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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 THURSDAY, 13 FEBRUARY 2014, AT 10.34 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.

KENNETH MARTIN J: Mr Niall.

NIALL, MR: If your Honour pleases. Can I indicate the batting order for today. Firstly, Mr Bishop will be first, your Honour. He's in court and I will call him very shortly. Then Mr McInerney, who is an agronomist; then Ms Gore, who was one of the review officers, she's a NASAA person, and then Mr Davies by telephone.

KENNETH MARTIN J: All right.

CAHILL, MS: Mr Davies might pose a little problem for us because he hadn't been flagged to us. I'm not sure we're in a position to cross-examine Mr Davies. I thought we were - we had discussed Ms Coleman giving evidence today. It might be something that we can deal with over lunch.

KENNETH MARTIN J: All right. Well, let's see how we progress through what seems like a reasonable workload anyway, so we will see how we are placed if that arises. Are there any objections in respect of Mr Bishop's evidence?

NIALL, MR: There are, yes.

CAHILL, MS: Yes, there are, your Honour. If I can address you on those. I think your Honour received a document this morning that indicated that our objections were 1 through 11, 17, 22 and 26. I don't press 17 and 26. In relation to 22, there's a document referred to their which, as we understand it, has been removed from the trial bundle because we took an objection on the grounds of relevance and - - -

KENNETH MARTIN J: So this is a March 2012 audit report, PD366.

CAHILL, MS: Yes. Yes. So we took an objection on the grounds of relevance, as I say, to the document in the trial bundle. The document was taken out but, for some reason, the defendant - the plaintiff assists with the paragraph. Now, I don't want to waste time. Either the document has to go back into the trial bundle so this paragraph can stay or it must go. We don't think it has any relevance to the matter but we are not - we don't want to waste time debating the issue.

KENNETH MARTIN J: Right.

CAHILL, MS: So that's that point. In relation to paragraphs 1 to 11, we maintain the objection on the grounds of relevance. We started objecting to both the paragraphs and the documents referred to in those paragraphs where they appeared in the trial bundle, as I say, on the grounds of relevance that the policy in Tasmania - the policy of the Tasmanian Government to maintain a ban on all commercial production of GM canola - GM crops is irrelevant to the facts in issue in this case. As we understand it, the plaintiff agreed to take the documents out except for the 2009 policy which is one of the documents referred to there.

KENNETH MARTIN J: Where is that? That's - - -

CAHILL, MS: That's at - it's - - -

KENNETH MARTIN J: Policy Statement Gene Technology And Tasmanian Primary Industries.

CAHILL, MS: Yes, that's the one.

KENNETH MARTIN J: 09 to 14.

CAHILL, MS: Yes. But he has taken all the other documents out and then, apparently, wants the paragraphs all to remain in. So to the extent that they have done that, we have an added objection now, not just on the grounds of relevance but where there is a reference to a document that's not in the trial bundle, that's secondary evidence which is not permissible.

KENNETH MARTIN J: All right. So that's 1 to 11 on the basis of relevance.

CAHILL, MS: Yes, in 22, as - it's not really an objection how it's morphed, your Honour. We are really saying it's one in all in. If you want paragraph 22 in, you have to have the document. If it's not relevant to have the document in, then the paragraph is not relevant.

KENNETH MARTIN J: Well, you maintain your objection to the relevance of everything in 22 or just the document?

CAHILL, MS: Yes. Yes, everything but I'm - what I am signalling to your Honour is I don't plan to have a sustained debate on it.

KENNETH MARTIN J: All right. Thank you. Mr Niall. Can we deal with 1 to 11 first if that's convenient?

NIALL, MR: I didn't quite catch my learned friend, I'm sorry, your Honour. Could I just clarify - - -

KENNETH MARTIN J: By all means, yes.

NIALL, MR: I just - no objection was made to us at all about paragraphs 1 and 2 and I can't see how they could be objectionable.

CAHILL, MS: That's right. That's right, your Honour.

KENNETH MARTIN J: So 1 and 2 are fine. Yes.

NIALL, MR: Right. Then in relation to paragraph 22, my understanding was that the March 12 audit report was in but if it's not, we will put it back in and that would resolve that question as - - -

KENNETH MARTIN J: Not sure that - I think that - - -

NIALL, MR: - - - as the independent ground.

KENNETH MARTIN J: Yes.

NIALL, MR: I think there's a relevance ground which I will come back to in a moment.

KENNETH MARTIN J: Right.

NIALL, MR: And did my learned friend indicate - I'm sorry, not by way of question to your Honour, that 17 and 26 are not pressed?

KENNETH MARTIN J: I think 17 and 26 are not pressed, that was my note.

NIALL, MR: Different to what we had immediately before your Honour came on the bench, but - so, I have to address your Honour on 1 - 3 to 11 and - - -

KENNETH MARTIN J: Well, 3 to 11.

NIALL, MR: 3 to 11. Thank you, your Honour. The evidence of 3 to 11 is directly relevant to a point in issue, your Honour. On the pleadings, the defendant puts in issue the reasonableness of the NASAA standard at various levels of attack, including that it mandates, in effect - and I'm paraphrasing on our construction - that

there can be no GM present, even if it not reflected in end product.

Your Honour may recall in opening, my learned friend puts the construction of the standards on contamination as saying that the only contamination is genetic contamination or, alternatively, genetic contamination which is reflected in the end product. Your Honour will recall that's the way our learned friend's put the case. And we contend for a broader construction. And they plead in paragraph 26 that if it's got the broader construction, it's inconsistent with the national standard or unreasonable.

KENNETH MARTIN J: Just have a look at 26 quickly again.

NIALL, MR: By way of example, subparagraph (v), your Honour.

KENNETH MARTIN J: So-called adventitious entry of GM material.

NIALL, MR: Yes. If that authorises decertification, it's unreasonable. Now, what - - -

KENNETH MARTIN J: By reason of inconsistency with the national standard.

NIALL, MR: Yes. Well, firstly, there's inconsistency and there's unreasonableness. And in our submission, what this evidence goes to, if your Honour goes to paragraph 3, it identifies that in July 2001, the Tasmanian Government relieved its gene technology policy. Then the witness goes on to describe the development of that policy over time. It's various iterations and causes are not - we submit we don't have any difficulty with the objections that were made to that and it's reflected in the policy which your Honour will see at volume 9 page 2893 of the court book. And I might just take your Honour to that. And - does your Honour have that?

KENNETH MARTIN J: I do now, yes.

NIALL, MR: Now, before taking on some of its features, what it shows is that the Tasmanian Government has got a zero tolerance of GMOs in Tasmania as a market protection tool. That is, the policy is directed to the maintenance of the integrity of the system in a market context. Now, part of the reasonableness of the standard which we will seek to advance to your Honour is precisely the same reason, that the purpose of the export control order, the national standards and the NASAA standards are in

significant part protecting the integrity of a market which describes a system.

KENNETH MARTIN J: Do you mean a product market for canola at the end of the day?

NIALL, MR: That's one example, your Honour, yes.

KENNETH MARTIN J: Distinguishing GM canola from non-GM canola?

NIALL, MR: Distinguishing organic canola - sorry, distinguishing certified organic oats from non-certified organic oats, and the certification process describes the system that produces it and it's objective is in large part market based; that is, it protects the brand, if your Honour pleases. And what Tasmania has done is adopted an identical policy at a state level for the same purpose. Now, in our submission it is rationally probative of both the reasonableness of the standard, its relationship to the achievement of the objective of the standard, and how the standard might be interpreted. By way of - - -

KENNETH MARTIN J: In the context of a national standard
- - -

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

KENNETH MARTIN J: - - - which axiomatically has got to include Tasmania.

NIALL, MR: It does, your Honour. And if your Honour looks at some of the features of the policy adopted by Tasmania your Honour will see in the first two lines:

The Tasmanian government has maintained the policy on GM technology, including a moratorium on commercial release of genetic modified organisms.

Because the policy records:

A parliamentary committee found there was a potential for use of gene technology to impact negatively upon Tasmania's ability to market locally produced food domestically and abroad under a clean green banner.

And then, for example, paragraph 2, Objective:

To position Tasmania in a global market place as a producer of food that is genuinely GMO free by striving

to ensure that no GMOs are released to or persist in a Tasmanian environment and by encouraging investment.

