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THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1561 of 2012

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

KENNETH MARTIN J

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 14 FEBRUARY 2014, AT 10.31 AM

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

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

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

KENNETH MARTIN J: Yes. Before you start, I just want to say on the record, I'm apologising if anyone was inconvenienced. I did say we were starting at half past 9 this morning. Subsequently, last night, events transpired which made that impractical in terms of video linkups. We did try and tell everybody we could about that, but if anybody got here at the wrong time then I'm sorry that that happened. All right. Now, Ms Cahill.

GORE, DIANE LYNETTE:

CAHILL, MS: Thank you, your Honour. Ms Gore, do you still have that volume 2 there? If you could open it up. We were at page 419 yesterday afternoon. Now, this was your review report of 30 March 2012; you remember we were talking about that yesterday?---Yes.

And do you remember just before we ended, I was asking you about that "not for publication" section at the bottom? And if you could go back there please, and I would just like to ask you a couple of questions about the contents that's in there. Those words were inserted there by you, were they?---Yes, I would think so.

Now, the first one, questions - first line - these are your questions, are they?---I'm not sure. I can't remember whether they were coming from the Marshes, from - from the inspector, or just a combination of - - -

All right?--- - - - of things that we were thinking about at that time.

All right. Is it possible that they were your questions to the OAB?---It is possible.

But it's - is it equally possible that it might be the Marshes' or the inspector's questions to you that you were answering?---It's quite likely that it will be my thoughts
- - -

I see?--- - - - as I was reviewing.

So can we look at that first one. "NOS" is a reference to the NASAA standard, isn't it?---Yes. Yes, it is.

3.2.8, that's the provision of the standard that you took me to yesterday, in the national standard?---Yes.

The five year rule - - -?---Yes.

- - - as we were calling it shorthand?---Yes.

Continuing:

Will the land be certifiable after five years from the date of contamination, 30 November 2010, or will it be five years after no GM positive canola is found?

That's the question. Was that a question in your mind at the time, or did you have a view about which - how the rule operated or the standard?---No. I had no view.

So was it a question in your mind as to - - -?---Yes.

- - - how long the five years - - -?---Yes.

- - - well, sorry, from when the five years would run?---Yes.

And is that something that you asked the OAB about?---I don't remember.

Now, the answer here:

This is yet to be decided, but not likely to require the five years, depending on trait RUR test result records and the management of the land in the meantime.

Is that a view you had formed at the time?---I would think it was. Yes.

That the five year rule might not apply?---That it may not apply. Only because it wasn't a deliberate planting.

Right. Now, I thought you said yesterday that it did apply?---Well, I mean, it's - the - the standards are not clear on accidental contamination of GM.

I see?---It's very clear if it's deliberate - - -

All right. So you were saying - - -?--- - - - exposure.

So then, did you have a decision to make at this time about - - -?---No.

- - - whether to re-certify or not?---No.

And - - -?---Because the timeframe was nowhere near it.

I see.

KENNETH MARTIN J: When you say "yet to be decided", decided by whom? You, or someone else?---It probably would have been a combination and more of, probably, from the organic advisory board - NASAAs, because they are the ones who interpret the standards for the certification officers.

KENNETH MARTIN J: Thank you.

CAHILL, MS: Yes. So, just coming back to the evidence that you gave just before his Honour asked that question, I think you said words something like, "There was no recertification decision to make at this stage because it was nowhere near the time yet." Was that - - -?---That
- - -

Yes?---That's right. I mean, this is only 12 months since the event.

So did you have in your mind that it was - the timeframe was a choice between three years or five years at this stage?---Not - no, not necessarily. No.

Right. But it had to be more than 12 months?---Absolutely.

And when you say "absolutely", on what - what was - what's the basis for you saying that? What are you referring to in terms of the standards that there had to be - that you couldn't recertify in less than 12 months?---Whenever there is a contamination issue, there is - can be no change within the 12 months, at least - - -

All right?--- - - - depending on results and depending on circumstances.

And are you referring to a standard when you - you give that answer?---Yes. It's probably in the NASAA standard and national standard.

All right. Well - - -?---Yes.

- - - can we go to those?---Yes, sure.

That's volume 5 again. And if we start with the NASAA standard.

KENNETH MARTIN J: It's 1293 of volume 5.

CAHILL, MS: Sorry. Yes. 1293.

THE WITNESS: So when something like this happens, or an overspray, or anything like that, the first 12 months are basically taking someone back to a non-certified level. After 12 months, if test results are clear or whatever, then they can move into what is called "in-conversion" status.

CAHILL, MS: I see. So - - -?---And then that would last for the next two years before they would be - we would consider upgrading to organic. But - - -

I understand. But - - -?---Yes.

- - - if you could just point me to the standard which says that you can't - well, the effect of which is that you're not able to recertify in less than 12 months?---Well, I - it - I mean, because it's contamination - - -

Yes?--- - - - you're going back to the start, so you go back to 2.1.

All right. So this is - so - - -?---And 2.2 talks about going through to the in-conversion level.

I see. SO is the position this then, Ms Gore: that where there's an event of what you've described as contamination; that might be an overspray - - -?---Yes.

- - - of chemical, it might be the application of a substance that's not permitted by the organic operator themselves - - -?---Yes.

- - - then - or, in this case, the presence of GMO on the land, the land is no longer organic and that operator must, in respect of that land, start again in terms of their application for certification?---They don't have to reapply because they're already in the system, but their certification status changes.

Well, they have to begin again in terms of status, don't they? They are treated as if they - - -?---Well, that particular parcel of land, for instance.

Yes?---Yes.

But all of the pre-certification requirements are imposed again in terms of regaining certification status for that piece of land?---That's right. So that means that although they are classed as conventional, they still have to farm

according to the - or treat that land according to the standards.

All right. So could you just point me then, please, to the standard that talks about the 12 months. Is that 2.1.1?---Yes. Yes.

I see. And the three year rule, where does that come in?---Well, 2.3.1 talks about - there has got to be demonstrated compliance for minimum of three years.

I see.

KENNETH MARTIN J: Sorry. What was that?---2.3.1.

CAHILL, MS: Is that under general - - -

KENNETH MARTIN J: Standard.

CAHILL, MS: Sorry, no, 2.3.1, the standard. So having regard to that then, this answer, this is yet to be decided back at page 419 of volume 2?---Yes.

I think your evidence to his Honour was that that was likely to be a decision made by the Organic Advisory Board?---Yes. Yes. That's right.

And - - -?---And/or the certification manager together with them.

Who was be Mr Ayachit at this stage?---At that point, I don't think he was there yet.

The person who had the role before him?---Yes.

I see?---That's right. Deana.

Now, given the two standards that you have just directed me to, was it your position then that there could be no - certainly no recertification within 12 months. It was possible that it could be three years or five years that would also be - that could be the alternative minimum requirements before recertification could arise?---Considering that it is in clear in the NASAA standard and the National Standard that it's five years.

Yes?---Then, you know, to be less than five would be an exception to those standards.

All right. Now, so - - -?---But it's all in consideration because it wasn't a deliberate planting and that's why it was still a little unclear.

Well, can I just pause there. The five year rule, you have pointed to the 12 months and the three years under the NASAA standard and is the five year rule just - under the NASAA standard is the only standard you refer to there 3.2.8, that you took me to yesterday, or is there another standard from the NASAA standard that talks about a minimum five year period?---No, I think that under the GM section there, 3.2, is where that talks about five years for GM.

Now, can we just go to the national standard and will you tell me where those standard apply there. National standards starts at page 1408 in volume 5?---3.3.4.

What page is that?---1422.

So 3.3.4?---Mm.

Thank you. That's the five year rule?---Mm.

And the 12 months and three years, can you - - -?---That's just a general certification that applies. So that's covered under 3.2 conversion of the land.

I see?---So 3.2.1 talks about during the first year and that's the same as the precertification year and then 3.2.2, from the second year, produce may be labelled as in conversion.

I see. So where does the three year rule come in here?---Well, it says - - -

Is that at 3.2.3?---For under the general principles, it says the farming system must operate under the standard for a specified period of three years. It talks about that. And a precert is the first 12 months. In conversion status may be longer than two years if the certifying body needs it to be. So maybe the farmer doesn't have their systems happening or their inputs are still not compatible or whatever it is. So their in conversion years may be longer than two - two years. But here it says that at least three years, it has got to be compliant to the standard.

Now, just in terms of your comment about the uncertainty around accidental presence, the evidence that you have just given about the requirement for minimum periods of 12 months, three years, five years, was it your understanding that the - of your review in March 2012, that those

standards were clear insofar as they applied to an operator actually using or placing GMO material on their land themselves or using chemicals themselves, so something that had occurred through their own actions?---I think the standards are always an evolving document and I just - we felt like it hadn't - it didn't have something there to cope with coming in from a neighbour, sort of like that.

Yes. I will get to that in a moment. I am just exploring the - - -?---So - I mean, that's what the standard says, five years, so there's no exceptions available there, no derogations, it says five years.

Yes. But is your evidence this - it's clear in its application where it's the operator themselves who has introduced the contamination?---That's what it talks about in the standard.

Or is responsible for the incursion?---Mm.

But is your evidence on your understanding the standards weren't so clear at that point as to whether those provisions applied, where the incursion was accidental?---And that's why we were referring or deferring decisions to the AOB4 interpretation of the standards.

I see. But, nevertheless, at this point, there was, as far as you understood, no ability on your part to recertify any part of the land that had been decertified. Is that right?---That's - that's correct.

And is that because of the guidance you got from the OAB at that time?---Because this was only the 12 month period following, there was no - it was no - it was very clear that it couldn't be.

All right. So - - -

KENNETH MARTIN J: So just for clarity, we are talking October 2000 and - - -?---11.

- - - 11 as regards a decertification of December 2010?---Mm.

And therefore you are still less than a 12 month window and therefore the matter is not open for any exercise of discretion on your understanding of the principles and the standards?---Mm.

All right.

CAHILL, MS: So, Ms Gore, is this the position, that your understanding of the standards at the time was that whether it was accidental presence or whether it was something within the control of the operator, within a minimum period of 12 months, there could be no recertification?---That's correct.

And you were well aware that the incursion happened as his Honour has identified in late November, early December 2010?---That's right.

But your review decision, or your review report here, was not prepared until 30 March 2012, was it?---Mm.

Which was a period of more than 12 months since the incursion?---There can be no change in the status unless you have a physical inspection, so he had his annual inspection in that October.

I see?---So we would be waiting until the next one - - -

All right?--- - - - before any change could be made.

I see. So all you can do is rely upon the status as reported within the 12 month period. You have no new information outside of that 12 period so there is, in effect, no decision for you to make?---That's right.

Thank you. Now, if you could come back to volume 2, I just asked you about the not for publication sections - the material there about standard 3.2.8. It then says - standard 3.2.9, that's the one about unacceptable risk of contamination, isn't it?---Mm.

The one that talks about that. And if we go over the page to 420:

Sheep, can progeny be organic? If ewes managed to national standard for last trimester? Yes, I would say so. DJ.

?---Mm.

Are you able to translate that for us?---Sure. If the mothers have lost their organic status but then they are managed according to the standard and they are on organic land, progeny, and that's the last three months - the last - well, not three months, the last trimester of the gestation for the lamb, if they are managed, according to the standards, on organic land then the - those lambs could be - or would be eligible to be certified organic.

So it wouldn't have mattered if the ewes had up to, but not beyond the last trimester, eaten GM canola - - -?---Mmm.

- - - as long as they were put on certified land and fed only organic food - organic diet in that last trimester; the lambs would be certified organic?---The lambs, not - not the ewes.

Yes. I'm not suggesting the - - -?---Yes. That's right.

- - - lambs - the ewes - - -?---The ewes. Yes.

- - - just the progeny?---Yes.

And who - do you know who DJ is?---Well, that's Deana Jemrebel.

The person who had Mr Ayachit's job before him?---Yes. That's right.

And was it that you had an inquiry about the progeny and she answered it, or for you?---I can't remember how that came in.

Or it may have been the Marshes?---It might have been - it wasn't in the inspection report; I would have to look back, but it's - yes - obviously a question that has come in.

All right. But, in any event, she was the person who answered the question?---Yes.

Thank you. And then when we go down the page, do you see, a third of the way down, there's a series, in smaller type, of emails?---Mmm.

Did you include those emails in the report?---Yes. I would have just copied them.

And is that because you - it's useful information to include as a matter of record?---Well, it is, and it's, you know, relevant to this review. So - - -

I see?---Just so that it's all in one place.

I see. Now, if you - can you see the second email, with the date 11 October 2011?---Mmm.

What you've done there is inserted a copy of an email from Mr Marsh to you, where he has asked if NASAA could be clear

as to how long they will be decertified, so that they can formulate a claim for loss. And you were aware at this time that he was anticipating the commencement of legal proceedings against his neighbour?---Probably. Yes.

And that he needed that information for that claim. Would you agree?---Yes.

And that was an inquiry - it includes here in the last sentence:

Will our situation come under standard 3.2.8 -

That's the five year rule -

as the GM canola is growing on Eagle Rest, or another germinating for many years according -

Sorry -

or another standard.

Is that where the inquiry about - of the OAB about the five year rule came about?---I would think so. Yes.

And if we go down the page, they reference to a 29 September 2011 email from David Silkstone. He's the communications manager at NASAA?---Yes, he was.

Is he the chap who was responsible for media releases and that sort of thing?---Yes, he was.

Dealing with the media?---Yes. I think - yes, I believe so.

And that was an email, was it, from Mr Silkstone to Jan Denham?---Yes.

And he has forwarded an email, which you've included in here, from Mr Marsh to Mr Silkstone, is that right?---Mmm.

And if we go over the page, that's the email there?---Mmm.

And why did you include that email in the review?---As I said, I just felt it would be handy to have them all together in the one place - the emails onto the review sheet, just for the relevant things that were being thought about - discussed.

Did you think it relevant to the review, this email?---No. Not really, I don't think, because they were just - it's

sort of the - the future of when it would be recertified, which was not what I was considering at that point.

All right. Now, if you're at page 421 and you just look at the top of this email, and Mr Marsh is mentioning the litigation. And in the next paragraph, he says:

Since December last year, I have been working with my lawyer, Richard Huston, to prepare the case. I could not have achieved what has been done so far without your continued support and the fundraising efforts of NASAA WA, and the group behind the Steve Marsh benefit fund.

Were you aware of the continued support that David Silkstone or NASAA was providing Mr Marsh at this stage?---Not - - -

NIALL, MR: I object to the question. The premise of the question, having read that, was that Mr Silkstone and NASAA were supporting the position of Mr Marsh, and, in my submission, it's not established by the evidence.

KENNETH MARTIN J: So you say the question proceeds on a false premise by reference to that document?

NIALL, MR: It does, your Honour.

KENNETH MARTIN J: What do you say?

CAHILL, MS: Are you aware of any support - - -

KENNETH MARTIN J: So you're re-phrasing it?

CAHILL, MS: Yes. Are you - were you aware at this time of any support that Mr Silkstone or NASAA generally, was providing to Mr Marsh?---I wasn't aware of what - what was - what was being done, no.

All right. Now, can we go to your witness statement, if you still have it, Ms Gore. And can you go to paragraph 11, please, on page 3. Now, you say there in the first two lines that you formed the view that it was not appropriate to recertify the paddocks that had been decertified in 2010:

The factors that indicated to me it was not yet appropriate to recertify were as follows -

Your evidence is actually slightly different from that, isn't it? Your position is that you couldn't have

recertified at this time, because the last inspection report was less than 12 months after the incursion?---Mmm.

So it's not that it wasn't appropriate; it was that you couldn't. Is that right?---That's right.

And where you say at 11(a), when you're identifying factors that indicated to you that it was not yet appropriate to recertify, the contamination had occurred only about a year earlier. But that's not quite right, is it? At the date of your report, which was March 2012, the contamination had occurred over a year before - a year and three months?---Yes. But we - we work to the inspection date.

Yes. I understand. But your point is this, isn't it, that the report - the last report was within that 12 month period, and it was because of that that you could not recertify?---Mm.

Yes. And you say in 11(b) that a factor that indicated to you that it was not yet appropriate to recertify was that the 2010 contamination was extensive. But that's not in fact correct, is it? It was irrelevant how extensive or not the contamination was; the fact was it had been decertified in 2010, and the latest inspection report you had was within the 12 month period?---But that point isn't - is not not irrelevant. I mean, it is - it's - - -

Well, Ms Gore, you just - - -?--- - - - a factor.

You just told me that you had no ability to recertify, isn't that so?---Yes.

Because the last inspection report was within the 12 month period?---Yes.

So it didn't matter how the property had been decertified, what the extent of the contamination was; because it had been decertified and there was no inspection report after the 12 month period, you could not recertify, whatever the condition of the property, whatever the extent of the contamination in the first instance. Isn't that so?---That's so.

Thank you. And when we go to (c):

Some canola plants -

This was a factor that you say was not yet appropriate - that indicated to you it was not yet appropriate to recertify. You say:

Some canola plants had germinated at the time of the 2011 inspection, and those tested were found to be GM.

Do you recall how many canola plants had germinated?---No, not - I don't now.

There were nine?---Mmm.

You say that that was a factor that was - - -?---That was nine that were seen.

Yes, and what's your point, that there might have been more?---Maybe.

And if there were more, that would be justification for not recertifying?---It's just a consideration. I mean, because I was dealing with it in that first 12 months that was not certifiable but these were points that was relevant as well. It's - - -

Well, how are they relevant if it wasn't certifiable, Ms Gore?---I think they're just observations about - - -

They're observations, I see. So the property wasn't certifiable at March 2012 because you didn't have an inspection report post-dated early December 2010, the date of the incursion. Is that right?---We had the 2011 report.

That was within the 12 month period. You needed a report that came - I might have misstated the date, I'm sorry?---Yes.

You needed a report that was dated 1 December 2011 or later, didn't you?---For there to be any hope of recertification you're saying?

Indeed. That's the position, isn't it?---Well, when you consider that the best that could have come if the five years were disregarded, maybe, but - - -

But you weren't in a - - -?--- - - - we still had the five years to consider.

You weren't in a position to disregard the five years at this stage because the OAB had said that the minimum period was yet to be determined, wasn't it?---Mmm.

Is that right?---Mmm.

You just need to say yes or no for the - - -?---Yes, yes.

- - - transcript?---Sorry.

So there was no potential at all for you to recertify at this time. The factors that you have identified at (a) to (e) were simply observations that you made at the time?---That's right.

And one observation that you made was that the 2010 contamination according to the reports was extensive?---Yes.

And do you say that when you read those 2010 reports they allowed you to form an understanding of the concentration of swathes across the land that had been decertified? So where there were more swathes, where there were only a few?---Yes, to some extent, yes.

To some extent?---And they also had a map showing where they were.

They had a map?---I'm sure there was a map submitted.

KENNETH MARTIN J: So when you say they had a map, who do you mean is they?---Well, the operators had sent in a map with the inspection report.

That had found its way to - - -?---That's the Marshes.

