

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

No. CIV 1561 of 2012

B E T W E E N

STEPHEN WILLIAM MARSH

First Plaintiff

SUSAN GENEVIEVE MARSH

Second Plaintiff

and

MICHAEL OWEN BAXTER

Defendant

WITNESS STATEMENT OF JANET DENHAM

I, **JANET BOURKE DENHAM** of 292 Ellerslie North Road, Palinyewah, in the State of New South Wales, director and farmer, make the following statement:

Personal Background

1. With my partner I have a 22 hectare property at Palinyewah just outside of Mildura on which we grow organic citrus fruit, plums and vegetables.
 2. I am, and have been since 2008, a member of the Murray Valley Citrus Board (**MVCB**), a statutory body established under the Victorian Government Agricultural Industry Development Act 1990. The MVCB provides services to around 400 citrus growers in the Sunraysia region.
 3. My partner and I were involved in establishing the Sunraysia Mallee Organic Growers Association in about 1990.
 4. I am a member of the board of directors for each of the National Association for Sustainable Agriculture, Australia (**NASAA**) and NASAA Certified Organic Pty Ltd (**NCO**).
 5. NASAA started as a coalition of state based organisations, with each state appointing 2 directors to the NASAA Board. I was appointed as a Victorian director of NASAA in 1992. I was NASAA's treasurer for the first three years (1992 – 95) and then chairman for 7 years (1996 – 2003). I stepped down from the board in 2003 but remained involved in NASAA, including on its Standards Committee.
 6. I resumed a position on the NASAA board in 2010 and was appointed NASAA's chairman.
 7. In 2009 I was appointed to the NCO board and resigned in 2010. In 2012 I was reappointed to the NCO board as chairman.
 8. I am a member of the NASAA Standards Committee. The committee is responsible for developing and maintaining the NASAA Organic Standard (**the NASAA Standards**). The NASAA Standards is NASAA's private standards compliant with the IFOAM Norms and the National Standard for Organic
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and Biodynamic Produce (**the National Standard**). I refer to *NASAA Organic Standard* [TB 1293-1407].

9. I was a member of the AQIS (Australian Quarantine Inspection Service) Organic Advisory Committee, the first time I was chairman of NASAA. In that capacity I had significant input into the drafting of the National Standard. My role on the committee included providing comment on drafts of the National Standard and liaising with industry about the development of the standard.
10. I am now, and have been since about 2008, a member of the working group for the AS6000-2009. Standards Australia convenes the working group.

NASAA and NCO

11. NASAA is a not-for-profit company limited by guarantee. NASAA was formed in 1986 and comprised an association of members and certified operators.
12. In about 2008 NASAA decided to conduct its certification operations through a wholly owned subsidiary which it created for that purpose (NCO).
13. NASAA has developed and owns the NASAA Standards and the NASAA label. It licenses each to NCO.
14. NCO is the “certification engine room” – through its employees and contractors it conducts certification operations. NASAA is NCO’s public interface.
15. Certification, in this context, refers to the issuing of a certificate to a farm or other operation signifying that the operation complies with a particular standard for organic production. (I discuss the organic standards below).
16. The certification service offered by NASAA/NCO covers the organic supply chain – from input manufacturers to producers, processors and wholesale and retail operations.
17. NASAA’s functions are essentially:
 - a) facilitating the organic certification service operated by NCO by developing and licensing to NCO the NASAA Standards and the NASAA label;
 - b) providing information and advice about organic farming issues to its members;
 - c) representing the organic industry by participating in national, international and regional events and supporting industry research and development programs;
 - d) maintaining and developing relationships with national and international organic bodies.
18. NASAA currently has approximately 80 members and 830 certified operators. Land the subject of NASAA certification currently covers about 7 million hectares.
19. NASAA operates in several countries including Nepal, Brazil, Papua New Guinea, Indonesia, Samoa, Malaysia, East Timor, Solomon Islands and Sri Lanka. It has an inspector based in Nepal. Otherwise, it sends representatives overseas to conduct inspections. The purpose of NASAA operating overseas is to assist producers who wanted to become certified, where there are no accredited certifiers or

certifying organisation in their country.