If your Honour goes over to paragraph 3, there's the scope of the policy. Four guiding principles, GMO free means GMO free, and it there sets out the following paragraphs - various policy statements in relation to the administration in order to protect that market. If your Honour goes over to page 2900, 6.14, the policy in the context that I have just outlined to your Honour provides that:

Zero tolerance for viable GMO contamination in imported canola seed and wholegrain will continue to apply. The government will accept as evidence of zero contamination a negative result from a test capable of detecting one GM canola seed in 10,000 non-GM canola seeds with a 95 per cent confidence or an alternative import proposal which achieves an equivalent level of assurance that GMOs are present. The same zero tolerance approach may be applied to other imported seeds and wholegrains if these are likely to be contaminated with viable GM material. For example, as a result of increased planting.

In the next paragraph there's a reference to the department continuing to assist landholders affected by Grace canola GMO contamination:

To eradicate residual seed and prevent spread of GM material offsite, commensurate with risk, and with at least possible destruction to normal farming activity.

There's a reference as to coexistence and it goes on to deal with, on the next page, legal liability for GMO contamination. So here we have in the context of a national standard a policy statement of a state government, which describes the purpose of a moratorium being market based. It describes the importance to the protection of that purpose as zero tolerance and it deals with the prospect of contamination.

Now, in a context where there's an attack on the reasonableness of the NASAA standards, which in our submission - and there's a contest, your Honour, on the construction of the NASAA standards, but on our construction it is reflective of the policy of the Tasmanian government and therefore it is probative of a rational connection between the purpose and the method by which that purpose is achieved. Now, in our submission we're entitled to defend the operation of the NASAA

standard in the context of the national standard, including in the context of this policy released in Tasmania.

Now, in our submission, if your Honour returns to Mr Bishop's statement and in particular paragraph 3 to 11, he describes the development of the policy. He says in 10 that he assisted in drafting the original policy and has helped maintain the - manage the process for obtaining subsequent reviews, and then he describes the basis of it, his perceived risk to the Tasmanian economy and particular markets for Tasmanian products. And then he goes on to say in the top of - or the next - last sentence of that paragraph:

The Tasmanian government has no philosophical objection to gene technology or GM crops.

Now, in our submission that evidence plainly passes the test of relevance and it provides some probative evidence upon which your Honour ought construe the meaning and operation of the NASAA standard in the context.

KENNETH MARTIN J: So if I've just got this contextual right, and you say the evidence the relevant because it goes to the defence, which attacks the - not so much the inconsistency but the alleged unreasonableness of the NASAA standard, it being an Australian standard axiomatically for Australia, which is relevant in the context of the causation argument in negligence, vis-à-vis the loss of NASAA certification and the economic losses tied to that
- - -

NIALL, MR: Yes, your Honour, and also just - - -

KENNETH MARTIN J: - - - in that evaluation. Yes.

NIALL, MR: At (indistinct) evaluate, and just one point at an antecedent step. There's a point of construction in that issue between the parties, your Honour, and - - -

KENNETH MARTIN J: Of the standard.

NIALL, MR: Of the standard. And we have had a lot of cross-examination of Mr Marsh about the meaning of contamination and the questions about one plant - you're seriously contending that one plant is contamination? Now, we're entitled to meet what we apprehend will be a construction argument about the implausibility or impracticability or absurdity of such a construction.

Now, here you have a state adopting a policy, which we will submit on its proper construction is consistent with that type of embargo, and rather than saying - and we will be submitting positively, your Honour, as part of our case that our construction has no element of absurdity or extremism or impracticability but rather is consistent with a rational choice about regulating GMO, in particular market systems, for a particular market outcome. And what we submit is that the choice of NASAA is a rational and logical means by which the integrity of the organic system is immunised from genetically modified organisms.

So for those reasons, your Honour, it's contextually relevant to the context and directly relevant - I beg your Honour's pardon - it's contextually relevant to the construction and it's directly relevant to the reasonableness of the standard. Now, in our submission, even if there would be a narrow attack on the reasonableness of the standard, we're entitled to meet that with a broader attack on its logical underpinnings. If your Honour pleases.

KENNETH MARTIN J: Thank you, Mr Niall. Ms Cahill.

CAHILL, MS: If it please, your Honour. The pleadings join issue in the particulars. We were asked to give particulars of 26(v) just a short time ago, actually. I think that was last week - last Friday and we did so.

KENNETH MARTIN J: So what's the date of your particulars?

CAHILL, MS: 7 February.

KENNETH MARTIN J: I now have those.

CAHILL, MS: And we were asked for these particulars on the - just a few days prior. Your Honour will see, most relevantly at paragraph E on the last page, page 3, those are the particulars of unreasonableness. The reply, which hasn't been relevantly amended, I don't think, that's dated 28 January, basically sets out at paragraphs 4 and 5 the reasons why the plaintiffs contend that there was an entitlement to decertify - talk about some substantial quantities and so forth. Now, it might be - there's nothing in that joinder of issue on the matters - the facts that are pleaded that would, in any way, suggest that this policy of a moratorium on commercial GM crop production in Tasmania is in any way relevant to the matters in issue in this case. So I understand the submission is now put, it's - well, it's a construction - this is a construction argument about what the NASAA standard says.

There's ambiguity around words such as "contamination" and others, we say, in parenthesis. But so the argument goes on our opponents side, your Honour may therefore take into account extrinsic evidence, presumably, to inform your Honour as to the proper construction. Even if that were so, your Honour, the point is this, we say: the NASAA standard, for the purposes of this matter, the facts that you're considering and the geographical area in which it is applying, namely Western Australia, operates and is to be construed in the context of the co-existence, legally, of GM and non-GM crop production. A policy, the object of which is to remove co-existence, cannot in any way inform your Honour as to how to construe the standard where there is co-existence. Those are my submissions.

KENNETH MARTIN J: Yes. I don't need to hear you, Mr Niall.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: I will allow the foreshadowed evidence between paragraphs 3 to 11 on the basis of its potential relevance in the context of the trial. Again, I emphasise that its weight is a matter for another day and ultimately for me to determine in the context. However, in the face of arguments, not so much about inconsistency with the national standards, but arguments of reasonableness, even as particularised under paragraph (e) of the particulars of unreasonableness, the position, by way of policy of another government, albeit it has taken a different position in terms of GM canola than that of the West Australian Government, might bear upon - and I emphasise "might" - bear upon arguments concerning the ultimate reasonableness of the standard, or, more correctly, the attack on it, as being unreasonable.

Where that goes is a matter for evaluation and weight in terms of the context of all the evidence, at the end of the day. But, at this preliminary point of the trial, I think it would be dangerous, and in the state, to eliminate that evidence, given its potentiality. That's my ruling.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: So just the practicalities of that, Mr Niall, the policy statement that you've now taken me to, referred to in paragraph 6 in volume 9, that obviously stays.

NIALL, MR: And we will delete the references in the last sentence of paragraph 3.

KENNETH MARTIN J: Yes.

NIALL, MR: The last sentence of paragraph 4 - - -

CAHILL, MS: Well, I object to that, your Honour, because then you have the secondary evidence point. The reason that we have objected to the documents is - - -

KENNETH MARTIN J: Didn't you want those out anyway?

CAHILL, MS: - - - is on the grounds of relevance, but you can't have secondary evidence of documents in the way in which my friend contends. It's either a one in, all in - - -

NIALL, MR: We will put them in, your Honour.

KENNETH MARTIN J: All right. Somebody just needs to tell me where they are, that's all.

NIALL, MR: I will do that, your Honour. We will give you a - now - - -

KENNETH MARTIN J: So is there anything live in the wake of that?

NIALL, MR: I think 22 was dealt with by us putting in the Marsh 12 audit.

KENNETH MARTIN J: Yes. The document is back.

NIALL, MR: And that's the only objection, your Honour.

KENNETH MARTIN J: All right. On that basis, I think we're ready to receive Mr Bishop's evidence.

NIALL, MR: If your Honour pleases, I call Andrew Bishop.

KENNETH MARTIN J: Right. Mr Bishop, if you're in court, could you come forward, please, and be sworn or affirmed, as you choose.

BISHOP, ANDREW CHRISTIAN affirmed:

KENNETH MARTIN J: Mr Niall.

KENNETH MARTIN J: All right.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: That's helpful. Cross-examination, Ms Cahill?

CAHILL, MS: If it please your Honour.

CAHILL, MS: Paragraph 9, Mr Bishop, of your witness statement there?---Yes.