- - - your files. Is that what you say?---Yes, yes.

CAHILL, MS: If you just bear with me a moment, please. Is that a map at - there's a map that the inspector produced at 328. Is that one that you're referring to?---Yes, I don't particularly remember it.

You would accept that that doesn't show you the concentration of swathes in the decertified land, does it?---No, it doesn't.

Have a look at page 318. Is that the map you're referring to?---Yes, I recollect that one.

So that shows you the area over which swathes were found or observed but it doesn't show you the concentration of them, does it?---No, it doesn't.

You wouldn't know from reading or looking at this map whether, for example, in paddock 7 there was one swathe or thousands?---No, you couldn't tell that.

So in terms of (b), that according to the reports, the 2010 contamination was extensive, did you just mean it was over a wide area rather than that it was concentrated?---Yes, that it was over a wide area.

So it was relevant to you not whether there was one swathe or a thousand but just that there was a swathe?---Mmm.

Is that right?---That's right.

And we have dealt with (c), nine plants that had germinated since the incursion. Was that enough for you to, in your view, to warrant refusal of recertification had it been open to you to do so?---Contamination is contamination. So if it's not pure and it's contaminated, it's contaminated. We're talking about organic systems. GM are prohibited.

So this is the question - - -?---It cannot be there.

If there was one volunteer that had germinated since the incursion or nine, that would be enough to refuse certification at this time, March 2012, had it been open to you to consider that possibility?---I would say yes.

Thank you. And in (d) you talk there about the difficulty spotting germinated canola plants among other yellowed flowered plants at the time of the inspection. Have you had experience of seeking to distinguish canola weed from other - canola volunteers from other yellow flowered plants in a paddock?---I haven't had that experience but I have experience in other matters like that, and looking for particular plants would be very difficult.

All right. And it was important for you, as you say at the end of (d), that there be no more germination before recertification was considered. Is that right?---I said it wasn't reasonable to think there wouldn't be any more germination, yes.

Yes. Over what period would you need to be satisfied that there was no more germination before you would consider recertification?---I don't know that off the top of my head right now but I know that one of our certification officers did look into the viability of canola seed and I remember that I did read that but I don't remember the years - time span.

And is (e) a reference to the uncertainty surrounding the application of standard 3.2.8 in the circumstance of accidental incursion?---Yes.

And is the point you're making there that the reason - one of the reasons why, even if certification had been open to you as a decision here, you would not have been inclined to do so because there was uncertainty around whether or not that standard nevertheless applied in the case of accidental presence?---Yes, and that's why we had asked the advisory board for an interpretation of the standards because they would need to look to any implications in case we did recertify for what our accreditors might think.

All right. And just to be clear, did you discuss the contents of your review with anyone before you finalised it?---It's quite likely that I did.

And who would you have been likely to have discussed it with?---I would have discussed it with the other certification officer, Wingpang, and also with Deana, the certification manager.

But you were the only one making an certification or review decision at this stage, weren't you?---Mmm.

We had now moved into that phase where there was only one officer rather than two - - -?---That's right.

- - - who was reviewing?---But this is very unusual case - very difficult circumstances and we were always discussing decisions, always.

So you are likely to have discussed this with Mr You?---Yes.

And with your - Deana?---Yes, the certification manager.

The person whose surname you can't remember?---Yes.

And with Ms Denham - Jan Denham?---I'm not sure that I discussed it particularly with her. Deana and Jan probably talked, but I - I don't think I did.

But you wouldn't know? And Jan's involvement here is likely to have been in providing that guidance in respect of the five year rule, through the organic advisory board?---Yes.

Is that right?---That's right.

Now, was your review, or the consequence of your review, communicated to Mr Marsh in any way?---Yes. He would have been sent our usual letter that follows reviews.

Are you sure about that?---There's no reason to think why we wouldn't have, because he would have been waiting for his new certificate.

Right. There was an inspection - another inspection of Mr Marsh's property 14 days after your review. Do you remember that?---I think we scheduled - it was either an unannounced or another announced inspection at that point.

And why was that?---Just to follow up - just to follow up that. I didn't remember that, but I wouldn't be surprised if that happened.

You wouldn't be surprised?---No.

Is that because - - -?---In a case like this, where you've got an issue happening - I mean, it happens with other operators as well. If there has been an overspray or there has been some sort of issue, and NASAA also has to - NCO has to do five per cent unannounced inspections anyway.

All right. So that could have been just a normal consequence, not anything arising from the - the content of your review?---Yes. I can't - I can't remember.

Okay?---I mean, usually, if we - I mean, as a reviewer, you've got the chance to ask for an additional inspection, so there's a section in the review sheet where we can do that. I see that there's nothing written there. But it may have been organised anyway. I don't know.

And you weren't involved in the review that came immediately after that inspection, were you?---I can't remember - if it's not here, no.

Well, if you have a look at 448?---448.

You will see the review document is between there and page 451. That's not your document, is it?---No. Jan signed that one.

And when you say "signed" - - -?---Well, she has got her name there - - -

I see. Yes. Thank you?--- - - - as the reviewer.

I was looking - - -?---For a signature.

Well, I was looking right down the bottom and there wasn't one, but I see where you refer. Thank you. Now, your next involvement, if we go to paragraph 13 of your witness

statement, is after another inspection in October 2012. And Mr You has performed an initial review, and then you're asked to come in and do a second review?---That's right.

Now, we're in the phase where that former practice has been abandoned or changed, hasn't it?---Mmhhh.

Was it because this was a special or controversial case, that two review officers were involved?---Yes. Whenever there is three or more issues, or where there has been decertification, or anything that is not just normal, then a second review takes place; that's part of procedure.

And who asked you to do the second review?---Wingpang would have.

And did he produce a review document?---Well, we use the same sheet. We don't do separate sheets when we do a second review.

All right. So if we go to page 452. That's the - that's the inspection report. I beg your pardon?---Yes.

And then if we go to 476. Is that a composite document, comprising both your comments and Mr You's?---Yes.

And is there any clear way to tell whose is whose?---There might be in the original - in the database, but not from here.

And we can see at 479, Mr You, in the middle of the page, has spent two and a half hours on the review and you've spent one?---That's right.

And did you discuss it with Mr You, or did you keep yourselves separate?---No. Usually what happens is that you just re-read the documents, read their review, and make any changes. But you have to discuss those changes, if you're going to make any, with the initial reviewer.

All right. Now, 12 months obviously had elapsed since the incursion. Had you received some further guidance from the OAB about the minimum time limit - - -?---No.

- - - before you could consider recertification?---No. I don't - don't believe we had.

Did you consider it was now open to you to consider recertification?---No, we didn't.

And is that because you hadn't heard back from the OAB?---No. It was because it wasn't less than three years, and certainly not near five.

All right.

KENNETH MARTIN J: So can I just understand that from a timing perspective. You do an hour's work on this review on 15 January 2013. And, as at 15 January 2013, your assessment is that it's still not open to you to recertify?---That's correct.

All right.

CAHILL, MS: Because a minimum of three years had not elapsed?---We're still using the 2012 - or whatever date it was - October - - -

It's 18 October 2012?---Yes. So that is the date. You can't - just because you're doing a review so many months later doesn't mean that you can change the certification status anyway. But this is still well clear of the three years, five years timeframe.

So if we come to paragraph 15 of your witness statement - before we go there, can I just bring you back to 478. Normally when you do a review, and you get to that section that's at 478 of the form, which is Information to Client, and the section immediately above it in particular, "Certification granted renewed. Complete the applicable box", with provisions for decision date and so forth, this is normally where you would insert your decision about recertification or just continuing on the same way?---Yes. Yes.

And there are some words inserted in the cropped section and the other section?---Mmhmm.

But is your position that you couldn't make any decision at all at the moment because the two years hadn't elapsed, or you were obliged to just maintain the status quo and refuse certification of - - -

KENNETH MARTIN J: Three years.

CAHILL, MS: - - - the three - did I say - - -

KENNETH MARTIN J: You said two. You meant three.

CAHILL, MS: I'm sorry. I meant three. You were obliged to refuse certification of block 7 - paddock 7 to

13?---There - yes. There's no opportunity for recertification.

All right. And then when we get down to Information to Client, do you know if, under 3.2.10, those are your words or Mr You's?---The first part, I think, is straight out of the standards. And then - - -

Well, it says - - -?--- - - - it is commended.

Yes?---So that's just a comment.

Is that your comment or Mr You's?---I think that was mine.

And so you were appraised of the fact that there had been no volunteer plants found in 2012?---Mm.

And only a few in 2011?---That's right.

But still you were constrained by this minimum three year rule?---Absolutely. Yes.

Was it you or Mr You who said it wasn't necessary to take the sample of seeds of weed in grain?---Yes. That was Mr You.

Because there was no risk of cross-pollination - no risk of genetic contamination was possible, is that right?---That's right.

And then there's a reference to the inspection report updating the standard. And then it says:

Inquiries. Timeframe for the GM canola contaminated paddocks to be certified yet to be determined by OAB. See below.

?---Mm.

And this is coming back to this same point, that the Organic Advisory Board had yet to tell you what the minimum withholding time was. Is that right?---That's right.

And so without that guidance, you were still left in this position that it could be three years or it could be five years. Is that right?---Well, we were in their hands. Yes.

Yes. As to whether it was - - -?---But it wasn't three years yet, so - - -

Yes, I understand. But once that three years clicked over, then it would be a live question as to whether it was going to be three or five and the organic - - -?---As I understood, they were seeking clarification from the national standards people.

I see?---And where else Jan was asking, I don't know.

All right. She - you know, she has meetings with other certifiers and with the people who run the national standards, so I believe they were discussing it.

I see. But you had no feedback at this stage. All right. And then there's some discussion about the quarantine areas and how they might be used. And do you see down the additional review notes, not for publication section, after your signature has gone in there. These are notes of the inspector, are they and not your own or in terms of comments that the inspector has made or are these your views?---These were our questions.

I see?---Yes. Yes.

And at numbered paragraph 4 - sorry, 3:

GMO testing. What to test. Is it necessary. Perhaps the seed from the original incursion has lost viability.

Was that a question in your mind?---I can't remember exactly if I wrote that or Wingpang but, yes, we were - we were wondering - wondering that.

Right. In number 4:

Inspector states that as no canola plants were found this past growing season, 12/13, and if the screened weed seed from the decertified paddocks are tested and no GM found, then it should be returned to full organic certification for next season, 13/14.

?---I think that was her opinion, however inspectors are supposed to just do a report.

Inspect, yes. And you were waiting for the AOB to give you some guidance about the minimum withholding period?---Yes. And, you know, if - if it was to be three years, then how would we satisfy ourselves that there was no risk to any organic product.

No risk?---Of any GM contamination.

As opposed to an acceptable risk?---Well - - -

Did you think the task was to satisfy yourselves that there was no risk at all, not just an acceptable risk?---It would be no risk really, yes.

All right. Is that how you understood 3.2.9 worked, the standard 3.2.9?---I'm not sure that we had put it that way really.

I see?---It's managing the risks, so we were looking at what Marshes were doing - - -

Yes?--- - - - and we were thinking about what testing or what demands we could put on testing the product that they wanted to sell.

But as far as you were concerned, your role was to be satisfied that there was no risk at all, not just an acceptable risk. Is that right?---Well, I didn't get to that point because that's when I - I wasn't there any more.

I see?---And that really would be the certification manager AOB decision.

I see. Now, coming to paragraph 15 of your witness statement, you say factors that - sorry, on about 14 - on about 15 January 2013, was asked to do this second review and whether he may be eligible for recertification?---Mm.

But he wasn't eligible for recertification, was he?---Well, this was looking forward to the next growing season - that's what this is referring to. It wasn't at that 2012 point, it was looking forward.

So you were being asked, were you, to form a view about whether or not he should be recertified at some point in the future and what point?---Well, that's what we were considering. So we were looking at - because no canola plants had been found in that last inspection, what would we - what factors would we consider if there was still no canola plants found during the next growing season or what might happen - what could happen.

At the end of that season, if you were looking at recertification - is that what you are saying?---That's right.

So when we come to paragraph 15, you say:

Factors that indicate to me that it may be appropriate to recertify - - -

?---At the next inspection.

Continuing:

At the next inspection (a) the contamination had occurred three years earlier.

So by the time the next inspection was going to happen, which was October-ish, November 2013, it would be three years - - -

I see?--- - - - since the initial - - -

I see. That would, of course, depend upon what the OAB said to you about three years versus five years?---That's right.

All right. And then you make that point about only a few canola plants had germinated. So you discussed this recommendation with Mr Ayachit?---Yes.

And he didn't have any difficulty with what you had - - -?---No.

- - - concluded?---No.

And you say at 17, because this is obviously a year old almost exactly, this statement:

At this time, I'm not aware if a final decision has been made.

So you weren't responsible for making a decision about recertification in this matter?---(indistinct)

That was Mr Ayachit's job?---Yes.

And is that because there was some controversy and publicity around this particular case?---Not particularly but I think it's - you know, the three years, five years timeframes in the standards and this is different circumstances, perhaps not fully covered by the standards, and whatever Jan had found out and that sort of thing. That's what they were considering putting it all together.

All right. Thank you. Can I just have a moment please? I have nothing further, thank you, your Honour.

KENNETH MARTIN J: Thank you, Ms Cahill. Any re-examination?

NIALL, MR: No, thank you, your Honour. May this witness be excused.

KENNETH MARTIN J: Yes. That completes your evidence, Ms Gore. Thank you for coming and assisting the court. You are excused.

(THE WITNESS WITHDREW)

NIALL, MR: If your Honour pleases, the next witness is Professor Van Acker. We will need to establish the video link. Maybe if your Honour - - -

KENNETH MARTIN J: He's in Canada, is that right?

NIALL, MR: Canada.

KENNETH MARTIN J: All right.

NIALL, MR: If your Honour perhaps would give us a couple of minutes to do that.

KENNETH MARTIN J: Yes, certainly. We will just adjourn then to reconstitute, hopefully, with a video link to Canada very shortly.

NIALL, MR: If your Honour pleases.

(Short adjournment)

KENNETH MARTIN J: Yes, Mr Niall.

NIALL, MR: If your Honour pleases, we have Professor Van Acker by video, and perhaps he could be affirmed.

KENNETH MARTIN J: Yes. Good morning, or rather, I think, probably good evening, Professor. Can you hear us okay?

VAN ACKER, PROF: Yes, I can. Thank you.

KENNETH MARTIN J: Excellent. Well, I'm Justice Martin in the Supreme Court of Western Australia. Thank you for participating in this video link to give your expert evidence. I'm now going to ask you to be affirmed by my orderly, who will ask you to repeat after her the words of the affirmation.

VAN ACKER, RENE affirmed:

KENNETH MARTIN J: Yes. Thanks, Professor. I will now ask counsel for the plaintiff, Mr Niall, to question you. We will listen to your evidence.

NIALL, MR: Thank you, your Honour. Professor Van Acker, could you tell his Honour your full name, please?---Rene Van Acker.

And your address?---16 Oak Street, Guelph, Ontario, Canada.

And your occupation?---I'm a Professor and Associate Dean in the Ontario Agricultural College, at the University of Guelph.

Thank you. Now, professor Van Acker, I'm just going to get you to identify some reports that you have prepared for the purposes of this proceeding. Firstly, have you prepared a report dated 6 November 2012 - - -?---Yes.

- - - of some 16 pages?---Yes.

And are the contents of that - - -?---Yes.

- - - report true and correct?---Yes.

And does the report reflect your opinions?---Yes, it does.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Yes. Very well. Professor Van Acker's report of 6 November 2012 will be exhibit 16A.

EXHIBIT 16A Plaintiffs DATE 06/11/2012
Professor Van Acker's report

NIALL, MR: Thank you, your Honour. Next, Professor Van Acker, have you prepared a report, dated 30 May 2013?---Yes, I have.

And that goes for 12 pages?---Yes. Yes, it does.

And are the contents of that true and correct, and does it reflect your opinions?---Yes and yes.

Thank you. I tender that, if your Honour pleases.

KENNETH MARTIN J: Yes. The further report of Professor Van Acker of 30 May 2013, will be exhibit 16B.

EXHIBIT 16B Plaintiffs DATE 30/05/2013
Further report of Professor Van Acker

NIALL, MR: Finally, Professor, have you prepared a document titled Supplementary Report, dated 13 January 2014, of nine pages?---Yes, I did.

And are the contents of that report true and correct?---Yes, they are.

And does it accurately reflect your opinion?---Yes, it does.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Yes. The last report, as referred to, of 13 January 2014, will be exhibit 16C.

EXHIBIT 16C Plaintiffs DATE 13/01/2014
Last report of Professor Van Acker

NIALL, MR: Now, Professor, did you also engage in some conferrals with three gentlemen: Professor Powles, Dr Rudelsheim, and Professor Preston?---Yes, I did.

And, in respect of each, was a record of that conferral prepared by you and the other gentlemen in respect of each conferral?---Yes, in each case we did.

Can I just identify those for his Honour. Firstly, in relation to Professor Powles, is that a memorandum of conferral, signed 14 January 2014?---Yes. That's right.

And in relation to Dr Rudelsheim, a memorandum of conferral, dated 22 January 2014?---Yes.

And finally, a memorandum of conference between Professor Preston and yourself, dated or signed on 28 January 2014?---Yes.

I tender each of those, if your Honour pleases.

KENNETH MARTIN J: Certainly. I don't have the joint memoranda as regard Powles and Rudelsheim, but I've got the one in respect of Preston.

NIALL, MR: I beg your Honour's pardon. May I hand those to your Honour?

KENNETH MARTIN J: Yes, by all means.

NIALL, MR: Copies. I'm not sure - - -

KENNETH MARTIN J: You've got these, Ms Cahill?

CAHILL, MS: Yes, I have.

KENNETH MARTIN J: Yes. Very well. The joint memoranda note, or notes, in respect of the conferral between Professor Powles and Professor Van Acker, dated 14 January 2014, will be exhibit 17A.

EXHIBIT 17A Plaintiffs DATE 14/01/2014
Joint memoranda notes of the conferral
between Professor Powles and Professor
Van Acker

KENNETH MARTIN J: The note of the conferral between Dr Patrick Rudelsheim and Professor Van Acker of 22 January 2014, will be exhibit 17B.

EXHIBIT 17B Plaintiffs DATE 22/01/2014
Note of the conferral between Dr
Patrick Rudelsheim and Professor Van
Acker

KENNETH MARTIN J: And the joint memorandum of conferral between Professor Preston and Professor Van Acker of 28 January 2014, will be exhibit 17C.

EXHIBIT 17C Plaintiffs DATE 28/01/2014
Note of the conferral between Dr
Patrick Rudelsheim and Professor Van
Acker

NIALL, MR: Thank you, your Honour. Professor, they're the questions I have. If you wait there, counsel for the defendant will now ask you questions?---Okay.

KENNETH MARTIN J: Yes, Ms Cahill.

CAHILL, MS: Thank you, your Honour. Professor Van Acker, you can hear me clearly?---Yes. Yes.

