidence was led at the trial, on behalf of the Marshes, in relation to their previous (to 2010) sales of organically grown oats to a local corporation trading as Morton's Seed & Grain Pty Ltd (Morton's). Evidence was received from Ms Janine Morton (exhibit 22) and Mr Jonathan Morton (exhibit 23). Ms Morton was not required for cross-examination at trial.

613 Morton's is primarily an exporter of oats for human consumption. Mr Morton explained the importance of organic certification in relation to purchases of oats made in Australia and from the plaintiffs, for the purposes of Morton's largely export business. Morton's does not sell anything labelled as organic - unless the product is first certified organic by a recognised (Australian) certifier body (par 5). Morton's had been purchasing organic oats from the Marshes since 2004 (par 9).

614 Ms Morton also explained (exhibit 22, par 3) that the corporation Morton's was itself certified by NCO/NASAA. This was to ensure Morton's met the organic standards of Australia as an exporting country.

615 Morton's certification from NCO required it to source organically grown grain from accredited Australian suppliers who, in turn, were

required to show Morton's their own accreditation from a certifying organisation for produce sold to Morton's.

616 Mr Morton's witness statement was tendered as exhibit 23. He was called to be cross-examined. He spoke about the demand for organic grain from producers for the seed business of Morton's. Essentially, the market for the Mortons' seed sale business was an export market. On that basis, it was important that the Mortons' produce suppliers be certified. The Mortons' operation was certified. Bearing in mind the export orientation of the Mortons' business, this was readily understandable.

617 The Mortons' evidence is, essentially, uncontentious.

Frederick Davies

618 Mr Frederick Davies, whose witness statement was tendered as exhibit 24, is an oilseed grower and processor from Victoria.

619 His evidence by telephone, essentially, addressed the higher prices his business was prepared to pay for organic linseed, which had been cleaned via a machine process.

620 He spoke of the almost threefold value of that product, in terms of prices paid to suppliers by his business, in contrast to non-organic linseed. This evidence may be accepted. Its utility, however, is marginal.

Digby Stretch

621 Mr Stretch's witness statement became exhibit 29. Mr Stretch is a farmer in the Kojonup area who also grew GM canola. His evidence was of limited scope. I assessed Mr Stretch essentially as a direct and reliable witness. He did confirm a HRWR problem in the Kojonup area. I accept that, but the evidence was not otherwise of significance.

Plaintiff's expert witnesses at trial

Peter McInerney, Agronomist and consultant

622 Mr Peter McInerney is an agronomist and consultant of Wagga Wagga, New South Wales. His three reports became exhibits 13A to 13C. Exhibit 13D was a table he had caused to be prepared.

623 The thrust of Mr McInerney's evidence concerned observations about proper weed management practices on farms.

624 Prior to trial, Mr McInerney conferred with three of the experts proposed to be called by the defendants. That exercise resulted in the settling of joint memoranda between the experts. The relevant memoranda are exhibits 14A, 14B and 14C. In substance, they show a very considerable degree of harmony in terms of the fundamental issues.

625 Mr McInerney held a generalised concern about the overuse, across Australia, of glyphosate as a herbicide. He repeatedly made that point, which may be accepted, generally. Whilst herbicides are legitimately used, they should, of course, be used sparingly and as a part of an overall system of multiple strategies towards controlling weeds.

626 Mr McInerney was correlatively concerned that the overuse of glyphosate by Australian farmers will, over time, generate a resistance to it in weeds. A longer term problem would manifest by glyphosate ultimately losing its utility as an effective herbicide.

627 The second minor area of disputation Mr McInerney held with some of the defendant's experts was over whether, in fact, GM canola statistically delivered any greater yield for canola than a conventional canola crop. There was arid argument over underlying data supporting conclusions concerning better yields and also a wider question that the overall profitability of using GM canola as opposed to conventional canola. Mr McInerney contended it had not been clearly established that GM canola was more profitable than conventional canola. He was sceptical of suggestions that farmers had found their yields improved by planting GM canola, in contrast to ordinary canola. It seems apparent, however, to the extent Mr McInerney deals with data derived from growing trials of GM canola, then measured against conventional canola, that the trials compared canola yields from rural land which was not unduly burdened by a weed problem.

628 On the other hand, it is to be expected that for land encumbered by a heavy weed burden, the ability to use glyphosate late in a growing season, in conjunction with an almost matured RR canola crop, can reduce the end result weed burden and thereby deliver better yields and thus, potentially, better financial returns - even bearing in mind the higher initial outlay involved in purchasing RR canola seed. This is especially so where some weeds have developed resistance to herbicides other than glyphosate. Further, by helping to reduce a paddock's long term residual weeds' seed bank, the use of glyphosate during an RR canola growing season may assist in reducing weeds in subsequent years - when other cereal crops, or non-GM canola varieties are grown.

629 I assess it as more helpful to focus attention upon a precise set of underlying characteristics concerning an individual farm or farmers, rather than make attempt generalised and global observations about such issues from arid statistical data.

630 Otherwise, Mr McInerney's evidence acknowledged swathing was often the preferred method chosen by farmers for harvesting their canola, depending on total acreage and yield per hectare. Swathing as a process carried agricultural advantages, including by combating weeds, or the spread of weeds: see exhibit 13, pages 4 - 5 and exhibit 14C, page 2, joint memorandum with the defendant's expert, Professor Stephen Powles.

631 Mr McInerney addressed swathing in re-examination. He was asked about whether he would recommend swathing to one of his client farmers, in circumstances where there was an organic farmer operating from a neighbouring property. The answer was that in those circumstances, he would not make such a recommendation, by reason of his concerns about the spread of GM material.

632 Overall, I did feel that Mr McInerney's academic criticisms fashioned remotely from Wagga Wagga at Mr Baxter's weed management practices at Kojonup were too distant and, in the end, unconvincing. This was in circumstances where Mr Baxter presented to me as an experienced and knowledgeable Kojonup farmer who held the best direct knowledge and insights into the seasonal weed issues affecting each of his paddocks at Sevenoaks. Mr Baxter acted upon independent advice from a local agronomist as regards his weed issues. I find no substance in Mr McInerney's mild and remote criticisms about Mr Baxter's seasonal weed management practices for his paddocks at Sevenoaks.

Professor Rene Van Acker

633 I have already mentioned some significant evidence received by video-link from Canada by Professor Rene Van Acker.

634 His three reports are in evidence as exhibits 16A, 16B and 16C, as are three conferral memoranda he participated in with the defendant's experts, Dr Christopher Preston, Dr Patrick Rüdelsheim and Professor Stephen Powles, exhibits 17A, 17B and 17C.