And you've reproduced clause - paragraph number 6.15 of the policy. Just in that first line there, where it says:

Zero tolerance for viable GMO contamination -

could you just explain to me what that "viable GMO contamination" means?---Okay. Basically, the Tasmanian Government is interested in not having viable seeds imported into the State. So, in this case, it's related to seed, so - - -

And by "viable", you mean ones that could grow?---Able to grow. Yes. As opposed to, sort of, you know, denatured or treated in some way that it won't - can't reproduce.

All right. Yes. And so the reference to "contamination", what is that?---Well, basically we're regarding that as if there's GM - GMO seeds within the imported canola - - -

Intermingled, do you mean? Or - - -?---Yes. That's the contamination.

Yes. All right. Thank you. Now, if you - do you have - do you see to your left there, there's those files. If you could pick up file number 9 and turn to page 2894. The page numbers are in the bottom right hand corner?---Yes.

And you have a section, Guiding Principles, that you can see there?---Yes.

And the heading GMO Free Means GMO Free, talking about the Tasmanian Government recognising as a small island, etcetera, there's a well developed biosecurity system promising brand. Now, the next paragraph, where it says:

Government also appreciates that the value of that position can only be realised if it is built on and protected by standards above those accomplished through crop and commodity segregation, contamination tolerances, or other measures designed to accommodate GM and non-GM production in the same geographical area of production chain.

See that?---Yes.

Does that reflect your understanding of the Tasmanian Government's position, that unless there is a moratorium - if you're going to have co-existence, then necessarily there has to be some accommodation for that co-existence by allowing for such things as segregation practices, tolerances of, for example, some level of GMO material in finished product; that sort of thing?---Yes. The basis for that is that co-existence, we believe, is possible in terms of having a tolerance level.

Yes?---And, obviously, as the - you know, if you don't have a tolerance level, we don't believe that you can have co-existent systems, and that also gets back to the nil tolerance position.

KENNETH MARTIN J: Co-existence of what? Co-existence of product or co-existence of crops, or what?---In this case it's referring to crop production, so non-GM and GM.

Thank you.

CAHILL, MS: So there must - you can't have zero tolerance with a co-existing system of GM crop production and non-GM crop production. Is that right?---That's what we believe.

Thank you. And this zero tolerance that - where you don't have the systems co-existing, even then it's not possible to have 100 per cent confidence that there is no - let's use the word "contamination" - in any product, is there?---It's - I guess it's a case of, you know, can you ever have zero risk, and I guess the Tasmanian Government has gone to the closest point it can and - - -

And that's what's set out at 6.14, I think, isn't it, at page 2900?---Which is the testing requirement.

Yes?---Yes. Yes. So, I mean, effectively our position is, you know, tests which can detect at 0.01 per cent and return a zero, we regard as meeting our requirements. But, effectively, you're looking at limits of detection.

Yes. That test with the - that you identify there, the - sorry - that is identified in the paper, one canola seed in 10,000, non-GM canola seeds with 95 per cent confidence; that's about as precise as you can be. You can't be any more precise than that, is that right?---Yes. Certainly at the time of this policy, that's what we believe - it's as close as we can get.

That's the limits of our scientific testing that's available - or was available at the time of the policy?---At the time of the policy. Yes.

Thank you. Now, just as we head down this page, there's a section that is headed Co-existence?---Can you please give me the page number again?

2900.

KENNETH MARTIN J: Just underneath 6 - just above 6.16?---Yes. Yes.

CAHILL, MS: Now, it says here that the Department of Primary Industries and Water will continue to monitor arrangements for co-existence between GM and non-GM canola and other crops on the Australian mainland, with particular regard to levels of GMO contamination. Are you able to say what the policy intends there in relation to contamination in what - contamination in what way?---I think the aim of that statement - what the policy intends, basically, is for this to be a one in which the government has a watching brief, if you like. So it's monitoring - - -

Yes?--- - - - what's happening, and that's to inform policy development, you know, obviously into the future.

Yes?---And this policy extended to 2014. So during that period, you know, the government has gathered information on, you know, what's happening in the rest of Australia, and that helps it inform its policy reviews, which we had one recently.

Yes. And so, if you can assist me here, just at the end of the first sentence, the third line, a particular regard in the monitoring arrangements is to the levels of GMO contamination?---Yes.

And my question is, GMO contamination in what, specifically?---Yes. That's referring to within crops.

Right?---Yes.

And anything else?---That's referring to within crops, but certainly, obviously, you know, the ultimate contamination of seed source and that sort of thing.

Thank you. Now, can I come back to your witness statement, please, if you have that there still. In the second section, where you talk about GM trial site audits?---Yes.

Now, these audits that have you been involved in are audits of sites where GM canola was deliberately planted on the site, initially for the purposes of the trial. Is that right?---That's correct.

They're not sites where GM canola incidentally arose through movement of the wind or via animals, or something like that. Is that right?---The audits refer to here are - yes - specially former trial sites - - -

Thank you?--- - - - conducted pre-regulation.

Now, so the GM canola there was deliberately sewn and cultivated? Yes?---Yes.

Sorry. I just say that because you need - - -?---Yes. Yes. Sorry.

- - - the answer on the transcript. And the way in which it was - it was originally devised and has continued to be devised throughout, as the primary means of getting rid of these volunteers on those trial sites, was to encourage - continually encourage germination, is that right?---Yes. That was the primary task. A number of the sites, when they were established - after they had been established, they had been deep ploughed, which should induce what we call secondary dormancy in the seed.

All right?---So - resulting in, you know, a viable seed bank there. So the (indistinct) was to draw down on that seed bank as quickly as possible.

All right. So the audit results are suggesting quite a seed bank - plenty of seeds having built up in those trial sites from the sewing and cultivation of the GM canola during those trial period years?---That's correct. I must say, sites varied considerably as well, in terms of, you know - - -

Yes?--- - - - seed bank sizes and that sort of thing, depending on the trial, how it was managed and that sort of thing.

Thank you. And there's nothing in the audit reports that tells us about the conditions in the individual trial sites in which the GM canola was originally cultivated?---Not within the audit reports, but there's certainly history put into the site management plans which go with those sites now.

Yes. But the audit reports that this court has got hasn't got that information? You would agree?---No. I agree. Yes.

For example, where in Tasmania these sites were, that information isn't there?---No. I should say, that's not the purpose of the audit reports.

No. I'm not suggesting it is. I'm just trying to identify the limits of the contents of the document, or documents?---Sure.

There's nothing in those audit reports that tell us how much rainfall each of the trial sites experienced during the trials?---Not within those reports.

No. How the canola was harvested?---Not within the reports.

How much pod shattering was experienced at any particular site, either before or at the time of harvesting?---Not within those reports.

KENNETH MARTIN J: How many times it was cropped? So are we talking about one planting of GM canola, or multiple plantings over several seasons?---I think it's more a purpose of what those reports are, and it's checking in terms of, you know, what volunteers are emerging and to try and provide a control on that. The information you referred to is in site management plans for each of those sites.

Thank you.

CAHILL, MS: Now, paragraph 17, Mr Bishop, you are giving some examples there of trial sites where the subsequent volunteer population that germinated was quite extensive, aren't you?---That's right.

Now, it was the case, wasn't it, that it wasn't until 2003 that the Department recognised that the arrangements for removing volunteers could be improved?---That's correct.

And so that was a few years after the trials had finished?---Yes.

Yes. And what the change was for improvement was that the department moved to a much more site specific individual or bespoke tailored program for managing the volunteers on each site. Is that right?---That's correct. Our original approach was basically working cooperatively with those landowners. So we had guidelines, for instance. When we assisted, we provide agronomic advice on how to draw down the seed bank. Legislation at the time as well, we were regulating this through the Plant Quarantine Act. So at around about 2003, it was when drafting took place of the Genetically Modified Organisms Control Act, and the site management plans were effectively a formalising of those guidelines, in two site managements plans, which would be incorporated under the act.

All right. And those management plans took into account such things as the sorts of crops that were now being grown on those sites. That was one factor, wasn't it?---Yes, that's right. And herbicide strategies?---Yes, yes.

And just different cultivation methods that different farmers employed?---Yes, and also the history you referred to before is very important as well in developing those plans.

Yes, thank you. And the department recognised full well, didn't it, that notwithstanding the regulatory aspect of these plans - these management plans, the practical adherence of individual farmers to those strategies significantly influenced the number of volunteers that were being seen in subsequent years?---That's correct, yes.

And that's why you make the comment you do at paragraph 26, isn't it?---About the management.