Thank you. Can I just clarify your title. In your reports, you describe yourself as Dr Van Acker. How should I refer to you? Dr Van Acker or Professor Van Acker?---Professor Van Acker is fine.

Thank you?---Either is fine.

Now, your first report was prepared in response to a letter you received from Slater & Gordon of 19 October 2012, is that so?---Yes.

And in that letter you were asked a number of questions. Do you have the letter there?---I don't - I don't have that letter in front of me at the moment.

Do you recall being asked a question:

Please provide a high level description of, (a) the kind of traits that are realisable in GM crops, (b) the extent to which the consequences (positive or negative) of the realisation of such traits are presently described or documented in peer reviewed scientific literature.

- - -?---That question, I - I mean, I didn't - I didn't really answer that question, so I - - -

Just asking you whether you - - -?----I don't recall - - -

Sorry. I'm sorry. I'm just asking you whether you recall being asked that question. Does your Honour have a copy of the letter?

THE WITNESS: Yes.

KENNETH MARTIN J: No, I don't.

CAHILL, MS: Can we get one, please - copy of the letter.

THE WITNESS: Yes. I think I was originally.

CAHILL, MS: Were you told that you were no longer required to answer that question?---Right.

Were you told that by Slater & Gordon? Just getting your Honour a copy of the letter.

THE WITNESS: I think so. I mean, it has been over - well over a year now, so I'm trying to recall. But - - -

CAHILL, MS: Do you also recall being asked this question in the letter of 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?

?---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.

All right. And similarly, I assume your answer is this, you were also asked:

If your answer to that question was yes, please provide a high level description of the principal contentions in that debate.

That was something - - -?---(indistinct)

- - - you were not prepared to answer. Is that right?---That's right.

All right?---That's right.

Thank you. Now, can you take up your first report, please?---Yes.

16A, and could you please go to page 5. And the section at the bottom where you're talking about the movement of GM material?---Yes.

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 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.

Thank you. Can you go to page 8 please. And under the heading Seed Mediated GM Material Movement, you observed that in contrast to the position with pollen mediated movement, there has been relatively little research done on that topic. Is that so?---That's right.

And in the bottom half of the page, you are identifying there and referring to the experience you have had with your - with seed lots in Canada where there have been - - -?---Right.

- - - attempts to prevent the adventitious incursion of GM canola seeds. Is that right?---That's right.

And what you're reporting there is that there has been success in reducing the adventitious presence into seed lots at or near zero by systematic and continued efforts to exclude. Would you agree with that?---That's right. That's right.

And those efforts include keeping seed clean, yes?---Yes.

The implementation of isolation fields, is that right?---Yes.

The use of separate storage facilities and so forth?---Yes, yes.

Now, at page 9 of this report you discuss the persistence of volunteers?---Yes, yes.

In your conferral with the expert witnesses for the defendant you have agreed, haven't you, that the actual survival of volunteers and their persistence depends very much on individual paddock conditions. Would you agree?---Yes, and management, yes.

And when it comes to management, in terms of the persistence of volunteers, a significant factor reducing their persistence is their removal - the removal of volunteers from a paddock before seeds set?---Yes, that's important.

Would you regard that as one of the primary methods of reducing the persistence of volunteers?---Yes.

Would you regard it as the primary method of reducing the persistence of volunteers?---Maybe that and preventing tillage. So preventing seed burial would also be important.

Thank you?---But, yes, preventing that and preventing further seed production would be very important.

Yes?---Yes.

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.

Thank you?---Yes.

And where you make the point at page 9 of your report, that volunteers might still take years to fully germinate out of a paddock, nevertheless that can be effectively controlled on an ongoing basis by this method of hand pulling?---Yes, that would be possible.

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.

Yes, thank you. Now, can we go to page 10 of your report, please. And here you begin to speak of the situation of coexistence in different - - -?---Right.

- - - countries and regions around the world?---Right.

And that's coexistence between GM and non-GM crops - canola?---That's right.

Yes. And the point that you make here is from your experience and knowledge derived from working in this area, where the matter is not ensured by law, that is government regulation, the default position is it's up to the organic farmer to take steps to prevent or reduce the risk of the adventitious introduction or presence of GM canola onto their farm. Is that so?---That's right.

Yes. It's not up to the GM grower. That's your experience?---Well, not if you have unconfined release. I mean, there's no mechanism for those farmers. There's no recourse - no formal recourse or mechanism other than, I guess (indistinct)

And you then go on to identify what an organic grower in that default position can do to minimise, reduce or eliminate the - as far as possible the risk of adventitious presence and you talk about such things as buffers, the cleaning of seed and the control of volunteers in the way in which we have just discussed. Is that right?---Yes, that's right.

And the point that you go on to make is that - I'm sorry, I withdraw that. Now, at the bottom of page 10, you talk about the research that has been done into the movement of pollen?---Yes.

And adventitious presence threshold requirements and you talk about the way in which one can reduce those possibilities or risks and you comment towards the very end of page 10, the last three lines, that there are problems when thresholds are very low or zero. It becomes very hard practically to eliminate a risk to that level or to that extent. You would agree?---That's right. Yes.

And so one sees, therefore, this conundrum, doesn't one, that the more onerous the restrictions on the adventitious presence of GM material, the more difficult it becomes to control or comply with those requirements?---Yes. And that's why I gave an example in one of my reports that, you know, they are in the EU - in the EU there's a recommendation in some countries of banning GM production just because of the practicality of trying to maintain coexistence, for example.

Yes. Yes. And so if, for example, an organic farmer is confronted with the situation where they are not permitted to have any GM trait movement into their product, that's something that the organic farmer can control by, for example, the selection of crops that cannot cross-pollinate. You would agree?---That - that could be something one could do, yes.

And that would be a reasonably effective way of ensuring that no GM material moved across to your product?---It would be a way of - certainly tremendously reducing the risk of pollen mediated gene flow, yes.

Yes. And if an organic farmer was in the situation where the requirements for farming organically in their jurisdiction required that there couldn't be any GM material at all intermingled in their product that they were selling, that could be addressed to a reasonable level of acceptability, couldn't it, by cleaning of seed or cleaning of produce, that sort of method.

NIALL, MR: I object to the question on the basis of reasonable level of practicability. That needs to be couched in some context, reasonable level from a scientific point of view, from a regulatory point of view. The standard at large would not provide probative evidence of anything (indistinct)

KENNETH MARTIN J: Look, it was a fairly compound question.

CAHILL, MS: Yes.

KENNETH MARTIN J: You would accept that point, Ms Cahill?

CAHILL, MS: Yes. I can - yes, I can rephrase, your Honour.

KENNETH MARTIN J: All right. Perhaps if you rephrase then.

CAHILL, MS: Okay, your Honour. That's the quickest rather than arguing about it, I think.

KENNETH MARTIN J: Thank you.

CAHILL, MS: Professor Van Acker, if I put it this way. If an organic farmer was in a situation where they were required to produce product that was GM free, I put that in air quotes - it had no GM material in it - then what they could do is they could clear their product, couldn't they, If we are talking about grain?

NIALL, MR: Well, in my submission the premise - the question is misleading because it identifies no GM product in it. Whether the question is covering the DNA incorporated into the organism or within - which was the premise of the earlier questions or product within it, as in together with it. In my submission, they are two different concepts and they should have been made clear to the witness.

CAHILL, MS: A moment ago we were talking about the transfer of GM traits from one organism to another, Professor Van Acker. I now want to talk about a situation in which an organic farmer might not be permitted to have any GM material intermingled with their product, their grain product?---So, sorry, you are talking about seeds - seed and mixtures or - - -

Yes. We are talking at the end of crop production and you have your grain that you are going to sell as an organic farmer. Might be oats, it might be wheat, barley, something like that. And the organic requirements for certification that you are operating under say that you must - your production must be GM free, completely FM free. It would be possible, wouldn't it, to meet that requirement by seed cleaning and testing of your product?---You could - you could certainly seed clean. I mean, seed cleaning something like canola out of a typical serial like wheat is pretty straight forward and not too - not too challenging. But - but, of course, the risk is always if the standard is absolutely zero That's such a low number - - -

Yes?--- - - - that that's - that's always very risky and I think there - that's part of the - part of the problem, is that when you are talking about zero. And it's impossible to test down to zero, of course, it's just not possible.

Well, all you can do is test within the limits of detection that are available from the scientific tests we have. Is that right?---That's right. And then it becomes cost

prohibitive to test really, really low levels. I mean, testing to, say, one in 10,000 for example might be practical. Testing for one in 100,000 becomes expensive.

Yes?---Yes. So those are also considerations.

Yes, thank you, Professor. And what you were identifying there is that the more onerous the requirements become, the harder and harder it gets to comply with them. Would you agree?---Yes, harder and - harder and more costly.

Yes?---Yes.

And if an organic farmer's organic standards require that he may not ever - he or she may not ever have any GM plant material on their land at all in any quantities, well, that becomes in a coexisting agricultural region something very difficult for the organic farmer to control, is that right?---it becomes very difficult. I mean, it's why, for example, we don't see organic canola produced in Western Canada - - -

Yes?--- - - - is because there's so much GM canola produced in the region that it becomes almost impossible to produce organic canola in that region.

Yes. Almost impossible to prevent those sorts of incursions in a coexisting situation?---Yes. Well - yes, I - yes.

And what I'm talking about here - - -?---Yes, that's right.

- - - is not necessarily an organic farmer who has organic canola growing next door; he might have quite different crops but he's under a restriction or regulation that requires that no GM material of any description ever touch his land in any quantities?---Right. Right.

In a coexisting situation where you might have a GM canola crop growing nearby, that creates great difficulties in terms of the ability to comply with that requirement. You would agree?---It's challenging, certainly, yes.

Almost to the point of impossibility on an ongoing basis, would you agree?---It would depend - it would depend, I think, on how much GM was being grown around the farm and the operation that's going on around the farm in terms of transporting of GM etcetera. So, if there was a lot being grown around that farm - if the farm was sort of an island in a sea of GM production, it would be very difficult.

And if the organic farmer - the hypothetical one that we're thinking of at the moment - were under a restriction under his organic certification that no seed or seeds with - that are genetically modified, could ever be on his land. That, too, in the context of a co-existing GM canola production area would be very difficult to comply with?---Yes.

And in your report at page 12, I think, you - your first report - I beg your pardon - your second report at page 6. You're identifying there the ways in which these risks of incursion can develop the opportunities for - - -?---Yes.

- - - in particular, seed movement?---Yes.

Would you agree?---Yes.

And there's - - -?---Yes.

There's essentially three points in the production cycle of GM canola that are particularly susceptible to the risk of seed movement, aren't there? That's during sowing, during harvesting, and during grain handling after harvesting?---Yes.

And would it be a fair reflection of your opinion and your report that you perceive the - the - the highest risk, where seed or grain is being moved by mechanical transport?---Yes.

Especially along roads?---Well - yes. That and - and in the harvest period, especially if you have swathes.

Yes. Swathing increases the risk of movement of plant material?---Right. Yes.

You do need strong winds though for that, don't you? It's not inevitable?---That's right.

Yes?---That's right. Now, at page 7 of your second report, Professor, do you see in the middle of the page you were asked a question - I'm sorry. I will go back a step. I will go back a step. Sorry. I will just withdraw that question. On page 7 you identify ways in which Mr Baxter could have taken - - -?---Yes.

- - - steps to reduce the risk of incursion on the occasion which we're considering in December 2010. Is that right?---Yes. Yes. That's right. And I think I comment in general, as well.

Yes. What your report doesn't deal with is the additional steps that Mr Marsh could have taken to reduce that incursion as well. Do you agree with that?---I agree with that. Yes.

So, to the extent that you identify physical distances - isolation distances, those are something that, equally, Mr Marsh could have put in place on his farm. Would you agree?---Yes.

And at page 8, I think, you make the point that segregation is the primary method of reducing the risk of incursion, yes?---Yes.

And - - -

KENNETH MARTIN J: Segregation of crops?

CAHILL, MS: Yes. Segregation of crops is what you're talking about there, isn't it?---And I think I mean more generally as well. I mean, to segregate those operations in as many ways as possible. So - - -

And that - by your answer, you mean then to include right through the production cycle and into the grain handling - - -?---Yes.

Separate facilities for grain cleaning, that sort of thing?---Yes.

Grain transport - - -?---Yes.

Harvesting?---Yes.

I see?---Yes. That's correct. Yes.

And when it comes to segregation of the production of crops on the land, the point you make at page 8 is that the primary method of segregation requires cooperation and agreement between farmers. Do you agree?---Yes.

Yes?---That's right.

And where you say, in the first full paragraph at the top of page 8, in the last line:

Segregation requires a system that includes many methods, and no single method should be relied upon -

are you really - - -?---Yes.

- - - talking about what you just - the evidence you just gave to his Honour about the need for different - segregation at every stage of the production process?---That's right. That's right. Yes.

And it would be a multi-faceted approach on the land as well, wouldn't it?---Yes. It - - -

Just at the growing stage?---It could include - - -

KENNETH MARTIN J: Sorry. Whose land are we talking about? Whose land?

CAHILL, MS: The - a grower's in a co-existing situation.

KENNETH MARTIN J: In a segregation scenario, the grower.

CAHILL, MS: Yes. Yes. Well, there's a grower - there's two growers in a co-existing. If it has been unclear I will just go back, your Honour. When you're talking about the need for cooperation and agreement between growers in relation to segregation, Professor Van Acker - - -?---Yes.

- - - and you talk about there being - - -?---Yes.

- - - no single method at the growing stage. There might be physical barriers - - -?---Yes.

- - - that are to be implemented?---Yes.

And the organic grower is at liberty to - obviously, to implement an isolation distance, aren't they?---They could, yes.

Yes. They can do seed cleaning?---Yes.

And they can test for GM material in their product?---Yes.

They can pull out volunteers?---Yes.

These are all the things that they can do to maintain segregation, would you agree?---Yes.

Thank you?---Yes.

Can you go to your third report, please, page 4. You may have already answered this, Professor. But just responding to Dr Rudelsheim's report here, regarding the biological significance of canola plant material rather than the seed or the pollen. That, in itself, has no biological significance, does it?---No. And my answer there was in

relation to whether the presence of GM material could have an impact, and I was - and I was speaking to, you know, if the requirements were absolute freedom from and you had any material present, even dust could possibly have an impact in terms of the market - - -

Yes?--- - - - the organic market, if that's a requirement.

If the requirement is as onerous as that, then it will still have an impact on the organic farmer?---It could.

Yes. But in terms of just plant material without any pollen or seed, that has no potential to propagate, does it?---No. No. No.

And it has no potential at all to transfer genetically modified material or traits to another organism?---That's right. That's right.

It is - is this - would you agree with this language: it is, in that context, correct to describe the plant material without pollen or seed as "inert"?---It's not inert, but it's not - it's not going to be a vector of trait movement.

Yes. It's just like any other plant; it will - it can be - - -?---It's just plant material. Yes.

Now, at the bottom of page 5 you are talking about impact on crops of GM - a GM crop being grown somewhere nearby?---Right, yes, I think.

And you identify three ways in which there can be an impact?---Right. Yes.

And you use the language - if you look in this last full paragraph at the bottom of the page, and you go five lines up?---Yes, yes.

You use this expression:

The potential for GM contamination in the future.

?---Right, yes.

And by that expression, what you mean is, by contamination, the transfer of a GM trait into a plant organism in respect of which the transfer was neither intended nor wanted. Is that right?---Or it could be the presence of material in harvested crop.

Yes, the intermingling product?---So if it - yes, yes.

Is that right?---It could be that as well, yes. It just - I think I was referring to volunteers in the future.

Yes?---Yes.

But I just wanted to be clear here, when you used the word contamination, you don't mean by that just a piece of plant material - like, GM plant material lying on the ground?---I'm probably thinking of plants growing up and producing pollen or seed.

Which have the potential to transfer GM traits into another organism, where that transfer wasn't intended or wanted. Is that right?---Yes, or it could just merely be presence
- - -

Intermingled?--- - - - as admixture.

Yes, but in the product - - -?---Yes - - -

- - - at the end of the day?---In the product.

Yes?---Yes, that's right. Yes.

But if the volunteer is growing in a crop or a volunteer is growing in pasture, then absent that potential for the movement of a GM trait into an unintended and unwanted transferee, there is no contamination, is there, in your view?---I don't understand that question.

Yes, sorry?---I don't understand what you mean.

Just what the limits of contamination are in the way in which you have used it in this report. Contamination, you're focusing on the potential for GM transfer, aren't you, GM trait transfer?---Well, GM transfer and just presence.

Yes?---Because presence is the issue.

Yes, but only in respect of - - -?---So - - -

- - - the presence where pollen and seed have the potential to move and by that movement one elevates the risk that there will be the movement of GM traits into another organism. Isn't that so?

NIALL, MR: Well, in my submission that's a very compound question?---No, that's not what I mean.

KENNETH MARTIN J: I think the professor has got it, bearing in mind what has proceeded it. So I think I will let him answer?---Yes, I don't think that's what I mean. Certainly that is part of what I mean but I think - just more simply, I mean that those volunteers can appear in a subsequent crop and then it could, yes, you're right, be a means or a factor for gene flow but it could also just be present in harvested crop - - -

CAHILL, MS: I see?--- - - - and therefore be a contaminant so to speak.

I see, because of intermingling?---Yes, that's right.

Yes?---Yes, yes.

Intermingling with the final product?---The harvested crop, yes, that's right.

I understand?---Yes.

So contamination means one of two things in your view, either that movement of a GM trait or the intermingling in the harvested product?---Yes, that's right.

And nothing else?---That's right, yes. Well, it's part of that process going forward.

Yes?---Right, so - - -

Thank you. Nothing further, your Honour.

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

NIALL, MR: Thank you, your Honour. Professor Van Acker, you were asked a number of questions about the method of dealing with persistent volunteers and it was suggested to you a primary method of dealing with persistent volunteers. In circumstances where seed is present on a pasture at a paddock, is there a way of managing it prior to the germination of the seed?---Prior to the germination of the seed - I mean, certainly it's the experience that if you don't bury that seed, there is an opportunity for more of that seed to be predated or to be weathered, become non-viable, and also the seed is less likely to go into secondary dormancy and then it's less likely to persist. So that could be part of managing before the seed germinates.

Thank you. And in terms of determining if that is part of the management that's adopted, are there any measures to determine how successful or unsuccessful such management would be until you see whether or not there's germination?---Yes, you would be doing it based on an understanding of that's what happens but, yes, it would be hard to test how effective you were, you're right, especially when you have no control.

No other re-examination if your Honour pleases.

KENNETH MARTIN J: Yes, very well. Thank you. Professor, thank you very much for assisting us through your evidence from Canada today. That completes your evidence and you are now excused?---Thank you very much.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: What's the plan now, Mr Niall?

NIALL, MR: Now, the next witness, your Honour, is Ms Goldfinch. I'm just making inquiries as to - she's here, your Honour, if that's convenient.

KENNETH MARTIN J: Yes. Unless anyone wants a break, we will proceed straight on with her evidence.

