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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 WEDNESDAY, 12 FEBRUARY 2014, AT 10.24 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 v Baxter.

**MARSH, STEPHEN WILLIAM:**

**KENNETH MARTIN J:** Ms Cahill.

**CAHILL, MS:** If it please, your Honour, Mr Marsh, can you open up volume 1 please and turn back to page 215.

**KENNETH MARTIN J:** 215?

**CAHILL, MS:** Yes, your Honour. This is the letter that you wrote to Digby Stretch in May 2009, Mr Marsh. Do you have it?---Yes.

There's a reason that you wrote this letter, to assist your legal position if you ever wanted to sue to Mr Stretch?---No.

All right. What was the purpose?---Just purely to explain to Digby my concerns if GM canola was to escape and affect other people.

So you say to him:

Digby, I'm not against new technology but as farmers, we must contain whatever we do within our boundaries - this is clear under common law - and not impact on our neighbours.

?---I was referring to the case, like, with sheep.

I haven't asked you a question yet. If you just let me ask the question now that I have drawn your attention to that paragraph. Had you researched the legal position  
- - -?---No.

- - - before you wrote that statement?---No.

Had you received any legal advice?

**NIALL, MR:** I object to that question.

**CAHILL, MS:** I'm not asking what the content of the legal advice is.

**KENNETH MARTIN J:** What's the relevance of receiving it?

**CAHILL, MS:** Because I want to understand what the genesis of his - of the statement is, your Honour.

**KENNETH MARTIN J:** All right. I will allow it a little more.

**NIALL, MR:** If your Honour pleases, it can only be if it exposes the content of the advice because the premise of that proposition was, "I want to explore a little bit more to understand what he did," which could only be relevant if the inferences to be drawn is to the content of the advice, and in my submission it trespasses impermissibly.

**KENNETH MARTIN J:** The question has to be carefully couched in light of the privilege against revealing legal advice.

**CAHILL, MS:** Yes.

**KENNETH MARTIN J:** So perhaps it just needs to be rephrased, Ms Cahill.

**CAHILL, MS:** Yes. Before you wrote that statement in the letter, had you taken any legal advice, Mr Marsh?---No.

And you hadn't researched the law yourself?---That's correct.

Now, you say that all you wanted to do was to have Mr Stretch choose wisely. Is that your words?---Correct.

Choose wisely between growing GM canola and not growing GM canola. Is that what you mean?---No. What I meant was if it's - if he could not contain it, how it could affect other farmers nearby.

So to choose - so what are the choices that you were asking him to make wisely, choices between what?

**NIALL, MR:** Well, that's not what the letter says. It refers to a decision to be made - and the preface of the question involves a choice. My submission is it's misplaced.

**KENNETH MARTIN J:** I think if you look at the last line  
- - -

**CAHILL, MS:** Yes, your Honour.

**KENNETH MARTIN J:** - - - I have to uphold that objection.

**CAHILL, MS:** Yes. What decision did you want Mr Stretch to choose wisely about?---Just how he uses the technology, that's all.

Decision about how to use the technology?---Yes, so it doesn't impact on - - -

All right?---On other neighbours.

If you can take up exhibit 9 please.

**KENNETH MARTIN J:** I'm not sure that he has that. I might just ask for it to be obtained and we will pass that to you, Mr Marsh?---Thank you.

**CAHILL, MS:** This is a sign that you put up in places around your property in September 2010. Is that right?---Correct, yes.

And you authored the contents of this sign or approved the contents of this sign. Is that right?---I approved them, yes.

All right. Now, if I can take you to the third - sorry, the second bullet point. You say:

This farm is currently subject to a biosecurity declaration.

What does that mean? What were you referring to there?---It was originally registered with Western Power.

That's the fourth dot point, isn't it?---Well, that was still under my security declaration with them.

So the farmers in environmentally sensitive area, as declared by Western Power, yes? Is that right?---You're referring to dot point 4?

Yes?---Yes, you say - - -

And do you say that that also means that it's subject to a biosecurity declaration by reason of that?---I presume so, yes.

You presume so?---Yes.

When you authorised the statement that:

This farmer is currently subject to a biosecurity declaration -

what did you understand that meant? A declaration by whom?---Well, only the agreement I had at that time with Western Power.

I see. And what does biosecurity mean to you?---Well, biosecurity means the protection of the property.

Protection of the farm as a whole?---Yes.

From what?---From anything that's a biosecurity threat.

Such as? Can you give me an example?---Well, it could be declared weeds. In this case, we consider GMOs because it was a threat to the property.

In what way?---Well, the possibility that it could effect our certification.

I see. In any other way? GMOs are a threat to your property in your view in any way other than it might be a threat to your certification?---No, it becomes - it was considered - we considered it a contaminant.

For the purposes of your certification, isn't that right?---I still considered it a threat to my property.

In what way?---In that it could affect my business.

In what way?---By contaminating the property and if that then was to affect my certification - - -

Yes?--- - - - or anything else.

So I understand your evidence, Mr Marsh, that you saw it as a threat because it might affect your certification. But if you put that to one side for a moment, my question is what else, if anything, did you consider GMO could pose a threat to in relation to your property or your business?---I don't know.

Did you have anything in mind at the time?---Not particularly.

Now, you say in the third dot point:

This farm is declared GM free.

That was declared by you, wasn't it?---On advice we received.

From whom?---My solicitor.

All right. So you - but it was your declaration. Nobody else had declared your farm GM free, had they?---No.

No. And you had also declared your farm chemical free?---Correct.

Which meant what?---In this particular case it was in case somebody else used chemicals on the property without the controls under the standards.

I'm sorry. So you could use chemicals. Is that right?---Only in accordance with the standards.

Yes, I understand. So you could use chemicals in accordance with the NASAA standard but you couldn't use chemicals other than in accordance with the standard and neither could anyone else on your property?---Correct.

And that's what you meant when you said:

This farm is chemical free.

?---Correct.

I understand. And is that the same position with your declaration that it was artificial fertiliser free?---Yes, we referred - - -

Can I come back to the declaration that it was GM free. Did you mean the same thing, that it was free of GM material in accordance with the standards?---Yes.

Thank you. Now, just above the last dot point. We're talking there about - the second to last dot point, I think it's all one statement here. You're talking about:

Unauthorised access resulting in any contamination or forfeiture of GM free accreditation will result in a court action for compensation.

Now, I will just start from the back and work forwards:

This will result in a court action for compensation.

Was this the real purpose of this sign? You put this sign up to assist with your legal position in the event that you wanted to sue somebody for compensation?---No, it was to give people a warning of what the implications could be if we do have an impact on our business.

Now, what you were seeking to deter here was unauthorised access. Is that right?---From GM contamination you're  
- - -

Well, at all, wasn't it?---Unauthorised access refers to vehicles or persons, as clearly outlined.

Now, you say, "Unauthorised access by vehicles or persons resulting in any contamination." What did you mean by "contamination" there?---In this case, we were referring to  
- - -

Can I just pause. And when you say "we", who are you referring to apart from yourself?---I mean - - -

Does that mean you and your wife?---It's "I".

I?---Sorry.

So you - by "contamination", you meant here what?---Well, the meaning of "contamination".

Which was what?---Unless we have a different understanding of the word, it means any - in this case, it was referring to GM material - - -

Yes?--- - - - coming on the property that could affect our certification.

Well, those added words aren't there at the moment, are they? It says, "or forfeiture of GM-free accreditation"?---Yes.

Is that what you mean by - - -?---It's - it's the same.

Sorry. Sorry. I will just finish the question  
- - -?---Sorry.

- - - so that the transcript can record it. Where you say here "forfeiture of GM-free accreditation", were you meaning to refer to your NASAA certification?---Yes.

I see. And by "contamination", what did you mean exactly? Any presence of GM material on the land?---On the advice that we've received, yes.

You say yes, that's what you meant?---Yes.

So a single canola swathe on your property, you understood at this time, amounted to contamination that could lead to decertification?---It leads to contamination. I don't know

whether it will lead to decertification. It would depend on how that plant is dealt with, and NASAAs decision.

So is your evidence then that you understood that at this stage that a single - let's use that example, a single canola plant on your property did amount to contamination, but you were unclear as to how NASAA would respond to that contamination?---Are we talking about a GM canola plant  
- - -

Yes?---Yes. That's - that's true.

So all you knew at this stage was that one plant, not growing, just a - just a swathe, for example, sitting on your land, could amount to contamination, and it would be up to NASAA to say whether that amounted to decertification or not?---That's correct.

Right. Now, if you can go to - that advice you received that contamination meant any presence of GM on your property, who did you get that advice from?

**NIALL, MR:** Your Honour, my submission - - -

**KENNETH MARTIN J:** Mr Niall?

**NIALL, MR:** - - - this is potentially trespassing on privileged matters, and the witness should be at least advised that his - accept that the answer and the question might need to reveal legal advice. He's not obliged to answer it, in my respectful submission.

**KENNETH MARTIN J:** What do you say, Ms Cahill?

**CAHILL, MS:** Well, it doesn't seem to have the character of legal advice at all, but if and to the extent it does, the witness has already identified that he has formed a conclusion on the basis of advice. I think I'm entitled to at least explore with him, where it doesn't evidently bear the character of legal advice, where the advice came from.

**KENNETH MARTIN J:** Well, we've had the content of the advice already - - -

**CAHILL, MS:** Yes.

**KENNETH MARTIN J:** - - - so, yes, all right, I will allow the question.

**CAHILL, MS:** So where did you get that advice from?---Our solicitor.

All right. Now, you go to page 246, please.

**KENNETH MARTIN J:** So you're done with exhibit 9 for the moment, Ms Cahill?

**CAHILL, MS:** Yes, I am, thank you.

**KENNETH MARTIN J:** All right. We will take that back. And, sorry, the page you want to go to now?

**CAHILL, MS:** 246.

**KENNETH MARTIN J:** 246, in volume 1. No, volume 2, I think. No, volume 1.

**CAHILL, MS:** Do you have that, Mr Marsh?---Yes.

Now, you sent this notice to Mr and Mrs Baxter in September 2010, didn't you?---Correct.

Late September 2010?---Correct.

And Mr Baxter's GM canola crop had been in for several months at this stage, hadn't it?---Yes, presumably.

Well, presumably, you knew - - -?---Yes.

- - - that, didn't you?---Yes.

You're not presuming?---No.

You knew that?---Correct.

You knew that well, didn't you?---Yes, I knew he'd planted it.

You didn't write this letter yourself, did you?---No.

You filled in blanks where the handwriting is, but the typewritten component was written by someone else, wasn't it?---Correct.

And was that your solicitor?---Correct.

Was that Michael Huston, or was it Slater & Gordon?---No, it was Richard.

Richard Huston. Sorry, I beg your pardon, Richard Huston, who wrote this for you?---Correct.

And did you read the typewritten part of the letter carefully before you sent it to Mr Baxter?---Yes.

And did you believe all of its contents to be true?---On the advice I received.

Okay. So paragraph 3, you thought it was true at the time that it was perhaps inevitable that GMOs would eventually contaminate non-GM farms?---As I say, this was drafted by our solicitor, but, yes.

I'm asking if you believed that to be true at the time?---Yes.

And by contamination there, you understood that to mean even the presence of one canola swathe on your property?---One GM canola (indistinct) we're talking about, yes, amounts to contamination.

Not a conventional one?---I stated contamination refers to a particular product intermingled with something else, or on where it shouldn't be.

Right?---It depends on the definition, you know, I'm sure counsel would be both aware of what contamination means in the dictionary.

So, just coming back to my question, then, you answered my question about contamination when I said one canola swathe on your property amounting to contamination, but you said GM canola. Was one canola swathe of conventional canola resting on your property as at September 2010, did you understand that constituted contamination?---I did, but I also didn't consider it a risk to my certification.

And why was that?---Because it was conventional.

Right.

**KENNETH MARTIN J:** Sorry, I didn't get that last word. It was - - -?---It was conventional, your Honour.

It was conventional. Okay?---Yes.

**CAHILL, MS:** You can get rid of the conventional canola, can't you? You can just pull it out?---Well, yes, it's - under the standards, yes.

It's just a - you - under the standards, you say, you can pull conventional canola out?---Pulling it out is how I dealt with it, your Honour.

Conventional canola?---Yes.

**KENNETH MARTIN J:** If it had germinated?---True, your Honour, yes.

**CAHILL, MS:** Now, yesterday, you gave some evidence about the clarification that you had received at your request from NASAA about whether GM canola could be a risk to your property?---Correct.

That was the letter of 23 April 2009, exhibit 11. Do you still have that?---No, I don't.

It's okay, I don't - - -

**KENNETH MARTIN J:** I will just ask that to be passed.

**CAHILL, MS:** I don't need - - -

**KENNETH MARTIN J:** Yes. Go back - - -

**CAHILL, MS:** - - - the witness to see it at the moment. But did you have that letter in mind when you were reviewing the contents of this document before you sent it to Mr Baxter?---No. This document was totally related to independent advice that we received from Mr Huston.

Right. And, although you said to me yesterday that having read that letter from NASAA you had a better understanding of the standards, this letter, you say, was your understanding of the application of the standards as at September 2010. Is that right?---This letter?

Yes?---For clarification, your Honour, what we did - we had Mr Huston look at the NASAA standards.

**NIALL, MS:** Your Honour, in my submission, the witness should be advised that he's not required to divulge legal advice that has been given to him - - -

**KENNETH MARTIN J:** Yes.

**NIALL, MS:** - - - for the purposes of answering any question or giving evidence to the court. It may be something that the witness is not aware of and, in my submission, I would seek that direction from your Honour.

**KENNETH MARTIN J:** All right. I think that is an appropriate observation. When you get advice from a lawyer, it's the subject of your privilege. You don't have

to disclose it to anybody unless you're under compulsion of some law that says that you have to. Now, relevantly, at the moment, there's no law that says you have to disclose your legal advice if you don't want to?---Okay, your Honour.

But you can if you want to; you can waive that privilege. That's entirely a matter for you. But you need to understand that when you're talking about legal advice, it's privileged until you decide that it isn't?---Okay. I would rather keep it.

**CAHILL, MS:** So let's come back to this. This was your understanding of how the standards applied as at September  
- - -

**KENNETH MARTIN J:** Sorry, talking about the document a 246 now?

**CAHILL, MS:** Yes, we are.

**KENNETH MARTIN J:** All right.

**CAHILL, MS:** As at September 2010, this letter fairly reflected your understanding of how the standards applied, is that right?---The standards were actually in a NASAA document. So I would rather not go into explain the advice we received to draft this document.

I'm not asking you about that, Mr Marsh. I'm asking about your understanding of the application of the standards as at September 2010. The question is this: does this letter fairly reflect your understanding of how they applied? In particular, paragraph 6, Mr Marsh?---That's as I understood the standards. Yes.

And again, let's not dwell on it, but "contamination" meant the presence of as little as one canola swath of GM canola on your land?---Yes.

Now, had you ever had conventional canola swathes on your land before this?---Not conventional canola swathes. No.

Paragraph 9:

If the farm land described in paragraph 4 above our land becomes contaminated with GMOs or GM canola -

And you understood contamination to mean just as we've discussed, yes?---Well, that and more, yes.

What do you mean and - by that?---Well, if there's one plant, or one swath, or many more swathes.

100. Yes?---Yes.

I understand your point -

We intend to immediately commence one or more legal actions to recover all expenses -

etcetera. That was the purpose of this letter, wasn't it?---No. This letter was given as a warning.

That you were going to commence legal action if there was contamination?---No. With the hope that Mr Baxter would consider containing his GM, given that it had already contaminated Eagle Rest with one GM canola in 2008.

Paragraph 10. That was designed to improve your legal position. That's why you sent the letter, was it?---Wouldn't it be fair to say that if any business faced a loss or effect, then they could seek redress?

If you just attend my question, Mr Marsh. This paragraph 10 here was - you sent a letter including this paragraph 10 to Mr Baxter because you thought it would assist your legal position if you ultimately had to sue him, isn't that right?---We weren't working on the presumption of going to court at that particular time. There was no - at this point in time there was no contamination of our property.

You weren't working on the presumption of going to court. Can you come back to paragraph 9, please. Says:

If the farm land described in 4 above becomes contained with GMOs or GM canola, we intend to immediately commence one or more legal actions to recover all our expenses -

etcetera.

**NIALL, MS:** Was my learned friend asking a question?

**CAHILL, MS:** I will come to it.

**THE WITNESS:** If it affects and impacts on our business  
- - -

**CAHILL, MS:** Yes?--- - - - where we lose our livelihood  
- - -

Yes. But you were - - -?---It's an option.

You were definitely going - it wasn't an option; it was what you were definitely going to do, wasn't it, Mr Marsh?---No.

So is paragraph 9 wrong?---No, it's not. As I said, this was drafted on advice that we received.

Now, schedule A at page 25, this was the list of possible costs and damages that you would seek to recover, is that right?---Yes.

So this was to give Mr Baxter an idea of the sorts of claims that you would make against him, is that right?---But this wasn't - this letter wasn't given just to Mr Baxter. We give it as a warning to all our neighbours  
- - -

Right?--- - - - and others. Just to try and protect Eagle Rest from being contaminated.

All right. So all of them had this schedule A attached to them?---I couldn't be sure of that. No.

Well, this one to Mr Baxter did, didn't it?---Yes.

You handed this to Mr Baxter with schedule A; the purpose of which was to give Mr Baxter an indication of the types of losses you would seek to recover from him, is that right?---Yes.

Including costs of testing, yes?---That's what it states here.

So you thought that it could be possible that you would be asked to test your crop?---Just my crop. We obviously  
- - -

It says "testing costs"?---Obviously the test would involved the - the material on the farm.

It says:

Testing costs or additional contractual requirements required due to market perception that your choice to grow GM crops will cause contamination of our crops and/or produce.

So you were talking there, weren't you, about the testing of crops or produce, weren't you?---Yes.

Right. So you thought that's something that might happen; that you might be asked to test your crops or produce for GMO contamination?---Yes. We could - yes. I did.

And did you think it was possible that GM canola could cross-pollinate with oats or wheat at this stage  
- - -?---No.

- - - or Spelt or rye?---No.

No?---No.

So there was no possibility of genetic contamination; you understood that?---Correct.

So what kind of contamination of crops or produce were you thinking could occur on your farm?---As we discussed before, it is a contamination of the land to which the crops and that are grown, as well as - - -

So we will come to land in a minute, but just when we're talking about contamination of crops or produce, you accept that there couldn't have been any genetic contamination. So was there any way, in your mind, that the GM canola could contaminate your crops or produce?---Yes. With the - with the swathes and material blowing in, they could get - they would contaminate the land and the crops.

Let's focus on the crops. How would they contaminate the crops?---Well, unbeknown to us at that time that Michael was going to swath it, but in the case of swathes they could lodge in the crop and be picked up by the header, and so on.

Yes. And then you screen your - - -?---And the seeds spread on that land.

You screen your grain as it's harvested, don't you?---It's put through the harvester; I wouldn't call that screening.

Because you don't want weeds in the grain that you're going to sell to Mortons or bodies, do you?---We don't clean the grain that goes to Mortons.

So has weeds and other seeds - animal droppings in it, does it, or is it clean?---I don't think animal - no. No. It didn't have animal droppings, your Honour. No.

But it had weeds in it? You gave it to - - -?---It could have different - other matter in it, yes, with other - - -

Weeds? Did it have weeds in it, did it?---Yes. It could have rye grass seeds and other - - -

So you didn't screen or clean your grain after you - or at or after harvesting?---We used to, your Honour, clean our seed, just with a simple screener, for - so it will work through the air seeder. We did not clean the grain we sent to Mortons.

Just listen to the question. You didn't screen or clean your harvested grain?---It went through the header, if that's what you're referring to, so it does get a cleaning process, obviously.

Thank you. And what does that clean out of the grain as it's being harvested?---It cleans out the trash, your Honour, and most of the different seeds of different sizes.

Most of the different seeds. So what's left in, for example?---There could be small seeds like rye grass. That's predominantly the main one. But other - other - other seeds do get through the header; doesn't clean all the seed out of - - -

So what happens then? Does that end up in people's organic bread, does it, rye seed - weed seeds?---No. If it's going for human consumption, your Honour, it's cleaned professionally. And if we're - - -

By whom?---We, in our case, if we're selling our wheat or our rye; we usually take it down to Mortons and put it through a professional seed cleaning out there.