DAFF (AQIS) Approval

20. Organic certification in Australia is “co-regulated” by government and industry.
21. The Commonwealth Department of Agriculture, Fisheries and Forestry (**DAFF**) (formerly AQIS - (the Australian Quarantine Inspection Service) administers the National Standard. I refer to *National Standard for Organic & Bio-Dynamic Produce (Edition 3.4)* [TB 1408-1480].
22. Under the *Export Control Act 1982 (Cth)* and *Export Control (Organic Produce Certification) Orders (export regulations)*, produce labelled as organic or biodynamic cannot be exported unless it is certified by an approved certifying organisation, verifying that the produce has been prepared in accordance with the National Standard.
23. There are seven DAFF-approved certifying bodies in Australia, of which NASAA is one.
24. NCO may issue Organic Produce Certificates for DAFF because it is approved and audited by DAFF for the purposes of certifying organic and biodynamic produce destined for export.
25. A certificate from an accredited certifier is what verifies that the method of production (whether it be primary production or a secondary process including packaging) has been carried out in accordance with the National Standard.
26. NCO quality management systems are operated in accordance with the DAFF Organic and Biodynamic Program.
27. The NASAA Standards is intended to reflect the DAFF- administered National Standard.
28. NCO is routinely audited by DAFF.
- 29.
30. NCO certifies hundreds of operators throughout Australia each year. A significant proportion of those operators are not seeking certificates for export. That means that the operators are selling directly into the domestic market or selling to wholesalers who may be selling the produce they acquire domestically, or exporting it, or both.
31. I have personal experience of the role that DAFF-approved certification plays in the sale of organic produce in the domestic market.
32. My partner and I have farmed organically since 1989.
33. For the last 15 years or so the majority of our produce has usually been sold as organic. We produce all of our crops as certified organic but when the market dictates we sell some of it as conventional. When we have had too much produce we sell it where we can, including into conventional markets.
34. We have exported our produce to Europe, Asia and the United States. Once the domestic demand for organic produce increased we pulled out of export to a great extent although we still export a small

amount of produce to Malaysia and Singapore. All the produce we sell to wholesalers for sale to independent retailers and supermarkets is organic.

35. About 10 years ago the major Australian supermarket chains (Coles and Woolworths) started taking organic produce that changed the demand for our organic produce.
36. We cannot sell our produce as organic to the wholesale market unless it is certified organic.
37. When selling organic produce to wholesalers we must provide a Certificate of Registration, to the wholesaler. In most cases the wholesalers require certification by a DAFF-approved certifier (which in our case is NASAA). It is also my experience that wholesalers selling to the major supermarkets will only buy from DAFF-approved certified producers.
- 38.
- 39.
40. It has been my experience as a grower selling to wholesalers for supply to supermarkets that all facilities in the chain must be certified in order for the produce to be sold to the consumer at the end point, as “organic.” Each input into that supply chain must itself be certified. That protocol is commonly referred to as “paddock to plate.”

NASAA's International Accreditation

41. NASAA is accredited by International Federation of Organic Agriculture Movement (**IFOAM**) and was the first Australian certification body to obtain IFOAM accreditation.
42. IFOAM is the international peak body for the organic movement. It provides a forum for global exchange and cooperation amongst organic producers and national organic bodies.
43. IFOAM publishes reference or basic standards for organic production and processing (**the IFOAM Norms**). The existence of the IFOAM Norms is intended to encourage equivalency between organic producers world-wide. I refer to *IFOAM Norms for Organic Production and Processing* [TB 1908-2041].
44. NASAA's IFOAM accreditation requires it to ensure that its Organic Standard is consistent with the IFOAM Norms and the IFOAM accreditation requirements.
45. Since receiving accreditation from IFOAM, NASAA has participated in IFOAM governance and is represented on many international committees concerned with the worldwide development of organic agriculture.
46. IFOAM accreditation was established with the anticipation of assisting the easy flow of certified organic product around the world. As it happened, a universal system of organic accreditation did not evolve. The US, China, Japan and various other countries have their own requirements, as does the European Union.