CAHILL, MS: We might have an objection. I just have to check with Ms Vernon, your Honour.

KENNETH MARTIN J: Is it just the one statement?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: Ms Goldfinch, would you mind just waiting outside for one more minute until we resolve this legal point of objection and hopefully we will have you here very shortly. According to the note that was circulated on Monday, 7(a), 7(b) - - -

CAHILL, MS: Yes, that's it.

KENNETH MARTIN J: - - - 10, 25, 25, and 27 were the issues.

CAHILL, MS: That's the one, your Honour. 7(a) and (b) can presumably be dealt with on the same basis that your Honour ruled previously in relation to secondary documents. I think your Honour said - - -

KENNETH MARTIN J: You mean identified as the - - -

CAHILL, MS: Your Honour - - -

KENNETH MARTIN J: - - - physical document received without conceding the truth of the content of the communication.

CAHILL, MS: I think when we began the objections in relation to Mr Marsh's statement, your Honour made the ruling that the material could stay in but everyone was to understand that to the extent that there was any controversy about what the document said, your Honour would go to the document and not the person's evidence.

KENNETH MARTIN J: I see. In terms of - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: Okay. The summary of - the secondary evidence rule as regards the contents of a document.

CAHILL, MS: Yes. So as long as - - -

KENNETH MARTIN J: All right.

CAHILL, MS: - - - that secondary evidence is treated on that basis - - -

KENNETH MARTIN J: Understood.

CAHILL, MS: - - - then we don't have anything further to say about that. Paragraph 10 - - -

KENNETH MARTIN J: Sorry. That just reminds me as regards Mr Niall, I'm going to need a link up to where these PD documents are in the trial bundle through a cross-referencing tool at some point.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: I don't want to hold things up now, but if that could be done, it would be good.

NIALL, MR: Yes.

KENNETH MARTIN J: Yes. All right. Next?

CAHILL, MS: Paragraph 10 is hearsay, if that document is intended to go in as the truth of the contents of something that Ms Goldfinch was told by Mr Marsh. There doesn't seem to be any relevance to it going in on any other basis, so

we object to that. Don't know if you want to go blow-by-blow through each one or keep going.

KENNETH MARTIN J: All right. Mr Niall, on the face of it, it does look like if it's tendered for the truth of its contents, hearsay. On the other hand, if it has got a purpose in terms of stimulating the witness to do something, it might have a chronological relevance. I can't really tell without going to the document.

NIALL, MR: The document would be a means by which the witness could refresh her memory.

KENNETH MARTIN J: Certainly.

NIALL, MR: In terms of - just pardon me one moment, your Honour. Well, if I understand the objection, the first sentence is not objected to; the balance of it -

He stated that contamination had now spread into paddock 13 -

we tender it as relevant to the information that was before Ms Goldfinch as the review officer, and we don't press the last sentence.

KENNETH MARTIN J: Does that excise the notes?

NIALL, MR: Yes, your Honour.

CAHILL, MS: Well, the notes should go in, your Honour, if her evidence is that she took a note.

NIALL, MR: Well, my learned friend can cross-examine her on the notes; she has got them. Well, tender them, your Honour. If your Honour - if my learned friend is asking us to tender them, we will do so.

KENNETH MARTIN J: All right. Well, I think the whole paragraph should say then on that basis.

NIALL, MR: If your Honour pleases.

CAHILL, MS: 25 might be easily dealt with, your Honour, as long as it's admitted only as to the witnesses' opinion and not intended to be any sort of statement of the - of legal conclusion that the plaintiffs seek to rely upon.

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

KENNETH MARTIN J: Let me just look at this again.

CAHILL, MS: Well, prefaced with "in my opinion".

KENNETH MARTIN J: Yes. Well, I think that's obviously inherent in the observation at 25, so - - -

CAHILL, MS: That will deal with both - - -

KENNETH MARTIN J: - - - on that basis, it can be received.

CAHILL, MS: That will deal with the next objection as well, your Honour. And then 27 - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: The point revolves around the word "the" in the first line. This witness can speak to the factors that were important to her decision, but if she is intending to speak more widely as to a decision made by, for example, NASAA as an organisation, she can't really speak to that without some further substantiation of her position. So if the "the" were changed to a "my", we would live with that.

KENNETH MARTIN J: Don't I have to read 27 in the light of 26, in which she says, "I formed the view that it should be decertified"?

CAHILL, MS: Well - - -

KENNETH MARTIN J: So if it's read any wider than her, then it needs to be changed to 26, I think.

CAHILL, MS: The objection is to the extent that it is intended to put the evidence forward as factors important to a decision made by someone other than Ms Goldfinch.

KENNETH MARTIN J: Well, that's not how I read 27. I read 27 as being personal to the decision maker identified in 26. So if it's intended to be read wider, then I give notice of the fact that it won't be.

CAHILL, MS: Thank you, your Honour.

NIALL, MR: It's not, your Honour.

KENNETH MARTIN J: Yes. All right. (indistinct) can I say that I have now been handed a copy of the statement that does actually have the references. So I'm grateful for that. Thank you.

NIALL, MR: Yes. Your Honour should have those for our witnesses. I'm not sure if that's also true of the defendant's witnesses but we might get to that when they are in their case.

KENNETH MARTIN J: There's just one thing. Ms Cahill, the Slater & Gordon letter of 19 October. Did you - - -

CAHILL, MS: Sorry, I would like to tender that, thank you.

KENNETH MARTIN J: Did you want to put that in. Is there any objection?

NIALL, MR: No, your Honour.

KENNETH MARTIN J: All right. Slater & Gordon letter that was of 19 October 2012 in respect of which some questions were directed to Professor Van Acker to go with the video will be exhibit 18.

EXHIBIT 18 Defendants DATE 19/10/2012
Slater & Gordon letter directed to
Professor Van Acker

KENNETH MARTIN J: All right. Now, Ms Goldfinch.

NIALL, MR: If your Honour pleases.

GOLDFINCH, STEPHANIE JANE sworn:

KENNETH MARTIN J: Thanks, Ms Goldfinch. Have a seat. Yes, Mr Niall.

NIALL, MR: If your Honour pleases. Ms Goldfinch, would you keep your voice up and direct your answers to his Honour please. Would you tell his Honour your full name please?---Stephanie Jane Goldfinch.

And your address?---8 Duke Street, Bridgewater.

And that's in the state of South Australia?---Yes.

And your current occupation?---Consultant to the organic industry.

And for the purpose of the proceeding, have you prepared a witness statement dated 24 February 2013. I will hand a copy to the witness for her to identify it, your Honour.

Freshcare?--- - - - under the Freshcare programs for AUS-QUAL.

CAHILL, MS: So who are Freshcare?---Freshcare is an independent organisation set up by the industry as a market - the supply chain verification system.

I see. And in what way do you audit them?---I audit the producers.

I see?---And it's organic.

So they have a standard - - -?---Yes.

- - - or certain requirements - - -?---Yes.

- - - and you audit to ensure that they are - that they comply with them?---Yes.

And so you continue to retain a familiarity with the national standard, certainly?---Yes, I'm still using that for AUS-QUAL. They use that as their organic standard.

So they don't have their own standard the way NASAA does?---No, they don't.

Now, when you were at NASAA, Ms Goldfinch, it was part of the quality management or assurance system that was implemented that you made records of all your telephone conversations. Is that right?---No, I just kept records of, you know, notes for my own purposes in order to remember things I needed to remember. We also had a system, electronic system, where we recorded client information.

And were you obliged to do that as part of a quality assurance system or just as part of your employment?---No.

Okay. Now, if you could go to volume 1 of those files that are behind you, Ms Goldfinch, and go to page 213. Now, I'm not suggesting that this is your record that you made. It appears to be a record made by somebody else. But was there a Susan Shelton who was working at NASAA or NCO with you in April 2009?---Yes, there - there was.

And do you recall her providing you with a copy of this document?---No.

Do you recall her asking you to prepare a letter that had been requested by Mr Marsh?---No, I don't recall her asking me to do that.

So, if I give you an opportunity, have you had a chance to read through just now as I have been asking you questions, or would you like an opportunity to read it?---Do you want me to red the whole thing?

Yes, please.

NIALL, MR: Well, in my submission, it must be clear, firstly, whether the witness has seen the document before. If it's not her document, in my submission, what's the relevance of her looking at it now?

KENNETH MARTIN J: I guess it depends on the question but I understand your concern.

CAHILL, MS: Would you read it please?

THE WITNESS: Is that what you want me to do, your Honour?

KENNETH MARTIN J: Yes, if you wouldn't mind, please, Ms Goldfinch.

CAHILL, MS: Having read that note, do you have any memory of Ms Shelton in about April 2009 asking you to prepare a letter for Mr Marsh about the standards NASAA had in relation to the tolerance of GMOs in organics?---No. No, I don't.

Right. Could the witness be shown exhibit 11, please.

KENNETH MARTIN J: All right. I will just ask my orderly to dig out exhibit 11 and that will be passed to Ms Goldfinch.

CAHILL, MS: I will just give you an opportunity to read that. Are you right, Ms Goldfinch, or do you need a moment?---The desk is a bit high.

Would you like a moment to just adjust it, if you
- - -?---Well, I've adjusted the chair. Now, my feet have got nothing.

Are you comfortable or - - -?---I will survive.

All right. I will give you a moment to read this letter and then I will ask - just tell me when you're ready and I will ask you a question?---I have read it.

You recall sending this letter to Mr Marsh in April 2009?---Having read it, I'm familiar that I must have written it.

And you certainly identify - - -?---Which follows, I assume, it was sent.

But you certainly accept that this is your letter?---Yes. And you understood when you wrote the letter that you were responding to concerns that Mr Marsh had at that time about the risks to his livelihood posed by the potential GMO trials in WA at that time, yes?---Yes, it would seem so.

And do you recall that the purpose of your writing this letter was to identify to Mr Marsh what on your understanding were the risks to his livelihood in respect of effect on his certification?

NIALL, MR: I object to the question on the basis of relevance as to why - the purpose of sending a letter. My learned friend identified the relevance - - -

KENNETH MARTIN J: The letter says what it says, Ms Cahill. What does the author's state of mind back in April 2009, as to purpose, bear upon its relevance to the case.

CAHILL, MS: If the witness could leave the room, I can address your Honour on that.

KENNETH MARTIN J: All right. Ms Goldfinch, would you mind just waiting outside briefly for a couple of moments and we will just resolve this legal issue.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: Ms Cahill.

CAHILL, MS: Your Honour, the - obviously, one of the really important issues in this case is the reasonableness of NASAA's conduct at the time that the decertification decision was made. Ms Goldfinch, on the statement that you have just received, your Honour, was responsible for that decertification decision. In this letter it is important to understand when in April 2009 at some time earlier, she was asked to turn her mind to the consequences of an incursion in terms of the standard. This was how she answered.

It is a very different response from the one that she gave at the time of decertification. In particular, her

focus upon the national standard rather than the NASAA standard and what I expect her to say in answer to cross-examination is a clear reference in the second paragraph to standard 3.1.9(b) of the national standard.

KENNETH MARTIN J: 3.1.9(b)?

CAHILL, MS: Yes. Your Honour will remember from my opening - your Honour might remember from my opening when I took your Honour through the national standard and identified the provisions that are relevant to GMO incursion or presence and in particular the breaches of the national standard that had been pleaded by way of particulars by the plaintiff in their reply.

The point that I endeavoured to make by way of submission was this, it was quite clear on a proper construction of the national standard that there was only one standard that dealt with the consequences of accidental incursion outside the control of the grower - of the organic grower, and that was this clause 3.1.9(b), which is the one that Ms Goldfinch identifies here in this letter. So in my respectful submission, it is important to understand the purpose with which she came to write this letter, what was in her mind as to the point she was endeavouring to address - - -

KENNETH MARTIN J: But what does that go to in the case, the fact that she - - -

CAHILL, MS: Because we will see - - -

KENNETH MARTIN J: - - - had something in her mind - - -

CAHILL, MS: Well, because we will see - - -

KENNETH MARTIN J: - - - in 2009.

CAHILL, MS: What we will see is that when it comes to the decertification decision, she abandons any reference to the national standard and moves to the NASAA standard, which is in quite different terms.

KENNETH MARTIN J: Well, the documentation will show that.

CAHILL, MS: Yes.

KENNETH MARTIN J: So - - -

CAHILL, MS: Well, the question is this, to - and what I would seek to explore in cross-examination is what was

actually motivating the - and the factors that were relevant to the decertification decision in December 2010. It will ultimately, in our submission, be relevant for your Honour to appreciate on the evidence that where NASAA had previously identified the sole basis for effect on certification, it then changed course and focused on a completely different basis, being the only basis that would enable it to decertify the operation rather than the product.

KENNETH MARTIN J: Mr Niall.

NIALL, MR: If your Honour pleases. The issue in the case commences, as the defendant would have it, about the reasonableness of a decision that was made in December 2010. This is 18 months earlier and it's a piece of correspondence. The purpose of sending the correspondence is entirely irrelevant to any issue before your Honour. The letter was sent to Mr Marsh. He acknowledges receiving it. In our submission, the purpose motivating Ms Goldfinch's writing or sending of the letter are entirely irrelevant to the extent there's any relevance in the case, and we submit that it's entirely minimal; it's the fact that a letter was sent in these terms. If your Honour pleases.

KENNETH MARTIN J: Do you want to respond?

CAHILL, MS: I have no further submissions, your Honour.

KENNETH MARTIN J: All right. Yes, I will uphold the objection. It seems to me that what was in the author's mind in April 2009 vis-à-vis purpose. It doesn't bear upon the issues in the case. It may be that objectively assessed by reference to what actually passes between the parties in terms of documentation that inferences can be drawn but I don't see how, if it's capable of being reliably probed, which I would possibly doubt anyway, what was running through someone's mind a year and a half before the relevant decertification decision is capable of assisting what they put on paper in terms of the notice that they gave on 23 April 2009.

CAHILL, MS: If it please, your Honour.

KENNETH MARTIN J: All right. So we will have Ms Goldfinch back.

GOLDFINCH, STEPHANIE JANE:

KENNETH MARTIN J: Yes, thanks, Ms Goldfinch. You will now be asked another question.

CAHILL, MS: Ms Goldfinch, you still have that letter in front of you?---Mmm.

In the second paragraph, where it says:

The issue of contamination from GMO is a risk to your certification -

That was a view that you held at the time?---It was something that I was just stating because that's what the standards state.

You go on to refer to the national standard. Is that right?---Yes.

Yes. And are you referring there to clause 3.1.9(b)?---I would need to see it to be able to answer that question.

If you pick up volume 5 and go to page 1419.

KENNETH MARTIN J: Got that.

CAHILL, MS: Are you there?---Mmm.

Is that the standard that you're referring to in the letter?---Yes.

And it's expressed a little differently, isn't it, in the actual clause itself - the standard itself?---Which clause did you refer to?

3.1.9(b). You say product - - -?---There are a number of references in this standard that apply to genetic and this - genetically modified organisms and that's not the only one. So I wasn't considering that clause alone. I was
- - -

All right. So can - - -?---I was considering the whole - it as a whole.

All right. Now, the quote though, you have put the words:

Products known to be contaminated with GM cannot be sold as organic..

?---Yes.

So that's a quote from the standard?---Yes.

Can you show me which part of the standard you have quoted from?---It's not word for word to that paragraph. There may be another part of the standard. I actually did have all this written down but I wasn't allowed to bring my notes in. I could have referred to that and I could have probably found it for you if - - -

All right?--- - - - I had been allowed to bring my own copy in.

Would you mind just flicking through the standard now and letting me know if you can find that reference?

KENNETH MARTIN J: The quote you mean?

CAHILL, MS: Yes?---This doesn't have page numbering.

Just if you look at the - above - - -?---Yes, I have got it.

Can you see the page numbers?---Yes.

KENNETH MARTIN J: I just wonder if this an effective use of time - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - bearing in mind the luncheon adjournment is progressing. I wouldn't mind the witness having a copy of the standards - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - and could flick through them over lunch - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - at her leisure and see if she can find what she's looking for.

CAHILL, MS: Yes. I will just see if I can make a copy available to - - -

KENNETH MARTIN J: Well, I think we could take out the relevant pages from the trial book, put a bulldog clip around it, and I will allow Ms Goldfinch to have access to it over the luncheon break as long as she brings it back.

CAHILL, MS: That was my first idea, your Honour, and then I quickly abandoned it, thinking that you wouldn't possibly entertain that, but - - -

KENNETH MARTIN J: You never know, Ms Cahill. You never know.

CAHILL, MS: - - - your Honour having suggested it, I'm all for it. Would your Honour - - -

KENNETH MARTIN J: Are we happy with that, Mr Niall?

NIALL, MR: Yes, your Honour. Would it - but it's up to my learned friend if the witness was also given a copy of the NASAA standards.

CAHILL, MS: Yes, absolutely.

KENNETH MARTIN J: Yes, I'm more than happy for that to be done. Well, look, what my orderly will do will be to pull out the NASAA standard at page 1293 to 1407 and the national standard, between 1408 to 1480, being documents 142 and 143 in volume 5, they will have a clip put around them, they will be given to Ms Goldfinch so she can familiarise herself with them. And then we will return at 2.15 pm.

CAHILL, MS: Yes. Thank you, your Honour.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: All right. We will adjourn until 2.15 pm.

(LUNCHEON ADJOURNMENT)

GOLDFINCH, STEPHANIE JANE:

KENNETH MARTIN J: Please be seated. Yes, Ms Cahill.

CAHILL, MS: Thank you, your Honour. Ms Goldfinch, you have had an opportunity now to look through the NASAA standard and the national standard over lunch?---I have.

Now, if you could come back to exhibit 11 please and - - -?---Exhibit 11.

Yes, that's the letter of 23 April 2009. Have you got that?---Yes, got number 276 on it.

Yes, and it - yes, that's right.

KENNETH MARTIN J: Don't worry about that.

CAHILL, MS: Yes. Now, the second paragraph, your quote there - the material you've quoted, was that intended to be a reference to standard 3.1.9(b)?---No, I would - I cannot be certain what reference that is - - -

So - - -?--- - - - because no number was quoted.

In the letter?---Yes.

So you've had an opportunity to look through the national standard over lunch. Have you not been able to find a standard with those specific words in it?---That's correct.

All right. Now, before lunch you said that you were intending - I'm sorry, I withdraw that - that you had in mind a number of standards, not just one, when you wrote this letter in April 2009. Have you had a chance to look now through the standard and can you tell his Honour what other standards you had in mind?---I cannot remember what I had in mind when I wrote that letter.

All right. Can you - you did have in mind, though, 3.1.9(b)?---I cannot say that for certain because I haven't quoted the number. It's five years ago and I do not remember what I was thinking when I wrote that letter.

All right. So you can't assist his Honour at all as to what standards you might have had in mind when you wrote this?---I can't explain how that quotation mark is around those words and with no reference to any number, your guess is as good as mine.