That the inability to guarantee that all sites will ever be totally clear of all GM canola plants is in part due to different management practices adopted by different farmers?---That's correct. I should say the context of that, within the Tasmanian agricultural system, they're quite diverse cropping rotations as well. The presence of the GM canola and managing that was certainly a restriction on those particular farmers; hence, we were working closely with them to try and minimise the impact on them. But, you know, each site, it had a different history, different backgrounds, treated in a different way. So each one was, you know, it was individual.

This audit report, and I have already canvassed with you that it was - these are audits about the actual trial sites themselves. It's not possible from these audit reports, is it, to draw any inferences about the size of the seed bank in areas surrounding those trial sites; the seed bank of GM seeds is what I mean. Do you want me to repeat that question?---Yes, I don't really understand your question.

It's my fault. It was a bad question?---There's no surrounding GMs so the trial site is basically aware that the work was conducted.

Yes?---In some cases that was just a few metres squared.

Yes?---In others it was up to a hectare.

Yes?---But that's it, that's where they were.

Yes?---And the audit is on those sites and on surrounding areas to check that there has been no leakage.

Yes, and in relation to any areas beyond that, there has been no investigation of the store of GM seed bank in surrounding areas through seed having moved on the wind or moved with animals, that sort of thing?---Earlier on there was a lot more work in terms of the broader areas that were looked at, and I think over the years that sort of narrowed down a bit to, you know, to more immediate confines, logically, because, you know, the plants aren't seeding and there was no movement at that stage. But at the beginning, of course, we weren't sure of, you know, where this had actually gone so - - -

But that's not an issue for the Tasmanian government now?---No, no.

So, really, the purpose of your evidence here in relation to these audit reports and the trial sites is really about the trial sites themselves, what the volunteer population is in the long term in a field where you actually grow canola - GM canola?---Yes. I mean, the purpose the of the activity and of the actual audits is to obviously determine what numbers are coming up, to take actions against those that are, but the ultimate aim is clearance of those sites.

Thank you. I have nothing further, your Honour.

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

NIALL, MR: Yes. Thank you, your Honour. Just in relation to that last question, Mr Bishop, you referred to the ultimate objective being clearance of those sites. Has any criteria been developed to determine when a site can be identified as clear?---Yes. The criteria that has been developed is, what, over a period of two years for a site to have been cultivated at least twice and for no GM canola to have emerged.

KENNETH MARTIN J: Cultivated with what?---Mechanically cultivated.

So just ploughed?---Not ploughed, no. Lightly tilled, basically. Just to stir the soil and that sort of thing.

But not sown with another crop?---No, no.

Thank you?---And if there's no emergence over that period, we would sign those off. Now, I should also say within the context there, that depends on, you know, ideal germination conditions. So you wouldn't be going out doing a check after a - you know, during a drought period and saying, "It's all clear." So in practice it may be more than twice but certainly over that period and if there has been consecutive non-emergence, we would sign off those sites as we have done with four of the sites.

NIALL, MR: Would you sign off immediately on the second year or at what period of time?---We would sign off after the next nearest audit, which hadn't found any emergence at that site. Once the sign-off occurs, there's no formal checks so we would do random checks from time to time after that.

So just going back a couple of steps, so you have two years of cultivation. Is that right?---You have at least two periods of cultivation across a two year period.

All right, and just describe in a bit more detail what that cultivation would entail?---Okay. So it might be sort of lightly tilling the soil and it might be sort of doing it, you know, at the appropriate time of year. So autumn, if there's autumn rains there. So you would be lightly tilling the soil, encouraging the germination of whatever plants are there and we would be looking for the emergence of brassicas and then testing those for GM.

And if within that two year period a GM volunteer is observed, what happens then in relation to clearance of the site?---It doesn't get cleared. So if we were to see one plant or two plants of GM, it doesn't get clearance.

Well, what happens after that?---Audits are maintained. When I say clearance, these sites are all - they're all under permit, basically, under the GMO Control Act because when the act came in we would have had all those farmers basically being in breach of the act, handling GM products. So they were all given permits. The condition of the permit was a site management plan and we worked with them on it. So the sign-off is to sign off from the permit. They no longer need a permit. They're no longer handling GMO plants.

And you indicated that you would look for two periods of cultivation and you said in answer to that question to his Honour that you might not look - you would look in a period where it was suitable and you might not in a drought period. Why would you not look in a drought period, Mr Bishop?---Simply because we would be looking for conditions which are ideal for germination. So, you know, lack of water, obviously, isn't ideal. We would also be looking, for instance, if there has been excessive rain and, you know, there has been waterlogging in the site, we wouldn't be counting that. So we're looking for cultivation under ideal conditions just to optimise the chance of emergence.

And can you explain to his Honour why the period of two years of cultivation was adopted?---I guess you could say that there's a bit of a drawing a line in the sand, but that was sort of our best (indistinct) so that agronomically that we are likely to have cleared those sites.

And of the number of sites in the trials, how many have you cleared to date?---Of the 57 original sites, we've cleared four.

So does that mean the remaining ones have not met the criteria for clearance?---That's correct, yes.

Now, you were asked a number of questions about a policy and you were taken to page 2900. If you go to that?---Yes.

And you - it was put to you that you can't have zero tolerance of genetically modified crops in coexistence. Do you remember being asked that question?---I do.

What is your understanding about in that context, the coexistence between genetically modified crops, on the one hand, and organic farming on the other?---Well, prime - - -

CAHILL, MS: I object to that question.

KENNETH MARTIN J: Just don't answer for the moment, Mr Bishop.

CAHILL, MS: It doesn't have any relevance arising from the cross-examination, that's one thing. But this witness is here, your Honour, in his capacity as a government officer from Tasmania speaking about the moratorium and audit trials - audit reports on GM canola trials that were done in the late 90s, early 2000s. That question, as it was posed, is not something that this witness has been qualified by my learned friend to speak on.

NIALL, MR: Well, I'm not sure - - -

KENNETH MARTIN J: What do you say?

NIALL, MR: If the objection is that it doesn't arise out of cross-examination, in my submission, it does. The witness was asked a series of questions about coexistence, tolerance levels and the understanding and I'm asking this witness about his understanding of the relationship between zero tolerance, GM and organic farming,

KENNETH MARTIN J: By reference to the policy.

NIALL, MR: By reference to the policy including paragraph 6.16, which deals with monitoring arrangements for coexistence on the Australian mainland.

KENNETH MARTIN J: I think the question needs to be tied a little more tightly to the policy document about which the cross-examination was asked, but subject to that refinement, I would allow it.

NIALL, MR: If your Honour pleases. Perhaps if I could take you to 6.16 of the policy and the reference to coexistence. And if you look - you refer - or the policy statements refers to monitoring arrangements for coexistence between GM and non-GM canola and other crops on the Australia mainland with particular regard to levels of GMO contamination. Now, do you have any - withdraw that. In terms of the monitoring of arrangements and the examination of coexistence between GM, non-GM and other crops, do you have any knowledge about the coexistence between GM crops and organic farming on the Australian mainland?---I guess I - I would answer that, that we were obviously aware that there are significant issues there. Certainly in terms of our policy and the market basis. You know, organic production within Tasmania is a key component of our farming systems there. So it would be the same concern, I think, you know, in terms of movement and

material from GM to the non-GM area. Whether that cropping system is an organic production system or a conventional system.

And what are those concerns?---It's basically leakage, because coexistent systems can be set up. You could have distances, you can have buffers and that type of thing, but in terms of leakage of, for instance, of pollen and that sort of thing, which is all quite low, very low levels of events, those are the sort of things you can't stop and within the policy where we have the nil tolerance, those are the things that we can't stop. So I guess in that context, it would be much the same for an organic production system.

And why do you draw the comparison with the organic production system?---Well, I mean, I guess, basically, it's a similar one where there's nil tolerance for the organic production system. You know, it's much the same thing. I mean, if we are to detect, as I said before - if we are to detect one plant that's shown to be GM canola, that's a concern to us. You know, in a conventional system, it probably wouldn't be an issue. You would be managing - you know, you would be managing your crops. The same concern applies to an organic production system, although you would have to obviously manage that in a different way. There obviously are certification issues too.

And what's your understanding of those certification issues?---Well, my understanding is that the standards wouldn't allow for the presence of any GM plant. So a detection in that situation would be as concern in maintaining the certification of that site.

And in terms of - you were asked a number of questions about this concept of GMO contamination. Could you tell his Honour what might be the modes by which GMO contamination might occur?---Well, I guess, if we are talking, sort of, crop to crop.