635 I was impressed by Professor Van Acker in terms of the direct and clear way he answered all questions.

636 Having said that, I do not think his evidence really assisted the plaintiffs' case that much.

637 Professor Van Acker's second report speaks of some separation distances and buffer zones as between GM and non-GM canola crops. But it does not really deliver any underlying empirical basis for reliably setting down any particular separation buffer distances.

Dr Christopher Preston

638 The defendants called Dr Christopher Preston via video-link from Adelaide. Dr Preston's report became exhibit 27. Dr Preston is an internationally published academic with recognised expertise in plant biochemistry. His ongoing work as associate professor of weed management at the University of Adelaide focusses upon the evolution, biochemistry genetics and the management of herbicide resistance in weed species.

639 In their joint memorandum following conferral (exhibit 17C) Dr Preston and Professor Van Acker agreed that canola seed can be screened out of cereal grain and about the practicality of how this is done. They said:

> Commercial seed enterprises can easily and economically screen canola seed out of cereal seed. It can be done on farm or by delivery to a seed cleaning plant. There may be some practical challenge, if a farmer at time of grain harvest wanted to deliver the grain directly to a commercial grain storage facility, because the farmer would need to clean prior to delivery and given that most farmers do not have much on farm storage this may pose some logistics challenge.

640 The same answer, concerning the practicality of screening, is seen in the joint memoranda of Professor Van Acker and Professor Powles. Professor Preston describes the commercial seed cleaning process in answer at page 15 of his report. I accept this evidence.

641 Section 3 of Professor Preston's report addresses some research conducted in 2002 and 2005, concerning the persistence of seeds and canola volunteers in commercial practice, by reference to soil samples collected from fields that had previously grown canola.

642 The research had determined that canola seed banks in commercial fields decayed quickly, after a canola harvest and that no viable seed remained after 2.5 years. A conclusion drawn was that a rate of (seed

viability) decline meant that at 3.5 years 'no germinal canola seed remained' (see exhibit 27, page 4). Those observations may be accepted.

643 There is, nevertheless, as I have already said, a considerable conceptual distinction between an assessment of canola plants (volunteers) in a field that has previously and deliberately been intensively sown by machine with cultivated by canola seed to raise a crop, in contrast to the situation of very random dispersal by the wind of seeds in a swathed canola seed pod, scattered across an adjoining farmer's land. As to that, see the observations under section 5, page 7, where Professor Preston says the 'research on roadside canola is less relevant, but supportive of the fact that seed banks of canola decline rapidly with time'.

Professor Stephen Powles

644 The defendant called Professor Powles of the University of Western Australia. He provided three expert reports, tendered as exhibits 32A, 32B and 32C respectively.

645 Professor Powles holds a doctorate in plant and agricultural science, a field in which he has been both a research and academic professional for over 37 years. In that time, he has been an author or co-author of approximately 200 plant site research papers, published in international research journals.

646 For 10 years (1999 to 2009) Professor Powles was a member of an expert committee advising the Australian Gene Technology Regulator (OGTR) about its assessment of GMOs for release in Australia. In that time the OGTR approved RR canola for release in Australia.

647 Professor Powles also owns a 600 ha West Australian grain belt farm growing wheat, barley and both GM and non-GM canola crops.

648 Towards the now overwhelmingly absence of any toxic or harmful qualities in RR canola plants or seed, I will add Professor Powles' observations:

> Canada, the world's largest canola producer and exporter, has cultivated RR canola for the past 15 years over very large areas (approximately 4 million hectares annually). RR canola seed and food products derived from RR canola seed are globally traded and have been widely consumed by humans and livestock for many years (2).

> Notwithstanding this widespread history of RR canola production and consumption, to my knowledge there are no reports establishing RR canola plants or seeds exhibiting harmful or toxic substances.

649 I also mention some following observations concerning the assessment by the OGTR as to the human safety and effect of GMOs and as to food products by the Food Standards Australia New Zealand (FSANZ). That is another example of the overwhelming and essentially uncontradicted state of the evidence in this trial upon that issue.

650 As to an imposed separation of GM canola from non-GM canola by WA agricultural industries, Professor Powles discusses the cost of maintaining the separate supply chains in order to separately market GM and non-GM canola from Western Australia. That position stands in some contrast to Canada, where there is no such attempted segregation.

651 At section 14 of his report Professor Powles deals with swathing. He observes:

> I have examined the literature but have not found any published research studies of wind-impelled physical movement of canola stems from windrows. However, on rare occasions I have observed canola stem movement from windrows, due to strong winds. Therefore, I expect that strong winds could move some canola stems from windrows in a canola field to an adjacent field. If the two adjacent fields were on different farms then this would move canola stems from one farm to another. This could occur equally whether the windrowed canola was RR or non-GM.

652 To like effect, see the observations concerning swathing by the plaintiffs' own expert, Professor Van Acker. At page 11 of his report, under the heading 'Method Of Harvest', Professor Van Acker observes:

> Canola is more typically swathed rather than direct combined because it is prone to shattering … The Canola Council of Canada recommend swathing over direct combining in order to maximize harvested yield and to limit the seed that can volunteer in subsequent years. For farmers wishing to limit the size of their volunteer canola population swathing is recommended because it results in much less canola seed on the ground at harvest. For managing volunteers, it is best if they are controlled before they ever set viable seed. (citations omitted)

653 Professor Van Acker refers to the movement of canola swathes by wind and the technique of using a roller pulled behind a swather to push the swathe into canola stubble helping to hold it there in wind (page 12). Interestingly, Professor Van Acker concludes noting:

> In cases where GM canola needs to be contained, direct combining of the canola would be considered a better and more responsible practice, but alone, it may not necessarily prevent movement of GM material from a given field.

654 Exhibit 17A, a joint memorandum by Professor Powles and Professor Van Acker, identified no points of difference between them on the topics conferred upon.

655 Exhibit 14C, a joint memorandum prepared by Professor Powles and the plaintiffs' expert, Mr McInerney, recorded a substantive agreement as between them, save in relation to a question 4. Here there was a minor point of disagreement in relation to the economic benefits of GM canola and its yield penalty, in contrast to Triazine Tolerant (TT) canola.

656 Earlier, Professor Powles and Mr McInerney agreed that a range of activities may be used in addition to the application of a standard herbicide in the control of weed seeds. They said:

> As an example, swathing a canola crop is expected to reduce annual ryegrass (ARG). Seeds set by 35% with a range of 15-50%. If the stubble was to be burnt after harvest, in autumn, when fire restrictions are lifted a further 40% of ARG seeds could be expected to be destroyed, with a range of 10-90%.