You put it through a professional seed cleaner?---Well, no. They clean it on our behalf, sorry.

I see what you're saying. So you do get it cleaned, it's just you don't do it yourself?---Only if it's to go for human consumption.

I understand?---If - if - if it's our bulk of our grain that goes to Mortons and other places, your Honour, it is not cleaned - - -

Because - - -?--- - - - except through when it goes through the harvester.

Because it's not for human consumption?---They clean it - - -

I see?--- - - - as they process it.

I understand. So if you're selling it direct to whom? What are the circumstances in which you professionally clean it?---Only if it's going to people that require it for human consumption. So - - -

I understand that?---Your Honour, if I'm selling it to Bodeys or places - bakeries or private people, then we look at getting it professionally cleaned to make sure there's no - no other matter in there.

**KENNETH MARTIN J:** And how would you do that? Run it through an organ?---No. They've got a professional cleaning outfit. It goes through an aspirator, which sucks a lot of the stuff out. It goes through various screens over - by rating. I forget the name. And it goes through from that cleaner, it goes through an indent, and then it goes down through a gravity table if need be. So there's a variety of processes and equipment used in that seeding process.

**CAHILL, MS:** So is the - sorry, your Honour. So is the short point this, Mr Marsh: either you professionally clean the seed after it's harvested, or - sorry, the grain - or somebody else does it who's buying the grain from you, but, either way, it gets professionally cleaned if it's destined for human consumption?---The only exception to that would be if it's sold for seed - if we're selling it for seed.

All right. Not for human consumption?---Correct.

So coming back then to the contamination of your produce, there's no risk of the GM canola contaminating your produce, is there, because there's no genetic contamination, and, one way or other, the grain will be cleaned professionally if it's destined for human consumption?---We - - -

**CAHILL, MS:** I object to the question on the premise that it doesn't identify the time at which the premise of the question is being asked. It said there is no question of contamination, and, in my submission, it should be identified as to what point, given that my learned friend's question identified a series of points through that question.

**KENNETH MARTIN J:** I think the intent of the question was directed at harvest of the grain.

**CAHILL, MS:** Correct.

**KENNETH MARTIN J:** But if that wasn't clear, perhaps it can be prefaced, Ms Cahill.

**CAHILL, MS:** Yes. When you're - well, I'm actually trying to identify the product - the wheat that you sell as certified organic wheat, your oats that you sell as certified organic oats, Spelt rye; all of these grains, the oats, none of them can be the subject of genetic contamination from GM canola; you accept that, don't you?---Yes.

And none of them can ever be the subject of contamination from GM canola otherwise because they're professionally cleaned?---They're not all professionally cleaned on my behalf.

Well, the ones that go back to seed and are used for seed you say aren't?---Yes.

But the ones that are destined for human consumption, that are labelled as certified organic, they're either professionally cleaned by you or professionally cleaned by someone else, and not only any GM canola seed or trash, but any other kind of weed, trash or seed is removed in that process?---I - - -

Is that right?---It has been in my experience where some professional cleaning outfits don't get all of the seed out, your Honour. Where we brought in seed that has been professionally cleaned, we can find a - - -

So what you would - what you're endeavouring to say is that although that's the intention of the professional seed cleaning service, to remove all of the extraneous seed and material, including, if it were, the - if there was a risk of a GM canola, that might not always happen?---Correct.

So when your produce, any certified operator's produce, is labelled as organic - and we're talking about grain - people who are buying that product have to understand that it's not a perfect world and professional seed cleaning can nevertheless leave some substances in there that ought not be in there, consistent with organic principles. Is that right?---Can I just interrupt, your Honour. I'm not involved in the professional seed cleaning business, so I don't feel I'm qualified to really answer that in detail.

**KENNETH MARTIN J:** All right. That was quite a long question, Ms Cahill, with a number of premises about on-stages of human consumption that, clearly, Mr Marsh - - -

**CAHILL, MS:** Yes.

**KENNETH MARTIN J:** - - - doesn't have knowledge about. So I think I would uphold his objection.

**CAHILL, MS:** Thank you, your Honour. So, Mr Marsh, is your point this: that professional seed cleaning isn't a perfect solution to getting all of the impurities out of your product?---Again, I couldn't comment on that, because I haven't got enough - - -

I'm sorry. I misunderstood your evidence before because I thought that's what you were endeavouring to say. It may or may not; you just don't know. Is that the answer?---Yes.

All right. Thank you. And if we come back to 250, please. Looking at these losses that you were trying to warn Mr Baxter about. Segregation costs; that was the cost of trying to keep the GM material away from the organic aspect of your farm, is that right?---It would be more in the lines that if I lost my certification, your Honour, we had to run a parallel production system, or it could mean a - a couple of things.

Now, can we go down to the fifth dot point:

New control measures required to remove canola from grain sold, including any grading outturn.

What's a "grading outturn"?---That's when it has to be cleaned for on-selling.

Right. And when you say "new control measures required to remove canola from grain sold", what did you have in mind there?---I don't know.

But something more than you were presently doing; is that what you meant by that?---Correct.

All right. Thank you. Now, I will just mention this here at page 251 and 252. There's an extract from the NASA standards or someone has typed - typewritten out the section 3.2, dealing with GMOs. Do you see that?---That's 3.26, is it?

Well, do you see 251?---Yes.

And it says NASAA organic standards at the top?---Yes.

If you go over the next page somebody has written out those standards - typewritten them out, haven't they?---These were copied out of the NASAA standards.

Yes. By your lawyer?---No, by ourselves.

By you?---Yes.

And can I just clarify something here, Mr Marsh. You say at paragraph 52(f) of your 2012 affidavit that you gave this copy of the standards to Mr Baxter at the time that you gave him the letter?---Correct.

But you don't say that in your statement of claim at paragraph 18. You only mention the letter?

**NIALL, MR:** Well - - -

**CAHILL, MS:** Would you be - - -

**NIALL, MR:** If that's being put as a proposition that the statement of claim is a statement of the witness, it's incorrect. So - - -

**KENNETH MARTIN J:** Well, I haven't heard the balance of the question. It might go somewhere but I'm alert to the  
- - -

**NIALL, MR:** If your Honour pleases.

**KENNETH MARTIN J:** - - - problematic issue that you raise, Mr Niall.

**NIALL, MR:** Thank you, your Honour?---I give this document  
- - -

**KENNETH MARTIN J:** Sorry, we haven't finished the question yet, Mr Marsh. Let Ms Cahill complete it.

**CAHILL, MS:** I will just take you to your statement of claim. If you can open up the amended statement of claim at paragraph 18.

**KENNETH MARTIN J:** Are you asking for the witness to be handed a copy of the pleadings?

**CAHILL, MS:** Sorry, your Honour, yes.

**KENNETH MARTIN J:** I will just ask for a spare copy to be passed Mr Marsh's way?---Thank you.

**CAHILL, MS:** I don't have page numbers, I'm sorry, Mr Marsh, on my version. So it's paragraph 18. Now, this statement of claim you approved before it was filed, didn't you?---Yes.

And you reviewed it for correctness as to the facts alleged in it, didn't you?---To the best of my ability, yes.

Now, at paragraph 18 you say that:

On about 1 October Marsh hand delivered a notice to Baxter which stated relevantly the following.

Do you see that?---Yes.

But it doesn't mention the standards - providing that extract from the standards. Now, this is my question. Could you be mistaken now in your recollection that you provided the standards as well as the letter to Mr Baxter?

**NIALL, MR:** I object?---No.

I object to that question, your Honour, for a number of reasons. Firstly, if the witness has been taken to paragraph 18 to assert that it was a statement of the plaintiff and therefore a prior inconsistent statement, it's impermissible on the authorities because a statement of claim does not stand as a statement of the witness and therefore it cannot constitute a prior inconsistent statement. Secondly, my learned friend is cross-examining on paragraph 18, which identifies by particulars that the document is in writing. In fairness to the witness, the document that was available for inspection should be shown.

**KENNETH MARTIN J:** Well, the second aspect of that - I didn't actually assess the line of question to be a prior inconsistent statement formulation. But as to the second aspect, you're referring to which aspect of paragraph 18, Mr Niall?

**NIALL, MR:** Well, paragraph 18 - - -

**KENNETH MARTIN J:** Yes.

**NIALL, MR:** - - - hand delivered a notice to Baxter.

**KENNETH MARTIN J:** Yes.

**NIALL, MR:** And then the particulars is the notices in writing. The copy of the notice is in the possession of

the plaintiff's solicitors and may be inspected on reasonable notice. That should be identified.

**CAHILL, MS:** It refers to the notice, your Honour, not an attachment to the notice. That's the whole point of the question, your Honour.

**KENNETH MARTIN J:** All right. I will allow the question.

**CAHILL, MS:** Thank you. And the witness has answered it, your Honour. He said he wasn't - he's not mistaken in his recollection in his evidence.

**KENNETH MARTIN J:** So this - just to be crystal clear about this, though, the standards that we are talking about being given to Mr Baxter is the extract that we see; two pages at 251 and 252.

**CAHILL, MS:** That's what Mr Marsh says.

**KENNETH MARTIN J:** All right.

**CAHILL, MS:** And that's at 52(f) of his affidavit, your Honour. Now, at around this time, Mr Marsh, you also put lots of notices in local publications, didn't you?---Yes.

And what was your purpose in doing that?---Again, your Honour, that was to do with legal advice we received at the time.

**KENNETH MARTIN J:** All right. Well, don't say any more than that.

**CAHILL, MS:** Can I take you to page 260 please. This is a notice that you put in The Bleat, which - is that a - that's a West Arthur local newspaper, is it?---Correct.

And was this notice written by someone other than you?---Correct.

Was it written by your lawyer?---Yes, it was drafted by a lawyer.

But you read it before it went into the newspaper?---Yes.

And you considered that the contents were all true?---To the best of my knowledge.

And did you think you understood clearly what it meant?---I believe so.

All right. Now, see that first paragraph at the bottom?---The last paragraph?

First, commencing, "I, Stephen William Marsh"?---Yes.

And then if you go to the bottom of that paragraph, you have got all your certificate of title reference numbers for your farm and then you say:

Is officially declared a generally modified organisms (GMO) free area as of September 2010.

So that's again referring to that declaration you yourself had made?---Yes.

Yes?---That's correct.

And you had only done that in September 2010?---That's when we had - as I say, we had received all our advice and we had acted on it. And just, can I be clear here, if we drop down to the next sentence, what you meant by the property being under strict biosecurity?---That's correct.

Yes, but what did you mean by the property being - - -?---It's controlling the entry of people and everything onto that farm.

All right, and the next sentence where you refer to the farmland if it becomes contaminated, that's contaminated in the sense that we have just discussed. Is that right?---Yes.

Continuing:

With GMOs resulting in any forfeiture of GM free accreditation or organic certification.

They were really the same thing, weren't they?---I declared the property GM free but the certification was under the NASAA standards.

You didn't have any accreditation separate from your organic certification, did you?---Correct.

Okay. So these are the same thing, the GMO - GM free accreditation and the organic certification?---I declared the farm GM free, your Honour, to try and protect it from contamination in my own right. The certification we considered to be separate at that time.

You didn't have any accreditation from anyone out - anybody?---That is correct.

All right. So there was no accreditation that you could lose separate and distinct from your organic certification, was there?---That would be correct, your Honour, yes.

All right. So when you referred to:

If the farmland becomes contaminated with GMOs, resulting in any forfeiture of GM free accreditation or organic certification -

you're really referring to the same thing by both those labels, which is your organic certification?---I wasn't, no.

Okay. So what was the GMO accreditation you were - - -?---It was - I didn't have an official accreditation. I had declared the farm GM free. I wanted to keep it GM free.

But you couldn't accredit your own farm as GM free, could you?---I don't know.

And just down the bottom of this notice, you say - you're talking about foreseeability of the losses and damages that you and your wife would incur - presumably you're referring to your partnership:

If GMOs escape onto our land and the contamination by GMOs of our farm production cycles generally - - -

Can I just ask what you meant - sorry, what you understood by "contamination by GMOs of our farm production cycles generally"? What are you referring to there when you talk about a - - -?---That is referring to our certification with NASAA, where it's clearly a whole - whole system.

Okay?---It's a whole - it's a whole farm certification scheme.

All right. So I'm just trying to understand this. So we've talked before about contamination of crop, and we've talked about contamination of the land with the presence of swathes or seed lying on the land, and volunteers growing in the soil. Is there any other way that you contemplated at the time that the operation could be contaminated?---Are you referring specifically to GM?

Yes. I'm trying to get to the bottom of what you meant by contamination of production cycles generally?---Anywhere where that interfered with the production of our farming system - - -

Okay?--- - - - which could be affected to land. It could be affecting our - our - in our crops - - -

Yes?--- - - - or it could be in our produce. It's - it's a - it's a whole production system.

So just in the crops, do you mean volunteers or swathes - swathes lying in the crops before they're harvested, or volunteers growing amongst the crops before they're harvested?---Both.

Sorry, when I said "or", I meant "either/or"?---Yes, both.

Yes. Could be that; could be one, could be the other, could be both?---Correct.

And that's how you would describe contamination of the crop - - -?---That's the - - -

- - - as opposed to contamination of the produce?---That's correct. If it's growing, yes. Sorry, your Honour. If it's growing in that crop, or it's either blown in that crop, or whatever, if that contamination is in there, yes.

And what's the consequence of having a swathe in your crop, a GM canola swathe in your crop?---It could shed the seed.

Yes?---And it could - it could shed many, many seeds.

Yes?---And they could reproduce.

And then what would happen?---Well, then, we've got an ongoing system where they can basically become a weed, and they can keep producing if they're not controlled.

If they're not controlled?---Yes.

But you would seek to control them, the same way you would seek to control conventional canola incursion, wouldn't you?---It would depend on the quantity and how difficult it is to remove it, because canola seed, for example, in the soil, and once they've shed out of the - the pods, they're going to be a large number of seeds spread over a large - well, can be spread over a large area.

So you're saying there's circumstances in which you simply couldn't control an incursion?---It would be very difficult.

And what circumstances would they be?---Very similar than - to what has unfortunately occurred, where we've - - -

You weren't able to control that incursion, do you say? The effect of the incursion?---We - we done our best to control it, yes. We - we tried to remove the swathes. We tried to top and - - -

But do you say you were unsuccessful in controlling the effect of the incursion?---Well - well, it appears that we have been successful - - -

I see. I see?--- - - - at this point. But we don't know how long those seeds could - could - could stay there.

It appears that you have been successful to date?---Well, in - since 2011 - - -

Yes?--- - - - we haven't found any GM.

Yes?---As they germinate.

So what are you talking about now, the possibility that a situation might arise that - where the outcome is different, where you're not able to control it in the way in which you have on this occasion?---It could be possible.

Yes. And what do you think would need to be the relevantly different circumstances to make it less successful, or not successful?---If those canola plants outcrossed into another weed - - -

Yes. Then what?--- - - - then it would be very difficult to control.

Yes, and then what?---What do you mean? It - - -

You got GM canola in your weeds. You're not selling the weeds and labelling them as - - -?---No, I'm sorry - - -

- - - certificated organic, are you?---I think you missed what I was trying to say. Let's say it outcrosses into the same family of weed as the canola, and then that - there is a genetic transfer.

Yes?---Then it would be very difficult to eradicate the problem.

You're not selling GM weeds as certified organic, are you? There's no intention to do that?---Well, we've got - we can't sell GM, or use GM in our system, production cycles.

And you don't use weeds, except as part of the organic pasture, do you?---Well, some - - -

You try and control your weeds, don't you?---We try to control our weeds, but they can be quite evasive.

Right. You don't actually have any GM contaminated weeds, do you, on your property, as far as you're aware?---As far as I'm aware.

So the possibility of outcrossing into weeds, growing in the land, lying on the land, growing in the crop, lying on the crop, that's it, isn't it? That's contamination of the production cycle, as far as you're aware?---Pretty - pretty well, yes.

Okay. Now, can we come to the event of the incursion in late November 2010. But just before we get there, at the beginning of October 2010, you had drenched your lambs, hadn't you?---Correct. We had a drought year that year, your Honour. It was very dry.

And normally it's not permitted to drench lambs, because you're using a chemical. That's right, isn't it? We will come to the exceptions in a moment. But we're talking about the normal position under the standards, is that you're not allowed to drench because it involves the use of a prohibited substance. Isn't that right?---That is correct.

And there is an exception in circumstances where, for reasons of animal welfare and health, it is necessary to treat the - the animal, and you can be given a dispensation in those circumstances. Is that right?---That's correct.

And so, because it was a drought year, and the lambs were losing condition, you - or had lost condition - you were keen to drench them to preserve what condition they had. Is that right?---It was to deal with worms, because obviously - - -

Yes?--- - - - once sheep get under stress, a series of events take place, including - your Honour, they do get - - -

**KENNETH MARTIN J:** So it's to deal with parasites in the lambs?---Yes. Yes.

**CAHILL, MS:** Yes?---And there's not an effective organic alternative that I'm aware of yet, your Honour, so we try and manage that with good rotations and so on, but if it's required, we have to deal with it.

And so when you drench under these circumstances, the sheep are quarantined in a paddock for a month, and then they're allowed to graze on organic pasture after that month?---Well, it depends on their withholding period, but generally it's about three weeks.

All right. And then that paddock that has been used for quarantine, may not be used to sow organic crops for a period of less than 12 months?---Correct.

Now, these sheep - these lambs were quarantined in paddock 8 at the time of the incursion, weren't they?---Yes, I can't quite recall, actually.

Would you like to go to volume 2, page 319. That's a letter you wrote to Stephanie Goldfinch on 8 December, so that's a week or so after the incursion, and you're telling her a couple of things about your operation, but in the first paragraph, one is explaining about the drenching of the lambs and their quarantining in paddock 8?---Yes.

If your Honour has the map which was exhibit something or other - 6, from yesterday, your Honour, you can see where paddock 8 is. So you had no intentions to grow any certified crops on that paddock, did you, at the time of the incursion, for the next 12 months? That was just going to pasture, is that right?---Yes.

Now, there was this event of incursion, and if you go to page 291, you wrote to Ms Goldfinch at NASAA. She's in South Australia. Do you understand Ms Goldfinch to be the head of the certification arm of NASAA?---I think she's head of the inspection side.

But not certification?---Well, certification side. Yes.

**CAHILL, MS:** I see?---Yes.

She heads that up, as far as you're aware?---As far as I'm aware, your Honour.

Okay. And that's why you wrote to her rather than somebody else. Someone down the chain?---I just wrote to Ms Goldfinch.

Because you had had previous contact with her or because she was the head of NASAA - NASAA certification, or both?---I - generally, I've had letters to others as well, not just Ms Goldfinch. It's whoever we deal with at that time.

Now, you tell her - you say:

This fax is to urgently notify you of substantial contamination of our farm.

You're obviously not suggesting any genetic contamination at this stage, are you?

**KENNETH MARTIN J:** Sorry. You're 319?

**CAHILL, MS:** 291.

**KENNETH MARTIN J:** 1 December 2010.

**CAHILL, MS:** Yes, your Honour. So, Mr Marsh, just where you say there in the first line:

...urgently notify you of substantial contamination -

You weren't suggesting - intending to suggest there was any genetic contamination at this stage, were you? Do you have page 291 there?---Yes. That - that was referring - - -

Just the first line. Can you see it?---Yes. I was referring to GM contamination.

Yes. I understand that. But just what type of GM contamination? Not genetic contamination; you weren't suggesting that, were you?---No. If I've used - it was swathes.

Just swathes on the land. Did you see any swathes in any crop?---Yes.

In paddock 12?---At that stage we hadn't done a proper analysis. This was (indistinct) - - -

You had seen swathes in paddock 12, is that your - in the crop in paddock 12. Is that your evidence?---Yes.

Okay?---I have seen crop - yes.

No. At this time, had you seen swathes in the crop on paddock 12?---This point in time - look, I can't recall exactly. This is only the second day after the incursion

and we hadn't done a proper analysis. We had seen a lot of swathes - - -

On the ground?---On the ground in paddock 10, and - - -

Yes?--- - - - in - there were some in paddock 8 and 7 and 9, in those (indistinct)

Some in 9?---Yes.