All right. Do you say then you weren't intending to refer to clause 3.1.9(b)?---No, as I said, I can't remember what I was thinking five years ago.

All right. So it's possible but you just couldn't say one way or the other?---I don't recall what I was thinking.

All right. Can you help me with - in the second paragraph you used the word contamination. Do you see that? Can you recall what you meant by contamination at that time?---At that time, this was a totally new issue and I probably referred to somebody else so this is probably what - when I

have spoken to other people in the NASAA standards committee or the chairman or something, what they have said to me.

Can you remember what that was?---No, certainly cannot.

So you can't assist his Honour by explaining what you might have meant by the word contamination at that time when you wrote it?---Well, contamination would mean the same now as it did then because it hasn't changed. It just means - it's a general meaning and it means getting some substance that is not allowed under the standards in or on a certified operation.

In or on did you say?---In or on a certified operation, whether it be soil, plant, products, animals, air, water.

So a canola swathe resting on a sheep's back would be contamination?---I guess it would because it can - no, if it was genetic - I assume you meant genetically modified.

Sorry. I'm sorry, you're right, I didn't preface that. A GMO canola swathe resting on a sheep's back would be contamination?---I think that's a farcical sort of a question.

Could you answer that question please?---It's not a sensible question.

KENNETH MARTIN J: Well, the question hasn't been objected to by your counsel so would you be kind enough to answer it?---Well, GM is not allowed on an organic farm, so it's contamination. It's on the farm. It's contaminating the farm.

CAHILL, MS: So is it contaminating the - - -?---Because it's not likely to stay on the sheep. It's likely to fall off and the sheep is likely to eat it.

While it's on the sheep's back, is it contaminating the sheep in your view?---It's contaminating the system because it's not allowed.

My question is, is it contaminating the sheep in your view?---The sheep is part of the system. It's a whole thing. The sheep, the system, and the GM is there.

So if you would just answer my question, in your view would a GM canola swathe resting on a sheep's back be contaminating the sheep?---Well, it's probably

contaminating the wool. He wouldn't be able to sell the wool, would he?

Is it contaminating the sheep?---Yes, contaminating the sheep's wool. That's part of the sheep. That is the sheep.

Is it contaminating the sheep's body to the extent that it's resting on its back?---Sheep have pretty thick wool, don't they?

So it's not contaminating the sheep, only the wool?---It's contaminating the sheep because the wool is part of the sheep.

All right. And if that GM canola swathe does fall off the sheep's back and land on the pasture, it then contaminates that paddock where the pasture is. Is that right?---Mmm.

KENNETH MARTIN J: Mmm, that's a yes?---I beg your pardon, yes.

That's a yes?---Yes.

Sorry, we're recording your evidence so if you can indicate yes or no rather than mmm, that would be helpful?---Certainly. I'm not used to this sort of situation.

CAHILL, MS: It's understandable, Ms Goldfinch. So you discussed - did you discuss, at the time that you wrote this letter, your understanding of the meaning of contamination with - - -?---No, I did not.

With anybody at NASAA?---No, I did not.

Is that a discussion you had had prior to writing that letter with anyone at NASAA?---The meaning of contamination?

Yes?---I've been involved with NASAA and the standard since the 1980s, so I have been having discussions about it for, you know, ever since then - - -

All right, but the - - -?--- - - - in one way or another.

All right. But is your evidence this, that as a result of perhaps discussions you have had over a long period of time and your work in the area, by 23 April 2009 you had a very clear idea of what was meant by contamination?---Yes.

And that idea - your idea of what is meant by contamination hasn't changed since then?---I don't believe it has, no.

Thank you. Now, do you recall speaking with Mr Marsh in August 2010?---I recall being given copies of my phone diary, where I recorded some conversations.

That wasn't my question. Do you - - -?---No, I don't recall because I cannot recall the date specifically, who I spoke to. In that job, I can't even recall who I spoke to the day before. There was just so much - - -

I was just asking not about a specific date in August but just in August, if you remembered speaking to him?---Which year?

2010?---I did speak to Steve in 2010.

But you can't remember the month?---Well, it was more than one month. It was over a period of time.

You were in regular communication with him, were you?---He called several times about the issue.

About the - - -?---His concerns.

- - - exemption that had been put in place for GMO canola production?---He called - - -

Sorry?---With his concerns about the possibility that he could be - his farm could be contaminated.

That was prior to the incursion incident in December?---Yes.

Yes. I'm happy for you to put away volume 1. If you leave volume 5 out and pick up volume 2 please.

KENNETH MARTIN J: Are you done with exhibit 11, Ms Cahill?

CAHILL, MS: Yes, I am, your Honour.

KENNETH MARTIN J: All right. We will take that back as well.

CAHILL, MS: Sorry, I will just need that back. Do you have volume 2 there?---2.

Yes, and can you turn to page 289 please. And this is one of the phone notes that you have been recently shown in

preparation to give evidence. Is that right?---No, I haven't been recently shown this.

All right. Can I - if you would like to take an opportunity to read it and then I will ask you a question?---Yes.

Do you recall now, having read this note, this conversation?---No. I don't recall the conversation, but this is a memo,= and where I've recorded having conversation.

Sorry. I was distracted then, Ms Goldfinch. Could you just repeat that answer?---It's a memo where I've recorded having a conversation, so it does jog my memory in that way. But otherwise I don't recall it.

I see. You don't dispute now the contents of the note that you've made?---No.

You called Mr Marsh to say that the definition of contamination was genetic contamination. What did you mean by that?---That was what was said to me by Rodd May. That's the other person that's mentioned there.

Rodd May? What's his role?---I believe he was chairman of NASAA at the time.

Chairman of NASAA, did you say? And you had had a conversation with him about the meaning of the word "contamination", did you?---I don't recall what I discussed, but it was about genetic - it was about the situation.

That Mr Marsh was confronting as an organic farmer - - -?---Yes. Yes. I didn't really have - - -

- - - in an area - sorry?--- - - - much involvement at this time.

Right. The situation that you just referred to was a situation where Mr Marsh was an organic farmer in an area where GM canola production was likely to commence nearby, is that right?---Yes.

And you had had a discussion with Rodd May about what the word "contamination" meant, is that right?---I - look, I honestly cannot recall, because I wasn't taking a particular - it was Rodd's - he was chairman of the standards committee, so it was his role, which is why I've

referred to what he was doing with those other people and the standards discussions. So I was really leaving it up to them at that time, so I didn't - - -

Leaving what, Ms Goldfinch?---Discussion about genetic modification.

Well, here you've called Mr Marsh to say that the definition of contamination is genetic contamination. So you were communicating that information to Mr Marsh, weren't you?---Yes. That would be something that Rodd May had said to me at the time.

All right. And what did you understand, at the time, "genetic contamination" to mean?---Any genetic material - genetically modified material - just what I said before.

So if a canola - GM canola swath is resting on a sheep's back, in your view, that would amount to genetic contamination?---I've already said that, I think.

Well, you said it amounted to contamination. Is your evidence that, in your view, that amounts - - -?---It's contamination of an - - -

Sorry. Sorry. Ms Goldfinch, it's important that I get the question out completely before you begin to answer it, because we need to have the question followed by the answer on the transcript. A moment ago you gave some evidence about your understanding of the meaning of the word "contamination". Is your evidence that the two words "genetic contamination" together have the same meaning as "contamination"?---I wouldn't use those two words. I would always use the words "genetically modified organism" and a further word, "contamination".

So just explain that to me. Contamination by a genetically modified organism - - -?---Modified organism.

- - - is genetic contamination, is it?---I wouldn't speak of it like that. No.

Well, you did insofar as you told Mr Marsh that contamination is genetic contamination. Would you agree?---At that time - - -

Sorry. Can you answer the question, please?---Well, I am. At that time, the issue was GM canola, and most genetic contamination around the world had been by pollen, I understand. That's what was - we were concerned about at

the time: contamination by genetic material in the form of pollen.

Cross-pollination was what you were concerned with, wasn't it, Ms Goldfinch?---We were then considering that there was no canola on Steve's farm.

What you were concerned with at that time was cross-pollination of GMO material, wasn't it?---We were concerned that - our understanding was, as I have just said, that most contamination was from pollen. And in the same way, if it was a wheat crop that was growing next door, we would have been concerned about pollen coming and contaminating just the same - exactly the same.

Did you think that canola could cross-pollinate with wheat?---No.

Did you think that GMO pollen could intermingle with a wheat product?---No. Well, of course it could. (indistinct) that - well, we weren't thinking that.

Your concern was - can you just explain to me what the concern was in terms of contamination?---It was just a matter of what the standards say. That's what we were involved in.

All right?---"Concern" wasn't really the right word, I wouldn't think.

So what you were telling Mr Marsh in this phone call was what you understood - what NASAA understood the standards said. Is that right?---No. It was more in the context of developing an understanding of the situation, because it was a new situation in this country.

Well, you're giving him some information here, aren't you? You're not developing an understanding; you've told him something on behalf of NASAA, haven't you?---I've told him what NASAA understood.

That contamination meant, do you agree?---I don't want to get hooked up on the word "contamination", because, to me, it's about whether the pollen - at that time, as I said, it was about pollen, and therefore, that's why "genetic" has been mentioned. It's not very precise wording. It's really far too simplified.

So does this mean that as at this date, having had discussion - a discussion with Rodd May, your understanding of what "contamination" meant under the NASAA standard and

the national standard had changed; it no longer was as broad a concept as a canola swath lying - - -?---No.

Please pause, Ms Goldfinch. It no longer was as broad as a canola swath lying on a sheep's back, but it was limited to the dispersal of pollen. Is that the case?---No. That is not the case. NASAA never would think like that.

NASAA would never think like that?---That's not how you think about GMOs or contamination.

Can you tell his Honour how NASAA thinks about GMOs?---No, because I'm not part of NASAA at this time.

Right. How did NASAA think about GMOs at the time?---You would need to ask the chairman.

NIALL, MR: I object to the question, your Honour. It can only be directed to what this - - -

KENNETH MARTIN J: I uphold the objection.

NIALL, MR: If your Honour pleases.

CAHILL, MS: What did you think about GMOs at the time?---I thought that they were prohibited under the standards.

Yes. But in terms of contamination, the prohibition, what did you think?

NIALL, MR: Well, I object to the question on its vagueness. "In term of contamination, what did you think?" A question should be more precise, in my submission.

CAHILL, MS: I will move on, your Honour.

KENNETH MARTIN J: Very well.

CAHILL, MS: You understood, didn't you, that at the time of his phone conversation, that Mr Marsh had a wheat crop fairly close to where some GM canola production was being carried on?---I don't recall, at that time, if I knew or didn't know what crops Steve had.

But you doubted, didn't you, that canola would contaminate wheat?---I don't think I can answer that.

It's what you said though. You said that in your note?---Well, so I said that.

Yes. That's what you thought at the time, isn't it?---That would be what Rodd May said. Yes.

So that's what Rodd May said. Do I understand from your answer it's not what you thought at the time?---I can't remember what I thought at the time, and I can't remember what Rodd May said at the time either. It was five years ago. Things have changed a lot since then.

Did Mr Marsh say to you that growers wanted certainty in standards to aid in suing if necessary?---I don't know. I doubt he said that. I probably said that.

You probably said that?---I don't know.

One of you said it though. Is that right?---I was probably making a statement.

To Mr Marsh?---No, this is a - just a memo.

So - - -?---It's for people in NASAA's reference, not for the grower's reference.

So it's not necessarily something Mr Marsh said to you?---No, no.

Could have been, is that right?---I doubt it.

Why do you doubt it?---Because I don't think he said it.

So you have sufficient memory of this and other conversations you had in 2010 - - -?---I have sufficient
- - -

Please pause, Ms Goldfinch. You have a sufficient memory of the conversations you had with Mr Marsh in 2010 to be able to say that it's unlikely he said that. Is that right?---No, it's not right.

So it's possible then, isn't it, that he said to you:

Growers want certainly in standards to aid in suing if necessary.

?---No.

And why do you say it's not possible that he said that?---The question you asked before that where I just answered no, I would have said if I was able that I - from

the conversations I have had with Steve five years ago, I don't take him to be that sort of a person.

Well, what sort of a person do you mean?---Talking about suing, especially at that early stage. It was just a what-if situation, really.

All right?---It was all what if.

All right. Did you consider the standards to be uncertain at that time as to what the consequences would be in the event of GMO contamination?---No, I don't think I would have thought that.

You thought the standards were clear, did you?---I don't recall what I thought about the standards five years ago.

Except that you did not think that they were uncertain. Is that right?---No, I can't - I can't answer that question.

Well, you just did. You said that you did not think that they were uncertain. Do you want to change your evidence?---The standards are what they are. They've - they're in black and white. That's what they are.

Did you think in August 2010 that they were uncertain as to their consequence and effect in the event of GMO contamination?---No, I don't think that. I doubt whether I thought that and I don't think it now.

So you consider the standards now to be clear about the consequences and effect of GMO contamination. Is that right?---Yes.

And you are fairly sure you thought the same thing back in August 2010?---I doubt in August 2010 that I was required to assess the standards in this context.

That's not the question?---Sorry, I have misunderstood you then.

You're fairly sure, aren't you, that back in 2010 - in August 2010 you did not think the standards were uncertain. You thought that they were certain as to their consequence and effect in the case of GMO contamination?---The standards are what they are.

That's not answering my question?---Well, I can't answer that question because I don't know what I thought and I doubt whether I questioned that in that way. It's not

something I'm required to question. You just - the standards are there; you just use them.

So do you say you hadn't turned your mind in August 2010 to the question of whether they were certain or uncertain in this way?---Well, I doubt it.

Notwithstanding what's written in this note?---Notwithstanding.

Thank you. Now, can you go to page 291 please. You have seen this document recently, haven't you?---I have.

This was the first notification you received from Mr Marsh in relation to the incursion, yes? Is that right?---I can't answer whether it was the first notification.

Well, have a look over the page. Do you remember receiving more than two - - -?---Yes.

- - - faxes from him?---Yes.

So the one at 291, that was the first, wasn't it, the first notification?---Yes.

Now, NCO - you were in charge of the NCO at this stage, weren't you?---I was. Well, I was the executive officer.

And you supervised all the certifying - - -?---I wasn't chairman of the board.

I beg your pardon?---I wasn't chairman of the board.

Yes. You were the executive officer in charge of NCO on a day-to-day basis?---Correct.

And you supervised all the certifying officers, didn't you?---They were directly responsible to me.

That's right. You supervised them, didn't you?---Yes.

Thank you. And now, obviously you had to organise and oversee how NCO was to respond to the incursion. Is that right?---Yes.

And you became directly involved in the decision about certification, didn't you?---Yes.

And the other person who was involved was Luke You?---Yes.

And as far as you're aware, he still works for NASAA or NCO?---Yes.

Now, at paragraph 14 of your witness statement, if you have it there, you say that you considered:

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.

Now, is it normally the case that where there is an incidence of contamination, whether it's GMO or chemical - whatever the nature of the prohibited substance, is it a much more usual case that that arises as a consequence of the actions of the certified operator?---There's no set rules about when you would have two people as far as I can recall but it's going to be in cases like this where you have few or no precedents. If you've got lots of precedents, it's unlikely you would need more than one person.

Just coming back to paragraph 14, where you say:

The case was unusual because the contamination appeared not to have been due to any actions of the certified farmer.

Now, my question is this, is the usual case where the contamination has been due to the actions of the certified farmer?---No, there's not really usual cases.

So is every case of contamination unique?---Yes.

So you have two officers involved in every instance of contamination?---No, as I said it depends how many precedents there are for the similar situations.

But I just thought you said that all cases of contamination were unique?---We treat all cases on a - all issues on a case-by-case basis. Therefore, they're unique.

So you have two officers in each case to review them?---Single officers are able to handle unique cases.

So just coming back to paragraph 14, you considered:

The case was unusual because the contamination appeared not to have been due to any actions of the certified farmer. That's why two people were involved.

I'm just trying to understand that evidence. You would allocate two review officers where it's an unusual case, yes?---I don't strictly allocate them. They often just do it themselves because they need to discuss something.

In this case, you became directly involved, didn't you, because it was unusual?---Because it was the first time that they had had - we had had GM contamination.

So - - -

KENNETH MARTIN J: In Australia?---As far as I'm aware, with NASAA. I'm not talking about anyone else.

With NASAA, in Australia?---I'm not aware of any others.

That's a yes?---I'm not aware that NASAA has any other - had any other issues with GM. If that means yes, then that means yes.

Prior to that time?---Not at that time, no.

CAHILL, MS: And so was that the real reason why you had two review officers look at the matter? Not because it was unusual because the contamination was not due to any actions on the part of the certified farmer, but because it was unusual because it involved GMO incursion?---The whole issue was about GMO contamination, and it was totally unusual, it was totally unique, and it was a once-off case.

And that's why there were two review officers involved, is that right?---Yes.

Thank you. Did you not think that this was simply a case where standard 3.1.9(b) applied, because it was a case of the accidental presence of GMOs?---At what point in time are you referring?

When you received this notification?---When I received this notification I didn't make any decisions - wasn't my job to make a decision based on a particular standard at that time.

But you said at paragraph 14 that you considered that the case was unusual, and that was why two people were involved in the review process. It wasn't that unusual, was it, Ms Goldfinch, because it was simply a matter which fell within standard 3.1.9(b) of the national standard. Isn't that so?---It was unusual. No. The answer is no. It was unusual.

Could you go back to the national standard, please, in volume 5. Do you have page 1419 there?---Yes.

And if you have a look at standard 3.1.9?---Yes.

So where - it says there:

Where product has been contaminated with non-permitted substances as a result of factors beyond the control of the certified operator - - -

- - -?---Yes.

So you understood that, at the time, to be a standard referable to accidental presence outside of the control of the farmer, yes?---Yes, but we weren't using this standard, specifically; we were using the NASAA standard.

Can we just stay with me here, just for a second. If we drop down to (b):

The product known to be contaminated by GMOs or their by-products must be excluded from sale.

- - -?---What about it?

So are you saying you didn't have regard to this standard at the time you received these notification?---No. At the time I received that notification, it was a notification.

Yes?---I wasn't - it wasn't time for making a decision.

All right. And when you decided to allocate two review officers to the matter because it was unusual - - -?---Yes.

- - - you didn't have regard to this standard?---I didn't assign the review people at this time.

All right?---They were assigned later.

In paragraph - well, all right. At the time that the two review officers were assigned to the certification decision because the case was unusual, you didn't have regard to this standard, did you?---I didn't have cause to regard it because we were using the NASAA standard; that was the standard that Mr Marsh - that was our - part of our operating system for Mr Marsh's certification.

Under the NASAA standard?---Yes.

And are they different, in your view, the NASAA standard and the national standard?---They're considered to be equivalent.

Are they different, in your view?---That's not how we view things in the organic industry.

Not sure I - - -?---As different or - or not. We view them as being compliant or non-compliant, or as equivalent or not equivalent.

All right?---Not as different doesn't come into it; there's no such consideration made.