657 Professor Powles' trial evidence was only faintly challenged. It presents as essentially uncontroversial. Accordingly it will be accepted, particularly his observations in exhibit 32A in answer to questions 2 to 5, concerning the basically benign character of GM canola plants or seeds with there being no evidence of harmful or toxic substances in these seeds. On this state of the evidence it must also be accepted as well that RR canola does not pose any environmental or food safety risks, even if grazed upon by domestic livestock.

Summarising nine underlying cornerstone conclusions in this trial

658 It is now possible to resolve some fundamental features in the case which bear upon my conclusions which follow.

659 First, courts resolve litigation exclusively on the basis of the state of the evidence led before the court at a trial. In this trial, the Marshes did not prove or even seek to prove that a swathed canola plant with attached seed pods and with viable canola seed in the seed pods is in any way toxic, harmful or otherwise dangerous to humans, animals or to land. No evidence was led to that end. The trial evidence was overwhelmingly the

other way - to the effect that an RR canola swathe is an entirely benign subject matter.

660 Second, by correlation, it was not contended in this trial that any adverse physical consequences had ever been suffered by humans, animals or by the land (ie, at Eagle Rest) by reason of the airborne incursion on the wind of approximately 245 GM canola swathes, which I have found were blown into some Eagle Rest paddocks from Sevenoaks, in late November or early December 2010.

661 Third, it follows that the only injury or loss claimed to have been suffered by Mr and Mrs Marsh as a result of the 2010 swathe incursion out of Sevenoaks is a pure financial (ie, wholly economic) loss of profits. Such financial damage is said to have been suffered by the Marshes by reason of the event that NCO, as their NASAA standards organic status certifying organisation, with whom Mr and Mrs Marsh had entered a private 2007 contract, decided on 29 December 2010 to withdraw the organic certification status for approximately 70% of Eagle Rest's land.

662 The December 2010 loss by the Marshes of their contractual right to apply the NASAA certified organic trademark label in sales of Eagle Rest produce from paddocks 7 was a decision by NCO reached on the basis of a perceived 'unacceptable risk' of 'contamination'. The risk arose from a presence of GMOs in the decertified Eagle Rest paddocks from GM canola seeds spilled to the soil out of the broken seed pods of 245 swathed canola plants blown onto Eagle Rest.

663 NCO's December 2010 decertification decision meant sale produce from the decertified Eagle Rest paddocks could no longer be sold by the Marshes (under their contract with NASAA/NCO) labelled as 'NASAA certified organic'. But it could still be sold.

664 That marketing inhibition is said to have carried adverse pricing implications for the Marshes - in relation to the sales of future organic cereal crops, namely, oats, barley, wheat, spelt and rye, and also the meat or wool from the dorper sheep which had grazed upon the decertified paddocks.

665 A financial loss bottom line as asserted by Mr and Mrs Marsh, is that the produce grown or raised from the decertified paddocks of Eagle Rest, between 2011 and 2013, was sold off at lower prices than the greater (premium) prices which could otherwise have been achieved, had their Eagle Rest produce been sold labelled as 'NASAA certified organic' produce.

666 That is the underlying basis for the financial losses claimed by the Marshes, both for negligence and for nuisance, and which the parties have agreed upon as a figure, just before the trial began, at $85,000: see exhibit 2, supplementary statement of agreed facts.

667 Fourth, it was shown by scientific evidence led at the trial that none of the Marshes' crops or sheep at Eagle Rest could acquire any genetic traits of RR canola. Their own expert, Professor Van Acker, discussed the issue of a genetic transfer of GM material in his report at pages 6 - 9. There can only be a genetic transfer via pollen to a compatible species, sometimes referred to as pollen mediated transfer. More relevantly to the present case, there may be a seed mediated transference. But this requires the germination of a GM canola seed to become a plant, which later then cross-fertilises (by pollen) with another compatible plant species (generally another canola species) although some remote prospect of a possible weed species match-up was discussed.

668 Of potential modes of DNA gene transfer presenting for GM canola, only the second, as regards seeds, or a seed spread, carried a potential relevance in this trial. That is because the prospect of a pollen mediated transfer would only present as a viable risk had, for instance, Mr and Mrs Marsh been growing canola on Eagle Rest. They were not. The Marshes have never grown a canola crop from the Eagle Rest soil. So, in the 2010 growing season there was no prospect of any pollen mediated transfer. In terms then of any real risk of GM canola possibly spreading, it was only a longer term mode of a seed mediated transfer via GM (volunteer) canola plant germination which arose as a potentially relevant GM gene trait transfer consideration. But even then there needed to be a compatible plant species for the pollen from the volunteer GM canola plant to cross-fertilise with. Nothing of that kind was present at Eagle Rest.

669 Fifth, as regards a longer-term seed mediated transfer of GM canola at Eagle Rest, the uncontested evidence in this trial was that after the incursion of approximately 245 swathes of GM canola by air (with their attached seed pods and seeds) only eight volunteer GM canola plants were ever detected on Eagle Rest in a subsequent growing season. These volunteer plants were readily identifiable since canola was not otherwise grown on Eagle Rest. In due course the volunteer plants were pulled out by Mr Marsh, and presumably before they had set seed. No more volunteer GM canola plants were, on the trial evidence, subsequently identified upon Eagle Rest in the 2012 or 2013 seasons.

670 Sixth, Mr Baxter harvested in two eastern paddocks of Sevenoaks the 2010 RR canola crops by using the harvesting process of swathing. Any risk of an incursion of cut GM swathes unintentionally blowing on the wind into Eagle Rest during late November and early December 2010 would likely have been significantly reduced, if not eliminated completely, had Mr Baxter deployed the alternative method of canola harvesting open to him, ie, of direct heading. Mr Baxter was cross-examined from that premise (ts 829 - 830). See also senior counsel for the plaintiffs' opening address (ts 63 - 65).

671 Seventh, it follows from a causation of loss perspective that a bald grievance from Mr and Mrs Marsh just against Mr Baxter's mere growing GM canola on Sevenoaks in two eastern boundary paddocks in 2010, has been undermined. Merely growing GM canola on Sevenoaks in 2010 did not, of itself, bring about the subsequent airborne incursion into Eagle Rest of 245 cut GM canola plants on the winds later that year. For that swathe incursion event to happen, the GM canola plants at Sevenoaks first had to be cut at their base, then stacked and left standing in windrows exposed to the wind.