You're sure about that?---Paddock 9.

Yes. Are you sure about that? Sure you had seen swathes in paddock 9 at this time?---Yes. I'm pretty we drove up the fence and there was - caught on the edge of paddock 9, there was - - -

Caught on the edge?---Well, they're in the fence, your Honour, of paddock 9, in that paddock.

How many?---Well, at that point we hadn't done a - - -

Well, 300 or one?---Well, we - - -

A handful?---It's hard to estimate, but no. There was - - -

That's why I've given you such broad - - -?--- - - - a lot more than just one. There was numbers - - -

Okay. 20 in the fence?---No. In that particular case there was one - - -

We're talking about paddock 9 here?---Yes. There was - - -

Paddock 9?--- - - - one caught in the fence.

On the fence. Caught in the fence, how many?---I see - I observed one at that point.

One swath caught in the fence on the boundary between paddock 9 and what else?---Paddock 7.

Right. And you say that that's contamination of paddock 9 that you saw before you wrote this letter to Ms Goldfinch, is that right?---This doesn't state that particular paddock.

I'm not suggesting it does. I'm going back to your evidence that you had seen swathes in paddock 9?---I had

seen - definitely a swath, your Honour; whether it's swathes - - -

On the - in the fence on the boundary between paddock 9 and paddock 7, you had seen one swath, and no others on paddock 9 itself, had you?---We hadn't searched that paddock properly at that point in time.

Not suggesting that you had. I'm asking what you had seen - - -?---That - that is correct.

- - - before you wrote to Ms Goldfinch?---That's correct.

Thank you.

**KENNETH MARTIN J:** Sorry. What part of the fence in paddock 9?---It was just up from paddock 8, your Honour. If you go up the edge of that fence, you will see between - there's the sheep camp - - -

Yes?--- - - - and it's caught in about half way there. But there was - - -

So it's not your boundary fence bordering the road, it's further towards the east?---That is correct, your Honour. Or probably - yes - more north of - - -

Heading towards paddock 7?---Correct, your Honour.

Okay.

**CAHILL, MS:** Now, there were obviously no volunteers at this stage, were there?---No, there wasn't.

So just swathes lying on the ground - sorry if I'm misremembering your evidence, but you hadn't searched the crop at this stage?---I don't think I had at that point in time. This was quite early.

All right. So you couldn't say whether there was any - - -?---I couldn't quantify exactly how many. We just seen a number of swathes in paddock 7 and - and paddock 10.

Now, over the page, 292, you write the next day. And do you see, pretty much in the middle of this fax, you say:

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

Do you see that?---Yes. I'm just getting to it. There's hundreds of swathes - yes.

Now, you hadn't actually made any attempt to count the swathes at this stage?---It was an estimation. There was a large amount. By this time we had started to have a (indistinct)

But concentrated - the large amount was concentrated in paddocks 10 and 12 on your observation, wasn't it?---No. There was a lot in paddock 7.

Lot in paddock 7, was there?---Yes.

All right. How many?---(indistinct) - look, I couldn't answer that, your Honour, because we - we hadn't been able to count them at that time. They were scattered over quite a large area of that paddock.

So you have to help me with "a lot", Mr Marsh?---Well, estimation - as I said there, there could be hundreds.

Hundreds in paddock 7?---No. Across the whole site.

So I want to talk about paddock 7. How many had you observed, in your estimation, in paddock 7 by 2 December?---I couldn't accurately say there - - -

I'm not asking you to accurately say; it's just an estimate, because I appreciate you hadn't counted them?---No. You know, I'm reluctant to guess, your Honour, because I didn't really know. There was just a lot of swathes scattered over a fairly large area.

So what I put to you was that the hundreds of swathes that you refer to here were concentrated in paddocks 10 and 12, predominantly. Would you agree with that?---And included a fair portion of paddock 7 as well - - -

Okay?--- - - - at that point in time.

Now, are you - - -?---It's a combined amount.

So are you saying that there were a lot of swathes in paddock 7 that you saw prior to 2 December - - -?---Yes.

- - - or on or prior to 2 December?---December. Yes.

So when you say "a lot", do you mean 10 - - -?---No.

- - - or 100, or somewhere in-between?---Somewhere in-between. There might have been - - -

50?--- - - - 50 or so. There might have been - - -

Really?--- - - - more. There could have been a hundred.

Are you sure about that?---No. I'm not sure, because  
(indistinct) - - -

So it might not be 50; could be less?---I doubt that, no.

Could be more?---It could be more.

Okay. Somewhere between 50 and 100?---Yes.

Comfortable with that?---Yes. Reasonably. Yes.

Reasonably comfortable with between 50 and 100 swathes in  
paddock 7?---Yes. Short of not counting them, counsel,  
it's very difficult to establish exactly how - - -

All right. And then you say, "Thousands of seeds are  
spread across our land." That was something you observed,  
was it?---Well, the seeds were contained within those  
swathes.

Well, quite, Mr Marsh. Canola seeds are very small and  
dark, aren't they?---They are. That's correct.

Almost a bit like poppy seeds, would you agree?---Yes.

Yes. So when you say:

Thousands of seeds spread across our land -

in this letter, you're actually speculating from the fact  
that you have seen hundreds of swathes. That's your  
observation?---And the fact that those - - -

Sorry, don't interrupt me please?---Sorry.

I will just finish the question so that you can then answer  
it?---Yes, my apologies.

You were speculating, weren't you, that because there had  
been - you had seen so many swathes, there must have  
consequentially been thousands of seeds scattered across  
the land?---What I observed is a lot of those canola pods,  
obviously on entry to that land, had shattered. So they  
weren't all complete. So I took a presumption that that  
had spread seed over the land.

So sorry, so there was some closed pods on the  
land?---There was some whole - sorry.

And there were some open pods. Is that right?---That sounds about right, yes.

And you assumed, did you, that the pods had opened on your land rather than before they had blown in?---I presumed on the transit across the land - our land - hitting fences, rocks and everything as they were being moved across the land, they had shed on (indistinct)

And not shed at all on Mr Baxter's land?---Look - - -

Could have?---Given that the canola was grown there, some of his would undoubtedly have shed on his land.

So this was an informed guess. Could I put it that way?---To the best of my - - -

That there were thousands of - sorry, I will just finish?---Sorry.

That there were thousands of seeds across your land?---Well, there was certainly thousands of seeds contained in those swathes.

All right?---And spread on that land as - - -

So what are you saying, there were closed pods on your - in the swathes on your land. Is that what you meant by thousands of seeds spread?

**NIALL, MR:** Well, the witness can answer that question, your Honour?---There was both. Your Honour, some of those - - -

**KENNETH MARTIN J:** All right, I will let Mr Marsh finish his answer?---Yes, obviously with the movement of the material, and your Honour has seen a swathe, as they move they shatter. Knowing that as a fact, we made the presumption that they had spread across the land and a part of those swathes still contained hold pods that hadn't shattered at that period of time as well.

How many pods on a canola swathe?---Look, I can't answer that offhand.

Two or three?---No, no. You know, we have got that one you can have a look at, your Honour. It's a classic example. No, there was lots of pods.

Multiple?---Yes, yes, a lot.

All right. Some had shattered and some hadn't in terms of pods?---Yes, your Honour. Yes.

All right.

**CAHILL, MS:** Now, Kathe Purvis from NASAA came out to inspect the property on 4 December 2010, didn't she?---Yes.

Now, that's a couple of days after you wrote that letter to Ms Goldfinch. Had you done any more inspection yourself of - to observe the extent of the incursion?---Yes, we started to - NASAA required - there was a - the area recorded and mapped out to the extent that the contamination occurred.

So sorry, NASAA required you to do that, do you mean - - -?---Yes, as a part - - -

- - - or she did it?---Well, Ms Purvis was doing the inspection.

Yes?---But I was helping get a lot of the - you know, the maps and documents as well.

All right?---Just the maps really to formulate the extent of the contamination.

Now, by the time Ms Purvis arrived on the 4<sup>th</sup>, had you observed any swathes in paddock 9, apart from that one on the fence that we talked about a moment ago?---There's a point that those paddocks had stock in as well but I don't recall finding any more, no, your Honour, at that point in time.

All right. So nothing actually in paddock 9 itself. There was the one stuck in the fence. What about paddock 11? Had you had the chance - so your Honour's - - -

**KENNETH MARTIN J:** Sorry, weren't we walking about paddock 8 before?

**CAHILL, MS:** It was on the boundary between paddock 9 and paddock 7, your Honour?---Can I - - -

**KENNETH MARTIN J:** I thought it was 8 and 7.

**CAHILL, MS:** No, it was 9 and 7. If your Honour looks at the map you can see - if you're going in a northerly direction, you will get that boundary between 9 and 7.

**KENNETH MARTIN J:** North-east. All right.

**CAHILL, MS:** I will just get Mr Baxter to - - -

**KENNETH MARTIN J:** Anyway, so we're talking about paddock 9 now.

**CAHILL, MS:** Yes. Shall I just get Mr Marsh to confirm that. I had that right, didn't I, that this canola swathe in the fence was on the boundary between paddock 9 and paddock 7. Is that right?---That's correct.

Yes, thank you. And had you had a chance to inspect the crop in paddock 11, the wheat crop?---We had just started - it was actually spelt - no.

No?---Not at that stage.

That was in paddock 12?---Yes, you are correct. No, I hadn't at that stage.

Hadn't in - - -?---No. To do a proper search over the area involved is quite onerous.

I'm not in any way criticising you, Mr Marsh. I'm just trying to ascertain what the position was at the time and what you had observed. So you hadn't inspected the crop in paddock 11 at all?---I don't believe at that point - look, to be honest, I - no, at that point I may not have done.

All right. Now - - -?---But I'm not sure, your Honour, really. There's - we were dealing with a fairly large area of contamination. We were trying to map out the boundaries as much as possible.

Now in paddock 12 you had the spelt and rye that was in - on a quarantine paddock from - - -?---Correct.

- - - 2009, wasn't it?---Yes.

Yes?---That is correct.

So that wasn't going to be certified organic produce anyway, was it?---That's correct.

And you understood that at the time?---Yes.

Yes. So did that mean that you subordinated, if I can put it that way, you put to the bottom of the list the inspection of paddock 12 and the crop because it didn't matter so much whether there was GM canola in there?---No, that's not correct.

All right?---It mattered wherever it was.

It didn't matter to the crop though, did it?---Well, I would certainly prefer it not to be there.

Understood, but in terms of its saleability, it wasn't going to be certified anyway, was it?---That's correct.

Now, your position was this, wasn't it, by the conclusion of Ms Purvis's inspection, that you had seen swathes in paddocks 7, 8, 10, and 12. You hadn't seen any in 9 or 11 but you suspected they were in there.

**NIALL, MR:** That's not a fair summary of his evidence. He is giving evidence that he saw one in paddock 9?

**CAHILL, MS:** Come - - -?---Can I just bring one point  
- - -

**KENNETH MARTIN J:** Well - - -

**CAHILL, MS:** That's not fair. We were given - I put to the witness a moment ago, your Honour, that he hadn't actually seen any swathes on paddock 9 itself and he agreed with me.

**KENNETH MARTIN J:** I think the witness is about to lock horns with that proposition in any event. So in the circumstances, I think Mr Marsh is capable of identifying what he saw at the particular time. So you answer, Mr Marsh?---Yes. Seeing that canola plant in that fence but, your Honour, I just want to bring up the point, we were dealing also with a very dry year and those paddocks also had sheep in those paddocks and they were also consuming the GM canola.

The swathes?---The swathes, your Honour, yes.

Did you see that?---Yes, your Honour.

Okay.

**CAHILL, MS:** So the sheep were eating the swathes?---Correct.

The sheep were decertified though, weren't they?---Well, at that point they all were because of the season.

All of them, the lambs, the ewes, yes?---Yes.

All your livestock were decertified because you had drenched all of them because of the drought year?---At that point in time, yes.

Well, yes?---Normally we sell organic lambs. So we raise those and we don't normally drench those, but because of the dry season and, as we have discussed, the issues with worms and getting our saleable sheep off, we had drenched them that year.

I'm sorry, I might have put that slightly incorrectly to you. They hadn't been formally decertified at this stage by NASAA but you knew that they would be because of the drenching. Is that right?---I would have to check my records but I think they were all had received in their lifetime a drench.

Well, they had, hadn't they?---I'm pretty sure they had, yes.

That had all happened in October/November?---Yes, I'm not sure that I drenched all my flock at that period of time. I may have only drenched the ones that were having health or animal welfare issues with worms.

Your records would show that though, wouldn't they? You didn't have any certified - by the end of December, you didn't have any certified livestock left on your property, did you?---No. That's probably correct. That's correct. Yes.

And one of the reasons why you didn't was because of the drenching of all of the livestock?---Yes. Probably is.

Yes. Thank you. So when you mention to his Honour that you had livestock eating the GM canola, this was livestock destined for decertification eating the GM canola, is that right?---Well, not in that circumstance, no.

Why do you say that?---Well, if they were already - the only things that could be certified in that case would be the lambs from the next ewes.

Yes?---But that's - - -

You didn't have any of those?---No.

All you had were - - -?---The ones that I dealt with as we discussed.

- - - drenched. Yes. And so they were going to be decertified anyway?---Yes.

Yes.

**KENNETH MARTIN J:** You mean, if they were sold for meat, the meat couldn't be sold as organic meat?

**CAHILL, MS:** As organic. That's right. That's what it means to be - - -

**KENNETH MARTIN J:** That's what it means?---Yes. Yes, your Honour.

All right.

**CAHILL, MS:** And it was those animals who were eating the GM canola?---Well, it was those - most of my stock was exposed to eating - - -

Yes?--- - - - the canola at that time.

But you can't say now that any animal that remained certified organic ate GM canola, can you?---No.

No. Now, after Ms - sorry. We will go back a step. You saw swathes - by 4 December, you had seen swathes in paddock 7, 8, 10 and 12, hadn't you?---If that's what we've recorded, that would be correct.

No. I'm asking what your recollection is. What is your evidence? Did you - or can you not remember?---Yes. We - we had seen in - could you just repeat those paddock numbers?

7, 8, 10 and 12?---Yes.

You had seen swathes in each of those paddocks?---I'm not sure when paddock 12 we found it, because it was later that we discovered the extent - gone up into paddock 12.

Right. By 4 December you hadn't seen any swathes in 9 or 11, had you? When I ask you that question, I refer you back to the discussion about the swathing in the fence between paddock 9 and paddock 7. Apart from that, there was nothing in paddock 9 that you had seen, was there?---Except for that one. That's correct - - -

And you - - -?--- - - - at that time.

Yes?---At one point there was some. There was another one up on the boundary on the road.

This is by 4 December?---Yes. Look, I can't recall exactly what the dates were. I can only - - -

You're referring to one on the road?---Yes. There was one stuck in the fence at that - you know, when we done a more, you know, a larger search of the property, we started to find them over a larger area, your Honour.

And you didn't see any by 4 December in paddock 11?---I can't recall exactly when we found those ones in paddock 11.

Right. Now, you - - -

**KENNETH MARTIN J:** Paddock 11 has got a crop in it, hasn't it?---It has got a wheat crop in it.

That's the wheat crop?---Yes, your Honour.

**CAHILL, MS:** Now, if you go to page 323, please. You received a copy of this decision of suspension on about 10 December 2010, didn't you?---That would - yes.

And paddock 11 wasn't suspended at this point, was it?---No.

And that's because there was no evidence of contamination at that point, on your understanding. Is that right?---Obviously I hadn't found the plants in that paddock at that stage.

So you accept that no evidence of contamination, any swathes lying on the ground or in the crop?---We just hadn't properly searched that area at that point in time.

Right. But - all right. And there's a mention here of a provision of the NASAA standard 3.2.9, which talks about the contamination of paddocks 7 to 10, 12 and 13. Do you see that?---Yes.

Did you go back to that standard and have a look at it when you got this letter?---I don't recall I did. No.

And then when we go down the page, there's three other, what's called major non-compliances, and this refers to your livestock, doesn't it?---First ones outlined in crop production, isn't it?

Yes. But that's in relation to paddock 12. That's the 2009 breaching event that's being referred to there on your understanding, isn't it?---Yes.

Yes? Sorry, Mr Marsh. Do you agree with me?---That is correct. Yes.

Yes. So that has got nothing to do with the incursion, has it, that one?---It was still contaminated.

I beg your pardon?---It was still contaminated with - - -

Sorry. This major non-compliance here, the second one has got nothing to do with the GM canola, has it?---No. No. No.

Paddock 12 is dealt with above?---That's - that's - that's correct.

Yes. Yes. And then the next one, this is the feeding of the stock, and there's two reasons for the decertification of the stock, and that's the drenching and the GM canola?---Correct.

Yes. But it's not land that has been decertified there; it's just the stock?---Well, that's referring to the stock at that stage.

Yes. It's not decertifying the land by reason of that non-compliance. You didn't understand that your land was being decertified because the sheep had eaten GM canola; it was only the sheep that were being decertified, isn't that right?---That's what it refers to there.

Yes. And similarly over the page?---That's correct.

Yes. So can we go down to the page 324:

Period of suspension remains in force until further investigations are completed.

There was another inspection of the farm, wasn't there, and there was also some samples of the swathes tested, wasn't there?---There were samples taken at both inspections.

Yes?---But yes, at the second inspection (indistinct)

Yes. And two inspections and samples of swathes tested; that was the further investigations as far as you were aware?---Yes.

Right. And now the suspension conditions. Can I ask you just about numbered paragraph 1. You read this at the time, didn't you?---Yes.

And so it mentions all those paddocks, other than 11, being suspended until further investigations. And then it says:

Status of crop from these paddocks to be determined by NCO after further investigation.

(indistinct) was only a crop on paddock 12, wasn't there?---That's correct.

Which had been decertified?---Yes. Yes.

Couldn't grow an organic crop on paddock 12 - that Spelten rye?---Not at that - not at that particular time frame.

So then it says:

Cereal harvested from the suspended paddocks must be stored separately and tested by NCO after harvest to determine the crop status.

Did that happen?---Not that I was aware. No.

This was a condition of your suspension. Did you not comply with it?---That was held.

Sorry, what was held?---We're talking about the wheat?

It says:

Cereal harvested from the suspended paddocks -

You had Spelten rye on paddock 12 - - -?---Yes.

- - - and no crop on any other of those nominated paddocks?---Yes.

It says:

Cereal harvested from the suspended paddocks must be stored separately and tested by NCO after harvest to determine the crop status.

Did you store - - -?---Yes. We did store it.

Where did you store it?---In a shearing shed, some of it, and the - some of the wheat was sold as conventional straight away.

So did you store it or not? That wheat that you sold as conventional? Wheat is on 11, isn't it?---Yes. The wheat  
- - -

So this is Spelt and rye on paddock 12?---Yes. That was stored.

Okay. And it was stored in a shed?---Correct.

How?---In bulker bags.

And what happened to it?---The Spelt is still there.

Yes?---And the rye was - we ended up growing some of that rye - I forget which year it was claimed - and we put it in one of the little quarantine paddocks.

So you used it as seed?---Yes.

All right. And was it tested by NCO?---Not that I'm aware of.

Did you make arrangements for that?---No.

Why not?---Because I - yes, I - I didn't, or I didn't have it requested. Yes.

All right. Now, you didn't go back to the standards and look at clause 3.2.9, I think you just said, after you got this suspension notice?---I can't recall going back and looking at them.

Yesterday you told me that that letter from NASAA of 23 April 2009 was something that you had asked NASAA for in order to clarify whether GM canola could be a risk to your property, and that was the response that you got?---Correct.

Did you got back to that letter and refer to it once you had received this suspension notification from NASAA?---I don't recall that I did.

Now, what was your view of the suspension condition? Did you think it was reasonable, in your own mind?---Well, it was quite evident of what had taken place, and there was a large quantity of swathes on the property.

So you - you thought it was a reasonable decision to suspend - - -?---I couldn't - - -

- - - certification in relation to all of those paddocks, bar paddock 11?---My understanding of the standards and my advices I previously obtained, yes, the contamination was substantial.

All right?---And obvious, of course.

Did you go back to clause 9.3 of your contract, and have a look at that?---Which one, sorry?

Your NASAA contract. Did you go back to your NASAA contract and have a look at that?---What page?