KENNETH MARTIN J: Crop to crop, yes?---I mean, there would be a whole range. I mean, mechanical issues could be a problem, you know, in terms of seed being moved around or planting material moved around in to the non-GM areas.

So machinery movements and that sort of thing?---Machinery movement, yes.

Human movement?---Human movement. It adds to those mechanical sort of ways. Certainly wind movement is also possible over distances with canola. Probably our biggest

concern would be the movement of pollen, you know, through bees or any insect vectors or any organisms to, you know, carry the - carry the GM pollen. Things like the mechanical type ones, that you can put in mechanisms to manage that. As I say, buffers even can reduce the risk in terms of wind movement but, with some of these other ones, lower risk, obviously, with the movement of pollen and that sort of thing, it's quite difficult. Other potential is movement within water as well, depending on the distance between the GM canola paddock and non-GM canola paddock.

NIALL, MR: Now, you have referred to GMO contamination of crop to crop there, is there any other form of GMO contamination that might occur?---If you are talking in terms of seed or grain, certainly just - it's certainly, you know, a possibility in terms of who that's handled and managed, so there could be contamination in the seed cleaning area and that sort of thing. I mean, apart from if you have dedicated facilities for both, which I guess is a potential way of managing that, you are reliant on hygiene and clean-down procedures and that sort of thing. So you always run the risk of some contamination of whatever level.

And what do you mean by contamination in that context?---In that context it would be basically the GM seed being, you know - maybe residue of the GM seed getting mixed up with the non-GM seed being, you know - maybe the residue of GMC seed getting mixed up with the non-GM seed.

KENNETH MARTIN J: That's canola to canola?---Canola to canola. Not particularly an issue within grain. I mean, if the grain is going to be processed, less of an issue but certainly with seed it's a significant issue hence our testing requirements for the state for canola seed.

NIALL, MR: And what about land itself, is that capable of being contaminated by GMO?---It's the same thing, certainly. I mean, the trial sites that we have got, you know, someone looking in could say that that land has been contaminated with GM canola. I guess the fact that we are trying to clear it of that and remove - you know remove the presence of those seeds, you could regard that as a contaminant.

They're the only questions I have, your Honour.

KENNETH MARTIN J: Thank you, Mr Niall. That completes your evidence, Mr Bishop. Thanks for coming and assisting the court. You are excused.

(THE WITNESS WITHDREW)

NIALL, MR: If your Honour pleases, the next witness is Mr McInerney. Before I get him to come to the witness box or some into court, can I just identify and resolve, your Honour, the documents.

KENNETH MARTIN J: Yes.

NIALL, MR: There's some objections which I - I definitely
- - -

KENNETH MARTIN J: Just give me a moment to find in the
court - - -

NIALL, MR: Yes. The first report is dated 22 August 2013. The second report is dated December 2013, it's identified Supplemental 1.

KENNETH MARTIN J: Yes.

NIALL, MR: And the third report is dated January 2014 and dated Supplemental 2.

KENNETH MARTIN J: Yes.

NIALL, MR: And, in addition, a document headed Worked Example Of Seed Bank Rundown By Oats Lupins, Oats In Sequence which is a spreadsheet. Does your Honour have that?

KENNETH MARTIN J: I'm not sure I have the spreadsheet. In fact, I am sure I don't.

CAHILL, MS: It just came in - - -

KENNETH MARTIN J: You do, Ms Cahill?

CAHILL, MS: We only got it yesterday so your Honour may only have recently received it.

KENNETH MARTIN J: All right.

NIALL, MR: I will just explain it, your Honour, to your Honour.

KENNETH MARTIN J: Thank you.

NIALL, MR: Objection was taken to a paragraph in the Supplemental 1 page 8. Does your Honour have that?

KENNETH MARTIN J: I do now.

NIALL, MR: Objection was taken to - to parts of that page 8. Last paragraph:

...two options which would achieve -

Sorry, your Honour, just lost my place -

...two options would achieve -

Do you see that paragraph, your Honour?

KENNETH MARTIN J: I do.

NIALL, MR: Yes. Objection was taken to that on the basis of opinion without qualification or foundation, and, in light of that objection, we asked the witness to provide some explanation.

KENNETH MARTIN J: So what's the general topic we're talking about here? Rye grass reduction strategies through GM canola being tolerant to Roundup.

NIALL, MR: Yes. So the evidence of the agronomist - from Mr Baxter, was Mr Robinson, and his witness statement says words to the effect that, "Mr Baxter has been able to reduce rye grass population by 80 to 90 per cent, and this could not have been done without growing RR canola." So that was the proposition from Mr Robinson. "This is my observation as to how it achieved reduction of rye grass; couldn't have done it without Roundup-Ready canola." And Mr Baxter says there that it is possible to reduce it and provide - Mr McInerney, I beg your pardon, provides -and provides two options to achieve the same level of rye grass without planting Roundup-Ready canola.

So it's entirely responsive to something Mr Robinson said, and identifies an alternative to planting rye grass - planting Roundup-Ready canola. So Mr McInerney identified a hay crop in 2010 and a hay crop in two thousand - lupin in 2011 and hay in 2012. The basis for the it - the qualification was asked for, and some calculations were given in this document, and the sources were identified.

KENNETH MARTIN J: So if Mr Robinson, advising Mr Baxter, had said, as a matter of historic fact, the application of Roundup-Ready canola has had x-percent success in terms of eliminating my rye grass problem, or Mr Baxter's rye grass problem, this wouldn't arise. It's only because he said,

"And that's the only way that was achievable," to which you joined issue and say, through Mr McInerney, or would like to say, "Well, there's other ways you could have achieved that outcome."

NIALL, MR: We put - we - - -

KENNETH MARTIN J: Just wondering why that's relevant.

NIALL, MR: We put it this way, your Honour. Because part of our case is the reasonableness of the decision to plan Roundup-Ready canola in the two paddocks in 2010 and the decision to swath those two paddocks. The defendant pleads - sorry, before I get to the defendant. Part of our case is that in looking at that decision, as I opened to your Honour, your Honour ought look at the context in which Roundup-Ready was released and the conditions on the use of Roundup-Ready. And two of those conditions, that is, imposed by Monsanto, one of them related to the potential risk of glyphosate resistance. And indeed, there's very considerable caution expressed - - -

KENNETH MARTIN J: This is the antibiotic analogy.

NIALL, MR: It us.

KENNETH MARTIN J: If you use too much of it, the benefit that you get from it, knocking out rye grass, will, over time, be lost and will become ineffective.

NIALL, MR: And - that's so. And we're met - so, we will be inviting the court to take that into account as one of the restrictions that was operating in - on Seven Oaks - that constraint. But then, importantly, the defendant positively asserts - positively asserts that the defendant's decision to plant and harvest was in accordance with accepted farming practice.

Now - and they rely on Mr Robinson to that effect. Now, we will be submitting to your Honour that there were very, very significant risks and disadvantages in the use of Roundup-Ready canola, including the likely, probable development of rye grass - glyphosate resistant rye grass, such that we put - we seek to challenge and test the proposition that in 2010 it was in accordance with good farming practice and that there were other non-herbicidal means by which Baxter could have achieved the same outcome without any risk to our client.

Now, if your Honour goes - perhaps (indistinct) your Honour doesn't need to go to it, but questions that were

asked of Mr Powles - Professor Powles and Mr McInerney, and Mr McInerney and Dr Rudelsheim, and Mr McInerney and Dr Preston, related in large part of the development of rye grass resistance in the Kojonup area. So they were asked because it's relevant. Your Honour ordered, for example, the meeting of witness conferrals, and one of the questions asked, for example, of Powles and McInerney was the development and identification of herbicide resistance in Wimmera rye grass by farmers in the Kojonup area, including the herbicides in the dazolin, triazine and glyphosate.

And the next question was, the means by which farmers in the Kojonup region may attempt to control herbicide resistant Wimmera rye grass. So the experts have conferred on this question, including Mr McInerney, because it's directly relevant, and understood to be directly relevant, to issues in the proceedings. And this evidence - this additional document and that paragraph simply seeks to provide the basis by which Mr McInerney identifies an alternative. Now - - -

KENNETH MARTIN J: Does this go to negligence?

NIALL, MR: It goes to the - both causes of action. It goes to the negligence in the sense that there was a lack of reasonable care in planting.

KENNETH MARTIN J: How can that be, if Mr Baxter acts on the advice of Mr Robinson, as an independent agronomist? I mean, is it open to you to second guess Mr Robinson in terms of his advice?