672 Merely growing the GM canola upon Eagle Rest can only be relevant as a preceding historic event before the subsequent activity of a harvest by swathing. An incursion into Eagle Rest by wind of cut canola plants and their attached seed pods could not have come about at Eagle Rest, I would conclude, had the GM canola then growing on Sevenoaks paddocks been direct harvested by heading the canola seed pods, rather than by cutting of the whole canola plant at its base – thereby severing its root attachment to the soil. True it was first necessary GM canola be grown. An illustrative example is that no one would say that the decision of the great-great-grandmother of Lee Harvey Oswald to have children caused President Kennedy's death: see David Hamer, "'Factual Causation" and the "Scope of Liability": What is the Difference?' (2014) 77(2) *Modern Law Review* 155,180:

> The great-great-grandmother's decision to have children rather than not have children caused Lee Harvey Oswald's existence rather than his non-existence. But the great-great-grandmother's decision to have children rather than to not have children did not cause Lee Harvey Oswald to shoot President Kennedy, rather than not shooting President Kennedy.

673 The existence of a necessary historical precondition does not amount to that precondition being the cause of the relevant harm. Consequently, the precondition of Mr Baxter growing the GM canola would not rise to the level of demonstrating that growing was the cause of canola swathes

blowing into Eagle Rest and axiomatically, of the Marshes' subsequent economic losses.

674 From a viable causation perspective here, the mere fact some event of damage follows after a preceding event will not establish legal causation. Courts these days mostly now eschew Latin. But the phrase '*post hoc ergo propter hoc*' (meaning 'after it, therefore because of it') has not generally been a governing or sufficient criteria under the common law of causation under any accepted legal test. The logical deficiencies from a bare *post hoc*, *ergo propter hoc* approach are obvious. They can even be viewed as convincingly exposed by President Bartlett in popular culture, in an early episode of 'The West Wing' carrying that descriptor (see YouTube http://www.youtube.com/watch?v=HL vHDjG5\Vk).

675 Moreover, an extra threshold to establish causation is made applicable in a common law negligence action, courtesy of s 5C of the *Civil Liability Act 2002* (WA). The provision now draws a distinction as between factual causation and legal causation. Section 5C requires that both touchstones must be met to succeed in such a case. Here, as regards the complaint of the Marshes against mere growing of GM canola at Sevenoaks in 2010, my assessment is that neither standard under s 5C is met.

676 It seems, however, that the *Civil Liability Act* and s 5C does not apply to a private nuisance action. Nevertheless, for the tort of private nuisance, proving the causation of the claimed loss still must be shown to make good this tortious cause of action. The same difficulty, as regards challenging the mere growing of GM canola by Mr Baxter, remains.

677 From a causation of loss perspective then I assess the only viable potential grievance of Mr and Mrs Marsh, both as regards their common law negligence and their private nuisance actions, is against Mr Baxter's actions by deliberately swathing his GM canola crops on Sevenoaks in 2010. Even more precisely, it was not just the cutting of these GM plants as a first phase in a canola swathing process which was problematic. Rather, it was the subsequent gathering and stacking together of all the cut canola plant swathes into exposed windrows on the Two Dams and Range paddocks of Sevenoaks. That left the swathed GM canola swathes exposed to all the elements for a two to three-week period before the ripened canola seeds in the pods were harvested by another machine. That exposure to the winds was the effective cause of what followed, albeit unintentionally. These events laid the necessary preconditions for

the subsequent incursions of 245 GM canola swathes blowing into Eagle Rest.

678 It is patent, therefore, that if Mr and Mrs Marsh hold a legitimate grievance under private nuisance or negligence against Mr Baxter then from a causation perspective, their grievance is only against the swathing conduct of Mr Baxter in 2010, rather than against his mere planting of GM canola that year.

679 Eighth, it only became lawful to grow GM canola as a crop in WA from mid-January 2010. There had been some limited permitted agricultural trials carried out in 2009, including on Mr Digby Stretch's Kojonup property. Given that growing novelty for GM canola in WA, there was necessarily a certain amount of initial learning associated with the first planting, nurturing and then harvesting such a GM canola crop.

680 Although Mr Baxter had grown canola crops for approximately 10 years before 2010, he had never harvested any of these crops by swathing. In 2010, he engaged a contract swather, Mr Meredith, to carry out the operation. The overall experience from that first time GM canola cropping season would now obviously bear upon Mr Baxter's and the community's overall body of experience and knowledge, so as to be potentially relevant to any future assessment of a GM canola cropping exposure in the Kojonup district. But it should be fairly recognised that there was something of an unknown position all round in WA in 2010, as the first commercial GM canola crops were planted, then harvested by farmers.

681 Ninth, an earlier 2008 discussion between Mr Marsh and Mr Baxter after a few conventional volunteer canola plants had germinated on Eagle Rest was a fact scenario that I assess as significantly distinct from the airborne swathe incursion to Eagle Rest of December 2010.

682 The plaintiffs no doubt raise that 2008 meeting, and then a subsequent 2010 (1 October) delivery of the notice of intention document, to show a foreseeability of end loss perspective. In other words, it is sought to contend Mr Baxter was put on notice by Mr Marsh by these events of financial loss that Mr Marsh might suffer in the future as an organic grower.

683 However, a 2008 transportation of canola seeds via rabbit droppings as between farming locations stands in some considerable contrast to what actually happened at the end of 2010 with windborne swathes. The 2008 conversation does not deliver, in my assessment, a proper basis upon

which to fashion a duty of care in Mr Baxter or, for that matter, the breach of the type of duty of reasonable care that the Marshes contend for. It is not possible to artificially manufacture a duty of care, where it would not otherwise arise.

684 It is true the law does not require a tortfeasor to precisely envisage the mode by which a loss is caused: see ***Hughes v Lord Advocate*** [1963] All ER 705; [1963] AC 837; ***Tame v NSW*** [203] (Gummow & Kirby JJ, citing ***Mount Isa Mines Ltd v Pusey*** (1970) 124 CLR 383, 390, 402 – 403, 413 – 414, and at [249] (Hayne J, citing ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424, 487 (Brennan J). See also ***Hardie Finance Corporation Pty Ltd v Ahern (No 3)*** [2010] WASC 403 [357] (Pritchard J). But here there is not enough similarity as between the facts of the two seed transference incidents in 2008 and 2010 to meet a reasonable foreseeability of the loss threshold in the present case. Furthermore, the legal terrain as regards showing the recoverability of even a wholly foreseeable economic loss sits currently in Australia as largely unwelcoming.

685 As I see it, an evaluation of the chosen swathing mode of harvesting of his GM canola crop is at the heart of the evaluation. Swathing necessarily involves exposing the standing windrowed cut canola plants to the elements, in order for the seed pods to ripen more uniformly. It is the plant's seed pods, containing small black seeds which, from a potential DNA transference perspective, pose only a longer term risk of GMO contamination. That was the risk some seeds might subsequently germinate in the soil at Eagle Rest, grow into volunteer GM canola plants, develop and then, by their exchanged pollen, cross fertilise with another compatible variety at Eagle Rest. But there was no such compatible species at Eagle Rest.