**KENNETH MARTIN J:** Did you - I think the question is did you go back and look at it at this time?---I can't recall what I did.

**CAHILL, MS:** Did you think about how you might be able to remove the GM canola swathes, or minimise the risk of germination of volunteers, in a way that might persuade NASAA to give your certification back?---Yes. When - your Honour, when the contamination first happened, and the first few plants we found caught in the fence, we actually fenced out those plants, those swathes, to contain them there. Our thoughts was immediately as if we can remove the swathe and remove the soil, you know, we'd have a good argument that NASAA may not decertify us, because we could totally eradicate, we believed, the swathes, and the soil, if there was any seed spilt around that swathe. We looked in - this was the plant referred to on the partition in paddock 8 and 7, in the gully there, that was the first plant we found. We then found the other ones in paddock - paddock 10, and we started to do that, but soon there was just a vast amount. It wasn't practical to do that, your Honour.

**KENNETH MARTIN J:** There was too many to pick up?---There was too many to contain, for the point, before the inspections were done by NASAA and the department.

**CAHILL, MS:** You weren't trying to pick them up in December or January, were you?---Well, please appreciate, counsel, that we were trying to deal with a very difficult season. We were trying to get our crop off, after we went through all - all this issue with what was happening with the certification.

Mr Marsh, that question didn't have any pejorative intent in it. I'm just trying to understand what happened, and so that his Honour has a clear understanding of the

chronological sequence. The incursion happened in late November, early December?--- Correct. Yes.

Between then, the date of the incursion and around early April, you didn't attempt to collect the swathes, did you?---No. Well, we tried to work out how we were going to deal with it.

Sorry?---So, no, your answer is - - -

You fenced some of the swathes, didn't you? You put little fences around them?---We tried to - we tried to contain them, the original ones we found.

Sorry. Did you put some fences around some of the swathes? Yes or no?---Yes.

Yes. And that's what - one thing that you did between the date of the incursion and early April 2011?---That's one thing we did, yes.

Yes. But you didn't actually remove any swathes?---No. Not - not before that time.

And my question before his Honour asked his question was to understand what happened immediately after the suspension, when you received the notice of the suspension. You didn't talk to NASAA, did you, between the date of suspension, and the date of decertification on 29 December, about what you might be able to do to avoid decertification? Didn't have that conversation, did you?---I don't know. Look, I can't - I can't recall.

Didn't happen, did it?---I can't recall.

So are you saying you could have had such a conversation?---There could have been. I just can't - can't remember.

At this stage, though, you had no intention of appealing the suspension condition, did you?---I couldn't see how I could.

Right. Now, then Ms Coleman came - Ms Claire Coleman and had this further inspection on 21 December 2010. Do you recall that?---Yes.

And did you get a copy of her inspection report?---I'm not sure if we requested it or we did get a copy.

Just have a look at page 325, please. Do you remember getting a copy of that document? It goes through to - well, it goes through to, I think, at least 331?---I don't recall seeing it, actually.

Okay. Now, at page 332, you got that document, didn't you, because I think it has your signature on it?---Yes.

You just can't remember whether you got the report?---Which document were you referring to, sorry?

The report at page 325, you can't remember whether you got that?---With due respect, counsel, we did have a lot going on at that time. I just don't recall seeing it.

That's fine, Mr Marsh. I'm just trying to understand whether you had received it or not because it will - - -?---I just don't recall seeing it.

Then I will know what kind of questions to ask you if I know you had a copy or not. That's all?---Okay.

That's the only reason I'm asking. Now, at page 326, this is - I'm in the middle of the report. You may or may not have got a copy of it. I just want to draw your attention to something that Ms Coleman has said in her report at the bottom. She says:

The wheat crop in paddock 11 appears to be free of contamination.

See that?---Yes.

Now, did - does that accord with your recollection of what you had observed on the property at the time?---Yes. That would - - -

That paddock 11 was free of contamination - sorry, the crop. The crop. Yes. Sorry. And I think we mentioned this yesterday, you had actually put in about a 6.42 hectare buffer in paddock 11, hadn't you?---When we realised Michael was growing that - - -

Exactly?--- - - - next door, we put in a considerable buffer against that.

All right. Now, on - - -

**KENNETH MARTIN J:** By moving away from the road paddock 12 to an internal paddock to the east, namely 11. Is that the

buffer?---We moved from 10. We were originally going to put 10 in, your Honour, with the rye and the wheat. We shifted it across the creek and put 11 and 12 in, even though we knew that 12 was a quarantined paddock.

So 11 is the wheat, and 11 is northeast of 10 by reference to the road?---Yes.

So when you talk about the buffer distance, you're talking about getting the buffer distance by moving to a more easterly paddock from the Baxter property?---Probably more northerly, you Honour.

North-easterly?---Yes. Yes, that would be correct.

Okay.

**CAHILL, MS:** But not just moving paddocks, Mr Marsh. You also had a buffer within paddock 11 itself, didn't you?---That's correct.

And that was about 6.4 hectares?---That would be about right.

And is that the most - was that buffer area within the most southerly portion of paddock 11?---Yes.

Thank you.

**KENNETH MARTIN J:** And so, what is that buffer? Is that some sort of - - -

**CAHILL, MS:** It's - - -

**KENNETH MARTIN J:** - - - fire break, or - - -?---No. We just tried to give a - a fair distance between Mr Baxter's GM crops, canola, and our crops.

**CAHILL, MS:** So it was just left as pasture, that buffer area, wasn't it?---That's correct. Yes.

Yes. So the - you only cropped a portion of the paddock?---That's correct.

Thank you. And I think your evidence was a moment ago you - sorry. I withdraw that. By 21 December, when Ms Coleman came, you still had not found any swathes in paddock 9, apart from that swath that you had found in the fence between 7 and 9. Is that right?---Not that I'm aware of, anyhow.

And the one on the road fence?---Yes. There was one - - -

All right. All right. Now, then we get to page 333.

**KENNETH MARTIN J:** How are you going, Mr Marsh? Do you need a break at all, or are you okay?---I'm not too bad thanks, your Honour.

All right.

**CAHILL, MS:** I can break for five minutes if you think it's a good idea, your Honour.

**KENNETH MARTIN J:** When you get to a point that you think is convenient, we will do that.

**CAHILL, MS:** All right. Thank you. This is the decertification decision that you received eight days, I think, after Ms Coleman came to your property to inspect?---Yes.

And we've now got paddock 11 decertified, whereas previously it wasn't part of the suspension. You noticed that at the time?---Yes. Correct. Yes.

You hadn't detected any contamination in the crop, is that right?---That's correct.

And there - you had detected no swathes on paddock 9, apart from those two in the boundary fences we just discussed?---The only purpose we hadn't at that time was because we believed the sheep had consumed a lot of those on that paddock.

Right. Those sheep that were decertified?---Well, that's correct.

Yes. Thank you. And so you - paddock 7 through to 13 have all been decertified and the crop has been decertified from paddocks 11 - well, from paddock 11; paddock 12 was already decertified, wasn't it?---Yes.

Now, you didn't think you should appeal this decision, at least in relation to paddocks 9 and 11?---Well, given the extent of the contamination. I know you're referring that there's not a lot in those paddocks. No, I didn't consider it, because most of that area was contaminated. And, in that area, if the sheep had consumed, wouldn't they spread that on the land. So I didn't.

Weren't any sheep in 11, were there?---No. There wasn't in 11. No.

So there was no swathes in the crop in 11?---Not that I found.

No. And - yes. So you say - but the extent of the contamination that you had seen in paddock 11 was, in your view, sufficient to warrant decertification?---Well, there had been seeds on that. I didn't make the decision.

How many swathes had you seen on paddock 11?---There was three, I think. Three or four.

Three?---Yes.

Three? And you thought it was a reasonable decision to decertify the entire paddock?---I only looked at - I only considered it in its entirety.

So did you discuss any alternatives with NASAA to decertification when you received this decision or before you received this decision?---I don't recall I did.

Didn't discuss with them the possibility of testing of produce? Did you discuss that?---Look, I can't - there was a lot of things discussed around the visits and that sort of thing. I can't recall exactly what I discussed.

Did you discuss with them the potential for only parts of paddocks to be decertified?---I don't recall, again.

So if you found a handful of swathes in just a corner of a paddock, did you think it was reasonable to decertify the whole paddock?---Well, counsel, how is it practical in a farm to deal - - -

Sorry, Mr Marsh. The way this works is that I ask the questions and you answer them. So - - -?---Sorry. My apologies.

This is the question - - -

**KENNETH MARTIN J:** Well, it's a farmer's - - -

**CAHILL, MS:** I understand. I'm just - - -

**KENNETH MARTIN J:** - - - answer. I would let him - let him answer.

**CAHILL, MS:** I'm not admonishing the witness, Mr - Mr Marsh, can you answer my question? Did you think it was reasonable to decertify an entire paddock in circumstances where there might only be a handful of swathes in one corner?---I considered that the material and the seeds were in that paddock. It was very difficult to manage the operation with that contamination in not knowing how much seeds or the potential for germination in future.

So did you agree with the decision?---I didn't make the decision.

I'm not suggesting that you did. Did you agree with it? Did you think it was the correct decision?---Given the extent of the contamination and my understanding and advice we took on the damage, your Honour, I don't think they had a choice.

Did you think that decertification would assist you in a claim for damages against Mr Baxter?---I haven't considered that at all.

Did you think that decertification might assist you in lobbying the West Australian Government for removal of the exemption?---No. No. I hadn't considered that. The - it would be much better for us to be still organic.

Now, is your evidence that the reason that you didn't remove swathes from the pasture areas, between the date of the incursion and early April, was because you simply didn't have time?---Correct. We - we just - - -

All right. Thank you.

**KENNETH MARTIN J:** Sorry. Your answer was you didn't have time?---No, your Honour. We were dealing with so much at that time with harvest - we had to get our harvest off; we had a lot of this taken up till the end of December, where we usually harvest in the first to second week of December. We had - yes. (indistinct)

**CAHILL, MS:** And then after harvest, what was the busy time in February?---I was still harvesting in February.

And March? Did you harvest all through December, January and February?---No. I couldn't. I didn't harvest it - I didn't start until in January that year.

I'm sorry. So the incursion was in late November?---Correct.

You didn't start harvesting until January. Was that what you just said?---Till January.

Yes?---It would be getting on that way.

Sorry. When did you start harvesting your 10/11 crop?---Yes. It would be - the best of my ability, it would be starting in, certainly, late December/January.

All right. So for the month of December, because the incursion happened late November, what were you busy with that distracted you from picking up swathes?---Just all these paperwork and - and finding out the extent and complying with what I was required to comply with.

All right. Can we break that down then. You had two inspections; one on 4 December and one on 21 December. They lasted for about five hours each, didn't they?---Yes.

So one can understand that you might not have been able to pick up swathes on those days. Then had to fill out some paperwork; how long did that take you?---Well, to measure up the farm and the areas involved, it took - took quite a while. We had to - - -

How long?--- - - - had to get - look, I can't recall exactly, but it took up a lot of that time with - with just the incursion and what happened, and just all the - everything that went on. We just did not get the time physically to do it.

So tell me what you were doing apart from paperwork and looking at the swathes?---We had to organise my sheep. I wanted to - we had to obviously stop feeding them because there was stock quarantined in those paddocks. We had to prepare to get -quarantine - the little paddocks quarantined. We had huge inquiry from media and other individuals, your Honour, as well. We have tried to just deal with everything and we found it extremely difficult.

All right?---Counsel, I'm sorry, but we did not have the time to do it.

And your harvesting in January took two to three weeks, didn't it?---It was very extended. I couldn't tell you exactly how long it took.

It took about two to three weeks, didn't it?---I can't say exactly but generally it takes us about - - -

That's about right though, isn't it?---About three to four weeks it was extended.

All right?---Then we had to - - -

So let's say the whole month of January was harvesting?---Yes.

What did you do in February that prevented - - -?---We had - - -

Sorry, I will just finish this. What did you do in February that prevented you from collecting the swathes?---We fixed up the other header because I wanted to get the crops off because of the risk of losing those. We did have some storms and that in January, which delayed things a bit.

So we're in February now?---Yes.

And your harvest is complete?---Then we started harvesting with another old header so we didn't contaminate my - - -

Sorry, your harvesting was complete by the end of January, wasn't it?---I don't recall that it was.

So how long did your harvesting take?---Well, it would have went on - - -

Six weeks?---Well, it went on for a lot longer than the three weeks to get the oats off; that would have took about the three weeks to the month as we discussed. And then I fixed up another header which took about a week to get that up and going, and then we started harvesting the - - -

11 and 12?---Yes.

How long did that take?---That took probably a couple of weeks.

And then we're into March, let's say, late February, early March. What prevented you from collecting the swathes then?---Yes, I can't recall exactly.

Could you have picked up the swathes in late February and during March?---We had to - - -

Sorry?---We wanted to record as we picked them up so we went through - it is possible we could have started a little bit earlier but it wouldn't have been much earlier.

Were you concerned about the risk of encouraging volunteers? The longer you left the swathes lying - - -?---I'm sorry.

Sorry, lying in the paddocks?---A lot of that damage was already done.

Sorry, were you - if you listen to my question. Were you concerned about the risk of encouraging volunteers the longer you left the swathes in the field?---It's a potential they could shed more seed but a lot of that seed was already shed at that time.

Did you think it assisted any potential legal case about - against Mr Baxter to leave the swathes in the paddock for longer?---I didn't consider that at all.

Would you leave them there so long again if you had another incursion of this nature?---I probably would not.

Would you pick them up immediately?---Knowing what I know now - - -

You would?---I would try to, yes.

Thank you?---It just depends when it occurred and what the circumstances were.

Understood, Mr Marsh. If you simply didn't have the physical capacity to do so, then obviously you couldn't, could you? But if you did, is your evidence that knowing what you know now you would pick the swathes up immediately if you could?---If you could.

Yes. And the reason you say that is this, isn't it, because that's a good way to minimise the risk of volunteers germinating?---It would reduce the seed. It's not going to change whether the volunteers germinate but it would reduce the amount of seed - - -

Sorry, I put that badly; you are quite right. It would reduce the number of volunteers germinating?---Possibly.

Well, quite likely. Isn't that right?---Yes.

Yes, and that's why you have just answered affirmatively to my question. That if you're having your time again and the ability to do so, you would attend to this more quickly?---We're always wiser with hindsight.

Yes, thank you. Now, in early April you - sorry, I can pause there.

**KENNETH MARTIN J:** (indistinct)

**CAHILL, MS:** I can, yes.

**KENNETH MARTIN J:** All right. We will just break quickly for five minutes.

(Short adjournment)

**KENNETH MARTIN J:** Please be seated. Ms Cahill.

**CAHILL, MS:** Thank you, your Honour. Mr Marsh, just a couple of questions before we move on to the next thing. Do you recall Mr Baxter offering to help you collect the swathes in December 2010?---In 2010?

Yes?---No.

No, you don't remember that?---I don't.

And at any time before or after the decertification, did you undertake any research of your own about how long it would take for volunteer canola seeds to germinate?---In which period of time?

Any time before or after the decertification?---Long after the decertification - - -

You undertook your own research?---Well, I would have seen documents.

Sorry, did you undertake your own research?---I don't recall taking only - no, I don't think so.

You didn't?---No.

Okay. Now, early April or thereabouts - we don't need to be specific but it was around early April 2011 that you did collect all the swathes you could find on your farm. Is that right?---That's correct.

And your evidence is I think this, isn't it, that it was difficult to tell the canola swathes apart from the capeweed or - - -?---No, that's incorrect.

Sorry, volunteer plants from the capeweed. Is that right?---We're dealing a different period of time.

Okay. Can I just talk about that and then I will come back to the swathes when you collected them but after you had collected the swathes, you then went through your farm periodically looking closely for any volunteers and pulling them out of the ground, didn't you?---We looked for volunteers, yes.

Yes. And you did that by walking the paddocks with your wife 10 metres apart?---Approximately, thereabouts.

Yes. And it was at this that you - at this stage that you found it difficult to tell capeweed and canola flower apart. Is that right?---The difficulty would be that if we had seen a plant within that, it would be difficult to tell them apart. This - we're talking about later when the capeweed is flowering, probably in about September/October 2011.

Yes. And you found it difficult, did you, to distinguish a capeweed plant from a canola plant?---In flower that's - if they were - if you had a small amount in a paddock - a few volunteers in a paddock of capeweed, it would be difficult to see.

Well, the position is this, isn't it, if you were looking at a field full of yellow flowers from a distance or from the boundary, it would be hard to distinguish the capeweed flower from the canola flower?---Yes, if it was shored in pasture.

But when you're walking through a paddock with your head down looking closely at the ground in order to detect canola flowers, it is relatively easy to tell a capeweed flower apart from a - - -?---If you walk close enough.

Sorry, I will just finish the question?---Sorry.

It's relatively easy, isn't it, to tell a capeweed flower from a canola flower?---If it's in flower at close quarters.

And his Honour was shown some - a picture of some capeweed flower yesterday, which is like a - children call them dandelions. They have got the black centre with the yellow petals coming out from them, like a small sunflower. That's a capeweed flower, isn't it?---Correct.

And then if we look at the - it's in volume 1, page 211 of volume 1 of the trial bundles. Your Honour should have a better copy of that document now. Thank you.

**KENNETH MARTIN J:** Thank you.

**CAHILL, MS:** And I'm not sure if you have the better copy, Mr Marsh, of that document, page 211. It's this letter to Minister Redman. Got that one? I'm happy for Mr Marsh to just quickly look at my copy or - - -

**NIALL, MR:** I have another one.

**KENNETH MARTIN J:** Mr Niall is helping out.

**CAHILL, MS:** Thank you?---Thank you.

So that's what a canola flower looks like?---Correct.

**KENNETH MARTIN J:** Conventional?---Correct, your Honour, at this time.

**CAHILL, MS:** Your Honour, they don't look different. It's their genetic - - -

**KENNETH MARTIN J:** This is the 2009 one, isn't it, so  
- - -

**CAHILL, MS:** Yes. No, I understand your Honour's point. It's a picture of a conventional canola flower but the GM ones don't look any different, do they?---No, they don't.

No. That's what a GM canola flower looks like?---It looks similar to that, yes.

Yes.

**KENNETH MARTIN J:** How high is that plant?---About - that one would be getting on towards a metre.

**CAHILL, MS:** And the capeweed flowers are much lower to the ground, are they?---Yes.

So the fact of the matter is adopting the methodology or - sorry, adopting the method that you had, which was you and your wife walking through the paddock, 10 metres apart, heads to the ground - your eyes to the ground, looking for - - -?---To the best of your ability, yes.

Yes. Looking for canola volunteers, it was relatively easy to distinguish capeweed from canola?---In a pasture paddock we're dealing with, not in crop, which is different, where the - - -

You weren't going to walk through the crop though, were you, or did you?---We did walk through the crops as well.

And you could detect canola volunteers there, couldn't you?---It was very difficult to see them in the crop.

Now, I'm not - - -?---Depending on how tall the volunteer was and whether it was in flower. They generally - it depended on how tall the crops was and so on. So, no, it was a lot more difficult, your Honour, to find them in a crop, particularly if it had capeweed and that in it.

But you could tell the capeweed apart from the canola when they were in flower, couldn't you?---Well, at close range you can, yes.

Exactly, and that's the point - no, sorry, I will withdraw that. And instead of actually pulling out these volunteers, you fence them, didn't you?---Yes.

And you did that why?---I did some that way, some we removed.

Why did you fence the ones you fenced?---So they could be verified that they were GM.

So it was for the purpose of these legal proceedings, was it?---No, it was not. I - - -

Okay, so verified by whom?---By NASAA at their inspection, that there was current volunteers still growing - - -

All right, okay?--- - - - in the paddock.

So you weren't - you thought it was important to do that rather than simply record the fact that you had found a volunteer, remove it, and then tell NASAA about that later?---We did both.

Okay. So what was the purpose of leaving them intact?---Well, it depends what stage we found them as well because they were found at different stages of the crop, if you're talking about the ones in the crop. So some of the earlier ones, your Honour, we pulled up. Some of the later ones we did fence but - - -

But why did you fence them?---It was just what we did.

You don't have a reason?---Only to verify that they had germinated and grown, that's all.