The NASAA standard, as far as you're aware, must be consistent with the national standard, mustn't it?---The NASAA standard has been assessed as compliant with the national standard by AQIS and DAFF - Department of Agriculture, Fisheries and Forestry.

That's not my question. As far as you're aware, the NASAA standard must be consistent with the national standard, isn't that so?---Could you define "consistent", please.

That doesn't provide for anything different from what the national standard does?---Are you talking about different or consistent?

Ms Goldfinch, can you turn to page 1292.1 of volume 5?---Could you repeat the page number, please.

1292.1?---Yes.

You recognise that document, don't you?---Yes.

Can you explain to his Honour what that document is?---The AQIS administrative arrangements is the document which sets out the - more or less quality system that certifies who are credited by Daph are assessed against.

And if you go to page 1292.4 where the purpose is set out?---Yes.

This is the document that regulates the certifiers, isn't it, in effect?---No, it's part of the set of materials that are used.

To regulate the certifiers?---Yes.

And if we go to the purpose in section 2, 2.2, this document has been developed to enable AQIS-approved certifying organisations, which would include NASAA, obviously, wouldn't it?---Yes.

To a harmonised interpretation - - -?---NASAA Certified Organic, actually.

I beg your pardon?---NASAA Certified Organic.

Yes. Thank you. This document has been developed to enable AQIS approved certifying organisations to (a) harmonise interpretation and application of the national standard requirements. You understood at this time, didn't you, that in forcing the NASAA standard and applying it to those operators certified by NASAA that it was important to ensure that the NASAA standard was applied consistently with the content of the national standard?---I didn't really have to consider the national standard strictly because AQIS had already done that and already deemed it to be compliant and therefore we were just allowed to use our own standard.

Is that your evidence, you didn't need to have regard to the national standard?---When we were accredited for the NASAA standard and that's the standard which we certified our clients with.

So your evidence is this, is it? When it came to the situation with Mr Marsh and the incursion of the GMO material and the need to decide how to respond to that, it was not necessary to go back to the national standard?---Correct.

All you needed to do was to look at the NASAA standard because that standard had been approved by AQIS?---When we were considering Steve's case - - -

Is that right?--- - - - we didn't consider that question, we just used the NASAA standard.

Did you think it was open to you - and, by you, I mean, NASAA - to impose a sanction of suspension or decertification upon Mr Marsh's operation where there was no contravention of the national standard?---I don't know how to answer that.

If you could turn to page 129.22 please?---129 - sorry.

Point 22?---1292 - 12 - 129 - - -

2.22?---Which volume is that in.

You are in it right at the moment?---Could you repeat the number?

You are in 1292 at the moment?---Yes.

If you go first to 1292.6?---Yes.

Do you see there at 3.21 there's a definition of sanction?---Yes.

And that means a penalty, either financial or administrative in scope, applied by an approved certifying organisation as a result of non-conformity in relation to the national standard or importing country requirements?---That's what it says.

Were you aware of that definition? Did you have it in mind at the time that you came to consider the - NASAAs response to this incident of incursion?---As I mentioned before, we were using the NASAA standard which is deemed equivalent and one of the things that AQIS checked for compliance is how we implement sanctions.

Yes?---So I don't have to consider - I don't have to go to the AQIS administrative arrangements and look at 3.21.

So is the answer - - -?---It's not necessary.

- - - no, you didn't have that in mind because you didn't need to. I wouldn't put it like that but if you want to put it like that, yes. And when it comes to a non-conformity in relation to the national standard, if you can go to 1292.22?---Do you mean 1292.2?

Point 22?---Where is that?

Just keep moving through the document, you should come it, unless there's something wrong with your bundle?---1292.22. Right. Got it.

You're aware of section 16 of these administrative arrangements?---Yes.

And what it provides in relation to critical non-conformities?---Yes.

And did you have that in mind when you approached the decision of how to respond to this incursion?

NIALL, MR: I object to the question on the grounds of relevance, your Honour. It's not suggested by my learned friend in any pleading that there was some error or some failing on the part of NASAA for either having regard or failing to have regard to the AQIS arrangements. In fact, there's no mention of it at all in our learned friend's case. And so it's not relevant.

KENNETH MARTIN J: Do you want the witness out to respond or - - -

CAHILL, MS: I can probably deal with it a different way, your Honour.

KENNETH MARTIN J: Very well. Now, Ms Goldfinch, when it came time for you to consider what needed to be done, how to react to this incursion, if we go to paragraph 15 of your witness statement, you say that you decided to suspend - or, sorry, NCO decided to suspend certification of the affected paddocks and you signed off on that decision and you were relying upon what Mr Marsh - the information he had given and then also Kath Purves's inspection report. Is that right?--Yes, it's always a combination of what Steve had given us with maps and what the inspector had given us was the independent verification.

And if we go to the suspension decision at page 323 of volume 2?--Could you repeat the page, please?

323?---Page 323.

Yes?---Should it start with a zero?

Yes, that's right?---Yes.

Now, there was no evidence before you at this stage of anything other than GM canola material on the land, is that right? There was no plants growing and there was certainly no genetic transfer into other plant organisms, is that right?---Just checking my statement. Could you repeat your question please?

Yes. At this point, when you were suspending, there was nothing other than GMO material laying on the land; there was no plants growing - GMO plants growing on the land, nor was there any cross-pollination with any crop, is that right?---Could you repeat the first part of your statement - your question again. Statement/question.

All that had happened at this stage was that GMO plant material was lying on Mr Marsh's land, isn't that right?---I don't think that context you're painting is quite correct. I think it was a lot more significant than the way you're trying to portray it.

All right. There were seeds on his land?---I understand there were thousands of seeds lying all over more than half of his property.

All right. Thousands of seeds lying all over half of his property, and swath material?---Correct.

But there was no GMO material growing on his property, was there?---Of course not.

And there was no genetic transfer into another organism of GMO material?---I believe some sheep had transferred GM material down their throats.

And are you saying that the sheep had become genetically modified as a result?---I don't think I said that.

So there had been no transfer of any GM material to another organism, had there?---There was GMOs in the sheep.

Do you mean in their stomachs or in their faeces?---I guess so.

But not in their cells?---How do I know? I'm not a microbiologist.

Now, paddock 11 - sorry. The suspension decision was to suspend certification, not of product or livestock, but of land. Did you consider whether there should just be a suspension of certification in relation to product - crop and livestock, rather than the land itself?---No. The certification is - is a comprehensive package, comprising of the soil, the plants, the crops, the weeds, the livestock, the manure and the water.

But NASAA certainly does, from time to time, decertify product or livestock without decertifying the entire operation, isn't that true?---I'm sorry. In this context, I can't - I couldn't be sure - to answer that one.

Are you saying that - - -?---You're asking me to think back to - I don't work in NASAA. I haven't worked there since September 2011.

And are you saying, as far as you can recall, you can't remember NASAA ever decertifying just product or stock rather than the entire operation or part of the entire operation?---No. Honestly could not remember any other cases right at this moment.

Now, was that something influencing your thinking in terms of the suspension of the paddocks, that is much more usual to suspend the operation or part of the operation in its entirety, rather than the product?---As I said, it's always a case-by-case situation, and, as you know, at this time, Steve had some crops in and he had some pasture in, and he had some livestock in some places. The issue at hand was that there were thousands of seed lying on the soil, which is the basis of the current and future crops, and there was so much that you couldn't just pick it up and remove it.

Why was paddock 11 - why did that remain organic at this stage?---I think when I read through this, that might have been a mistake.

That was a mistake?---I think so. Yes.

All right?---When I read through this the other day.

Now - - -?---I noticed it seemed to - might have been a mistake.

The major non-compliance which was notified here, relevantly in relation to those paddocks, was 3.2.9, where NASAA determines there's an unacceptable risk of contamination. You agree?---Yes. Well, that was one of three.

We will get to them in a minute. But in relation to these paddocks, 7 to 13, with the exclusion of 11, it was 3.2.9, wasn't it?---As it says in that document, dated 10 December.

Yes. Because in relation to the other non-compliances, GMO contamination was only part of the reason for decertification, wasn't it? The other was that the operator had drenched sheep?---No. He wasn't decertified for drenching sheep. He's allowed to drench sheep.

The sheep were decertified for him drenching the sheep?---Yes. They were officially removed from his certification.

Decertified, Ms Goldfinch?---They were officially removed from his certification because they were drenched. He's

allowed to drench them if he feels that there's a reason for their health.

Yes?---And then they go to the quarantine paddock.

But they're not allowed to be sold as certified?---That's right.

And what this document demonstrates is your decision that those sheep were decertified, isn't that right?---Yes. This document demonstrates the fact of what is certified and what isn't.

Thank you. And if we can come back to those paddocks at the top, your decision to suspend was based on 3.2.9 of the NASAA standard?---The suspension was due to the GM, and that was stated as 3.2.9. Yes.

Yes. That was the basis of your decision, wasn't it?---The basis of the decision was the GM - - -

Yes?--- - - - and it was suspension, not decertification. It wasn't decertification; it was suspension.

Do you have to have a non-compliance, would you agree, before you can suspend certification?---No.

No?---You have - you only have to have suspicion of a non-compliance.

All right. So you - - -?---But, you know, a serious - in a serious way, of course.

Right?---Not nothing stupid.

So your point is this, is it, that there was a possible non-compliance with 3.2.9?---Yes. We had already had the inspection; we knew there was a non-compliance because we knew there was genetic material, and we were just waiting for the test results to confirm that it was genetic material.

Can I have a moment please, your Honour?

KENNETH MARTIN J: Yes.

CAHILL, MS: So can I just be clear, Ms Goldfinch. You, at this time, thought that the NASAA standard allowed you to suspend certification, not where there was actual demonstrated non-compliance, but suspicion of non-compliance?---This was 99 per cent non-compliance

demonstrated, wasn't it? We were just waiting on the test results.

So was there non-compliance with the standard or not at the time of your suspension decision?---Suspension is used prior to decertifying so that you don't make any wrong decisions. It allows you to ensure that the consumer doesn't receive product that may be contaminated when you're investigating. So this was under investigation.

Had you formed the view, at the time that you issued the suspension notice, that there had in fact been non-compliance with the standard?---The inspection report verified that there was GM contamination. It also verified that Steve had done all he possibly could to avoid that contamination. It was not his doing that caused this issue, and we just needed to confirm by testing that the material was what, for all intents and purposes, it appeared to be.

So had you formed a view at the date of this letter when you sent it that there had been, in fact, a non-compliance? Yes or no, Ms Goldfinch?---Yes. It's a non-compliance.

Because there was an unacceptable risk of contamination, or actual contamination?---It's - non-compliance isn't really the correct word in this situation. It's not a word - I don't think it has been used here.

So do you say you could suspend for something other than a non-compliance, non-conformity with, or breach of the standard?---This is more likely a non-conformity. It's not so much a non-compliance because Steve didn't do it himself wilfully.

So what's the difference between non-compliance and non-conformity?---Can I please have a couple of hours to go and research and write it up for you? I wouldn't just write that off the top of my head in a court without going and making sure what I say is absolutely correct.

So is your answer without further - sorry. Is your answer, "Without further consideration, I couldn't say"?---No. That's not my answer.

Right. So what's your answer? What's the difference between - - -?---I think I answered it before.

Non-compliance and non-conformity?---I think, before, I said we didn't use the word non-compliance in this context

because it wasn't a wilfully caused situation. It was inadvertent and then I said non-conformance was more likely to fit in this situation.

Okay. So non-conformity with the standard is when an operator doesn't meet the standard through reasons outside their control? And non-compliance is when they don't meet the standards by reasons within their control. Is that a fair distinction?---We would - I don't believe NASAA uses the word non-conformity. It doesn't really talk about - it talks about non-compliance, and as I said, we didn't use the word non-compliance in this because it was under investigation to determine whether it was a non-compliance.

KENNETH MARTIN J: The table that you give at 323 commences:

The following non-compliances are notified.

?---Well, there you go. Thank you.

CAHILL, MS: So it was a non-compliance?---It's just a technical term for when standards are not complied with, whether or not they would be through the fault of the operator or not.

And here, you identified 3.2.9 of the NASA standard? Yes?---Yes.

And did you have in mind that there had been non-compliance with any other standard that's not mentioned there?---There was no need to have any other standards in mind.

So is the answer, "No, I didn't"?---Correct.

Thank you. So if we come back to this 3.2.9 non-compliance, which is the first one, in order to arrive at that decision, you had Ms Purves's inspection report, didn't you?---Yes.

And if you go to page 294 in the volume 2, it starts at 293, so that you can get the sense of it. That's the first page. You recall that document?---Yes.

And you will have read it recently in order to prepare to give evidence. Is that right?---Yes.

Now, at 294, you would have read, at the time, if you can see under the inspection history comments, third line:

Extensive incidents of swath plants with full and broken seed head sighted in paddocks 7, 8, 10 and 12.

So you read that, did you?---Where does the word history - where are you - - -

Sorry. Do you see - - -?---Page 294?

Yes. And do you see the heading Paddock And Infrastructure Inspection History?---Yes. I do. Paddock And Infrastructure.

Comments. Comments column?---Yes.

And then a third line?---Extensive.

Yes.

Extensive incidents of canola swath plants with full and broken seed head sighted in paddock 7, 8, 10 and 12.

?---Yes.

Yes. But - sorry. I withdraw that. Now, in paddock 10, there were plants noted in the fence line. Do you see that?---Yes.

And then if we go over to 297, do you see under GMOs? It says Mr - - -?---G?

Yes. What is - and under the heading, What Is The Risk Of GMO Contamination, the list risks present:

Does the operator effectively manage GMA risk? SM suspects GM contamination has spread in an area on his land.

And then identifies that area. This includes 7, 8, 9, 10, 11, 12, and he has also expressed concern about paddock 11. So this is just a suspicion here, isn't it, of contamination? Is that right? Is that how you read it?---That's the word she has used. Yes.

Yes. So you wouldn't have been able to rely upon that as a demonstrated non-compliance of unacceptable risk of contamination at this stage, would you agree?---I wouldn't rely on any one line in a (indistinct) inspection report of - how many pages? Then the following look at maps, etcetera, etcetera.

My point is this, Ms Goldfinch. Whatever else you relied upon, you would not have been able to rely on that.

NIALL, MR: That alone, in my respectful submission, if that's the question, should be made clear.

KENNETH MARTIN J: That sentence alone, is that - - -

CAHILL, MS: That's not the question I asked?---That's what I thought you were - - -

KENNETH MARTIN J: Well, the question was you wouldn't be able to rely on that alone, and we normally would have a subject matter for that. So perhaps you should clarify that.

CAHILL, MS: Well, the question was put this way, your Honour. The prelude to it was what was - what was to the effect of what this witness was able to rely upon in support of her conclusion of a demonstrated non-compliance. And where there is only a suspicion of contamination, that's not going to meet it. So it doesn't matter what else is there - - -

KENNETH MARTIN J: A long dialogue about.

CAHILL, MS: Yes. But it's - that's not that question. The question I put was, in my submission, was entirely - - -

KENNETH MARTIN J: The problem is the question at that. And that's ambiguous. So if you could just clarify the question, that would be helpful.

CAHILL, MS: So these four lines here, Ms Goldfinch, that I've just taken you to, drawn your attention to, you would not have been able to rely upon those in support of a conclusion that there was a non-compliance with 3.2.9, isn't that so?---Absolutely so. I would not rely on four lines out of a 20 page inspection report to make a decision.

I'm not suggesting that you did. I'm - - -?---Well, I thought I answered the question. No, I wouldn't rely on that.

Ms Goldfinch, what I'm asking you is this. Is that whatever else in the report you relied upon, you would not have been able to rely upon these four lines to support your decision. Isn't that so?---Well, would I be in contempt of court if I say I don't understand that question

because it just seems to be absurd. Of course I wouldn't rely on one line in a 20 page report.

I'm not suggesting you would, Ms Goldfinch. What I'm putting to you is that you would have only been able to rely on other material in the report. What you wouldn't have been able to rely upon is those four lines.

NIALL, MR: I object to the question, your Honour. The question is, "You would not be able to rely on those four lines." The - - -

KENNETH MARTIN J: I think the witness understands the question. I think it has sort of been answered almost twice now.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: Let's have another go.

CAHILL, MS: Did you rely on these four lines?---Of course not.

You didn't?---Of course not. I've already explained why.

Sorry. Why was that? I missed that?---Because four lines out of a 20 page report is inadequate to make - base a decision.

I'm not suggesting that you relied only - - -?---It's right in the middle of the report, it's not in the summary.

Sorry, Ms Goldfinch. You would have relied - sorry, I withdraw that. I'm not suggesting that you would have relied only on those four lines. Did you rely on those four lines together with other material or did you exclude those four lines from your consideration?---I don't recall whether I relied or excluded; I just read the whole thing.

Now, at page 308 under Inspector Recommendations?---Yes.

You noted the inspector's note, didn't you, that the practices of the property were in keeping with the NASAA standard. Did you take that on board?---I took everything on board.

Did you take that on board?---Well, I must have if I took everything on board.

Are you having difficulty answering my questions, Ms Goldfinch?---I'm having difficulty with some of the direction your questions are going, yes.

So you took that as a factor into account in your decision, did you, that note there?---I understood that note to mean that Steve understood the NASAA standard and was implementing it to the best of his ability, in a manner that was compliant.

All right. And then the note that the non-compliance was despite the best efforts of this operator to buffer his property, notify his neighbours, and to protect his own crops. So that you took into account as well?---Well, whenever we make decisions, we consider the whole package, as I have mentioned, and one of those things is the operator's genuine - their understanding this and their understanding of the standards, their willingness to comply, you know, fully, and not just to - just be looking for profit. And that assists to be able to determine whether they - I'm not talking about this case specifically - whether they may or may not do things that are noncompliant. So that's why that sort of thing is written for - it's for the full understanding because the operator in an organic system is as important as the soil and all the other parts.

Now, in relation to the third paragraph here that commences:

The incursion of GM plant material -

Did you think it important before you made the suspension decision to ascertain the concentration of swathes across the farm, where they were most concentrated and where they weren't?---Well, that's what we were doing in the inspection. We were looking at - to the extent of the contamination, we were getting material for testing to determine whether it was or was not genetic - GMO. And it so happened that the winds had continued to blow and so this was just a point in time and the scenario continued to evolve.

Do you mean get worse?---No, I said it continued to evolve.

Did it get better?---The dynamics changed.

For better or worse, Ms Goldfinch?---I don't think any of those terms are scientific. I prefer to try and be as scientific as possible.

All right. So in what way did it evolve, Ms Goldfinch?---I understand that further wind events caused further material to blow further into the paddocks.

So the concentrations of swathes got worse, did they, or there was more material that blew in, do you say?---At what point are you talking?

After this - - -?---Because I'm looking right now - - -

Yes?--- - - - at this inspection report.

Well, you're the one that raised the issue of the evolution of the situation, Ms Goldfinch. So it evolved, you say, and material blew in, did it, or blew around?---Winds blow.