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47. NCO holds accreditation under the US National Organic Program (**USNOP**). I refer to *USDA Organic – Organic Production and Handling Standards* [TB 2286-2351].
 48. USNOP is an autonomous certification program developed by the United States Department of Agriculture and came into effect in 2002 to regulate organic production, processing and marketing in the US.
 49. NCO is accredited to the Japanese Accreditation Standard (**JAS**) which is administered by the Japanese Agricultural Ministry. I refer to the *Japanese Agricultural Standard of Organic Agricultural Products* [TB 1899-1907].
 50. When an Australian operator (farmer or other organic producer) exports produce to Japan, it must apply the Japanese seal of certification to its produce. (There are exceptions to that requirement for some types of raw produce). In order to do that the operator must apply to NCO (or another JAS accredited certifier) for certification JAS. NCO can certify operators to the JAS standards because it in turn is accredited to JAS.
 51. Once the operator is certified to JAS, NASAA licenses that operator to apply the Japanese seal to its products.
 - 52.
 53. NASAA has similar arrangements with certifying bodies in other countries.
 54. For export to Europe there is an 'equivalency' arrangement between DAFF and the EU. DAFF approved certification bodies are listed as 3rd countries to enable the export of organic products – only DAFF approved certifiers can export produce to the EU. (I believe that that arrangement does not apply to livestock). However stated above, under Australian law all organic produce that is exported anywhere must be accompanied by an Organic Produce Certificate issued by a DAFF approved certifier.

Organic Standards and GMOs

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56. The fact that NASAA and other certifiers have their own standards is a function of history. NASAA first issued its own standard in the 1980s before a National Standard was developed.
- 57.
- 58.
59. The Australian standard known as the AS6000-2009 was introduced in 2009 by Standards Australia. The National Standard was the basis for the AS6000-2009. One difference of which I am aware is that the AS6000-2009 allows the use of synthetic amino acids whereas the National Standard does not. I refer to *AS6000-2009 Organic and Biodynamic Products* [TB 1481-1550].

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- 60.
61. My observations below are directed specifically to the NASAA Standards, and NASAA's application of the NASAA Standards.
62. The NASAA Standards performs several roles. One is to state some key principles about what is acceptable and not acceptable in organic farming. Another is to educate and inform the operator about what he or she must do on his or her own farm. Another is to provide a framework for dealing with consequences of events or practices that do not conform to the principles expressed in the standard, or which directly infringe a particular part of the standard.
63. The NASAA Standards expresses the principle of "zero-tolerance" for GMO's, for example by:
- a) providing that GMO's have no place in organic production and processing systems, even where GMO's are not detected in finished organic product;²
 - b) prohibiting the deliberate use or negligent introduction of GMOs or their derivatives to organic farming systems;³
 - c) providing that operators must not knowingly permit exposure or fail to take action against the application of, or exposure to, GMOs;⁴
 - d) providing that certification shall be withdrawn where NASAA considers that there is an there is an unacceptable risk of contamination from GMOs or their derivatives.⁵
64. The principle reflected in standard 3.2.5 is that once exposure to GMOs is known, it can't be allowed to continue.
65. The parts of the standards dealing with GMOs address exposure of the *farming system* to GMOs, rather than specifically the presence of GMOs in product leaving the farm. This is because organic farming embraces a holistic set of principles and methods that are applied in the cultivation and maintenance of the land. Those principles are broader than the goal of producing livestock or produce that can be tested as being free of chemical residue or GMOs. As a result the NASAA Standards largely concerns farming processes and practices. It specifies the characteristics of the methods by which the products are to be grown, harvested and processed and ways in which the land should be used and treated.
66. The NASAA Standards is not intended to be applied as an inflexible set of rules. This is because agriculture is a living system. Producers are not making widgets. The NASAA Standards must deal in a fluid way with agriculture. The NASAA Standards is therefore written generally and must be applied on a case by case assessment and not rigidly, as one might apply a standard in a factory which produced a standard product.