686 Although 245 swathes appear to have blown into Eagle Rest in late November/early December 2010, they would appear to have largely lain around and been left undisturbed, whilst they were inspected, reported upon and then plotted by Mr Marsh in April 2011. That was by reference to their individual GPS co-ordinates (see exhibit 10). Curiously, it appears to have taken Mr Marsh over four months, from between early December 2010 to some time in April 2011, to gather up and remove these swathes.

687 The intruding swathed GM canola plants were readily identifiable and capable of being removed by Mr Marsh as, indeed, they ultimately were in April 2011 (ts 193 - 194).

688 These canola swathes were all physically benign. They posed no health risk or a risk of any a GM genetic trait transfer to any species.

689 Insofar as paddocks 7, 8, 9, 10, and 13 of Eagle Rest were under pasture at the time and were being grazed by sheep, there was no risk of any GMO material damaging or tainting the wool or the meat of the sheep. Much less was there any transfer risk to sheep of genetically modified canola organisms (GMOs), even if parts of the swathed canola plants or their seeds were digested. The only risk was one of a possible later transference if the seeds passed through the sheep's digestive system, then later germinated as volunteer GM canola plants and flowered so the pollen could be exchanged with another plant species.

690 Insofar as Mr Marsh was then growing a rye and spelt crop upon paddock 12, these crops were for other reasons already sown and growing in a quarantined paddock. Hence, such crops could never have been sold by the Marshes as 'certified organic', in any event. Furthermore, there was nothing to suggest that any canola seeds which might have made their way into the harvested grain from Eagle Rest after December 2010 could not have been separated out and removed under a cleaning process.

691 Mr and Mrs Marsh were also growing a wheat crop in their central paddock 11. That crop was decertified by NCO, it appears, due to a presence of three GM canola swathes at the southern, uncropped (fence) area of that paddock.

692 Paddocks 1 - 6 in the north-east of Eagle Rest remained unaffected by swathes. Likewise, paddocks 8 and 9 (see again exhibit 10, last page).

693 There is no evidentiary suggestion that the seeds from any GM canola swathe that reached paddock 11 at Eagle Rest reached the wheat crop in that paddock, or had germinated in that paddock to produce a volunteer GM canola plant in that wheat crop before it was harvested by Mr Marsh.

694 Nevertheless, the Marshes lost their organic certification from NCO for paddocks 7 to 13, including for all the wheat that was subsequently harvested from paddock 11.

695 Decertification by NCO followed two onsite inspections by local NCO contractors. First, was the inspection by Ms Kathe Purvis on 4 December 2010. There ensued a subsequent inspection by Ms Clare Coleman on 21 December 2010. Both inspectors produced written reports which duly passed up the NCO chain of command.

696 From South Australia there followed a review of the Marshes' organic certification status by Ms Stephanie Goldfinch.

697 On the basis of Ms Purvis' first report, Ms Goldfinch on 10 December 2010 suspended paddocks 7 - 10, 12 and 13 of Eagle Rest, but not paddock 11. In cross-examination she said that she had initially omitted that paddock in error.

698 After receipt of the inspection report from Ms Clare Coleman and confirmation that a sample of canola swathes from Eagle Rest was indeed genetically modified (ie, RR canola), Ms Goldfinch then caused NCO to decertify paddocks 7 through 13 of Eagle Rest and all produce therefrom. The Marshes' sheep on Eagle Rest were already decertified due to their earlier drenching with chemicals by Mr Marsh to address parasite problems.

699 The NCO decertification decision presents as being grounded almost exclusively upon NASAA Standard 3.2.9 and hence the so-called 'unacceptable risk' of GM contamination.

700 In 2011, eight volunteer GM canola plants were detected by Mr Marsh on Eagle Rest. These were identified, and subsequently pulled out by him (ts 204).

701 There was no evidence of any subsequent germinations of GM canola plants upon Eagle Rest.

Private nuisance: harvesting by swathing

702 First, and as foreshadowed, I conclude that there was no unreasonable interference by Mr Baxter with the Marshes' enjoyment of Eagle Rest merely by his growing RR canola on Sevenoaks during 2010.

703 Merely growing GM canola in 2010 was not in any way causatively responsible for the airborne incursion of 245 canola swathes. Growing RR canola was merely an anterior historic fact.

704 By contrast, and as I have indicated, both in relation to the common law negligence cause of action and in respect of nuisance, it was the chosen harvesting methodology of swathing of the RR canola crop upon Sevenoaks which is the potentially problematic feature in Mr Baxter's farming of GM canola in 2010. That is where the proper focus of the Marshes' private nuisance case must be directed.

705 The more relevant question then is whether the swathing harvest methodology as was chosen by Mr Baxter was an unreasonable interference with the Eagle Rest paddocks on which Mr and Mrs Marsh to his knowledge conducted their organic farming operation?

706 Approaching this issue, what is required is, in the words of Lord Wright from ***Sedleigh-Denfield v O'Callaghan*** (as approved by the High Court of Australia in ***Elston v Dore***) is the striking of a balance between the right of Mr Baxter to commercially utilise his rural land against the rights of his neighbours, Mr and Mrs Marsh, not to be unreasonably interfered with (903) in their enjoyment and use of Eagle Rest.

707 Recognising that no 'precise or universal formula' could ever be set down, the broadly useful test as fashioned by Lord Wright as 1940, is what is reasonable, according to the ordinary usages of mankind living in society or, more correctly, in a particular society?

708 So I must turn then to the Kojonup farming district in 2010, where two neighbouring properties, one organic and one not, existed side by side, operating commercially as broad acre farms on either side of a 20.9 m road reserve. This is in the context of a district where broad acre farming operations were the norm, where the Marshes did not grow any canola and where organic farming, in 2010, was an isolated practice at best (the only other organic farming operation on the trial evidence being some 25 kilometres to the south at the property of Mr Grantley Marinoni).

Swathing and the private nuisance cause of action: Key underlying facts events

709 McLure P observed in ***Southern Properties*** at [118], that the evaluation as to whether there has been an unreasonable interference with another person's enjoyment of that land, requires many factors to be looked at. Her Honour said:

> 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.

710 The following factors persuade me together that there was no unreasonable interference with the Marshes' enjoyment of Eagle Rest in 2010.

711 First, there was no physical damage from the 245 swathes to persons, animals, land or chattels at Eagle Rest. The character of the damage contended for by the Marshes is purely financial, arising out of a private contractual relationship the Marshes voluntarily entered into with NCO/NASAA as an organic status certifying organisation.