You could have made a record of that and then pulled them out?---I guess I could have done.

**CAHILL, MS:** Would you do it differently if you had your time again? Would you just pull them all out straightaway?---And record them?

Yes?---I may well do.

Do you think that's a better way of doing it, rather than leaving them in the ground fenced?---It probably is, your Honour, yes.

Thank you. Now, let's come back to April and collecting the swathes. You picked up everything you could find. Every swathe you could find you picked up. Is that right?---We endeavoured to, yes.

So the objective was to clear paddocks 7 to 13 of any swathes?---That we could find.

Yes, and I understand, Mr Marsh, you couldn't guarantee that you picked them all up?---No.

But your objective was to do that if you could?---Yes, if we could.

I understand. And can we go to your exhibit 10 please.

**KENNETH MARTIN J:** I will just find that and pass it to you, Mr Marsh?---Thank you, your Honour.

**CAHILL, MS:** Now, each time - for each and every swathe, you made a GPS recording. You took the GPS location and then you recorded it in the handwritten sheets, which are part of exhibit 10. Is that right?---Correct.

And then this map on the front of exhibit 10 is where you have plotted those GPS locations that accord with the swathes that you picked up on this map?---To the best of our ability, yes.

So this represents every swathe that you could find on those paddocks in early April?---Yes, during that period of time we picked it up, which of course took a while.

And as far as you were aware, although you couldn't be sure, there were no others?---Well, you can't be sure.

I've not put to you that you could be sure?---We done our best - - -

I've said as far as you're aware?---The best to our ability, yes.

Yes. All right. So just following from the handwritten notes, we can see that in paddock 10, you picked up 132 swathes?---If that's what's here, yes.

Yes. Well, you can go to paddock 10, can't you, with 3 April 2011 at the top, and it goes over two pages, and because you've numerically ordered each GPS location, it goes through to 132 on the - - -?---Yes.

So there was 132 swathes?---Yes. Correct.

All right. And in paddock 12, there was 67?---Yes.

Paddock 7, there were 13?---Paddock 7, you say?

Yes?---That's what was there, but please remember those paddocks were stocked with sheep.

Your decertified sheep?---Yes.

Yes. So paddock 7 had decertified sheep on it?---That's correct.

And paddock 8?---Yes, they were running the two paddocks.

Yes. Now, there was 13 swathes you picked up on paddock 7, nothing on paddock 8 - - -?---This is at that time.

Yes. Not suggesting to you it was any other time. This is the first time you've gone through and tried to pick up all the swathes, and you found nothing on paddock 8, nothing on paddock 9, three in the corner of paddock 11, and seven in the corner of paddock 13. That's the position, isn't it?---At that - at that time.

Well, this is the only time you tried to pick up all the swathes, isn't it?---It was - yes, that was the main time we tried to eradicate them from the paddock, yes.

And this is the only time that you actually tried to count them. Isn't that so?---Yes.

And this is the only time that you endeavoured to work out what the extent of what you would call the contamination

was?---No, the extent was visual to start with, and that's what we measured out.

But you couldn't be sure because it was just looking at it in a superficial way, would you agree, before then?---Well - these were reflective of what actually occurred, and you could physically see these on the paddock, so - - -

This is the only time you tried to definitively count the swathes. Isn't that right?---That's correct, to get an accurate measure.

And locate them?---That's correct.

Thank you. Now, coming to this map at the front, you see the roadway between you and Mr Baxter, you've got a buffer along there most of the way, a tree buffer, haven't you?---A roadway, you mean?

Yes?---There is a roadway, yes.

With a tree buffer?---It's got some trees on it, yes. Yes.

Do you see that as part of a buffer that is consistent with your requirement to maintain buffers under your standards?---Well, it does make a buffer, I guess.

Do you rely on it in that way?---I don't recall that I've relied on it in that way.

Now, we see that the great concentration of swathes is in paddocks 10 and 12. Would you agree with that?---On this map, yes.

Well, you say on this map. This is your map that you prepared recording the locations of the swathes you found in April?---That's correct.

That had been left there since December?---The majority, yes.

With the opportunity to blow around in strong winds and spread further than they may have originally. Would you agree?---No, because this was pretty well - the - the original map that was done shows the extent of the contamination we found at the time.

It shows the area - - -?---Well - - -

- - - not the extent, does it?---It shows you the area, yes, and the boundaries of that - - -

Yes?--- - - - which had already happened. So this really doesn't reflect anything that different to what occurred at that time.

Mr Marsh, are you referring - let me just take you back to this - are you referring to the map at 328 of volume 1, or the one at 318, or both?---Could you give me those numbers again, please?

318?---318.

Have you got volume 1 there?---Yes.

Might be in the wrong volume.

**KENNETH MARTIN J:** Volume 2, isn't it?

**CAHILL, MS:** I beg your pardon. I'm the one that's out of kilter. It's volume 2, Mr Marsh. I'm sorry. Are you referring to that map?---Yes. That's one of the earlier maps we did.

That doesn't show anything other than the area of contamination, does it?---That's correct.

It doesn't show you how many swathes were found within that area in any particular location?---No.

It doesn't show the concentration of swathes, does it?---That's correct.

And, similarly, at page 328 - this isn't your map, is it? That's Claire's map, Claire Coleman's map?---I - I will take your word for it.

So you don't rely on that?---It's not my map.

So this map in exhibit 10 is the only one that shows the concentration of swathes. Would you agree with that?---The concentration, yes.

Yes?---At that time, yes.

Well, you say at that time, but this was after - this was the concentration of swathes after they had been left in the paddocks for several months. Would you agree?---Several months?

Yes. December, January, February and March. You would agree with that?---It's - it's three. Three, four months.

Four months. The incursion was on about 29 November 2010, and these GPS locations were made in early April, so it's four months, isn't it?---Yes. Yes.

And the swathes had had the opportunity to blow around further in that time, would you agree? Or was it not a particularly windy season?---No. There was obviously wind about, yes.

So they had had the opportunity to blow around further?---It is not - at that time they hadn't extended greatly further than the original area that we mapped out.

You had never recorded the concentration before, had you?---I hadn't recorded the individual plants, no.

Thank you. And what we see here is a concentration of the swathes in paddocks 10 and 12, don't we?---Yes. And both those paddocks didn't have stock in them.

So we look at paddock - sorry, we will go back a step. Would you agree if we look at paddock 7, and at the southern end of paddock 10, that one can see a pattern of concentration of swathes in bush or tree'd areas?---Yes.

Would you agree that that suggests that the tree's or bush areas work as a buffer to restrict or prevent the movement of canola swathes?---No, not in this case, because in paddock 7 they were stocked, as I explained earlier, and 8 and 9. So anything that was in that pasture was clearly easily found by the sheep. The stuff in that sheep camp were in tree tops and so on.

All right. Now, paddock 7 is about 57 hectares, isn't it?---Paddock 7 is approximately. Yes.

57 hectares. And there were 13 swathes, the bulk of which were in the south-western corner of the paddock. You agree with that?---On this map, not at time of the contamination.

Yes. In April. In April?---In April there was, yes.

And paddock 8 is 22 hectares?---Thereabouts.

And you can see there's just that one GPS location, which is actually in paddock 7, isn't it; it's on the boundary there?---It's in the edge of paddock 8.

It says A, doesn't it? A1?---Yes. So the actual plant was actually in - I've recorded that it was actually in - - -

Paddock 7?--- - - - the edge of paddock 8.

So let's just have a look at your notes. Paddock 7, that's the GPS location, A1, isn't it?---That - that's how I've marked it. Yes.

You recorded it as a GPS location in paddock 7?---It was right on the partition fence. It was - - -

It's not in paddock 8, is it?---That plant was in the edge of paddock 8.

It was on the boundary at best, wasn't it, Mr Marsh?---It was on the boundary. Yes. On the partition bit.

Doesn't make it in paddock 8, does it?---Well, it was on that side of the fence.

Is that what you remember? Can you tell that from the GPS location?---Not from the GPS location, no.

51 - sorry - 51 hectares for paddock 9?---Thereabouts. Yes.

And no swathes there? Didn't find any swathes there in April?---Not at April.

40 hectares in paddock 11, three in the bottom corner - three swathes you found in the bottom corner. And 70 - is that 77 hectares for paddock 13. Is that right?---77 hectares - - -

Paddock 13 is about 77 hectares?---I didn't think it was quite that large.

Maybe it's 7.7. Is it 7.7?---No. No. It's not.

77 - sorry, I beg your pardon. 40 hectares - 39.3?---That sounds - yes. That's (indistinct) - yes.

I beg your pardon. I wrote that down incorrectly. So out of paddock 7, 8, 9, 11 and 13, that's a total of something like 200 hectares, is that right, approximately?---Approximately.

That entire 200 hectare approximately area was decertified because 23 swathes was found - were found in April - sorry, I've put that badly - had been decertified and you subsequently found 23 swathes in that area?---That wasn't at the time of the inspection though.

Well - - -?---We're dealing with April - - -

Sorry. You didn't record that though, did you?---I didn't record that. True.

And the three swathes in paddock 11 were the same three swathes that you had seen in December?---In paddock 11?

Yes?---Yes.

And you didn't go back to NASAA in April and say, "Well, could you please review your decertification of paddock 7, 8, 9, 11 and 13 because there's hardly any swathes there"?---No. I didn't go back. No.

With the benefit of hindsight, would you do - if you had your time again, would you do that?---That's a hypothetical, your Honour.

Could you answer the question please, Mr Marsh. If you had your time again, knowing what you know now, collecting the swathes in April in 2011 - and that many - 23 swathes over five paddocks - would you go back to NASAA and say, "Please review your decision to decertify, because there are only 23 swathes there"?---There was a lot more than - - -

So just listen to my question. Would you do it differently? Would you go back to NASAA, if you had your time again, after collecting and recording the location of the swathes, and say, "Please reconsider your decision to decertify paddocks 7, 8, 9, 11 and 13"?---I may well.

And why's that? Why might you well do that?---The trouble at the time of the inspection, your Honour, there was a lot more - - -

I'm just speaking - sorry - just pause - sorry - - -?---  
- - - swathes, and we can only - - -

**KENNETH MARTIN J:** Well, I think he's allowed to explain his answer, Ms Cahill - - -

**CAHILL, MS:** (indistinct) please.

**KENNETH MARTIN J:** - - - so don't chop him off. Yes. You answer, Mr Marsh?---Yes. Yes. Look, at the time, there was a lot more swathes in those paddocks and they were stopped, so I could understand why NASAA decertified those paddocks at that time. I do say, in paddock 11 there was only a small few in that corner, caught in that buffer we put in.

Okay.

**CAHILL, MS:** If you had your time again, you said that you might well go back to NASAA and ask them to reconsider their decision to decertify those paddocks with only the few or no swathes in them at April 2011. Why might - might well you go back and do that? What's the reason?---Well, I would have to consider it at that time, if it happened. I  
- - -

It's because there's minimal, if any, risk of what you would call "contamination", isn't that so? You must pull the - the - any volunteers out with such minimal exposure to swathes, surely?---Yes. You could pick up those swathes  
- - -

Yes?--- - - - but there is a - - -

You don't need to decertify the whole paddock, do you?---On a managerial issue, it becomes very difficult if those seeds have contaminated that area.

You can pull out any volunteers, can't you?

**CAHILL, MS:** At what point? The question was premised on the existence of 23 swathes, and then the question is now dealing with volunteers. The evidence - - -

**KENNETH MARTIN J:** Yes. It's a different subject matter. I understand the objection. I think you need to make the distinction, Ms Cahill.

**CAHILL, MS:** I will go back. You've agreed that you might well go back to NASAA if you had your time again, noting how few swathes were in those paddocks, and ask them to reconsider their decertification of those paddocks. The reason why you might well do that is this, isn't it: because you would understand that you could control the risk of future volunteers emerging by simply managing that in the paddock, going forward?---I have difficulty in having to manage a - a contaminant coming from next door. It's quite onerous for us to search and do these things.

That's the point, Mr Marsh, isn't it? That if you've only got a few swathes in the corner of one paddock, it's not onerous to monitor germination of volunteers in that small area, would you agree?---It requires some work, but it's a lot easier to manage it in - - -

Thank you?--- - - - a smaller area than a large area. Yes.

And that would be a basis to go back to NASAA and say, "Well, look, there's only three swathes in the corner of paddock 11. Please reconsider your decision to decertify, because I can manage any germination of volunteers in that small location"?---Your Honour, if I - - -

Sorry. Can you answer my question?

**NIALL, MR:** Well, with respect, your Honour - - -

**KENNETH MARTIN J:** Again, it's just a preface.

**CAHILL, MS:** Yes. But - - -

**KENNETH MARTIN J:** It's all right. Answer the question?---Look, your Honour, if we were running, for example, organic lambs in that paddock and it has been split like that and there was volunteers to come up and they consume it, I couldn't guarantee they wouldn't be exposed to that. We don't know how many seeds have been shed from those plants that are now on that area, so for a - - -

So the point is you were decertified before there was any volunteers germinated at all?---That - that - that is correct, your Honour.

And then come 2011, as the year goes by, you get some volunteers? - - -?---We had a storm - - -

- - - which you pull out?--- - - - in - in - we had a storm in - - -

After rain?---Yes. And those volunteers did germinate and start to grow.

I understand.

**CAHILL, MS:** So four volunteers in which paddock, after rain?---That was in paddock 10.

Right. Now, you forwarded press releases on behalf of NASAA, didn't you, to local media outlets after the decertification decision, is that right?---I believe I did.

Is that something that you thought might assist any future legal case against Mr Baxter?---No. I was just asked to do that.

Did you think it might assist with any political lobbying you might wish to do of the Government to have them remove the exemption?---My understanding of those letters were in response to a comment made by the Minister.

Those are the forwarding faxes at 345 and 346 of volume 2. Is that right?---No, that's - that wasn't correct.

345, this is where you say you have on behalf of:

I have on behalf of NASAA been asked to forward this press release to you and the Countrymen.

?---That's correct.

Yes?---Yes. They - they were the - - -

And over the page at 346. And the press release that you're referring to is at 343. Is that right? That's what you forwarded?---Yes, I think that was the one.

And so you did that on behalf of NASAA. Why?---I don't think NASAA knew which - which - the rural papers to send it to, I presume. I don't - I don't know the - - -

So you thought that was of assistance to NASAA?---As I said, NASAA just responded to a comment made by the Minister. I know nothing further of the reasons of that, your Honour. You'd have to ask NASAA that.

I tender those two documents, your Honour. I understood that there was an objection to the tender of those, 345 and 346.

**KENNETH MARTIN J:** Right. The documents dated 3 January 2011 addressed to Hady, in longhand, at page 345 of volume 2, which is document number 66 in the trial book, and then the longhand notes of 3 January 2011, at page 346, to Robbie, will both be part of the trial book.

**CAHILL, MS:** Thank you, your Honour. Now, Mr Marsh, in or about August 2011, was NASAA, or the WA arm of NASAA, doing fundraising for you, for these legal proceedings?---They are separate organisations, as I understand.

Sorry, who are separate organisations?---NASAA WA is separate than - it's a different entity, as I understand, than NASAA.

But it's a certifier of organic farms, is it?---No.

So what is it?---It's just a - it's just a group of NASAA operators.

I see what you're saying. So people who are certified by NASAA call themselves NASAA WA?---That's correct.

And they were fundraising for you?---They were assisting, yes.

And NASAA itself was not fundraising for you?---Not that I'm aware, no.

So if we go to page 420, what this is, Mr Marsh, is a review sheet of NASAAs, following an inspection by Claire Coleman of your farm on 24 October 2011. It starts at page 416, if that helps you to get the sense of it. So you're a member of NASAA WA, are you, or - are you a member of NASAA WA?---It's - yes, I - I am, yes.

And do you pay fees? Is it like an incorporated association or something like that?---Look, I'm not an expert in the - in the technical side of - of NASAA WA.

Well, what does it do?---It's just a - it's just a group of people that obviously we share the same interest. It's just a networking organisation, I guess would be the - - -

I see. I see. Now, at the back of Ms - this - I think this document appears to belong to Ms Gore, Diana Gore from NASAA, and at the back she has a series of emails that are attached. You know David Silkstone to be the communications manager of NASAA, don't you?---I understand - yes, he's - - -

Yes. That's how you know him?--- - - - he's - senior position in NASAA, yes.

And towards the bottom of the page he - he has an email there that says, "Hi, Jan". Do you see that?---Yes.

And then he talks about forwarding an email below of an original sent. And then if we go over the page it has at the bottom of this one, third of the eighth 011, and then an email. I will just leave you to read for a moment, and if you can tell me when you're ready for my question. You are leaping through. Have you finished that email or - I thought I saw you turn the page. Have you finished reading?---Yes, this front one.

Sorry, it's at page 421 that I want you to read?---Sorry.

Your Honour, I have just noticed the time.

**KENNETH MARTIN J:** Are you going to be longer with this line or - - -

**CAHILL, MS:** I can stop on this particular topic - - -

**KENNETH MARTIN J:** You want to wrap up this line and then we will break.

**CAHILL, MS:** Yes. Thank you. So is - on page 421, is that a copy of an email that you sent to somebody at NASAA in about August 2011?---I certainly don't recall sending it but, you know, I can't say I didn't either.

Did you consider then at that time that you had continued support from NASAA?---NASAA WA.

All right. NASAA?---I didn't - yes, well, I didn't understand that I had the support of NASAA in any financial way, no.

I'm not suggesting financial way. Did you think you had support from NASAA in any way at all?---No, I thought NASAA was acting independently of our situation.

So - all right. Do you consider that this court case is not just about compensation for the losses on your farm, but it's about things other than that?---It's about protecting the farm in the future, why we've put the injunction.

Do you think it's about getting clarity and regulatory rights for farmers everywhere in Australia, both organic and conventional, who wish to grow GM free crops?---I was only dealing with our situation.

Sorry, do you think that's what this court case is about in part?---The implication may well be that but no, we're seeking to recover what has been an impact on our business.

Do you think that an additional consequence of this case is that it will benefit consumers who want the right to buy and eat GM free foods?---I don't know that this court case will solve that issue.

There was nothing about this incursion that affected your ability to sell GM free food, was there?---No, I lost the certification.

Your product was GM free, wasn't it?---Well, I couldn't guarantee it was, no.

Because why, Mr Marsh?---Because of the swathed canola that did come into those crops. So if you're saying - - -

Your product had GM in it, did it?---Not as far as I know.

No, thank you. That's a convenient time, your Honour.

**KENNETH MARTIN J:** All right. We will adjourn until 2.15 pm this afternoon. We will see you back then.

(LUNCHEON ADJOURNMENT)

**KENNETH MARTIN J:** Please be seated.

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

Now, Mr Marsh, in October 2011 you had your next inspection from NASAA, didn't you, after that December one of 2010?---It would be about October. Yes.

And Claire Coleman came back to the property, didn't she?---I think so. Yes.

Now, just tell me, did you normally get copies of the reports that the inspectors made of their inspections?---I generally ask for them. Yes.

Yes. And just to explain that, if you go to page 409 of volume 2, please?---409, was it?

Yes. When there was an inspection, you always - sorry. I withdraw that. The intention was that you should always get one of these pieces of paper, is that right? At the completion of the inspection?---Yes. Well, that's one recorded by the inspector after they've done their job. Yes.

And you sign it - - -?---Correct.

- - - as well as the inspector?---Correct.

Right. And in the right hand side of the top table, at the bottom, it says:

I would like a copy of the report -  
yes or no, and here it's signalled "yes"?---Correct.

And you usually asked for a copy of the report of the inspector?---Yes.

Was there any occasion where you asked for one and didn't get one?---I can't recall.

Now, just before we get to the inspection report - sorry, withdraw that. On the basis of what I've taken your attention to there, do you - do you say that you got a copy of Claire Coleman's report of this inspection in October 2011?---I would presume I would have - - -

All right?--- - - - because I've asked for one, so - - -

Okay. Now, before we get there, the last inspection was in the December of 2010. You collected up all the swathes in April that you could find, and between then and this inspection, you had done quite a lot, hadn't you, to try and control the germination of volunteer GM canola plants?---Correct.

And you had done that in a couple of ways. We discussed on this morning where you and your wife had walked through the paddocks, pulling out any volunteers you could find?---Mm.