NIALL, MR: Yes, your Honour. He can't get out of - if his advice was in fact not soundly based, then that's a consequence that Mr Baxter might be fixed with. Now, he - - -

KENNETH MARTIN J: One of them is an expert and one of them isn't, and you pay an expert to give you advice about how to crop; you get the advice, and you act on it.

NIALL, MR: That may be - - -

KENNETH MARTIN J: Bit hard, unless the advice is absolutely flagrantly unreasonable or crazy, to attribute responsibility from a - that's why I'm focusing on negligence.

NIALL, MR: Well, in our submission, the advice that he got - and we will explore this with Mr - both Mr Baxter and Mr Robinson in terms of the circumstances and what Mr

Robinson was told, and a variety of things and the information on which he proceeded. Now, it's the defendant who has put it part of his positive case that what he has done is in accordance with good farming practice, and we seek, simply, at this point, seeking to adduce evidence.

KENNETH MARTIN J: Well, from the nuisance - if we move to nuisance in terms of an unreasonable use of land, which is the heart of that course of action - - -

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: - - - irrespective of negligence. I mean, plainly one of the factors to be evaluated in the reasonableness of what's done is dealing with a rye grass problem if there is one and how you deal with it. Now, the question though is whether - in terms of evaluating how you deal with it, whether we open up for dialogue and debate the merits of independent advice paid for by an agronomist.

NIALL, MR: Well, certainly, your Honour - - -

KENNETH MARTIN J: By reference to experts around the world who might want to second guess him.

NIALL, MR: Well, your Honour, we will seek to test what Mr Robinson knew and what he in fact advised but I didn't mean to - there was an objection to paragraph 8, which we sought to develop. That objection has been withdrawn but - this morning, immediately before we - but - so I've probably misled your Honour. The reason why I was going to it not - was to defend its relevance but to explain its provenance - - -

KENNETH MARTIN J: I see.

NIALL, MR: - - - which was to answer an allegation or a submission that it wasn't - there was no - the basis for the opinion wasn't established and all we sought to do was to ask Mr McInerney to provide some workings out that explains it.

KENNETH MARTIN J: All right.

NIALL, MR: That's the only basis.

KENNETH MARTIN J: Okay.

NIALL, MR: So that just explains why your Honour has it or why we have given it to your Honour.

KENNETH MARTIN J: The spreadsheet that you've - - -

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: I'm just going to have a look at that.

NIALL, MR: And it's an assumption - it identifies some assumptions based on an initial seed bank and works through some alternatives as to how over year 3 you could reduce the seed bank of Wimmera resistant rye grass over that three year period. We just simply seek to explain it. Now, I should also tell your Honour on the first page down the bottom it says:

It is based on research by Dr Bill Roy of Agricultural Consulting and the efficacy of weed control practices for resistant management compiled by Alister Draper.

That document, the Draper document, is attached to a memorandum of conferral between Professor Powles and Mr McInerney, and it's almost a very similar - so I'm not sure whether a basis - well, if there's no basis objection, your Honour, that that explains its document.

KENNETH MARTIN J: All right.

NIALL, MR: Now, that long way around, your Honour, can I identify the objections that remain in issue.

KENNETH MARTIN J: Certainly.

NIALL, MR: Starting - - -

CAHILL, MS: There's only one objection in issue, your Honour.

NIALL, MR: Which does - your Honour, we were, up until about 9.30 this morning, responding to 42 paragraphs of objection and we have spent a very large amount of time on responding and considering our response. We made concessions, your Honour, and the defendant says, "Well, we don't make the objection any more." So we have wasted a lot of time and, in our submission, inappropriately, where only four paragraphs are now addressed. Now, I will identify what that one is, your Honour.

KENNETH MARTIN J: So we're only concerned with the third of Mr McInerney's - - -

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

KENNETH MARTIN J: - - - substantive reports.

NIALL, MR: As of 9.30 this morning, that's right.

KENNETH MARTIN J: All right.

NIALL, MR: If your Honour goes to page 6. Unfortunately, your Honour, the paragraph numbers are not numbered but the paragraph beginning "The first paragraph shows," under the bold - - -

KENNETH MARTIN J: Under PR page 9.4.

NIALL, MR: Yes.

KENNETH MARTIN J: Development of resistant weeds.

NIALL, MR: The paragraph under that is deleted, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: I will go through the fixed ones first, your Honour - the agreed ones. Page 7, point 3 beginning with the words "My experience" goes out.

KENNETH MARTIN J: Sorry, page 7 and it's which - page 7, heading PR page 10.1, okay.

NIALL, MR: I'm down to the third one, your Honour. I have done page 6.

KENNETH MARTIN J: Yes.

NIALL, MR: I'm onto the - I'm passing over the - - -

KENNETH MARTIN J: Yes. First paragraph, second sentence.

NIALL, MR: I beg your Honour's pardon.

KENNETH MARTIN J: Continuing:

Additionally in Australia all states maintain a segregated delivery system to protect the larger majority of canola growers who do not presently grow RR canola.

NIALL, MR: That's the only contest, your Honour. Can I just identify and delete the two other agreed paragraphs and come back to that.

KENNETH MARTIN J: Yes, by all means.

NIALL, MR: So if you drop down two paragraphs, beginning with the words "My experience of farmer decision making."

KENNETH MARTIN J: Yes.

NIALL, MR: We don't read that paragraph, your Honour.
Page 11 - - -

KENNETH MARTIN J: So that whole paragraph is out.

NIALL, MR: Page 11.

KENNETH MARTIN J: Page 11, yes.

NIALL, MR: Three paragraph down, "Of note during this time."

KENNETH MARTIN J: Yes.

NIALL, MR: Delete that paragraph, your Honour.

KENNETH MARTIN J: Very good.

NIALL, MR: And page 12

KENNETH MARTIN J: Yes.

NIALL, MR: The first paragraph we don't read. So that leaves the contest over page 7, first paragraph.

KENNETH MARTIN J: Yes.

CAHILL, MS: Your Honour, before I begin, I know you're not terribly interested in these things but in order that I can address the insinuation of my friend, the directions
- - -

KENNETH MARTIN J: You don't need to.

CAHILL, MS: Well, may I just say out of deference to Ms Vernon that the objections were sent on 20 January. We didn't receive any response with concessions, as the plaintiffs were directed to do, until 6.49 pm on the night before the trial.

KENNETH MARTIN J: All right. Well - - -

CAHILL, MS: So the fact that we have not had the - - -

KENNETH MARTIN J: I'm not inferring any pejorative connotations against anyone. I know how these things go.

CAHILL, MS: It's just that it was reiterated and it - - -

KENNETH MARTIN J: That's all right.

CAHILL, MS: - - - was, with respect, unnecessary.

KENNETH MARTIN J: It's of no magnitude upon me, Ms Cahill, as you would know.

CAHILL, MS: I do know, your Honour. I do. Now, the short point in relation to this second sentence on page 7 revolves around the words:

To protect the large majority of canola growers who do not presently grow RR canola.

This witness may say that Australia maintains a segregated delivery system. The purpose of that system, in particular, that it's to protect one industry rather than the other is not only outside this person's qualifications to opine upon but it is also not substantiated in any way.

KENNETH MARTIN J: What do you say about that, Mr Niall?

NIALL, MR: Well, if your Honour puts a full stop after the word "system" - - -

KENNETH MARTIN J: "Delivery system" full stop, that would seem to resolve it.

NIALL, MR: It would, your Honour.

KENNETH MARTIN J: All right. So that's how we will proceed. Just for the transcript, on page 7 of the proposed third report of Mr McInerney in the second sentence, that paragraph will now read in its second sentence:

Additionally in Australia all states maintain the segregated delivery system.

NIALL, MR: Would your Honour just give us five minutes to make sure that the reports catch up with those rulings?

KENNETH MARTIN J: By all means. Would you like me to break for five minutes so that can be done.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: Yes, all right. We will have a short break of five minutes duration. Let me know when you're ready.

NIALL, MR: Thank you, your Honour.

(Short adjournment)

KENNETH MARTIN J: Mr Niall.

NIALL, MR: Thank you for the time, your Honour; I'm indebted. Can I call Peter McInerney, please.

KENNETH MARTIN J: Yes, indeed. We will have Mr McInerney. He might be out court, which case he will need to be summoned.

NIALL, MR: Have him arranged. Sorry, your Honour. I thought he was in or ready to go.

KENNETH MARTIN J: Yes. Mr McInerney, please come forward to the witness box and we will have you sworn or affirmed.