² NASAA Standards 3.2

³ NASAA Standards 3.2.1

⁴ NASAA Standards 3.2.5

⁵ NASAA Standards 3.2.9

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67. In the case of GMOs the NASAA Standards expresses the fundamental principle of the incompatibility of GMOs and organic agriculture. What occurs when that principle is offended must be assessed on a case by case basis.
68. The NASAA Standards does not specify particular consequences that must flow from the presence of GMOs within a farming system, other than that:
- a) where NASAA considers there is an unacceptable risk of contamination from GMOs or their derivatives NASAA shall withdraw certification; and
 - b) where GMOs have been planted (meaning deliberately grown) on the land, organic production cannot take place until five years after the harvest or removal of any GM crop.
69. There are a range of options available to NASAA/NCO in responding to an instance of non-compliance with the NASAA Standards. They are: de-certification, suspension, defining quarantine zones, continued certification under special conditions and additional inspections.
70. Where the consequences of a given contamination event cannot be readily determined by testing, some guidance may be taken from the timeframe for obtaining organic certification, namely that organic certification may be achieved only when there is demonstrated compliance with the relevant parts of the Standard for a minimum of three years.⁶
- 71.
72. To my knowledge neither the Organic Advisory Committee nor the AS6000-2009 Working Group considered incorporating into the National Standard or the AS6000-2009, a threshold tolerance for GMOs.

73.

NASAA/NCO Dealings with Steven Marsh

74. In keeping with NCO's process for conducting assessments, Steve Marsh's farming operation is subject to annual inspections.
75. I understand that Mr Marsh notified NASAA in late 2010 that he suspected that his property had become contaminated by the presence of GM canola blown in from a neighbouring farm.
76. I was not involved personally in the assessment of the contamination on the Marsh property in 2010 and 2011 but did participate in reviewing an inspection that was conducted by Claire Coleman in April 2012.
77. At the time of the April 2012 inspection Mr Marsh was conducting both certified organic and non-

⁶ NASAA Standards 2.1, 2.2 and 2.3

organic operations in parallel, following de-certification of part of his farm in December 2010.

78. The April 2012 inspection report noted that Mr Marsh had continued to monitor and seek to minimize the risk of the further spread of canola on this land. I refer to *NASAA Inspection Checklist and Report* [TB 0427-0446] and *NASAA Visit Confirmation and Exit Interview* [TB 0447].
79. In reviewing the 2012 inspection report and considering whether any changes were warranted to Mr Marsh's organic status at that time I took into account the circumstances of the contamination.
80. The presence and extent of contamination (meaning the presence of GMOs) on the Marsh property was and remains much more difficult to assess than say, where a chemical overspray has occurred. In that case the extent of contamination can be ascertained by soil testing, usually by the relevant state agricultural department.
81. In Mr Marsh's case the Western Australian Department of Agriculture had inspected and tested the plant material found on the property.
82. There was no ready means, however, for determining the extent of the GM incursion, other than by observing the way in which the plants had been spread over the property. It was relevant to observe also that if a contaminant is spread sporadically over a whole paddock it is impracticable to crop a portion of the paddock.
83. To my knowledge contamination of this kind has not occurred before on a property within NASAA's jurisdiction. When, for example, an overspray occurs, tests can be applied according to well established methods. It is very difficult (impossible) to look for seeds in soil although we can conclude that because of the extent of plant matter spread over property that it is likely that a vast number of seeds were spread over the property, considering the nature of canola.
84. Because of:
- a) the extent of the original contamination – in which canola plants were found across vast areas of the farm;
 - b) the impossibility of removing all of the GM plants detected in 2010;
 - c) the fact that there had been some germination of GM canola in 2011; and
 - d) the uncertainty concerning the extent of re-germination likely in the future,

in reviewing the April 2012 inspection I considered that it was appropriate that the status of Mr Marsh's property remain unchanged until at least the next annual inspection, which was scheduled for late 2012.

85. I understand that an annual inspection occurred in late 2012 and that NCO is currently considering Mr Marsh's certification status. I have not been personally involved in that process.

I have read the contents of this my witness statement and the documents referred to in it and I am satisfied that it is correct and that this is the evidence-in-chief which I wish to give at the trial of the proceeding.

Janet Bourke Denham

Dated: 14 February 2013

Amended: 17 February 2014