That's right? And you had then also topped paddocks 9 and 10, hadn't you?---Correct.

Yes. Now, with all of that work, you had discovered four volunteers in paddock 12 between April and October, hadn't you?---Yes.

And one in paddock 13, in what you call the "sheep camp"?---Yes.

And no other volunteers in any other part of those paddocks, or any other paddocks that had been decertified?---Between which period of time?

April 2011 and 24 October 2011?---Correct.

Is that correct?---Yes.

Okay. Now, we talked this morning about volunteers and you leaving some in the ground fenced, and pulling out some?---Correct.

Which ones did you pull out, and how many?---We removed all the earlier ones prior to that in - in paddock 10.

That's the four that you found after the January storms?---That's right.

So you pulled out those four?---We removed those.

Yes?---We definitely removed one or two of the earlier canola plants in paddock 12.

So two of the four that I just mentioned?---Well, there would be - definitely pulled out one - I think it was two that we removed. Yes.

So let's be clear?---It depends what time of the year we found them. The ones we removed were found quite early in the growing season, if you like; the other ones were found somewhat later, that we fenced out.

But you've only ever found nine volunteers in total, haven't you?---Yes.

Yes. And the four in - that you found early in 2011, before you removed the swath material, you pulled out?---Yes. They were removed.

And then after you removed the swath material, you found four in paddock 12, and, do I understand your evidence correctly, you removed two of those?---Either one or two. I'm not 100 per cent sure.

I see. And the other two, you fenced?---Correct.

And this morning you said that there was no reason why you did that - you had no reason?---I kept that to demonstrate to NASAAs at the inspection that they were germinating on the property.

And no other reason? It was for NASAAs benefit, was it?---I - - -

Just for NASAAs benefit?---It's just to - just to prove that they had grown; that's - that's all.

All right. Now, if you go to page 413, you recognise that document, don't you?---States here it's a contract condition.

Sorry. You recognise that as an attachment document that you provided to Claire Coleman to go with her report, isn't that so?---I presume so.

Well, these are your words, aren't they?---Yes.

And there's - you've inserted here what you've done to control the self-sewn GM canola, is that right?---Yes.

And can you see, a third of the way down the paragraph, the sentence commencing:

Because of the legal implications -

Have you got that?---Yes, I have now.

I will just read that out to you:

Because of the legal implications, the GM canola will be removed on advice from our lawyers.

You see that?---Mm.

So was one reason why you were leaving a couple of the volunteers in the paddock fenced, because you were waiting for advice from your lawyers?---Well, it could have been, in this case.

And did you have an idea in your head that whether you removed the canola plants or left them in the ground might have some implications for this case?---Well, they could be documented without them there, I guess.

Sorry. Did you - but did you think at the time that whether you left them in the ground or took them out, that could have some implications for this case?---It only demonstrated that they were growing there; that's all.

But did you think it had implications for this case, whether they were in the ground or pulled out?---I didn't have an opinion one way or the other.

All right. Now, you think you received a copy of this report. I would like you to go to page 407, please. And can you read to yourself, please, the typewritten material under the heading Any Other Findings Arising From This Inspection. And when you get to the end of that, let me know and I will ask you a question?---Yes.

Finished?---Yes.

Do you agree with every - with the comments that Ms Coleman has inserted there?---I do agree that we went to a lot of trouble to - to control.

Maybe I will put it a different way. Is there anything in there that you disagree with?---At the time we believed we'd done the best we could.

Is there anything that you disagree with in there?---Given our situation at the time, no.

So I was asking if you disagreed with any of that now. Did you disagree with anything she said there at the time, on 24 October 2011?---I can't remember.

So you agree with those comments now, and you did then. Is that right?---Yes. Look, I can't really remember at that time what - - -

There's nothing that leaps out there that you think - - -?---No. No.

- - - "No, I didn't agree with that at the time"?---No.

No. Okay. Did you think that - sorry, I will withdraw that. Was it your view at late October 2011 that you should get your certification back then in relation to all of the paddocks because of the work you had done to remove the GM canola?---I didn't have a view. That was up to NASAA to - - -

All right. So it was whatever NASAA decided?---Well, I don't have any control over that.

Did you expect to hear back from them fairly quickly after this inspection?---You would - you would presume, yes.

What was the normal period of time that elapsed after an inspection, up until this point, before you heard from NASAA as to whether they were - whether or not they were renewing your certification?---The normal period of time?

Yes?---You know, I just accept it when it - when I got notification.

But did you usually have to wait days, weeks or months?---Look, I can't really recall. I just waited when it comes up. You're busy running a farm, and doing other things, and when these documents come in, you deal with them.

All right. There's an inspection about every year, in the normal course of things?---Yes, there is one every 12 months, thereabouts, yes.

Yes. And are you saying that you have no recollection of how soon after the inspection you normally heard from NASAA as to whether or not your certificate was renewed?---Well, generally, I thought it was reasonably soon.

Two or three weeks?---Well, I would have thought it was three weeks or so, thereabouts, but I'm not - I'm not sure, your Honour.

You heard nothing back from NASAA for the rest of that year, did you, after this inspection?---Look, that could be the case. I don't know.

You didn't hear from them in relation to the decision in respect of that inspection until 3 April 2012, did you?---If that's the evidence.

Do you not remember a long period of time elapsing between the inspection and the decision?---Yes, there was quite a period of time, yes, I presume.

You remember that, don't you?---Well, yes - well, I presume so.

I beg your pardon?---Yes. Okay.

You do remember that? Yes?---Yes. Okay.

Was that something of concern to you?---Well, it should be.

Was it of concern to you?---Yes.

Did you chase NASAA up?---I don't recall chasing NASAA up.

Why didn't you chase NASAA up?---I guess, your Honour, it's like a lot of people with farmers, we - we deal with the paperwork when it comes. I - yes. I'd obviously overlooked it.

Well, Mr Marsh, you were decertified as to approximately 70 per cent of your farm at this stage, weren't you?---Correct.

And you had made a lot of effort to control the GM canola incursion on your property, hadn't you?---Correct.

And you had been inspected in October 2011, and there had been nine volunteers detected through all your vigilance in the period from the time of incursion to then. Isn't that right?---Correct.

Yes?---Yes.

And your certification was - getting back your certification was something that was very important to you, wasn't it?---That is true.

And you've given some evidence through your witness statement to his Honour of the effect that the lack of certification had upon your - your business?---That is true.

And your evidence is this, isn't it, that it was a very significant effect. It affected how you could rotate your crops and move your stock, the premiums that you could get on your product. Those are things that were affected by the lack of certification, weren't they?---True.

And you found it increasingly difficult, as the period of decertification went on, to manage the restrictions upon you because half of your - sorry, 70 per cent of your land was not certified?---That's correct. It got difficult.

So I suggest to you, Mr Marsh, that you must have been very keen to ascertain what NASAAs decision was about your certification status after the October 2011 inspection. Isn't that so?---Yes, it is important to us.

But you didn't chase them up, did you?---No.

And why was that?---I just - just didn't.

Did you think it assisted your legal case here to remain decertified while the case was pending?---No. It had nothing to do with that.

If you go to page 422, please, Mr Marsh.

**NIALL, MR:** If my learned friend is moving off that document, I would ask her to tender it, the inspection report starting at 385.

**KENNETH MARTIN J:** So it runs between 385 to - - -

**CAHILL, MS:** 385 through to four - I think it - it's at least 413, your Honour.

**NIALL, MR:** 407, your Honour.

**CAHILL, MS:** It's - 413 is the attachment.

**NIALL, MR:** Is the inspection - - -

**CAHILL, MS:** It goes through to 413.

**KENNETH MARTIN J:** Let's just have a look at the index.

**NIALL, MR:** It's a number of documents, your Honour. The first document is the inspection report, which starts at 385 and goes through to 407.

**KENNETH MARTIN J:** Yes.

**NIALL, MR:** That's the document I would seek my learned friend to tender. If it pleases.

**CAHILL, MS:** I'm not sure what the status of 409 and 413 is, your Honour, but if they're not tendered, we would seek to tender those as well.

**KENNETH MARTIN J:** All right. The document between 385 and 408 - although 408 is a blank page - will be in as part of the trial bundle.

**NIALL, MR:** If your Honour pleases.

**KENNETH MARTIN J:** Likewise, the document at 409, which was questioned about; likewise, 413; and 416 and 420.

**CAHILL, MS:** Thank you, your Honour. Now, 422 is the decision that you got on 3 April 2012, Mr Marsh. Can you recall that? Have you got that there, at 422? Do you recall this document? You're taking quite some time to answer, Mr Marsh?---Yes. It would have - it would have been one I received, I presume. Yes.

This is the decision that you received after the inspection in October 2011, isn't it?---Yes.

And the relevant part, for our purposes, is at 423, numbered paragraphs 3 and 4, isn't it?---423, which paragraphs, sorry?

Numbered paragraphs 3 and 4. See numbered 3 - - -?---Yes.

- - - "your ongoing monitoring program". Have you got that?---Yes.

So you're being commended for your monitoring program and control of the GM canola found on your land. And then at 4:

Following your next inspection, a reconsideration of the certification status of each of your paddocks will take place.

So you were being put off to another inspection; no re-certification at that time. You understood that, didn't you?---Yes.

And did you agree with that decision at the time?---That was decision made by NASAA (indistinct) - - -

I understand it was their decision, but did you personally agree with it?---I accepted their decision, that was all.

Did you agree with it?---As I said, I accepted the decision made by NASAA. That was - - -

Did you agree with it? Yes or no, Mr Marsh?---I - I accepted it.

I understand that you say you accepted the decision. Lawyers know all about accepting decisions; they don't always agree with them. That's the point I'm putting to you. Did you agree with the decision yourself?---I didn't really form an opinion. It was made and, as far as I was concerned, that's what I accepted.

All right. And so you were being put off to the next inspection, after which a reconsideration would take place. Did you have any idea, as at 3 April 2012, when that next inspection would be?---Not exactly.

Did you expect it to be in October or November of 2012, an annual inspection?---Generally it is an annual inspection.

Did that cause you any concern, having only found nine volunteers since the time of the incursion and all the work you had done, you might have to wait until November or - between October or December of 2012 to get another inspection?---The issue was that it had to be demonstrated that the material was removed off the property. Now, we did find some in 2011. (indistinct) growing season to demonstrate if there's going to be more germinate.

So is your answer you weren't concerned by the fact that you would have to wait perhaps up to another eight months before the next inspection?---Of course we're concerned, because we trying to get our certification back as soon as we can; that's the idea of doing what we did.

Now, the next inspection was actually just a couple of weeks later, on 19 April 2012, wasn't it?---If that's what it states. Yes.

Claire Coleman came back to the property around that time. Do you remember that?---Yes.

Did you ask NASAA for an inspection shortly after you received the decision of 3 April?---I can't recall.

Is it possible you did?---Look, I honestly can't recall.

Do you remember the inspection?---Yes. We had the inspection, but not in - - -

Do you remember the inspection?---Not in detail. No.

Were you trying to impress upon Ms Coleman during the inspection all that you had done to control the GM canola on your farm?---Impress?

Impress. To demonstrate to her?---We had done what we had done.

Yes. Were you trying to demonstrate to Ms Coleman, in the April 2012 inspection, all that you had done - explain to her and show her what you had done?---I believe so. Yes.

And was that with a view to putting yourself in the best position to get a recertification decision from NASAA at that time?---Well, hopefully by doing what we can to control it, soon as NASAA deemed it suitable to be recertified, it could - the property could be.

At April 2012, when Claire Coleman came for an inspection, did you want to be recertified?---It's our preferable option, as soon as we can.

Did you want to be recertified at that time?---If we could be, yes.

And there had been no volunteers that you had detected between the inspection in October 2011 and this inspection, is that right?---Between?

October 2011 and April 2012?---Yes. I'm not sure whether there was one very close in October/November, but - but, after that period, we hadn't found any more.

And so, this inspection took place. And if I can just take you to 447, this is the document that you and she signed, isn't it?---That the inspection was done?

Mm?---Correct.

And under non-compliances, it says, "none noted". Do you see that?---Correct.

And what was your position at the time; you shared that view, that there were no non-compliances with the standards on your part? Is that so?---That's what it states here. Yes.

And there was no decision communicated to you consequent upon this inspection, was there?---No.

Do you know why?---No.

You don't know why? That was unusual, wasn't it? That was unusual, wasn't it?---Usually it's in a quicker timeframe.

So you would like to get your certification back; it's causing a lot of disruption to your operation of your farm. The inspector comes out, she signs an exit interview that says there are no non-compliances, but you get no decision whether or not to recertify your farm, and you don't chase it up, or you did?---Well, I'm bound by the decision that NASAA makes.

You hadn't been told about a decision. Did you know that a decision had been made, Mr Marsh?---Not at that time. No.

Were you concerned that maybe they just forgot about it? It had got lost in the system? Mr Marsh?---Well, it does happen.

But you didn't chase it up, did you?---No.

Is that because you remain - sorry, I withdraw that. You thought at the time that the continued decertification of your farm assisted you in respect of these legal proceedings?---No.

Now, there was another inspection in October 2012, wasn't there?---Yes, I think there was.

Kathe Purves came and inspected the farm?---Correct.

So you had the decision back in 3 April 2012 that your decertification was going to remain?---Mm.

And you had had another inspection two weeks later, where it had been noted there were no non-compliances, and then you heard nothing; didn't chase it up, and then Kathe Purves comes and inspects in October 2012. Did you think at that point you should be recertified?---I didn't form an opinion at that point. It would be the sooner we could get it back, yes, I do agree it would be without a doubt.

Did you think you should be recertified as at October 2012?---We hadn't found any reason at that point.

To do what?---Well, we didn't find any material after that time and after that next growing season. So - - -

Let's be clear about material. You found no more swathes, canola plant trash or volunteers since the last inspection, did you?---That's correct.

So from the time of the incursion through to October 2012, you had found nine volunteers on the farm?---That's correct.

And none since the October 2011 inspection?---That's correct.

Did you think by this stage you ought to be recertified?---What we didn't understand was how long that - well, what I didn't understand was how long that seed was going. I don't know what NASAA's views and positions were taking on that.

Did you care?---Yes, I did and obviously to get our certification back sooner, it's beneficial.

Now, did you get a copy of Kathe Purves' report?---What page is it on?

Just first of all come to 472, if you wouldn't mind. And that's the exit interview record - visit confirmation and exit interview record, which you have signed, haven't you?---Yes.

On 18 October 2012. Under:

I would like a copy of the report, yes or no -

there's a tick there. Do you infer from that that you have got a copy of the report?---That infers that one was applied for.

All right. You don't disagree with that, that you probably did?---That's correct.

All right. Now, just under:

Further Recommendations, observation arising from this inspection if any -

It says:

Feedback and guidance requested on decertified areas in quarantine.

That was you wanting feedback and guidance, wasn't it?---Correct.

On quarantine and decertified areas?---Yes.

And you wanted to know how much longer you were going to have to remain in a decertified state?---That's correct.

Because it was your view, wasn't it, at this stage that you should be recertified?---Well, as we've previously just stated, the sooner we could get our certification back, the better for our business.

But having gone right through from the time of incursion with only nine volunteer plants, nothing since October, and your ongoing vigilance, you thought you should be recertified, didn't you?---I asked for clarification on that at this point, yes.

You thought you should be recertified, didn't you? Yes or no, Mr Marsh?---Yes.

Thank you. Now, let's go back to Ms Purves' report, page 452. It follows the usual format. If you can just leaf through that. Go to page 458, under the heading G, Genetically Modified Organisms. Now, the risks of GMO contamination, as is set out there, it says:

Ongoing neighbouring cropping of GM canola with the constraints as noted above.

See that?---Yes.

Did you understand that to be a reference to the GM crops that Mr Baxter had in that season? That's the '12/13 season. Would you like me to repeat the question, Mr Marsh?---Go ahead, yes.

Did you understand that reference there, next to:

Specify the risks of GMO contamination -

and on the right it says:

Ongoing neighbouring cropping of GM canola with the constraints as noted above.

Did you understand that to be a reference to the crop Mr Baxter had in on his land in that year, the '12/13 season?---I viewed it as a reference to what Mr Baxter had done any year when he grew GM crops.

So it could be the present year, the year before - I'm not sure if he had a GM canola crop in the year before or earlier. That's how you construed it. Is that right?---I took it was ongoing monitoring of my neighbour's position or his crops.

That's the second point there. I haven't got to that yet. What we're looking at is the risks of GMO contamination that the inspector specified at this inspection, whether you understood that to be referring only to the existing year's crop or past crops or future crops?---I took it as future crops.

Just future crops?---Well, yes, all crops.

Just future crops?---No, it's what has happened before and going forward.

Okay. All right. And then does the operator effectively manage the GMO risk. The answer is - given here is:

Ongoing vigilance of neighbouring activities and specific monitoring of risks on own land.

You would agree with that?---Yes.

All right.

**KENNETH MARTIN J:** And C to both columns would seem to indicate compliant - - -

**CAHILL, MS:** Indeed.

**KENNETH MARTIN J:** - - - in the eyes of the inspector.

**CAHILL, MS:** Yes. Now, if you go to page 468 please. Sorry, before we get there, 467, Residue Sampling. Do you

see that down the bottom? Have you got Residue Sampling?---Yes.

And do you see the very last entry under the - next to the number of the receipt issued to the operator? Let's just - it's the last - let's take the last two sentences. They're talking about samples:

They were taken in the paddock 7 and 10 as noted above as extensively warped. During this inspection the inspector did not note any weed that closely resembled canola, so did not feel the need to send the stem and leaf samples taken to a laboratory for testing. The inspector is recommending that screened out weed seed is sent for testing after the '12/13 harvest to rule out any GM canola being present in the organic system.

You understood that that was what the inspector's recommendation was?---That's what the inspector recommended, yes.

Now, under the - we're now at page 468, under the section V, any other issues not mentioned above. The inspector says:

Steve and Sue would like some guidance on the timeframes for the earliest possible return to full certification for the land decertified due to the GM canola incursion 2010.

That was in fact the case, wasn't it? You wanted some guidance on the timeframes for the earliest possible return to full certification?---It makes running a business a lot easier if you have got a - - -

Can you just answer yes or no to that question please?---Yes, I asked for it.

Thank you. And then she identifies your risk management and what it includes:

Ongoing vigilance, both of potential regrowth and observation of neighbouring activities, only several regrowth plants were found in 2011 and none have been found so far this year.

That was something that you told Ms Purves, was it? Mr Marsh?---Yes. I can't recall whether I told Ms Purves that. No.

You may have?---I can't recall.

You may have?---Well, Ms Purves, I would think, would have the records of what happened.

You may have told her that, isn't that so?---I can't recall.

I know you can't recall. I'm putting you that you may have told her that. It's possible, isn't it?---It could be possible. Yes.

And then we go on:

Harvested grain and seed are screened for weed seed and could be screened two or three times if NASAA thought this necessary. A test of the screened out weed seed would rule out any GM contamination present in the system.

See that? Have you read that?---I am reading it.

Why are you flicking back?---That's what it states.

That was your suggestion, wasn't it? To screen the - screen the grain and seed for weed seed two or three times if NASAA thought it necessary?---This was Kathe Purves' inspection report, wasn't it?

Yes?---Kathe Purves would have filled this in. That would be correct.

I'm not suggestion that you filled it in; it's her report. What I'm suggestion to her is that - - -?---Well, it's - - -

- - - you, is that it was your suggestion to her that this is what you could do with the seed and grain, you could screen it?---I'm not sure it is my suggestion to her.

It could have been?---I certainly can't recall that. No.

You don't disagree with that as a method of dealing with the detection of any GM, as you would call it, contamination?---It's a part of the decontamination process.

What's being suggested here is this, isn't it, that you look at any weeds and test them as they are - - -?---Yes. We - - -

- - - screened from the grain, and you test them for any genetic modification, and that would show you whether there's any GM transfer into your weeds, isn't that so?---That would be so.

Has that been done?---Not to my knowledge.

You're recertified now though, aren't you?---Yes.

Now, that was in October 2012, and just before we get there, if I can just pass on the way through to 475, please. This is your declaration of farm inputs for the 12 month period prior to Ms Purves' inspection, is that right?---Yes.

And the second entry for 10 September 2012 is the application of - would you pronounce that PIBO or PEBO?---Correct.