712 Mr Baxter was not at all privy to those idiosyncratic contractual arrangements between the Marshes, NASAA and NCO. Of course, this factor, by itself, is not determinative. It is acknowledged that a cause of action can viably subsist in private nuisance, where the damage that is sustained is purely financial. Nevertheless, it is still important to identify the actual character of the claimed loss, as a part of my overall assessment. Physical damage to persons or property will carry different considerations.

713 Second, on the trial evidence Mr Baxter held legitimate agricultural reasons for swathing his GM canola crop as at October 2010. Mr Baxter said the swathing methodology assisted his weed control of problematic ryegrass in the Two Dams and Range paddocks. Again, this is not alone determinative. It is a part of the overall balancing equation, bearing in mind that the private nuisance tort does not require fault to necessarily be established against the defendant.

714 Third, swathing itself is not a novel or aberrant method for harvesting a canola crop. Indeed, on the trial evidence, swathing presents as generally the preferred method of harvest, albeit circumstances vary. Accordingly, Mr Baxter did not, by electing to swathe, engage in any conduct that was unique or aberrant, in a context of the 'ordinary usages' of broadacre farming in the Kojonup locale.

715 Fourth, Mr Baxter did not make any unilateral or uninformed decision to swathe his crops in 2010. Swathing was recommended by and supported by the opinion of a local Kojonup agronomist, Mr Chris Robinson. Mr Robinson knew that Mr Marsh ran an organic farming operation next-door at the Eagle Rest property. But on the evidence Mr Robinson was not aware of Mr Marsh's 1 October 2010 notice of intention to take legal action document that Mr Marsh delivered to Mr Baxter at the end of September 2010. During cross-examination Mr Robinson accepted that his advice to Mr Baxter about swathing might have been different had he been told. How it would have differed was not fully explored.

716 In the circumstances, one cannot say more than that different swathing advice from Mr Robinson would, in all probability, have been consistent with what was contained in his employer's (Farmanco) publication issued in March 2010: see Farmanco Facts, Vol 30, issue 2. This document was tendered as exhibit 31 (see pages 6 and 10, as regards suggested monitoring of paddocks for volunteers). It further refers to a need to discuss 'management options' for this scenario and the possibility of strong winds moving swathes into your own and your neighbour's paddocks. It continues on to say that this 'is unlikely to affect the status of any non-GM canola crops, but you should be aware of this happening and monitor access routes'. This is hardly to tell growers of GM canola they should not harvest by swathing, or even that they should not swathe in a border paddock adjoining a road.

717 Fifth, an airborne GM canola swathe incursion emanating from the windrows of Sevenoaks was not, I conclude, reasonably anticipated or expected by Mr Baxter in November 2010. What occurred was the wholly unexpected series of events by force of the strong winds at the time, rather than any implementation of deliberate conduct to release canola swathes into Eagle Rest. Mr Baxter as a commercial farmer would hardly be happy about his losing a part of that year's canola crop as the result of such adverse wind events.

718 Sixth, there was a certain measure of first time novelty in the swathe incursion events of 2010, regarding the escape of 245 GM canola swathes on the wind from Sevenoaks into Eagle Rest. Mr Baxter had neither grown GM canola nor swathed a canola crop before. The communicated grievance by Mr Marsh in November 2008 related to a wholly different mode of transfer of canola seed, namely via rabbits, that being the transfer explanation which Mr Marsh had offered in February 2010 to Minister Redman (see TB Vol 1, pages 211 and 215).

719 In terms of assessing what was objectively reasonable as a first time swathing event, there is no indication that the cutting and pushing of cut GM canola plants into windrows was carried out in any way other than professionally by Mr Baxter's relevant swathing contractor.

720 Seventh, when Mr Marsh delivered to Mr Baxter his notice of intention to take legal action document on 1 October 2010 (TB Vol 1, page 246), Mr Baxter's GM canola crop was already up and well out of the ground, at about the flowering stage. There was never any prospect in early October 2010 of Mr Baxter not growing GM canola in 2010. He already had. Interestingly, in that context, the pro forma notice document

Mr Marsh had delivered only mentions swathing once, and even then only in a very broad context, as one of the things that could potentially be done with a crop. There was not seen in that notice any demand, or request, that a canola harvest method by swathing not be conducted upon any GM canola growing within Sevenoaks or within any stipulated linear distance of the western boundary of the Eagle Rest paddocks.

721 Eighth, the expert evidence at this trial from the Marshes' own expert, Professor Van Acker, was that there has been little research done in terms of separation distances as between segregated canola crops. So, in circumstances where little, if any, evidence existed (even viewing the separation issue at an international perspective) it is significant that there was not in 2010 any recommended swathing buffer distance suggested for GM canola grown in a boundary paddock put before farmers for the 2010 growing season. Indeed, even after this very incident at Kojonup, which had widespread publicity, a recommendation in a May 2011 publication from the DAFWA (TB Vol 1, page 285 - 288, and which is not in evidence for the truth of its content) only says, in bland terms, that:

> • Plant material - consider prevailing winds avoiding cultivation of GM canola in areas subject to wind events which might transfer GM material on to adjacent properties.
>
> • Avoid swathing in boundary paddocks; if you must swathe a boundary paddock leave a buffer of standing crop along your boundary fence.

722 There is nothing discernible even in that 2011 note identifying any safe or reliable recommended linear buffer distance to be implemented to reasonably inhibit a strong wind movement of a cut canola swathes from windrows.

723 The 2011 note, however, does make an extra point, concerning a need to consider prevailing winds (although that would not cater for a storm event). Significantly, in the present case, no evidence was put before me about the state of the seasonally prevailing winds at Kojonup generally or, in particular, about likely prevailing winds around November and December each year as crops in the district are being harvested at the end of the growing season.

724 The NCO inspection reports and contemporaneous communications of December 2010 speak of strong southerly winds. Mr Baxter's evidence was somewhat to the contrary, concerning his own observations of 'northerly' or north-westerly winds, in this period (see exhibit 26A, pars 68 and 69(4)). There is a deficiency in the overall

evidence in respect of the likely strengths of the prevailing winds at the relevant time. This arena was not explored. Hence I am not able to reach a finding about the actual prevailing wind directions or what would be an unusual wind event at this time, given the state of the evidence.

725 If strong winds were blowing from the south to the north, then by reference to exhibit 6 and the respective positions of the two properties, it is a little difficult to see how many canola swathes would have blown from the Two Dams paddock into Eagle Rest. More likely, the problematic swathes would have been blown, on strong southerly winds, northward from the Range paddock to Eagle Rest.