McINERNEY, PETER GEORGE sworn:

KENNETH MARTIN J: Thank you.

NIALL, MR: Just hand Mr McInerney a bundle of his documents, which I will get him to identify. They reflect your Honour's ruling and the position in relation to the evidence. Mr McInerney, can you tell the court your full name, please?---Peter George McInerney.

And your address?---Residential or business?

Residential?---150 Dukes Road, Wagga Wagga.

And your occupation?---Agribusiness consultant or wholefarm management consultant.

Thank you. Now, you have a bundle of documents in front of you, and I just want to get you to identify them one by one. Firstly, do you have a document headed Independent Expert Witness Report, dated August 2013?---Yes.

And if you go through to page 18. Is that your signature?---It is.

And also on paragraph 7 and 11 - 12, I'm sorry. 11 and 12. Yes. And are the contents of that report true and correct?---Yes.

And do they - does it accurately record your opinion?---Yes.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Very well. The second - Supplemental Two independent expert report of Mr McInerney of January 2014, with the excisions noted on the transcript, will be exhibit 13C.

EXHIBIT 13C Plaintiffs
Second supplementary independent expert report of Mr McInerney, dated January 2014.

NIALL, MR: The next document in your bundle is - might be slightly out of sequence to mine. If you just identify it, Mr McInerney?---In the appendices there's some copies of some trial results. Are you referring to the spreadsheet that I prepared, or - - -

No. What's the - is there some trial results?---Yes.

Perhaps identify those?---They're national variety trial results, conducted on behalf of the Grains Research and Development Corporation, and they're mid-season triazine tolerant and Roundup-Ready trial results from the Kojonup area.

And are they the national variety trial reports you referred to in references 4 to your supplemental 2?---They are.

Does your Honour have those?

KENNETH MARTIN J: No, I don't.

NIALL, MR: We will endeavour to get - - -

KENNETH MARTIN J: It's not on the copy I received. I'm not sure if it was on the original. No. It's not.

NIALL, MR: It may not be, your Honour. I will endeavour to provide those to your Honour over the luncheon adjournment.

KENNETH MARTIN J: All right. Well, they can augment exhibit 13C in due course.

NIALL, MR: Yes. Thank you, your Honour. The next document, Mr McInerney, is that a spreadsheet?---Yes.

And is that - - -?---Yes. Sorry.

- - - headed Worked Example of WAG Seed Bank Rundown?---Yes.

Could you identify that document, please?---It was prepared in my office on Monday.

And what does it show?---It shows a sequence of oats - lupins and oats where the oats are cut for hay, and various integrated weed management tactics are used to ensure the rundown of herbicide resistant - - -

I tender that, if your Honour - - -?--- - - - rye grass seeds.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Very well. The document entitled Worked Example of WAG Seed Bank Rundown via Oats/Lupins/Oats, Sequence Over Three Years, prepared by Mr McInerney, will be exhibit 13D.

EXHIBIT 13D Plaintiffs
document entitled Worked Example of WAG Seed Bank Rundown via Oats/Lupins/Oats, Sequence Over Three Years, prepared by Mr McInerney.

NIALL, MR: Now, next you should have some reports of conferrals that you had with other experts to be called. Do you have that, Mr McInerney?---Yes. The - - -

What's the first one you have?---The first one is with Dr Patrick Rudelsheim.

Does your Honour have these?

KENNETH MARTIN J: Just give me a moment.

NIALL, MR: I beg your Honour's pardon.

KENNETH MARTIN J: I think I do. Yes. 29 January 2014?

NIALL, MR: Which one did your Honour have?

KENNETH MARTIN J: Joint Memorandum of Dr Patrick Rudelsheim and Mr Peter McInerney, 29 January 2014. That's the first one. Yes. And I have Joint Memorandum of Mr McInerney and Dr Preston of 30 January 2014.

NIALL, MR: And also one of Mr McInerney and Professor Powles.

KENNETH MARTIN J: I do, of 10 February 2014.

NIALL, MR: The dates might be - does your Honour have a filing date?

KENNETH MARTIN J: Yes. Beg your pardon. I've actually - yes - that's what I was referring to.

NIALL, MR: I beg your Honour's pardon. So - - -

KENNETH MARTIN J: More correctly, the McInerney/Powles conferral memorandum given to me looks to be signed by Mr McInerney under the date 27 January 2014. It has got an attachment entitled Efficacy of Weed Control Practices for Resistance Management In a Nutshell.

NIALL, MR: Yes. And then the experts conferral of McInerney and Rudelsheim would be January 28.

KENNETH MARTIN J: Just check that. That's right.

NIALL, MR: And the Preston/McInerney is undated, I think, your Honour, but signed by both witnesses.

KENNETH MARTIN J: Yes.

NIALL, MR: Now, do you have copies of those three documents, that is, the - - -?---Yes, I do.

- - - reports, respectively, of Professor Powles, Professor Rudelsheim and Professor McInerney, and your conference with those gentlemen?---Sorry. You just referred to everybody as Professor, but only - only Stephen Powles is a professor.

All right. But you have conferral statement in relation to - - -?---I have copies. Yes.

I tender those, if your Honour pleases.

KENNETH MARTIN J: No objection, Ms Cahill?

CAHILL, MS: No, your Honour.

KENNETH MARTIN J: All right. The expert joint memorandum of conferral, involving, in each instance, Mr McInerney, will be, respectively, exhibits 14A as regards Dr Patrick Rudelsheim and the conferral between those experts of 28 January; exhibit 14B in respect of the conferral between Mr McInerney and Dr Preston, undated, but with a covering page, 30 January 2014; and exhibit 14C in respect of the joint memoranda of the conferral between Mr McInerney and Professor Powles of 27 January 2014, with the two attachments to that document.

EXHIBIT 14A Plaintiffs DATE 28/01/2014
Joint memorandum of conferral between
Dr Patrick Rudelsheim and Mr McInerney.

EXHIBIT 14B Plaintiffs DATE 30/01/2014
Joint memorandum of conferral between
Dr Preston and Mr McInerney.

EXHIBIT 14C Plaintiffs DATE 27/01/2014
Joint memorandum of conferral between
Professor Powles and Mr McInerney, with
two attachments.

NIALL, MR: If your Honour please, that's the evidence-in-chief. If you just wait there, Mr McInerney.

KENNETH MARTIN J: Yes. Thank you. Cross-examination.

CAHILL, MS: If it please, your Honour. Mr McInerney, you have a Bachelor degree in Applied Science with a major in Agriculture, do you?---Yes.

And you obtained that from Charles Sturt University in Wagga Wagga?---Yes.

Do you have any post graduate qualifications?---No master or PhD, no.

And have you worked mainly as an agronomist in your career?---It's probably better to describe as a whole farm management consultant where we take a holistic view of the farm business and assist the client to get where they have got to go.

How does that differ from the work of an agronomist?---An agronomist generally only looks at crops and pastures and has no other input into the business.

So what are the additional aspects of the business that you look at?---Soil management - or, sorry, soil agronomy, financial assistance, succession planning, business planning, goal setting, performance analysis, both physical and financial.

Thank you. And do you have a particular interest or experience in weed management and the topic of herbicide resistance in weeds?---Yes. I think you could say that.

KENNETH MARTIN J: Sorry, that was weed management.

CAHILL, MS: Yes. The consultancy that you now operate, that's part of this - that's essentially providing this holistic service that you have just described?---Yes. Integrated weed management is obviously part of that, yes.

I understand. And you provide your consultancy service in the Wagga Wagga area, do you?---Mostly. We have done work in Victoria, South Australia and Western Australia as well.

But it's mainly in Wagga Wagga?---Yes, mostly.

The Wagga Wagga environs and that's where you grew up, isn't it?---No, it's not. No, I grew up further north in central New South Wales at a place called Forbes, which is about 200 and something kilometres away, 250 ks.

Now, you mentioned you have done work elsewhere in Australia. Have you done work in the Great Southern?---I would have said so, yes.

And whereabouts?---I have been on farms in Katanning and then I have also been down through the Esperance region as well.

They wheat farms, were they?---They were mixed farms, yes, and wheat was grown on them.

Wheat and sheep?---Yes, and canola.

Right?---And pastures, and barley and lupin.

And have you ever been to Kojonup?---I have been through Kojonup.

You haven't stopped there though?---No, sorry, yes. I have - I have been to Kojonup.

For work?---No.

And you haven't inspected either Mr Marsh or Mr Baxter's farm, have you?---No. I stated that in my report.