PIBO?---Yes.

In paddock 4. And do I understand this correctly: you didn't appreciate at the time that you applied it to paddock 4, but then subsequently learned, during the inspection, that that was a prohibited substance?---That's correct.

Now, what, on your understanding, is the normal consequence if you apply a prohibited substance to a paddock - the area of the paddock?---You get decertified.

For that paddock?---Mm.

You didn't hear in response - sorry. You didn't get a decision after this inspection, or any feedback, until September 2013. Is that right?---They would - yes. I presume that's correct, your Honour.

Well, let me understand this. Ms Purves had noted compliance in relation to GMOs, proposed a method of testing for weed seed gene modification, and she had identified, through the input inspection record - your own input inspection record, that you had applied a prohibited substance to paddock 4 in September 2012, I think, wasn't it?---Yes. I think it was.

Did it strike you as odd that you didn't receive, within a few weeks, a decision consequent upon that inspection, about your certification status?---Well, they arrive when - when - when they get done, and we get our - our - - -

But you were seeking guidance, weren't you, at this stage?---Yes. I did seek some guidance on how to deal with that issue and over what timeframe it would apply.

So did you have any communications with NASAA between Kathe Purves' inspection in October 2013 and the decision that appears at page 480 of the - of the bundle?

**KENNETH MARTIN J:** Sorry. Did you say there was a Purves inspection in 2013.

**CAHILL, MS:** If I did, that was a mistake.

**KENNETH MARTIN J:** '12. You meant '12.

**CAHILL, MS:** I'm sorry. Yes. 2012.

**KENNETH MARTIN J:** Yes.

**CAHILL, MS:** It's the letter that's the - is 2013.

**KENNETH MARTIN J:** Yes.

**CAHILL, MS:** So the question is this, Mr Marsh: did you have any communication with NASAA between the inspection in October 2012 and this letter of September 2013?---I can't remember any. No.

You must have been very concerned about the silence, yes?---I accepted the decision that, when NASAA would make it, would be - they would make - - -

But you were seeking guidance, Mr Marsh; you had been explicit about that in the October 2012 inspection, hadn't you?---Yes. I had asked for direction.

Yes. You had signed a piece of paper where you had actually noted that?---Yes. Yes. I'm not (indistinct)

And then you heard, in the succeeding months, nothing, despite having made that request. Is that your evidence?---If there's no further documentation, yes.

Did you get some - did you get some test results from some samples that were taken in April 2013? Sorry. If I could just have a moment please, your Honour. I see. Were you - sorry, I withdraw that. Did NASAA write to you in April 2013 and ask you to get some weed test results?---I believe they asked for some screenings.

In April 2013?---If my recollection is correct.

But you heard nothing else?---Well, I - I - I honestly don't recall.

When they asked you for the weed tests, did you say, "Well, what about some guidance about when I'm going to be recertified"?---I don't recall asking that. No.

Why ever not, Mr Marsh?---Well, the fact is that it had been decertified and I - until they make that decision. I don't believe there's not much I could do.

There was not much you could do?---Well - - -

Couldn't you ask them for the guidance that you had requested back in October?---Well, I could have repeated that.

You see, your evidence to his Honour is that this was causing you real hardship, this decertification, Mr Marsh?---Well, that is correct.

So, surely, you would have been very motivated to get a decision from NASAA one way or the other?---I have requested - - -

Do you agree?--- - - - a decision.

Back in October?---Correct.

And you didn't receive a decision until the following September. Well, you've just shrugged at me, but does that - - -?---I'm sorry, but - - -

But what does that mean?---But that - that - that's what happened.

Yes. And do you mean by the shrug that you were unconcerned about - - -?---No.

- - - about that delay. Did you think the delay was reasonable?---No. I requested a - a - some guidance on that matter back then.

Did you think the delay was unreasonable?---It was a fair time delay.

Did you think it was unreasonable, the delay?---Well, I was - it's a long time, your Honour, yes.

**KENNETH MARTIN J:** Yes.

**CAHILL, MS:** Is the answer yes?

**KENNETH MARTIN J:** Yes.

**CAHILL, MS:** Is the reason that notwithstanding this unreasonable delay - sorry, I put that badly. Is the reason why you didn't do something about this reasonable delay, because you thought it assisted your case here for your farm to continue to be decertified?---I did not have that opinion, no.

Now, this decision comes in in September, and your farm - you still - these paddocks still aren't recertified, are they, by this decision?---No.

Were you surprised?---We asked for guidance.

Did you get it, or was this it, in your view?---Well, we got this - this document.

And were you surprised that your farm was not recertified at this time?---I guess it goes back to - your Honour, we didn't fully understand how long this material or seeds would take to germinate, so - it's all new. And I guess, as far as I knew, I tried to deal with it the best way we could, and the timeframe I didn't really know how long it would take to, you know, to get that certification back. Whether the volunteers were going to regrow. And I don't know what NASAAs views in that same line of thought were, how long it would take, your Honour. I don't - you know. So I guess we were all just trying to deal with it the best we can.

Now, Ms Purves came out and inspected the property again, three days after you received this decision, didn't she?---That could be the case. I can't - - -

Do you remember that?---No, I can't remember that.

Have a look at page 504, please. She came out three days later, didn't she?---Correct. Yes.

And you indicated you would like a copy of her report?---Yes.

And that's the report that starts at 481?---Yes.

And if we go to 482, there's another property - did you say, Montanga - that you had leased by this stage?---Montagna, yes.

How do you say it?---Montagna.

Montagna. And then there's Eagle Rest mentioned at 482, and in the last line in the section dealing with Eagle Rest, she reports:

No new weed canola was noted during the drive and walk of the inspection event.

That was how you remember it?---Yes.

And at 485, at the top:

To date, no GM material was found in the few weed canola found on the property in the 2013 cropping season.

That's how you remember it?---Which paragraph?

Page 485, at the top?---485.

That was the position, wasn't there?---Yes.

There was no GM material in the canola that had been tested on your property - - -?---That's - that's correct.

- - - in the 13 - 2013 growing season. Now, page 502, compliance statement - sorry, before we get there, can you just come back to 488. Have you got 488 there?---Yes, now.

Come down to GMOs, at section (g), at the bottom. She's asked to specify the risks of GMO contamination, C for compliant, and the risk, quite clearly there, she says at the bottom, "is limited to incursions by neighbouring crops as occurred in 2010". Do you see that? Have you got page 488 there?---Yes, I've got 488.

Do you see where I'm reading?---Down the bottom.

Yes, where it says "(a) specify the risks of GMO contamination". You got that?---Yes.

And then if you go along to the next column, it says "C" which obviously means "compliant"?---Yes.

And then there's some text:

The regions noted for divisions of opinion and occurrence of GM cropping of canola. Steve notifies neighbours in advance, takes note of crops within a 5K radius, although State Government legislation

apparently now does not require the disclosure of whether a crop is GM. No canola is grown on this property. The risk is limited to incursions by neighbouring crops as occurred in 2010.

See that?---Yes.

So you understood this inspector did not perceive any risk of contamination from the 2010 incursion, as at the date of this report?---That appears to be correct.

Right. And you were effectively managing the GMO risk. She says "yes" in the next row, at the bottom?---That's correct.

And you would agree that you were effectively managing the GM risk?---At that time.

All right. And if we go to 502, do you see under compliance statement, W?---Yes, I see it, compliance statement.

She's talking there about your application of PIBO to paddock 4, and she's suggesting that, in a worst case scenario, only 5.4 hectares, and not the whole paddock, paddock 4, should be decertified, because of the application of that chemical?---That's her recommendation, yes.

Yes. Did you agree with that recommendation? Your personal view?---I did agree with that.

You did agree with it?---Yes, at that time.

That it could just be - it should just be part of the paddock? Yes?---That - that was true. Yes.

That's decertified. Now, so that was in September 2013. Did you press NASAA for an urgent decision?---I recall I think I did.

And they finally made their decision on 25 November 2013?---Correct.

And you see that decision at page 513.

**NIALL, MR:** Before my learned friend continues, can I ask her to tender the documents starting at 481 and completing at 503, if your Honour pleases.

**KENNETH MARTIN J:** Are you happy for all that material to go in, Ms Cahill?

**CAHILL, MS:** Absolutely, your Honour.

**KENNETH MARTIN J:** All right. Yes. The material in volume 2 that has just been cross-examined on, particularly between 480 to 503, which, by reference to the index, is largely documents 91 and 92 so identified and be part of the tender bundle.

**NIALL, MR:** If your Honour pleases.

**CAHILL, MS:** Thank you, your Honour. Now, this decision at page 513, Mr Marsh - you see there at page 514 there's a feedback section? Have you got that?---Yes.

And then there's a reference to a standard 3.2.10, and if we skip 6.10.4 - 3.2.7. If we deal with 3.2.10 first, talks about your obligation to inform NCO - that's the NASAA offshoot that does the certification - of any sites known to be within that radius that are growing GM canola. You've done that all along, haven't you?---Well, it's very difficult to comply with, because we don't know where all the sites where GM canola has grown.

Mr Baxter, at least, told you about his GM canola, didn't he?---In 2010, he did.

Yes. And you knew where he planted GM canola subsequently, didn't you?---I didn't know exactly where he grew it in 2010. He informed me he grew it on the Range. He didn't inform me that he grew it in Two Dams paddock.

He told you that, didn't he, in April, that he was growing it at Two Dams - - -?---He didn't - - -

- - - intended to grow it at Two Dams and Range?---No. I don't agree with you.

Now, when you know, you tell NCO about GM canola crops that are growing; you always have done that, haven't you?---Yes, if I've known where they (indistinct)

Yes. You've always been compliant with that standard?---I've tried to be compliant with our standards.

And then they say:

We understand that, under your vigilance, no GM weed canola was found on your property in 2012 and 2013.

We've received a copy of the letter to neighbours on 22 September 2013. The operator's measures to monitor and manage the risk of contamination are acceptable. It's commended that your risk management includes ongoing vigilance, both of potential regrowth and observation of neighbouring activities.

Now, 3.27 says:

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

Talks about knowing about contaminant risks, implementing buffer zones, testing of crops perceived at risk, maintaining samples, implementing special handling and the like. Now, you agreed with all of that; you were prepared to do that and you had always done that, hadn't you?--I tried to my best to comply with that.

Now, this is the position at the end of the day, isn't it, Mr Marsh, that your careful monitoring of your paddocks - sorry, I will go back a step - your collecting of the swathes, your careful monitoring of the paddocks to identify volunteers and to either remove or fence them, your topping of pastures, all greatly assisted in reducing, indeed eradicating, the risk of GM canola volunteers germinating on your property?---Yes. We believe - - -

**NIALL, MR:** In my submission, that really was two questions which will be confusing, because the question was "greatly assisted, or eradicated" - - -

**KENNETH MARTIN J:** Yes.

**NIALL, MR:** - - - and I think they're two quite different - - -

**KENNETH MARTIN J:** It's the compound nature of the question that you object to.

**NIALL, MR:** Yes.

**KENNETH MARTIN J:** I think just break it in half if you wouldn't mind.

**CAHILL, MS:** Yes. Thank you, your Honour. All that work that you did: looking for volunteers, collecting the swathes, topping your pastures; that, certainly, greatly helped, didn't it - - -?---I believe - - -

- - - reduce the possibility of volunteer canola growing on your property?---Yes. I believe so.

And after 2011, all that work eradicated the risk, didn't it?---I wouldn't say it eradicated the risks. I don't know if it eradicated the risks.

So your property is still contaminated, in your view, is it?---I honestly couldn't answer that question.

It might or it might not; is that what you're saying?---We haven't found any in the last two years.

Two years?---Yes. We would hope it is eradicated, but I couldn't say before the court it's fully eradicated. No. I don't know enough about, you know, canola seed in the soils and that sort of thing to be able to make that assessment.

If you had your time again, Mr Marsh, and this incursion happened and NASAA took a step to suspend and decertify you, would you do things differently in terms of your reaction to those sanctions?---Given the level of contamination at that time, which was obvious and widespread, and my understanding of the standards and the advice we've got, it certainly impacted on our certification - - -

I'm not asking about what actually happened and how you responded then, Mr Marsh. My question is directed to whether you would do things differently if it happened again?---I honestly don't know if I - until you're in that position. I don't know.

The position is this though, isn't it, Mr Marsh, that you have demonstrated, through all the work that you have done in the last two to three years, how to respond to a canola - a GM canola incursion of this type. Isn't that so?---Yes. And it has been very onerous to do that.

Yes. But also very educational, would you agree?---It has been an experience. Yes.

Yes. And if it happened again, you would know to immediately pick up the swathes, wouldn't you? That would be important?---Yes, obviously.

And to diligently, vigilantly look for volunteers, would you agree?---Yes.

And to, where possible, top your pastures?---Yes. Deal with it where we - where we could.

Where you could?---Yes.

And you agree with me that you now have learned that that's a very effective way to deal with an incursion of this type?---There's a - there's a number of - yes. Whether it's - it appears to have been successful in this case, but I think you would have to consider what the example was at that time, you know?

I'm asking you to consider the same example. So exactly the same thing, if it happened again, you would know how to deal with it from the outset, wouldn't you?---Yes. I've got more experience in dealing with that.

Indeed. And if I - I'm sorry if I - I'm taking you back to something, but if we can just be clear about this; you would know, wouldn't you, that it was important to pick up the swathes as quickly as possible, would you agree?---Somebody - yes - should - - -

And to do that as fully as possible - make sure that, as far as you could ensure, that you didn't leave any swathes in the field. You would agree that that was an important thing to do?---The - the issue that concerned me though was we're having to deal with so much that was not of our making. So I'm having to do a lot of work in picking up those swathes and top, and it's an expense and everything to me when my neighbour is using that particular product - not contained that product.

Mr Marsh, what we're talking about here is what you could do to avoid decertification - to try to avoid decertification?---Yes, try to.

And you would approach things differently if this happened again, wouldn't you?---Yes, I - obviously you have got more experience after - - -

Indeed?--- - - - having to deal with the first - - -

And you would certainly tell NASAA straightaway, wouldn't you, of the incursion?---I did previously.

I'm not suggesting that you didn't. If you would just bear with me?---Sorry.

We're talking about a hypothetical situation if this were to happen again, all right. Do you understand what I'm asking you?---Yes, I'm a little concerned about talking about a hypothetical because - - -

It's exactly the same situation happening next December, let's say, all right?---Well, I hope that wouldn't be the case.

You hope it couldn't be the case?---I hope - yes.

All right?---We wouldn't have to deal with that.

All right. So let's say it does and you would know - you would contact NASAA and tell them, wouldn't you, straightaway?---Yes.

You would get someone to come out and inspect the property?---Yes.

And you would pick up the swathes as quickly as possible?---Yes.

All of them?---Well, we'll try to.

And you would say to NASAA, wouldn't you:

I have or am in the process of or am about to pick up all the swathes I can. I'm going to diligently monitor volunteers and pull them out and I'm going to top pastures where I can.

That's what you would tell NASAA, isn't it?---That's what I have done previously.

I understand that and that's why you would tell NASAA in the future if this happened that's what you proposed to do. Isn't that right?---Yes.

And wouldn't you say to NASAA:

On the basis that I do all of that and against the evidence of what happened on the last occasion, please don't decertify me because I can manage the risk on my own farm.

?---I wouldn't - - -

Isn't that what you would say?---I wouldn't draw that conclusion because I am not making the decision for NASAA.

You wouldn't try to advocate for your own position?---You would try and do whatever you can to protect, obviously, your business and your position.

So would you try to demonstrate to NASAA that there were - - -?---You would try.

Sorry, please don't interrupt?---Sorry.

That there were things that you could do to reduce the risk to a level that they should find acceptable?---I don't feel I could answer that question.

It is so, isn't it?---Sorry, your Honour, I don't feel that I'm in a position to answer that question.

**KENNETH MARTIN J:** Because it's too hypothetical, is that your position?---Well, it's hypothetical but I don't know - you know, we're governed by the standards and how they are implemented, your Honour.

All right.

**CAHILL, MS:** Now, if - could I just have a moment please, your Honour. If you had your time again, would you have appealed the decision to decertify, knowing what you know now?---The extent of the - - -

**KENNETH MARTIN J:** The December 2010 decision.

**CAHILL, MS:** Yes, the decision to decertify not recertify.

**KENNETH MARTIN J:** Yes?---Given the extent I, at that particular time, couldn't see an avenue for appeal.

**CAHILL, MS:** Yes?--- - - - given the level of contamination.

I'm not talking about then, I'm talking about now. If you had your time again and knowing what you know now, would you do it differently and appeal the decision of decertification rather than just accept it?---Look, I - - -

**NIALL, MR:** Look, in my submission - - -

**KENNETH MARTIN J:** Just a moment. I will deal with the objection.

**NIALL, MR:** In my submission that question has a false premise because there was a decision in 2010 - it's not hypothetical - and the only relevance could be to explain -

my friend can ask why he didn't appeal but the question was faced with all of the circumstances now, with all the knowledge of now, would you appeal it? Now, that's not relevant to the decision that was actually made. It might be relevant to a future decision or a hypothetical decision  
- - -

**KENNETH MARTIN J:** Well, that's how I understood the question. Assuming you're on the end of a similar decision  
- - -

**NIALL, MR:** Yes.

**CAHILL, MS:** Does your Honour - - -

**KENNETH MARTIN J:** In like circumstances, would you appeal it? Is that the question?

**CAHILL, MS:** It's relevant to the relief claimed, your Honour.

**NIALL, MR:** Okay. It's not a question of its relevance, your Honour, it's a question of whether it can adduce any probative evidence. The question is - - -

**KENNETH MARTIN J:** A question of whether the appeal would succeed.

**NIALL, MR:** Or the question is whether knowing all you know now, would you have appealed. Well - - -

**CAHILL, MS:** No, that's not the question, your Honour.

**KENNETH MARTIN J:** I think the question is - - -

**CAHILL, MS:** Would you appeal now?

**KENNETH MARTIN J:** - - - not the past, but assuming identical circumstances at 2014, assuming an identical NASAA decertification decision come December 2014, would you appeal such a decision?

**NIALL, MR:** Well, I understand that question but that question asked about the decision that was made in 2010, not the type of decision that that was made in 2010. But if it's simply a decertification decision - - -

**KENNETH MARTIN J:** That's as I understood it.

**NIALL, MR:** - - - in 2014 - - -

**KENNETH MARTIN J:** I think that's what you were getting at, Ms Cahill, wasn't it?

**CAHILL, MS:** Yes, your Honour, and to the extent that there's a substantive difference between your question as framed and my friend's question. I doubt it but I will ask  
- - -

**KENNETH MARTIN J:** All right.

**CAHILL, MS:** - - - one or other of those questions. I think it would - Mr Marsh, assuming that the incursion - all of those circumstances of incursion that happened in 2010 were to happen at the end of this year. So instead of 29 November 2010, it all happened on 29 November 2013, if NASAA moved to suspend and then decertify you, would you appeal those decisions?---To be honest, I don't know what my decision would be. I would need time to consider that.

Now, can you just go to your witness statement, the one of 13 February 2013. You made this witness statement - just  
- - -

**KENNETH MARTIN J:** Have you got a copy of that witness statement, Mr Marsh?---I don't think so, your Honour.

This is exhibit 5C the supplementary witness statement. We will just get a copy pulled out and passed to you now through my orderly?---Thank you.

**CAHILL, MS:** Now, there's some tables at the back, a table 1, with actual farming cycles 2007 to 2010. Do you have that?---I have got the one table there, yes.

Have you got table 1?

**KENNETH MARTIN J:** Do you mean the substantive witness statement of 2012, Ms Cahill?

**CAHILL, MS:** No, 13 February 2013. I have attached to the back of it a table 1.

**KENNETH MARTIN J:** All right. Well, we might be at cross-purposes I think. I think you mean exhibit 5B. I will pass you the larger witness statement.

**CAHILL, MS:** It could be my problem, your Honour.

**KENNETH MARTIN J:** That's where you find table 1, at the back of that - - -

**CAHILL, MS:** Back of the affidavit, your Honour. It's a document that's referred to at paragraph 87 of the first statement. Are we all - one of those rare instances where it's appropriate to ask if we're all on the same page.

**KENNETH MARTIN J:** Have you got a table 1 there at the back - - -?---I have, your Honour. Thank you.

All right. Good, Mr Marsh.