726 The plaintiffs before, and throughout the course of the trial, fluctuated over identifying the precise dimensions of an appropriate buffer distance between the boundary paddocks of Sevenoaks and Eagle Rest. At one point they sought under their proposed injunction distance, a buffer distance of 2.5 km (at the outset of an unsuccessful application for an interlocutory injunction in April 2013). That distance then truncated on the argument of that application down to 1.1 km. But that was subsequently followed by the seeking of cascading (downwards) different buffer distances (of between 2 km and 1.1 km). This altered again to a buffer distance of just 1 km shortly after lunch on day one of the trial. Finally, as the plaintiffs' senior counsel ended the closing submissions on the last day of trial (see ts 1131 - 1132) the advocated terms of the injunction now changed to eschew specifying any linear distance. At the end, a non-linear formulation was adopted as regards the Marshes seeking a permanent prohibition against the swathing of GM canola in Mr Baxter's Sevenoaks boundary paddocks.

727 Fluctuations by the plaintiffs over buffer zone distances, as regards inhibiting swathing on Sevenoaks carry, on my assessment, a revealing insight for my required overall evaluation concerning what was, or was not, reasonable conduct by Mr Baxter in November 2010 as regards his swathing harvest methods. More than three years after the 2010 incident, the plaintiffs plainly struggle to identify and to set down any fixed linear buffer distance. They finally reach a point where in the last breath of trial the they seek a permanent injunction against swathing of GM canola in the (eastern) boundary paddocks of Sevenoaks.

728 The fluctuations betray just how difficult it is in practice for the plaintiffs to delineate precisely an appropriate and reliable protective buffer zone distance, as regards inhibiting the neighbouring activity of swathing a GM canola crop on Sevenoaks.

729 The factors in aggregate lead me to an ultimate position that there was no unreasonable interference by Mr Baxter with the Marshes' enjoyment of Eagle Rest, by reason of the swathing of GM canola leading to the incursion of GM canola swathes onto Eagle Rest in late November/early December 2010.

730 Had the underlying facts been different, by an incursion of a physically dangerous substance such as, for instance, burning embers, or a pesticide or herbicide, thereby causing physical damage, the nuisance evaluation would, of course, be quite different. But here my evaluation concerns only the incursion of a wholly benign substance in a physical sense.

731 In relation to the view about an adequate protective distance between his GM canola crops in the boundary paddocks and Eagle Rest, Mr Baxter noted that he had informed Mr Marsh at a March 2010 busy bee of his intention to grow GM canola in those paddocks. Furthermore, Mr Baxter had by reference to a 5-metre gap left between the Sevenoaks eastern boundary and his GM canola crops complied with the terms of his Monsanto licence. There was also the almost 20.9 m road reserve gap between the fences of the two properties (a separation distance with the road reserve of almost 25 m from the GM crop to the boundary (western) fences of Eagle Rest. Coupled with this is the fact Mr Baxter mentioned the protective character of trees (seen in exhibit 6) growing on the edges of both properties - in terms of protecting any airborne incursion. No airborne incursion of canola plants on Eagle Rest had happened previously.

732 These were all relevant factors, properly considered, particularly in a first-time GM cropping and harvest situation as regards the swathing of GM canola on Sevenoaks.

Nuisance and NASAA/NCO

733 I would reach a conclusion that there was no unreasonable interference with the use and enjoyment by the Marshes of Eagle Rest by Mr Baxter's 2010 swathing, irrespective of any further consideration of the conduct of NASAA/NCO under the contractual arrangements with the Marshes.

734 Independently, however, I am of the view (and bearing in mind that NCO are not parties to this litigation) that NCO looks to have acted well beyond the scope of its contractual rights with the Marshes in decertifying 70% of Eagle Rest (paddocks 7 to 13) on 29 December 2010.

735 The NASAA standards may have supported a suspension of Eagle Rest's certification for a short time, whilst the GM canola seed and any subsequent volunteer plant germination scenario was monitored. A suspension might have led to the Eagle Rest wheat crop (in paddock 11) being denied organic certification whilst it was tested for the presence of GM material. Organic certification for the Eagle Rest paddock 12 rye and spelt crops was problematic in any event.

736 By reference to exhibit 10 there appear to have only ever been three canola swathes detected in paddock 11, and then not in the wheat crop itself. By the end of 2011 there were only eight GM canola volunteers detected on Eagle Rest (which were duly pulled out).

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

738 Any possibility of volunteer GM canola plants growing in 2012 or 2013 could have been monitored by NCO and addressed either by pulling them out before they set seed, or cleaning of the harvested grain (be it oats, wheat, spelt or rye).

739 That is no criticism of the NASAA standards. Rather, it is my concern as to their misapplication by NCO officials who appear to have been overawed by the December 2010 incident and applied zero tolerance rather than the terms of the NASAA standards as written. The Marshes would be better served directing their concerns in that contractual quarter as regards the economic loss sustained.

740 That is a further and independent factor supporting Mr Baxter, in my view, in a private nuisance evaluation towards the reasonableness of what occurred as regards the two properties.

Common law negligence action also fails

741 I have already said, the common law duty of care as contended for by the Marshes under par 35 of the ASOC is conceptually misconceived and cannot be made out, This is for many reasons. Not the least is, in a wholly novel case, the absence of a duty of care to avoid a foreseeable economic loss. Nor do I find any degree of vulnerability as arising from the contract the Marshes entered into with NCO/NASAA and under which they appear to have been wrongly denied their contractual right by NCO to use the label 'NASAA Certified Organic' on their Eagle Rest produce.

If there was contractual vulnerability in the Marshes to NCO, then from a ***Perre v Apand*** duty analysis perspective, I assess that as an ineligible vulnerability from a duty of care analysis perspective. This is because the exposure of the Marshes to NCO was wholly self-initiated by entering into the terms of such a contract.

742 Moreover, if I had found some lesser level of duty of care in Mr Baxter, say, to take reasonable measures to inhibit the movement by wind of GM canola from a boundary paddock of Sevenoaks, I still would not have found that more truncated duty to have been breached by Mr Baxter. The December 2010 incident was, as I assess it, an unexpected first-time event and that an escape of GM canola to Eagle Rest was, in a non-specific and very general fashion, spoken of by Mr Marsh in November 2008, is not enough. For reasons canvassed under my private nuisance evaluation, I am not satisfied that in 2010 Mr Baxter breached any (lesser) duty of reasonable care as regards his swathing activities given the following:

(i) the state of (ie, lack of) knowledge about prior escape events;

(ii) the considerable thought given by Mr Baxter to the protective work of the 5 m buffer to his eastern boundary fences (in Range and Two Dams), the 20.9 m road reserve and the buffer work of the trees on either side of the road reserve;

(iii) I do not have any or any sufficient evidence about whether the wind events of November 2010 were unusual in the Kojonup district at that time of the year; and

(iv) s 5B of the *Civil Liability Act* applies to deliver this negative outcome as regards a breach analysis.