Yes, and now we're talking about its effect on GMO material. Did more GMO material blow in or did the existing GMO material blow around?---We can look here at what happened - was reported at that time or we can go to the next inspection report and look at what was recorded at that time. I can't dream stuff up. I have to rely on what the inspectors see and write in their reports.

So you wouldn't be able to say what happened absent what's in the reports?---Of course not.

You have no other information?---Of course not.

All right?---That's why we have inspectors and I don't do it.

So at this point in time, at the date of the suspension decision, you are - Kathe Purves' report was the extent of your information about where the swathes were concentrated on the different paddocks. Is that right?---Yes, and Steve had provided maps.

That didn't give any information about the concentration of the swathes though, did it?---I don't think you can measure it and I don't know that concentration would be the word you would use anyway.

Just go to page 318 please?---And I don't actually think it's relevant.

We will come to that. Page 318 please?---Yes.

That was the map that Mr Marsh gave you?---That's a map Steve provided to NCO.

To you, Ms Goldfinch. It has got your name at the top, hasn't it?---Well, one always addresses somebody. It's good manners.

He provided it to you, didn't he?---I would say he provided it to NCO.

All right?---That's where his obligation lies, not to me. I'm not specifically mentioned in his contract.

But you certainly did read this map at the time that you received it?---Yes. Yes, of course.

And studied it, didn't you?---It was reviewed by the reviewers as part of their decision making process.

Well, Ms Goldfinch, with respect, that was a simple question. You studied the map, didn't you, yes or no?---Sorry, I'm not used to these kinds of questions. I apologise if I'm not answering them correctly.

You studied the map, didn't you?---I believe I read the map, yes.

Yes. And you understood it to depict the area over which swathes had been observed. Is that right?---Yes, it was Steve's duty to inform us, his understanding of the extent of GM contamination, and that's what he has done.

Well, the - - -?---So we would take that at face value.

Well, the area - - -?---It's taken at face value.

You understood it depicted the area over which the swathes had been found?---Yes, at that time.

Yes. But in your view, the concentration of swathes was irrelevant to your decision. Is that right?---Well, the inspector wrote that there were thousands of seeds.

Yes?---That's what's relevant to the decision.

The inspector wrote that?---The seeds are more important than the actual plant.

All right. But if the thousands of seeds were in one paddock and the rest just had swathes, that wouldn't matter to you? You would decertify all of the paddocks. Is that right?

NIALL, MR: If your Honour - - -?---I - - -

Just before the witness answers, I object on the grounds of irrelevance, your Honour. It's not pleaded or open on the basis that NASAA could have decertified less than the whole of the area that they do certified. That being so, this whole line of questioning based on, "Well, you could have looked at concentration with the individual paddocks," is not relevant to an issue in the pleadings.

KENNETH MARTIN J: What do you say about that?

CAHILL, MS: Well, we say it's very clearly relevant, your Honour. We have demonstrably pleaded that this decision was unreasonable for several - on several bases.

KENNETH MARTIN J: For this certification decision.

CAHILL, MS: Yes, and this is the prelude to it. We will come to that - - -

KENNETH MARTIN J: So you're exploring the area of concentration of - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - material.

CAHILL, MS: Yes. And it's certainly relevant insofar as the - - -

KENNETH MARTIN J: I will allow the question.

CAHILL, MS: Thank you.

KENNETH MARTIN J: Perhaps just repeat it again for the benefit of Ms Goldfinch.

CAHILL, MS: Yes. I'm always asked to do that and I can never remember the question - - -

KENNETH MARTIN J: I know.

CAHILL, MS: - - - after the objection.

KENNETH MARTIN J: Do your best.

CAHILL, MS: So this is the question, Ms Goldfinch, you mentioned that seeds were of particular importance. Can I just explore that with you a little. If there had only been swathes blown without seeds, would you have not suspended?---As I mentioned before, we only ever make decisions or considerations based on actual cases.

Yes?---Not on imagined cases.

Yes. So I'm asking you a question now which I would like you to answer, and that's if there had only been swathes on the land without seeds, would you have suspended?---Well, I'm not making that decision now. I'm not in the NASAA office, I'm in court of law and that - it's not fair to ask me that question because it's completely not relevant to what I'm doing here right now.

Would you answer the question?---If I was really making that decision, I would think about it but I would need to be able to about it; I can't think about it properly here.

All right. Ms Goldfinch, do you think it's a factor that might influence your decision differently. It had the potential to change your decision but you would need to think about whether it would or it wouldn't?---The decision that was made was based on a multitude of factors, not just one factor. You can't just isolate one factor out and say that was the reason for the decision.

But do you say that one factor was that there was seeds, thousands of seeds, as far as you were aware?---That was one factor, yes.

And do you know where those seeds were concentrated?---No, I don't know where they were concentrated. Could you define concentrated, please?

Whether there were, for example, all of the seeds or most of the seeds in one paddock and no seeds in another?---According to the report, I would have to go to the report to be able to answer that.

So if it - - -?---So extensive seed heads and seed at paddock 7, 8, 10 and 12.

Yes?---She says extensive. I presume that means significant amount.

And spread all over the paddock, not just in one area of it?---Well, significant doesn't necessarily mean spread uniformly over the whole paddock and I doubt that would be the case anyway, because the wind doesn't just work like that. And then you have got the land forms to consider and vegetation and so on and so forth. So, you know, it's never going to be uniform.

Now, can we come back - so your position is that paddock 11 was left out by way of oversight, not because there was no evidence of contamination at that time?---What - I'm only going from memory and I, from memory, think 11 was supposed to be suspended.

All right. Now, come back to page 324 please. This is the second page of your suspension decision notification and condition 1, there was some further investigations that had to be done and completed by NCO and that was why the suspension was put in place. Yes?---Yes.

And those investigations were limited to obtaining test results from the samples that Ms Purves had taken. Is that right?---At that time that was the next step in the process.

But you were not intending to undertake any other type of investigation, were you?---Not at that time, no.

You weren't intending to research the longevity or persistence of canola volunteers, were you?---I did some research on GM canola actually at the time.

Between the date of suspension and decertification?---No, I don't recall when it was but it would have been in November or December.

Right. So between the time of suspension and decertification?---Well, it may have been before. It may have been after, I cannot exactly confirm when.

Now, the next condition is that cereal harvested from the suspended paddocks must be stored separately and tested by NCO after harvest to determine the crop status. Were you concerned there about the potential for pollen or GMO seed to be intermingled with the product?---Yes, GM seed probably.

All right. If it had been tested and proved negative, could it have been sold as certified?---I can't answer that because that's a hypothetical.

Can you answer that question please?---I'm not sitting in a decision-making capacity - - -

Okay?--- - - - with the case in front of me.

I'm asking you a question. I would like you to answer it please, Ms Goldfinch. If the - you are the one that imposed the condition of testing, didn't you?---Yes.

And if the crop had been tested and had come back negative, how would you have responded to that?---I don't know.

So the purpose that you sought the condition or imposed the condition of testing was for what? What purpose was that?---Just to cover all bases.

So covering all bases means detecting whether there's any GMO material in the harvested crop?---Yes, that would be the reason.

If it wasn't, then surely you would have been happy for it to be labelled as certified organic?---I couldn't answer that because it's not that simple.

Why isn't it that simple?---This is a - this is a precedent case, and decisions aren't made by one person. You have a conference with people - experienced people who discuss the issue and make a joint decision; it's not a decision made by one person. It's not the kind of decision I, on my own, would ever make.

What's that? Whether to allow a product to be labelled certified organic?---What you're talking about is if the crop wasn't contaminated. Isn't that what your last question was about? What I'm saying is, if that were the case, it wouldn't be me, on my own, making that decision, because this is a precedent case; it would involve a group of people, with experience in standard decision and standards decision making, to review the precedent and to come up with a decision.

So more people than just you and Mr You, who were imposing the suspension condition?---It's a separate process. Yes. It's a separate process. It's not - it's - Mr You and myself were reviewing an inspection report. What we're talking about now is making a decision about a standards issue as a precedent case, and NASAA has to keep a record of all precedent decisions made, and it does so, and it doesn't just make those decisions lightly.

But this suspension decision was a precedent decision, Ms Goldfinch, wasn't it?---Yes, and it was discussed with members of the NCO board.

Before you made the decision?---Yes.

And who were they?---It was at least Jan Denham.

Yes?---As I believe you know.

And who else?---I don't recall of anyone else.

Rodd May?---He wasn't on the NASAA board at that time.

All right. So the decision to suspend and the decision about what might happen or how NASAA might respond if the test results on the crop had come back negative, would be group decisions, in effect?---The decision about what you would do with test results of crop in this situation would be a precedent decision, made by the precedent committee, which would be the either the board or the standards committee.

And what would your personal viewpoint be?---I don't have one.

You don't have one?---That's correct.

So if you were in that group situation, you would just say, "I'm unable to contribute"?---Well, I'm not in that, and I wasn't at the time.

So I'm asking a question, putting you in that hypothetical situation. You're in the group, the group is arriving at a joint decision, there are negative test results of the crop; would your view, that you would contribute to the group decision, be that the material should be able to be sold as certified organic or not?---There were negative - what do you mean by that?

No GMO material detected in the crop - in the product?---I can't answer that question.

Is it a difficult one for you?---No. I'm not prepared to answer it because I'm not in that - I'm not on one of those committees. I haven't been appointed to such a committee and I would just be - it's just pointless.

Sorry. What committee are you referring to, Ms Goldfinch?---The standards committee or the board.

You just said that these were - precedent decisions were joint decisions, yes?---I said that precedent decisions were - can't remember what I said. I assume I said precedent decisions were made by groups, not just one person.

Yes. But you and Mr You made the suspension decision, which was a precedent decision, in consultation with others. Is that right?---A suspension isn't so much a precedent. A precedent is when you actually - this - a

suspension is not a final conclusion. The decertification is the final conclusion. It's part of the procedure, and it is not a precedent decision.

Right. Now, the - all right. So that could just be done by you and Mr You, although you did consult with others?---Yes.

The decertification decision was a precedent decision, wasn't it?---I don't think we ever discussed it in these terms, because - we just get on with our business and we just do it, so we don't get all these funny ideas about how we should think about it; we just think about it how we're used to be thinking about it, because we've been doing it for so long, and we've, you know, been on international committees and been involved with setting standards internationally, and, you know, it's not a silly business. You just - - -

So did you consult with a committee about the decertification decision?---It's not part of the process, generally, to consider decertification to be a precedent. Precedents are generally to do with the standards.

I didn't ask you that, Ms Goldfinch. Did you consult with a committee about the decertification decision?---You said precedent decision, didn't you?

Ms Goldfinch, please listen to the question. Did you consult with a committee about the decertification decision?---No. It's not part of the process.

So when we come back to the testing of the product as condition of the suspension decision, normally that could be - the decision made about what to do with the crop is something that needn't be made by a committee; that's a decision you could make, isn't it?---What to do with the crop is a standards issue.

Yes?---And therefore, as I said, it's a precedent decision.

So - - -?---Suspension is a certification decision. Things to do with production and seeds, and that sort of thing, is standards. They're two separate parts of the whole.

So whether Mr Marsh could sell that crop that had been tested as certified or not was a standards precedent decision, not a certification decision. Is that your evidence?---No.

So having - - -?---Precedent decision would consider whether or not the circumstances and the results and - etcetera.

So who would make the decision about whether or not Mr Marsh could sell his tested crop as certified or not?---Well, this is a - this didn't really come into it when I was there. I'm only guessing.

Sorry. What was your answer?---It didn't come into it while I was there - while I was at NCO before I left. It wasn't an issue.

Do you mean it has never happened before, that somebody has - - -?---What I'm saying - - -

- - - had their crop tested and a decision has - - -?---What? No. No.

Please pause, Ms Goldfinch. It has never happened, in your experience at NASAA, is it, that somebody's crop has been tested and a decision has had to be made about whether or not that crop is sold as certified or not?---I'm sorry. I think you interrupted my - - -

NIALL, MR: Well, tested - I just object to the question.

KENNETH MARTIN J: Sorry. Just a moment. I will - dealing with this objection.

THE WITNESS: - - - train of thought.

KENNETH MARTIN J: Mr Niall?

NIALL, MR: Tested in what context, your Honour? Is it tested in genetically modified? The evidence is that this is the first one. In our submission, these line of questionings, which is a hypothetical on a hypothetical, really is ceasing to have any relevance to the issue. The decision was clear, and the evidence is that the property was suspended and crops were harvested, let alone sold during the period of suspension and decertification. So what would have happened in the event some crops were harvested and sold is a completely irrelevant matter.

KENNETH MARTIN J: I thought the wheat crop did get harvested subsequently on 11.

NIALL, MR: Not in between suspension and decertification.

KENNETH MARTIN J: Certainly not in that period, of course. Yes. All right. What do you say about that, Ms Cahill?

CAHILL, MS: It's directly relevant to paragraph 15(b) of the - sorry, 15(5)(b) of the amended defence, your Honour.

KENNETH MARTIN J: Just remind me again of what that says.

CAHILL, MS: In terms of the - in relation to - responding to paragraph 25 of the statement of claim, which has a flavour of causation, really, in a way, about it, without being so bold as to articulate it. The response at paragraph 15 of the defence is a denial and then a positive traverse at 50 - at sub (5), "NASAA did not act reasonably in deciding to issue the decertification notice, where," (b).

KENNETH MARTIN J: I think the problem is the hypothetical nature of the proposition that's put. If you want to put, by reference to 15(5)(b), the actual - the decertification scenario by reference to what was in the field at that time and what was done to it and what was not done to it, that's fine. But, I think, when you range into the hypothetical in terms of almost, but not quite the scenario with the variant, that's when it's problematic.

CAHILL, MS: Yes. Well, the exploration of it is to assist your Honour to get some sense of the materiality of that omission, your Honour.

KENNETH MARTIN J: Well, I understand that.

CAHILL, MS: Yes.

KENNETH MARTIN J: But I think the witness is understandably cautious about dealing with hypothetical scenarios other than what she was actually confronted with in 2010.

CAHILL, MS: Yes.

KENNETH MARTIN J: I think that's reasonable.

CAHILL, MS: In any event, this testing never occurred, did it?---I don't know what occurred after I left NCO.

Well, until you left NCO, it didn't happen, did it, Ms Goldfinch?---I don't believe that NCO did not test before I left.

And you were the person who is in charge, overall, of NCO, up until the time that you left?---Yes.

Thank you. Now, in paragraph 15 of your witness statement, you say that suspension - the - you decided to suspend, and then suspension of certification allows time for further investigation. That's not quite right under the standard, is it? The purpose of suspension is to enable the - afford the operator an opportunity to rehabilitate the noncompliance. Isn't that so?---A suspension - the suspension was implemented correctly so that we could investigate further the contamination.

That's not the purpose of a suspension is it, Ms Goldfinch?---It was in this case.

So that was contrary to the standard, was it?---No. There's no rules about suspension. If there's an issue affecting an operation's compliance with standards that needs to be investigated, you can choose to implement suspension.

You didn't tell Mr Marsh, nor are you aware that anyone else did, once the suspension was imposed, that he had an opportunity to demonstrate that he was standard compliant?---He is told in all communications - in most communications, including in his contract, that he has a right of appeal.

That's not the question I am putting to you?---Well, sorry, I misunderstood it. Would you rephrase it?

Ms Goldfinch. Neither you nor anyone else from NASAA or NCO to your knowledge, between the period of the suspension - the commencement of the suspension and until decertification advised Mr Marsh that he had an opportunity to demonstrate that he had complied with the standards?

NIALL, MR: Well, I object to that question because it's an entirely false premise. The decision of 29 December 2010 made it perfectly clear that it would be decertified until it can be verified that the GM material has been entirely removed, 333.

CAHILL, MS: It's to do with volume 5, page 1312, your Honour, under General Principles.

NIALL, MR: But the point I'm making - - -

KENNETH MARTIN J: Well, I think you might be at cross-purposes because you say that it's a false premise by reference to the decertification decision. I understood the preface to Ms Cahill's question to be in the period between decertification and suspension you didn't do anything. So it seems to me that that's the temporal period of inquiry under scrutiny. Is that right, Ms Cahill?

CAHILL, MS: Absolutely, your Honour.

KENNETH MARTIN J: Yes. All right. I will allow the question on that basis.

CAHILL, MS: Ms Goldfinch, can you provide your answer please?---Could you repeat the question please.

Between the time that you notified suspension and notified decertification, neither you nor anyone else from NASAA, to your knowledge, informed Mr Marsh that he had an opportunity in that period to demonstrate that he had complied with the standard. Isn't that so?---We were not - nobody was able to demonstrate compliance with the standard because we had not got any results on the GM testing.

Did you tell Mr Marsh that during the period of suspension, he had the opportunity to demonstrate compliance?---Well, with my previous answer I thought I was demonstrating why there would be no reason why I would tell him such a thing.

So is your answer no, I did not?---Yes, that follows.

And you're not aware that anybody else from NASAA told him that?---It follows, yes.

Is that right?---Yes, it follows.

Did you or anyone else from NASAA to your knowledge, during that period of suspension, suggest to Mr Marsh what he might be able to do to mitigate the risk of what you call contamination?---No, it's not allowed for the certifier to tell the operators how to manage their farms.

All right. Did you go back to this - to - sorry, I will pause there. You didn't go back to the national standard, I think we have established, at this time to look at it, did you?---Don't know.

I thought you said before that there was no need to because the NASAA standard was compliant with the - - -?---Well,

that was back then when you were asking a previous question. That was back at the earlier date.

So did you - - -?---I don't know what I did at this time, no.

You can't recall whether you went back to the national standard and looked to see whether or not - - -?---No, I can't recall.

Sorry, just pause, Ms Goldfinch.

KENNETH MARTIN J: I think you got an answer, "I can't recall."

CAHILL, MS: Yes. The balance of the question was going to be - to ascertain whether you could - had formed a view about whether there was a breach of the national standard. Did you turn your mind to that?---We had already - we were in suspension because we were determining whether there was a breach of the NASAA standards, which is - has been deemed to be equivalent with the national standard.

So is your evidence that you were only concerned to look at the NASAA standard?---I only had - there was no need to look at any other standard.

All right. Now, paragraph 21 of your witness statement, Ms Coleman went out and did another inspection and this was in part because she - the samples that Ms Purves had taken had been lost in the mail. Is that right?---Yes.

And was it also the case that the other purpose of the visit was for Ms Coleman to particularly focus upon and document the fact and extent of the incursion?---Well, you would have to go to her written instructions to be able to answer that I guess.

And where do we find those, at the front of the inspection report?---Well, I was thinking in terms of what the inspection officer allocated her, what she told her.

See 325?---Yes.

See Reason for the Extra Announced Inspection?---Yes.

Continuing:

This report is to establish the extent of the contamination.

?---Yes.

So that was a primary document for you to rely upon when deciding whether or not to decertify. Is that right?---Yes. Amongst others.

I beg your pardon?---Amongst others.

But this is the primary document, isn't it, because
- - -?---I thought you said a primary document.