**CAHILL, MS:** Okay, thank you.

**KENNETH MARTIN J:** Please proceed, Ms Cahill.

**CAHILL, MS:** Thank you, your Honour. Mr Marsh, this is some material you've put together of your - in effect, your yields from the different blocks between 2007 and 2010. Is that right?---Correct.

So 2010 was not only what you would call the contamination year - that's the year of the incursion - but it was also a drought year, wasn't it?---That's correct.

And so yields were down?---Yes.

Yes. 2007 to 2009, were they more representative years of average yield?---They would be, yes.

Thank you. Nothing further, your Honour.

**KENNETH MARTIN J:** Yes. Thank you, Ms Cahill. Any re-examination, Mr Niall?

**NIALL, MR:** If I may, your Honour. Just a short little while ago, my learned friend asked you some questions about what you did and what you might do in the future in relation to a GM incursion, Mr Marsh, and you referred to topping the paddock. Could you just explain to his Honour what that process involves, and what it's designed to achieve?---Your Honour, it's a piece of machinery that's got flails, which - how would you explain it - it's got a shaft running through driven by belts. It's got a - on that shaft there's chains hang down. The flails are designed to knock the heads off the plant, or to damage the seed. So it spins at fairly high revs. You adjust that and you go along and you actually, basically, smash off, or cut off, all the top of the seed heads, and the plant, down to ground level if you lower it low enough.

And what's - do you use topping within your system of farming, Mr Marsh?---I've used a little bit, but not - not as normal practice.

And what purpose does it achieve if you top a paddock?---It - it reduces the seed heads.

And in - following the 2010 incursion, which paddocks did you top?---9 and 10.

And why those two paddocks?---Because they were contaminated with GM.

Now, I want to go back to early on in your evidence, and you were asked some questions about a letter to Minister Redman. If you open up the first volume at page 211, please. Do you have that, Mr Marsh?---I do.

Why did you write to the Minister telling him that you had found canola plants on Eagle Rest?---I was concerned with the release of GM canola. It could contaminate other farms and if Mr Baxter decided to grow it, it could contaminate Eagle Rest.

And was there any significance in the fact that you had found canola growing on your land?---Yes, there was.

And what was the significance?---Well, we'd previously been contaminated with conventional canola.

Now, you were asked a number of questions about that, that the canola in 2008 appeared in a crop. Did you turn your mind to the question of what might happen if canola had been found in pasture?---Not really, no.

Now, as at 2009, you were asked about how the - your understanding about how the NASAA standards might treat conventional canola volunteers which had germinated on your property. Do you remember those questions?---Vaguely, yes.

Yes. What was your understanding back in 2009 as to how the standards would treat a conventional canola volunteer that had grown on your property?---You wouldn't be decertified. It would be treated. You - you wouldn't - it would be just treated as another - a weed, and there wouldn't be an impact on your certification.

And in terms of the conventional canola that had come onto your property, did you turn your mind to how that - the circumstances that led to the conventional canola plant growing on your land?---Well, as I outlined here, I

originally thought it had been spread onto the property by rabbits.

And how would that actually have occurred, in terms of what would have been spread, Mr Marsh?---Well, the canola seed itself.

And did the presence, in terms of going back to the standards, NASAA standards, did the NASAA standards, as far as you were concerned, have anything to say about conventional canola seeds being present on your land which had come from outside the property?---There was nothing I seen particularly in the standards.

In your view, going back to 2009 and 2010, would the standards have treated it any differently if the volunteer canola was genetically modified?---In my understanding, yes.

What was your understanding about how the standards would treat a genetically modified canola volunteer?---Well, it - it's a disallowed - it's a disallowed - it's disallowed. It's got a - it's a disallowed material to - to have onto the property.

And if - your understanding of the standards, if a genetically modified canola seed was found on your property that had germinated, what would be the significance, if any, of that?---Well, I would have to notify NASAA, and - and, yes, I would have to notify NASAA and seek their response.

And did you have any understanding of what the consequences under the standards that that might produce?---Yes, we were concerned that it could lead to decertification.

Now, you were asked a number of questions about exhibit 11, which is the letter of 23 April. Could the witness be shown exhibit 11, please.

**KENNETH MARTIN J:** Yes.

**NIALL, MR:** Now, I want to direct your attention to the third paragraph there, where you will see the words "known pollen dispersal patterns". Do you see that?---Yes, I do, yes.

Yes. When you received this letter, what was your understanding of what pollen dispersal patterns meant?---Well, it meant, basically, drift from a GM canola crop of - of the pollen.

And was that, the drift of canola pollen from a plant, was that relevant to your circumstances on Eagle Rest?---No.

Why not?---Because we were dealing with GM canola seeds and swathes.

And this letter dealt with, in that paragraph 3 - Ms Goldfinch wrote:

As such, when a risk analysis reveals close proximity of GM crops with known pollen dispersal patterns we would have the necessary test conducted at our expense.

Did that relate to the concerns that you had about the presence of GM canola?---No.

Why not?---Because it - it can't cross-pollinate with my oats, and my other grains.

So, having read that letter of 23 April, did you have any remaining concerns about the fact of genetically modified canola on Mr Baxter's farm?---Yes, I did.

And what were those concerns?---As what happened in 2008, seed coming across, or contaminating Eagle Rest, and where it had germinated, was present in our production system.

And when you refer to production system, what do you mean by that, Mr Marsh?---Our - our - well, basically implies that our whole - our whole certification because it's built around everything from what we do to what we put on the paddocks, how we manage the paddocks, our rotations, and - and ultimately come up with the products we sell.

Now, you were asked a number of questions about cleaning of seeds, and you identified two circumstances, in general terms, one in which you sold oats to the Mortons, and another example where you were selling it directly for human consumption. I think your evidence was that you had, in the past, sent that to Masons for cleaning. Now, dealing with when you sell to Mortons, do they require, or do you give them, any - or have you given them any advice about whether or not you're certified under organic standards?---Whether I'm - - -

Whether you're certified?

**CAHILL, MS:** Not sure this arises from cross-examination, your Honour.

**KENNETH MARTIN J:** Well, I think there was quite a lot of questioning about the nature of how the seeds are treated, and I think this might bear upon it. I don't know what the answer is, but I think I will let it go for a while.

**THE WITNESS:** Yes. I notified them we had been decertified. If - - -

**NIALL, MR:** No. Not decertified, I'm sorry. Whether you had ever told the Mortons that you were certified?---Yes. Yes.

And is there any requirement on you to tell or advise Mortons that you're certified?---Yes, if we're delivering certified organic grain, yes.

And how do you - what steps do you take to satisfy Mortons, if any, that you are certified?

**CAHILL, MS:** Sorry. This doesn't arise out of cross-examination.

**KENNETH MARTIN J:** What do you say, Mr Niall?

**NIALL, MR:** It arises directly, your Honour. It was put to the witness in cross-examination that, provided it was cleaned, there would be no contamination. And that included cleaning by the Mortons - - -

**KENNETH MARTIN J:** By the recipient.

**NIALL, MR:** By the recipient.

**KENNETH MARTIN J:** Yes.

**NIALL, MR:** And I'm trying to explore with the witness at what point in time the product leaves as certified product.

**KENNETH MARTIN J:** I will allow the question.

**NIALL, MR:** If your Honour pleases.

**THE WITNESS:** Yes. We have to supply our certificate with the product each year - a current certificate.

**NIALL, MR:** And do you do that in respect of oats that you sell to the Mortons?---Yes.

And what does that - to your understanding, what does that - or what requirement are you to have in relation to the provision of oats, in terms of their compliance or non-

compliance with the standards when you sell to the Mortons?---It has to be - it's - well, it's essential that they have that as part of - well, they require that certificate and then to prove that that grain is being produced organically, and then they will supply that onto their buyers. So it's essential.

And in terms of - you gave some evidence in answer to some questions about cleaning of oats in that case. Who undertakes the cleaning of the oats when you sell them to Mortons?---Mortons.

And do they undertake that cleaning before or after you sell the product to them?---After we sell it to them.

And who is responsible for paying for that cleaning?---Well, Mortons.

Now, in terms of - are you able to tell his Honour, in relation to the cleaning by Mortons, the cost of cleaning those oats that Mortons cleans?---No. I - I - - -

Now, in terms of the other category that my learned friend asked you about, which was the grains which are sold to Masons, what process - does Masons have any requirement that you sell - I withdraw that. Do you sell the product to Masons?---No.

What's the arrangement that you had or have had with Masons in relation to cleaning of grain?---It's purely - I take it down there and I pay them to clean that grain to - to the requirements of human consumption.

And what happens after the grain is cleaned?---I take that grain and then on-sell it.

And when you on-sell it, are you required to provide any evidence to anyone that the grain is certified?---Yes. It's essential I supply a certificate.

And in terms of Mason - when Masons undertakes the cleaning exercise, you've referred to some machinery they use - you gave some evidence about that. Do you have similar machinery on your farm?---No. No.

And are you able to tell his Honour how much Masons would charge for cleaning of grain?---I haven't had any cleaned for a little while, your Honour, but it was about - look, I'm not exactly sure, but it's something like 70-odd dollars an hour, your Honour, to clean that.

And what rate of cleaning per hour - - -?---(indistinct) to about - to do it to human consumption, about four tonne I think it is.

**KENNETH MARTIN J:** Four tonne per hour?---Yes.

**NIALL, MR:** And how many - what size of the grain load have you - your production have you produced and sold through or cleaned through Masons?---Only a small amount. Yes, I couldn't give you an exact figure offhand.

Are you able to give an overall percentage or perhaps the size of the amount of grain that you have asked Masons to clean at any particular point in time?---It might be only five per cent of the production. Most of our production is oats that goes to Morton's, your Honour. And I guess to be fair, you know, we could probably sell generally around 100 tonne or plus to Morton's, where what we sell privately would only be a few tonne. It would be less than 10 tonne, your Honour.

Are you able to tell his Honour in your opinion whether it would be economically viable for you to clean all your seed professionally before selling it?---Masons have informed me that their plant cost about \$100,000 to install many years ago, your Honour. So it would be really uneconomic for me at this stage to put that type of plant in for what I'm producing.

**KENNETH MARTIN J:** So the cleaning infrastructure is not within your means to purchase as a capital item. Is that what you're saying?---That's right, your Honour. Yes.

**NIALL, MR:** Now, I just want to ask you some questions about the contamination that took place in December - October - I beg your pardon, December 2010. And it was suggested to you that as at 2 December you hadn't seen any swathes in paddocks 9 or 11. Do you recall being  
- - -?---Yes.

- - - asked some questions about that?---Yes.

Now, having regard to your observations on 1 and 2 December, did you have any concerns that there might be swathes present in those two paddocks?---Particularly paddock 9, being closer to Baxter's GM canola, I would presume it was as contaminated as the other paddocks.

If you go to page 324 please of I think it's volume 2. Now, perhaps if you go over to 323. This is the letter of

suspension of 10 December and you were asked a number of questions about it. And over on page 324, under the heading Suspension Conditions, there's number 1. Do you see that?---Yes.

And it says:

Status of crops from these paddocks to be determine by NCO after further investigation. Cereal harvested from the suspended paddocks must be stored separately and tested and the suspended paddocks will be decertified for a period, depending on the ability to remove and eradicate GM plants.

Now, that was 10 December and you have given some evidence to his Honour that on 29 December you were - your certification was decertified. Was there any harvesting between the date of suspension and 29 December?---No.

Did you sell any produce between the date of suspension and the date of decertification at the end of December?---No, none of those bags.

If you go to 326 please. Down the bottom of 326 on the last line, you read the start of the sentence where it says:

The wheat crop in paddock 11 appears to be free of contamination, despite canola stems being found down the slope of the crop.

Do you see that?---Yes.

Are you able to tell his Honour what that's referring to, being down the slope of the crop?---It's referring to the buffer zone between the wheat and the lower part of that paddock.

That's paddock 11. How did you determine the line at which you stopped sowing the crop in paddock 11?---I just - basically, I just cut a line across the paddock, and that's the buffer zone that we drew.

Thank you. Now, you were asked a number of questions about exhibit 11, which is the - exhibit 10, which is the map with the GPS coordinates on it. That document, Mr Marsh?---Thank you very much.

You were asked a number of questions about that and I think your evidence was that these record the swathing that you

had picked up in 2011, April 2011, and it was suggested to you that you hadn't, prior to April, ascertained, or counted the swathes that were on Eagle Rest. Do you recall that being suggested to you?---Yes. That's correct.

Prior to April, did you make any observations about the concentration of swathes that were present on Eagle Rest as a result of the incursion?---Yes, we - we'd seen - yes.

And what were your observations in relation to paddocks 9 and 11?---Exactly - I'm not sure I fully understood your question. My observations were that there were those three or four swathes in the bottom of paddock 11 in that buffer zone, your Honour. Obviously, we'd observed the stock eating the swathe canola material that has entered the property. Can you just refine exactly what you're asking in - in regard to - - -

Yes, Mr Marsh. I haven't asked the question well. Prior to April, so between the incursion in December and April 2011 - - -?---Yes.

- - - when you counted the swathes in April '11, prior to counting them, did you form any observations about how many swathes there were in paddocks 7 and 9?---Not - not exactly, no, just that they were scattered across those - well, particularly paddock 7.

Thank you. Pardon me one moment, your Honour. If you go to page 413. Do you have 413?---Yes, attachment.

You were asked whether these were your words, and asked a number of questions about it. If you look at third line down, the sentence beginning, "We firstly removed all visible GM canola material we could find, but cannot remove all GM canola seed now contaminating Eagle Rest"?---Could I just clarify 413?

Yes. Three lines, four lines down?---Yes.

Sentence begins, "We firstly removed all visible GM canola material we could find, but cannot remove all GM canola seed now contaminating Eagle Rest"?---Could I - is that in volume 2 or 1?

**KENNETH MARTIN J:** It's in volume 2?---Volume 2.

At page 413?---413. Yes.

It's called an attachment?---Yes. I've got that.

**NIALL, MR:** Contract Conditions?---Yes.

I will start at the beginning:

Farm contaminated by neighbour's swath GM canola -

Do you see that?---Yes, I do.

Just keep reading down?---We firstly removed - yes. I have it now.

Continuing:

We firstly removed all GM canola material we could find, but cannot remove all GM canola seed now contaminating Eagle Rest.

See that?---Yes.

Were you able to form any view about how much seed was contaminating Eagle Rest at that time?---Look, including what would have been in the swathes and (indistinct) it would be - it would be, literally - yes - tens of thousands - hundreds of thousands of seeds. Could have even been a million seeds involved, or more.

And why did you write, "We cannot remove all GM canola seed"? Why was it the case that you felt that you couldn't remove all the GM canola seed now contaminating Eagle Rest?---We just couldn't physically doing it, given that the size and the way it spread across the land, your Honour. It's only very small; size of poppy seeds.

**KENNETH MARTIN J:** You mean these little black poppy seeds - - -?---Yes. They're just in - - -

- - - in the earth - - -?---Yes, your Honour.

- - - they would be hard to see - - -?---Yes.

- - - and pull out?---Well, they're like looking for grains - black grains of sand, really, your Honour.

**KENNETH MARTIN J:** I understand.

**NIALL, MR:** Thank you. Now, Mr Marsh, you were asked some questions about the time delay between October 2012 and September 2013, and the decision making of NASAA during that period. Do you remember those questions?---Yes.

Now, when you were ultimately recertified in November 2013, what was the position in relation to the crop that had been growing during 2013, but not yet harvested, in terms of your certification?---We're talking in?

November 2013?---November - last year. They - those crops were on decertified land - on 1 to 6.

And after 25 November 2013, when your property was fully certified, what was the position in relation to any product that had been growing, but not yet harvested or sold, during 2013?---There was - - -

**CAHILL, MS:** Decertified land or certified land? I think we need to clarify.

**THE WITNESS:** The - the - - -

**CAHILL, MS:** Sorry. Can I just (indistinct) asking Mr Niall.

**KENNETH MARTIN J:** Sorry. I can't hear you.

**CAHILL, MS:** Sorry. I will speak into the microphone. I'm just asking Mr Niall to clarify the question; whether he's talking about product from the certified portion of the land or the decertified portion.

**KENNETH MARTIN J:** I think it was a global question, but  
- - -

**NIALL, MR:** Yes. One - - -

**KENNETH MARTIN J:** - - - I think the objection is it should be more precise.

**NIALL, MR:** I will clarify it. Once the farm was entirely recertified in November 2013 - - -?---Yes.

- - - was there any limitation on your ability to sell produce after that date as certified?---No.

**CAHILL, MS:** Sorry. Does Mr Niall mean produce after the - the - something that was produced after recertification or before?

**NIALL, MR:** Well, in terms - in terms - what about the position the product had been growing prior to decertification - sorry, prior to recertification, but harvested and sold after November 2013? What's the position in relation to that, Mr Marsh?---Well, I presume

the product sold before that has to be sold as decertified if it had come off the decertified land.

And after that date?---Well, then it becomes certified product.

They're the only questions I have in re-examination, if your Honour please.

**KENNETH MARTIN J:** All right. Thank you, Mr Niall. All right, Mr Marsh, that completes your time in the witness box. You may now leave the witness box. That completes your evidence, but you're obviously free to remain and watch the proceedings?---Thank you, your Honour.

(THE WITNESS WITHDREW)

**KENNETH MARTIN J:** Another witness, Mr Niall, or?

**NIALL, MR:** The position is, your Honour, that we're somewhat discombobulated in our timetable. If your Honour would go to the timetable. Based on the estimates we've been given, we've flown witnesses from interstate, and Ms Goldfinch, who's here, has to go to a funeral tomorrow, and we will need to re-jig the timetable to try and make it sensible. In addition, your Honour, we've got Mr Bishop, who's coming from Tasmania. He's from the Department of Agriculture in Tasmania, and we've indicated to our learned friends last week that he is required or would seek a fixed time, so we've agreed that he would start first thing tomorrow morning.

**KENNETH MARTIN J:** All right.

**NIALL, MR:** So rather than interpose a witness, our intention would be to call Mr Bishop tomorrow morning and we will discuss with our learned friends how we're going to re-jig the timetable to deal with our witnesses who have come in from interstate.

**KENNETH MARTIN J:** So the position with Ms Goldfinch is, effectively, she will have to leave tonight to go the funeral, then return another time. Is that - - -

**NIALL, MR:** That's so, your Honour. Or first thing in the morning.

**KENNETH MARTIN J:** Well, that's a shame.

**NIALL, MR:** I mean, the only option would be to, when she's available - and my - - -

**KENNETH MARTIN J:** Could she be done over the video or do we need her in person?

**NIALL, MR:** Well, it may be possible to complete her tonight.

**CAHILL, MS:** I'm happy to sit on, your Honour.

**KENNETH MARTIN J:** Well look, I'm happy to sit to 4.45. Is that - - -

**CAHILL, MS:** I couldn't guarantee that would be long enough. So if Ms Goldfinch must leave tonight or tomorrow morning, that could be difficult. I don't think my friend or I would probably wish her to go part heard, your Honour.

**KENNETH MARTIN J:** So you think you're going to need - - -

**CAHILL, MS:** Should allow an hour, your Honour. I don't think it would be - - -

**KENNETH MARTIN J:** You need an hour.

**CAHILL, MS:** - - - right to suggest I could get it done within half an hour. We've got a couple of objections on her witness statement as well to deal with.

**KENNETH MARTIN J:** All right. Well, I think we shouldn't rush that. That's a shame. But, I think, to the extent that we could consider the option of dealing with her cross-examination over the video later in the timetable, then we should think seriously about that so she doesn't have to come to Perth twice. All right. So we will resume tomorrow at half past 10 with Mr Bishop, and you can let me know thereafter what the batting order is, Mr Niall.

**NIALL, MR:** I will, your Honour.

**KENNETH MARTIN J:** All right. There will be a CMC list here at 9.15, which hopefully will be well and truly wrapped up by 10.30, but don't be concerned. Perhaps if counsel could move some of their material from the front bar table, that would assist, but everything else is fine. All right. We will adjourn in this matter until half past 10 tomorrow morning.

AT 4.08 PM THE MATTER WAS ADJOURNED UNTIL  
THURSDAY, 13 FEBRUARY 2014

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