743 Finally, in the negligence context, I am not satisfied that the swathing harvest methodology used for Two Dams and Range paddocks in 2010 factually **caused** this economic loss under any tests of the common law, or by the second limb (legal causation) s 5C of the *CLA*. The legal cause of the economic loss was the work of NCO in unreasonably (erroneously, it presents) applying NAASA Standard 3.2.9.

744 The Marshes' negligence action fails as well for all these reasons.

Conclusion: Injunction

745 Shortly after lunch on day one of the trial the plaintiffs, through senior counsel, handed up a minute of the proposed terms of a permanent

injunction sought in respect of an abatement of the nuisance (see ts 99). That minute sought relief in terms:

> 1. The defendant be permanently restrained from planting genetically modified canola on his land (Sevenoaks), within 1 km of the plaintiffs' land, which is located in Kojonup in the State of Western Australia (Eagle Rest).
>
> 2. The defendant be permanently restrained from swathing any genetically modified canola which is planted on Sevenoaks within 1 kilometre of Eagle Rest.

746 Formulation of the terms of a perpetual injunction by reference to a segregation distance of 1 km was a significant forensic feature of this trial. The 1 km distance governed not simply a permanent restraint as then sought as against 'planting' (par 1), but also as against swathing (par 2).

747 An injunction is a remedy of equity. It is well established equity may assist the common law within its auxiliary jurisdiction (see Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, 2002) 708 - 714). However, unlike the remedy of common law damages, equitable relief lies at the discretion of the court. The discretion associated with a claim for equitable relief by way of injunction is exercised in accord with principles established in prior cases (see Spry ICF, *The Principles of Equitable Remedies: Specific Performance Injunctions, Rectification and Equitable Damages* (9th ed, 2014)).

748 Just before the conclusion of senior counsel for the plaintiffs' closing submissions on the afternoon of the last day (day 11) of the trial, senior counsel advised that the plaintiffs were (again) amending the terms of the permanent injunction sought now to (supposedly) 'narrow' its scope.

749 The revised permanent injunction then proposed was now directed solely against the activity of swathing and the former 1 km restraint distance was no longer in play. The terms of the revised permanent injunction (see ts 1131) now sought to restrain swathing of GM canola in the paddocks of Sevenoaks that abut the western boundary of Eagle Rest. I refer to this exchange with senior counsel for the plaintiffs.

> NIALL, MR: And your Honour has dealt with - and heard submissions on the question of damages. And we have, with respect, both reviewed the evidence and the interaction between your Honour's - my learned friend's submissions on the injunction. Now, in our submission, the evidence shows that were Mr Baxter to swathe on paddocks that are adjacent to the road that separates them, your Honour can be comfortably satisfied that

> there's a risk that he will, and he has certain not indicated that he won't, swathe those paddocks at some point of his rotation.
>
> NIALL, MR: And when that happens, there is an imminent risk that there will be an unreasonable interference, and a nuisance on the Marsh property, which would justify, at this point, an injunction in joining the defendant from swathing on the paddocks that are adjacent to the road of South Glenorchy Road. Now, that's narrower than three weeks ago, when it was, when I opened in the afternoon. And - - -
>
> KENNETH MARTIN J: Well, it's narrower - let me just get the dimensions of narrowing.
>
> NIALL, MR: It doesn't deal with planting.
>
> KENNETH MARTIN J: It doesn't deal with growing or planting.

750 As seen, the terms of the as finalised perpetual injunction would seek to restrain only the swathing of GM canola on the eastern paddocks of Sevenoaks.

751 The linear dimensions of the area of permanent restraint as sought by the plaintiffs had shrunk considerably in the period prior to trial. By my trial directions earlier made, the plaintiff filed a minute of permanent injunction in wider terms on 24 August 2012. That minute sought permanent restraints against planting GM canola against Mr Baxter on the cascading descent basis of within 2 km, alternatively 1.5 km, alternatively 1.1 km of Eagle Rest. A permanent restraint was also sought against swathing on an unlimited basis but, in the alternative (see proposed order 3) it was sought that Mr Baxter be permanently restrained from swathing GM canola on Sevenoaks on the same alternative descending basis ranging between 2 km to 1.1 km.

752 A second observation I render, beyond the shrinking character of a permanently proposed buffer zone of restraint, is that in this trial the plaintiffs led no expert evidence concerning any underlying empirical basis for buffer zone restraints at any distance from Eagle Rest vis-à-vis Mr Baxter. That was notwithstanding that I had observed during the course of resolving an interlocutory injunction application unsuccessfully sought by Mr Marsh in April 2013, see ***Marsh v Baxter*** [2013] WASC 209 [3], that the plaintiffs were awaiting a further expert report from a Dr Snow which evidence would ' … apparently go to the question of safe distances and suitable buffer zones as between distinct cropping or grazing operations': see also [20].

753 In circumstances where a court is asked to exercise a discretion to grant permanent injunctive relief, the absence of an empirical basis to support any buffer distance sought (in perpetuity) is a negative consideration of some moment.

Conclusion

754 In the circumstances, the Marsh's action for damages and a permanent injunction against Mr Baxter, must fail.

755 Upon the publication of these reasons, I propose to make, when moved, an order to that effect.

756 As to associated issues of legal costs, the standard rule is that the successful party in the contested litigation should receive its taxed legal costs paid by the losing party. Prima facie then, that is the order as to legal costs which presents as being appropriate in the present outcome. However, I shall hear the parties as to their respective costs positions if that is desired or in case special costs orders are sought. I would propose to hear the parties as to costs on the papers, upon the basis of the parties sequentially filed written submissions and affidavit materials (if necessary).

757 As the successful party in the litigation I would propose that the defendant, Mr Baxter, by his solicitors file and serve upon the plaintiff's solicitors within 21 days of today, a minute of proposed orders as to costs supported by written submissions (not to exceed 10 pages) and with any supplementary affidavit materials relied upon. It of course goes without saying that the parties should confer through their solicitors concerning such orders.

758 I would afford to the plaintiff through their solicitors a similar period of 21 days after the receipt of the defendant's costs materials to respond with any submissions or answering affidavit materials, concerning a different costs outcome.

759 I would thereafter propose to resolve any residual outstanding costs issues as between the parties, on the papers, without a further hearing, on the basis of the submitted materials. The parties of course have liberty to make a submission seeking an oral hearing, should that be considered necessary.

761 Accordingly, the orders today in light of these published reasons will be that:

(a) the plaintiff's action is dismissed; and

(b) all issues as to costs are reserved.