This is the primary document. There were other things that you looked at, but this was the main thing that told you about the extent of the contamination. Would you agree?---I wouldn't give this any primacy above any others.

Such as what, Ms Goldfinch? What are you referring to?---I'm referring to Cathy Purves's report, and the as yet, unattained test results.

All right. So the test results aren't going to tell you about where the GM material is, or in what concentrations. It's only going to tell you what was in the samples that were taken?---Well, it is going to tell where, because the - sorry. I'm getting a bit tired at this time of the day - this time of the week. Well, when you get co-ordinates, the co-ordinates were logged where the samples were taken.

Yes?---So I think you will find that - - -

But all you know is the location of those particular samples. In terms of the extent of the contamination, the test results aren't going to show you that, are they?---That's right.

Thank you. And do you say that even though the stated purpose of Ms Coleman's inspection was to establish the extent of the contamination, it had no more importance to you on that topic than Ms Purves's report?---The fundamental importance was to obtain further samples received because the first lot had been lost by Australia Post.

So that's not mentioned in the reason for the inspection, is there? Can you explain that?---I guess you will ask Claire that. She wrote the report.

Now, at page 325 there, you obviously read this report quite carefully in the - preparatory to making your decision?---Yes.

And can you see, at page 325, the second full paragraph commencing:

From there we drove.

?---I can see that paragraph.

And you say this was - sorry. She says this was on the eastern boundary in paddock 7 and has been measured and so forth. This stem has since further blown into the neighbouring bush. So that was one swathe, did you assume? Ms Goldfinch?---I'm still reading the paragraph.

Yes?---And thinking about it.

Just in terms of this paragraph here?---What was your question again?

Did you infer that she was referring to just one swathe?---Well, I haven't finished reading the paragraph.

Right. I'm sorry. You take your time. You tell me when you're ready? Are you still reading just that paragraph, or would you like to read the whole thing before - - -?---I need to put it in context, if that's all right.

All right. That's fine?---I don't know what I assumed. I don't tend to assume. I don't think that's very scientific.

You don't assume - - -?---I didn't - wouldn't know whether I did or didn't assume anything about this stem.

But you certainly had to assume that whatever she saw there had no seeds because that's what she said. Would you agree?---She said this stem had blown into the neighbouring bush and did not contain any seed.

Yes?---So I believe that.

Yes?---But I don't see what significance it has.

So did you - are you saying you can't remember now whether you formed a view about how many swathes she saw in paddock?---Well, because this is a complex situation where you have got a number of paddocks, you have got maps, you have got written reports, it's not something you can just go, yes, no, \$6 million, 50 acres, like that, you know. You have got to go and read everything all over again and it takes quite a while and then you can answer the question.

So can you remember now in your mind how many swathes you might have inferred were in paddock 7?---No.

Was that relevant to your consideration of whether to decertify or not?---The decision on decertification would have been taken on a number of factors, not just one factor.

But in terms of the concentration of swathes - - -?---I couldn't say.

Would it have been a relevant factor amongst others whether there was one swath or a thousand, or did it not matter?---The report as a whole is considered and I think it speaks for itself.

Yes. But you were decertifying individual paddocks, weren't you? Ms Goldfinch?---I'm not allowed to ask you questions, am I?

No, regrettably, no?---This decision was made five years ago. I can't answer the question.

But you can answer that question, which is that you were decertifying paddocks individually, weren't you, because - - -?---That's correct.

Yes. So in terms of a decision to decertify paddock 7, was it relevant to you to consider whether there was one swathe or many more than one swathe.

KENNETH MARTIN J: A swathe with no seeds on it?

CAHILL, MS: Yes. I was just trying to get the numerical issue sorted first. Yes. But if we can just deal with - - -?---I'm very loathe to answer a question which, if I could go back and read this when I go home, I could very well find was wrong.

Right. So - - -?---Because - because, like I said, we don't make decisions on that basis.

On what basis?---Of one paragraph.

So here's my question. Just put the report to one side. Was it relevant to your decision to decertify paddock 7 to ascertain or to - to ascertain whether there was just one swathe or many more swathes?---I don't know.

When you say you don't know - - -?---I don't know if it was relevant.

You mean you can't remember?---That's right.

And what are you looking at the there, Ms Goldfinch?---A map.

Yes. Mr Marsh's map?---No, I think it's Claire's map.

At page 328?---Yes.

And why is the reason that you are looking at that?---It was the first map I found.

Yes. But why did you want to look at a map?---Just to help me think.

Yes?---Like I said, we don't make decisions on the basis of one sentence.

Right. Now, just coming back to that question, about whether it was relevant for you to consider how many swathes were in paddock 7. What's your answer?---Well, I guess I would say everything was relevant.

So the number of swathes was relevant?---The number of swathes was relevant, the number of - how many seeds was relevant.

So whether a swathe had seeds or didn't have seeds, that was relevant?---Everything is relevant.

So, sorry, just to answer that question, Ms Goldfinch. Whether a swathe did or didn't have seeds, that was relevant?---There was GM canola, there was GM material, then there was GM material.

Just answer the question please, Ms Goldfinch?---That's what's relevant, there was GM material there, so it was relevant.

So, Ms Goldfinch, just pause a moment and listen to this question. You said everything was relevant, so the number of swathes on a paddock was relevant, you would agree? Yes or no?---Yes.

Thank you. Whether a swathe had seeds or not was relevant. Yes or no?---Yes.

Whether there were seeds that could be observed lying separately from the swaths. That was relevant, wasn't it?---Yes.

What else was relevant?---Whether there were sheep there?---Yes.

Whether the wind was still blowing?---Yes.

What else?---I'm not the inspector. I'm only the reviewer.

This is you making the - when you say you're only the reviewer, you're the one deciding whether to decertify or not?---Yes. I don't determine what she writes in the report.

Okay. But it's that material that you were relying upon, so to the extent that the number of swathes was relevant to your decision to decertify paddocks, can you tell me, from this report and Ms Purves's, how many swathes you discerned were in paddock 8?---No. I can't.

And where Ms Coleman speaks at page 325 at the bottom about entering into paddock 10, where there was a bundle of swathed stems, you wouldn't be able to say whether that was three or 300?---I referred to the photograph, I think. (indistinct) a photograph of it.

Where's that?---Photographs 1 to 3.

Yes?---So it looks like quite a few seeds could be there.

Well, swathes. How many swathes?---Can you count them?

Tell me how many swathes?---I can't count them. It's just a photo of bits of sticks.

So is your answer you don't know how many swathes were there?---Of course I don't know.

Thank you. You understood there were swathes on either side of paddock 10 and the road, is that right?---Are you looking at the last paragraph?

I'm looking over the page at 326. Can you see the third full paragraph commencing:

We then travelled along the fence line.

Yes. There were plenty of canola stems visible on both sides of the fence. The fact that swathes were on the road

outside of Mr Marsh's property, was that relevant to you?---Well, of course it would be relevant. It's right up against the boundary.

Right. And there were - if we just move on - - -?---It's only a wire fence.

I beg your pardon?---It's just a wire fence. It's easily going to go through it.

So if there's material outside the boundaries of the property with a risk that it will blow in, is that the point that that's - - -?---That's the point you're dredging up, Yes.

Is that relevant to your decision about whether there's an unacceptable risk of contamination?---Yes.

Thank you. Now, just continuing on with this paragraph. Do you see where it says:

We also found stems in the gully at the boundary with paddock 11.

?---Yes.

Then there's photograph 9. From there, we walked into paddock 11 and found further stems in the pasture there. And there's a photograph 10. So did you form a view about how many stems were being referred to there?---Well, I believe the photos were colour. It's a bit hard to see with this black and white image.

So you can't say now how many stems were found in paddock 11?---No. Of course not.

All right. And what about in paddock 12? How many stems were there?---I think the issue is that there are stems in all of these paddocks.

Yes. But how many, Ms Goldfinch? Did you turn your mind to that at the time?---Well, enough that she can collect samples of seed.

And was that sufficient for your decision to decertify? As long as there was enough material to collect samples?---No. That's not - I wouldn't make a decision on the basis of whether there's enough material to collect a sample.

So did there have to be more material than that?---It just had to be material.

So the quantity didn't matter?---With genetically modified organisms, per se, are prohibited.

So the quantities didn't matter. Whether it was three swathes or 300, that wouldn't influence your decision?---The fact that it was - it had blown throughout so many paddocks was more important than how many in paddock 10 specifically.

All right. So if you had one swath deep into the farm, that was more important than 100 swathes on a boundary close to a neighbour? Is that your evidence?---No. That is not my evidence.

So just picking up on that, it's not how many; it's how far?---No. It's not that either.

All right. Sorry, I misunderstood your point. So just coming back to volume, the number of swathes is or isn't relevant to whether or not to decertify?---Is not.

Thank you. So it wasn't necessary for you to consider - - -?---Well, may I finish that question.

Sorry?---Because I don't like these words. You know, they've got - sometimes they're quite ambiguous, because before, I said everything was relevant and I don't want to be seen to be contradicting myself, because it is relevant, but it's not relevant in the terms of your - in the context of your question.

So let me just understand that. The amount of swathes on the - that have blown onto the land is not relevant to the decision of whether or not to decertify, is that right?---That's what I said, but then I said - before, I said everything was relevant, and I still stand by that statement. But in the context of your answer, it's not relevant. The whole, as whole, is what's relevant - - -

All right?--- - - - to the decision.

KENNETH MARTIN J: Sorry. The whole, as a whole, is what's relevant?---The whole information. All the information about all the paddocks and all the seed and all the swathes and where it is and where it isn't, and the sheep, and the wind; all that is what's taken into account.

CAHILL, MS: Right. But if you're - - -?---No one factor.

But if you're deciding whether or not to decertify, you won't - the decision whether or not to do so isn't dependent upon the number of swathes. So if you had a paddock that has one swath in, and then you have a paddock next door that has 100, both of them will be decertified if all other conditions are equal? Is that right?---I don't think I'm going to answer that, because that wasn't the situation.

Well, it might have been, mightn't it, Ms Goldfinch? Because, as I understand your evidence, you don't know how many swathes were in each of these paddocks that you decertified?---That's correct. A farm is a dynamic place and nothing sits still.

All right. So - - -?---Especially swathes and sheep.

All right. So you considered the whole of the information you had been provided. You didn't know how many swathes were in each paddock, so it may well have been the case, you don't know, that there were only a very small number, if any, in one paddock, and a great deal more in another. Isn't that so?---There were bound to be less in some paddocks than others.

But there could have been a marked difference, would you agree?---There may have been.

Yes. But that wasn't a relevant consideration to you when deciding whether or not to decertify?---Not at this time. No.

Thank you

KENNETH MARTIN J: A paddock?

CAHILL, MS: A paddock. Yes. Yes?---Did each - sorry?

Not relevant to a decision to decertify a paddock?---Would you repeat the question, please.

All right. We will go back. So you didn't know whether in these paddocks 6 - I'm sorry - 7 to 13, whether within each individual paddock there were just a few swathes or many, many more swathes. You agree with that?---I think I would prefer to sit down with a piece of paper and write each paddock number down. This how the decision making process works. And it - I don't - we wouldn't count swathes. But if you want me to consider that irrational scenario then I would write down paddock 2, she said there was one swath.

Okay. One swath?---Kathe said there was (indistinct) swath. So that was a difference in time and - - -

So did you do that process or not?---No, because it's irrational.

I see. I'm sorry. I thought you wanted to do that. I - I - we were getting ready to give you a map. But that's not how you would go about it?---No.

No. So it is possible, then - you don't know - that there may have only been a handful of swathes, for example, in paddock - we will choose a number - nine. But hundreds in paddock 10?---I know where your questioning is going, and I don't think it's reasonable.

Well, if you could just answer the questions I ask you, Ms Goldfinch. In that scenario - - -?---Because I'm the one on the record.

In that scenario, Ms Goldfinch, you would decertify both paddocks. Is that right?---All I know is that these paddocks, at that time, were decertified. I don't know about any hypothetical that you're talking about now.

I'm not talking about a hypothetical. I'm talking about what might have been?---Well, isn't that hypothetical?

Well, it's not this is the possibility on the evidence, Ms Goldfinch. So I would ask you to attend to my question?---I'm looking you straight in the face.

You didn't turn your mind to the quantity of swathes on each paddock, did you?---Of course we did. The whole report is talking about swathes and paddocks.

The quantity on each?---I've already answered that question.

The relative quantity on each, you didn't turn your mind?---Already answered that.

And that's your evidence?---Well, if you read it back to me, I might want to correct it.

Now, paddock 9. What did you know about paddock 9 before you decertified it?---This report that we're referring to right now mentions that stems were found in the gully at the boundary with paddock 11.

Yes. So did you form a view about whether there was any swathes on paddock 9?---There were stems in the gully at the boundary with paddock 11.

Yes. So my question is this. Did you form any view as to whether there were any swathes on paddock 9?---I take that to mean there was stems in paddock - sorry. That's 10. I'm mixing up photograph number 9.

So could the - if the witness could just be shown exhibit 6.

KENNETH MARTIN J: The aerial photograph of the two properties?

CAHILL, MS: Yes.

KENNETH MARTIN J: All right. Ms Cahill, how much longer are you going to be today?

CAHILL, MS: Well, I'm sorry. I did expect to be finished by now. Sorry.

KENNETH MARTIN J: I'm happy to sit on for a few - but it is a Friday afternoon at 4.25.

CAHILL, MS: Yes. I know.

KENNETH MARTIN J: And I would like to wrap it up today if we could.

CAHILL, MS: I think Ms Goldfinch is from interstate, but I don't - I can't guarantee I will be finished in half an hour.

NIALL, MR: Well, your Honour, I would - - -

KENNETH MARTIN J: Mr Niall.

NIALL, MR: We had a difficulty with that, your Honour. At the start of the trial, pursuant to a direction to your Honour, your Honour requires to give a timetable.

KENNETH MARTIN J: Indeed.

NIALL, MR: My learned friend has given an estimate of that. We had to rearrange because Mr Marsh was cross-examined much longer, and I don't mean that critically, but that's the fact. Ms Goldfinch returned to interstate. She has now been cross-examined for approximately more than two hours, and closer to two and a half hours, which is an hour

longer than the estimate, and my learned friend, in my respectful submission, should be held to her estimate.

KENNETH MARTIN J: Well, I think the estimate was 90 minutes across two days.

CAHILL, MS: Yes. Yes, your Honour.

KENNETH MARTIN J: And it has certainly taken longer than 90 minutes. And - - -

CAHILL, MS: I don't wish to be - - -

KENNETH MARTIN J: I'm mindful of the fact that Ms Goldfinch has travelled twice.

CAHILL, MS: I'm not - I'm very happy to sit on, your Honour, but I'm just indicating that it could be longer than half an hour. And with the greatest of respect to my friend, it's not because I have not estimated appropriately for the questions that I'm asking. There's a particularly difficulty that has emerged here which is not of my making, and it would be unfair if the defendant - - -

KENNETH MARTIN J: Well, what are you proposing, then?

CAHILL, MS: Well, I'm happy to keep - - -

KENNETH MARTIN J: That it would be easier to break and resume on Monday?

CAHILL, MS: I'm happy to go on, and if - - -

KENNETH MARTIN J: But you say - you're not giving me a time of how much you need to go on with.

CAHILL, MS: I'm sorry.

KENNETH MARTIN J: And then we have got - - -

CAHILL, MS: I'm sorry.

KENNETH MARTIN J: - - - recertification - re-examination.

CAHILL, MS: Yes. I would be finished within the hour. I would certainly expect to be but I hope your Honour understands that there's - I'm doing the best I can.

KENNETH MARTIN J: Yes, I'm not inferring pejoratively against anyone. It's just a question of management, really, at 4.25 on a Friday afternoon - - -

CAHILL, MS: I appreciate that.

KENNETH MARTIN J: - - - and how we deal with this. Well, you think you might be an hour.

CAHILL, MS: I could be up to an hour, just based on - I had expected that I would be no more than half an hour when I began.

KENNETH MARTIN J: Mr Niall, you will be some time in re-examination I would have thought.

NIALL, MR: Not at this stage, your Honour. Not very long, five minutes.

KENNETH MARTIN J: Well, how do you feel, Ms Goldfinch? I don't want to put you under undue pressure but you have been in the witness box since 2.15 without a break. Are you all right?--Yes, I'm all right but I apologise for my attitude but - - -

No, no, you don't need to do that. I'm just trying to ascertain whether we break now and bring you back on Monday morning or whether you would prefer to keep going?---I'm just not prepared to concede anything. I have to be able to give a full answer and when I'm cut off in the middle of an answer, I'm going to have to ask for the question to be repeated.

Look - - -?---So I think it's a joint effort that it's taking so long.

I'm very reluctant to put you under more pressure than over two hours sustained cross-examination in one afternoon
- - -

CAHILL, MS: Yes, I'm not pressing - - -

KENNETH MARTIN J: - - - and I'm not - - -

CAHILL, MS: Yes - - -

KENNETH MARTIN J: I'm not - - -

CAHILL, MS: I'm not pressing either way, your Honour. I just want to - - -

KENNETH MARTIN J: I think we will have to resume on Monday morning.

CAHILL, MS: Yes, all right.

KENNETH MARTIN J: To be fair to everybody, I think. All right. Is there a section you would like to wrap up now, Ms Cahill, before we break?

CAHILL, MS: I beg your pardon.

KENNETH MARTIN J: Is there a section that you would like to wrap up now before we break?

CAHILL, MS: No, I can break now.

KENNETH MARTIN J: All right. Well, it is regrettable but in the circumstances I think we wouldn't be doing justice to the importance of the case and I'm a bit concerned about putting this witness under too much pressure - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - to continue, so we will break. And that means, Ms Goldfinch, you remain under cross-examination over the weekend. So please don't talk about the case with anybody?---Yes.

Ms Goldfinch, you may leave the witness box now. There's just a couple of points I want to raise with counsel.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: Number 1 is the question of the interstate trial bundle. For the purposes of cross-examination, I understand there was a problem with Mr Ayachit, was it, who was to be examined over the video and that couldn't be done because he didn't have a copy of the trial bundle. Has that been redressed for Monday?

NIALL, MR: I understand yes, your Honour.

KENNETH MARTIN J: All right. That was my first concern. The second concern really is a question on notice that counsel can think about over the weekend but there has been an unprecedented number of requests for copies of the transcript of these proceedings. The transcript, of course, is a copyright of the state but there has been an indication that in view of the public interest in this case that it's important that it should be publicly available.

Now, I understand the parties have engaged a running transcript and have paid for it. The proposal is that those funds be refunded and that at an appropriate time the transcript of the whole trial be put on the court's website for public scrutiny. There is, of course, at the moment an order for witnesses out of court, so that needs to be accommodated but it is something to think about. I don't expect any response now but perhaps it's something that could be thought about over the weekend and at some convenient time on Monday we will talk about it again. All right. On that basis, we will adjourn until half past 10 on Monday morning.

AT 4.35 PM THE MATTER WAS ADJOURNED UNTIL
MONDAY, 17 FEBRUARY 2014

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