Now, Wagga Wagga is in the Riverina agricultural region, is it?---Yes. The eastern Riverina, I guess.

Is that quite a diverse area agriculturally?---Yes.

There's some canola grown there, isn't there?---Yes.

Just a little though, relative to other agricultural products? A lot?---Quite a bit.

Not as much as Western Australia though, I don't think, is that right?---In terms of total acreage, no.

Right. It's wine district as well, is it? It grows grapes?---Yes, there are a number of wineries now, both east and west of Wagga.

Fruit?---Most of the fruit is west of Wagga in the Griffith area.

Sheep?---Sheep, yes.

Rice?---West of Wagga, in the Murrumbidgee and Coleambally and Murray Irrigation Areas.

And so do you consult only - sorry, I have put that badly. Is most of your consulting work in the area of canola production or is it more diverse than that?---It's more diverse than that. Canola is only a single crop in most of the enterprises we work with.

All right. Thank you. Now, do you have your first report there? That's the one - you probably don't have exhibit numbers on the top of yours yet, the one of August 2013. And if you could go to page 11 please. Now, this is the point, Mr McInerney, isn't it, where you start discussing glyphosate, really, Roundup Ready glyphosate - it's a herbicide - and you make the point, don't you, that it is a very important herbicide that people in the agricultural sector have. You would agree with that?---Yes.

And your point is it's so important that we shouldn't abuse it - that's your essential point, isn't it?---I don't think we should abuse any herbicide.

This one in particular because it is so special, isn't that right?---It is, yes.

You would agree with what I just put to you?---Yes.

And when I say abuse I mean you understand me to mean to use it exclusively or overuse it in a way that might accelerate the development of resistance to glyphosate in the weeds that it's being used to control?---In addition to that I would say to comply with the label requirements.

I beg your pardon?---To be used in compliance with the label requirements.

Yes, thank you?---For herbicide.

The resistance point, though, is a key one, isn't it?---Yes.

If not the key issue?---Sorry?

The most important concern the agricultural sector has about glyphosate is that weeds will become resistant to it more quickly than desired?---I'm struggling with the use of the word, the most important issue. But, anyway, look, it's critical issue. There you are.

Thank you. Resistance to glyphosate is happening already?---Yes, it is.

In agriculture, isn't it?---Yes.

And it will continue to happen, won't it?---If we adopt the right kind of integrated weed management packages, it doesn't need to get any worse than it already is.

Isn't it the case that essentially, whatever method of weed management one uses, even a non-herbicidal methods, mechanical methods and the like, the evolution of plants is such that they will adapt to become resistant to any method that is dominant over a particular period of time?---If there's not enough variety in the kinds of selection pressure we apply to the weeds, you might be right, however there are clear situations where we don't have resistance developing to glyphosate.

So your position is that you certainly think it's possible to stop completely the development of resistance to glyphosate, is that right?---Yes.

And even - can I put this to you, and even if we weren't successful in achieving that, by the use of a more diverse approach to weed management, we can, at the very least,

slow down significantly the rate at which glyphosate -
weeds become resistant to - - -?---Yes, I would - - -

- - - glyphosate?--- - - - say there's absolutely no
question about that.

And that's of benefit, of course, isn't it, to the
agricultural sector because the slower the resistance
develops, the longer everybody has to use this as one of
the means of weed management?---Yes.

Thank you. We have some inbuilt help in that objective,
don't we, because glyphosate belongs to group M - the group
M of herbicides, which has the lowest risk of developing
resistance? Would you agree with that?---It has got one
the rarer mutations, yes.

Thank you. But we can't rely on that alone; you would
agree with that?---No, the more selection pressure you
apply, the fast you run out of it.

And from your perspective there's not enough timely action
by farmers generally in recognising herbicide-resistant
issues in their operations; is that a fair comment?---Yes,
I think so.

And you see that, the lack of enough timely action amongst
farmers generally, as something that's an increasing
problem?---A lot of farmers are running out of options and
they are running out of time.

So do you see it as an increasing problem that farmers are
not taking timely action to recognise the resistance issue
in their operations?---On a lot of farms the problem is
already there. It is just a matter of how soon it becomes
unmanageable. So they need to - they need to do more than
use herbicides.

Yes, but your point is this, isn't it, and I think you have
made this point in your report, that there's not enough
farmers taking timely action to recognise that they have
got a resistance problem? Would you like me to take you to
what I'm referring to? Page 5 of your first report.
Discussing resistance there. Let me just see - - -?---Yes.

- - - if I can find where I was referring to. Sorry, I
have it. Just struggling to pick it up. I will have to
come back to that I'm sorry. You have experienced - - -

KENNETH MARTIN J: It's under the box.

CAHILL, MS: I'm sorry?

KENNETH MARTIN J: Under the box.

CAHILL, MS: Thank you, your Honour. It's not quite what I was referring to, but I will come back to exactly what I was intending to refer to. You have experienced this issue, haven't you, in your work in New South Wales of farmers not getting on top of their herbicide resistance issues - - -?---Yes.

- - - quickly enough?---Yes.

Do you see that as an increasing problem in the work that you are doing?---Yes.

Thank you. You think that - sorry, I put that badly. Your opinion is that weed testing is a very important thing to do when resistance, herbicide resistance, is suspected?---Absolutely, yes.

And you certainly advise your clients to do that?---Yes, we do.

Would you agree though that, notwithstanding the desirability of doing that, lots of farmers don't do testing that you would recommend they do?---In our office we have a saying that we give advice and our clients make decisions. We don't always agree with those decisions.

You find it disappointing, don't you, that so many farmers don't test when you think they should?---Yes.

Would you agree that rather than doing what you regard as preferable, which is testing their weeds for herbicide resistance, a lot of farmers simply rely on observational - conclusions they draw from observations in the paddock? They spray a paddock out. They are sure that they have sprayed weeds. And they come back, nothing has happened and they detect that - they deduce from that that there's resistance?---That's usually the first way you would see it.

Yes?---Is that you would have what you think is a failure of the herbicide.

Yes. Now your central point I think in your first report is this, isn't it, Mr McInerney, that in terms of insuring the longevity of herbicides, particularly glyphosate, and their effectiveness, we need to have a diverse approach to weed management?---Yes.

We can't rely on just the one thing?---Yes.

And in particular we can't just rely on herbicides?---That's correct, yes.

Now have you got your - if you have your supplementary report there - page 3. Now this was a report, a supplementary report, that you prepared after you had read Mr Baxter's witness statement that he produced in August, September last year; is that right?---Yes.

Yes. And you mention here - do you see under your section 3.1 with the italics, and then it has got MB para 21(1)(ii)?---Yes.

And that's a reference to Mr Baxter's witness statement, isn't it?---Yes, it is.

Yes. And you say - you talk about him not attempting to control the rye grass in his pasture paddocks, which he dedicated to his sheep. And then you go on to comment, don't you, that he is a farmer who has his cropping paddocks for cropping, and his pasture paddocks for his sheep, and they don't - he doesn't rotate the sheep onto crop or crop into pasture?---From the information I had available to me, it seemed that he had an area for pasture and an area for crop, and he didn't fallow paddocks and rotate pastures around into the crops.

Yes. And is the point that you are making in the second sentence of that second paragraph that if you did put sheep on a cropped area, then there would be potential for the sheep to have eaten the rye grass in the pasture and then deposit the seeds, through their faeces, into the - into the crop paddock?---Yes, there's some research that shows that approximately three per cent of rye grass seeds fed to sheep will pass, in tact, through their system.

Yes. So if I can come back to your first report - sorry, just before we go there, so that's useful, isn't it, then for managing rye grass in your crop to not put sheep onto it that have been in rye grass?---If you keep the sheep locked up for a few days until all of what they have eaten has passed through their system, then you could put them on the crop residues and there would be no cross-contamination.

I see. But you would have to be careful of that point?---Yes.

That issue. Now if we come back to your first report at page 10, and you are making the point on that page that we have already discussed, aren't you, Mr McInerney, about the need to have diversity in your weed management system not being entirely reliant on herbicides?---Yes.

And then can you see the small roman numeral iii, where you have discussed insufficient diversity of crops within a crop sequence, then you go on to discuss Mr Baxter's paddocks?---Yes.

But you are only discussing two of his paddocks there, aren't you?---Yes.

Did you consider the whole of his crop rotation plan that you were provided?---The paddocks that are referred to here are the ones where he was growing the Roundup-Ready canola.

In 2010?---Yes. That's why it only covers those two paddocks.

I see. I'm sorry, 2013, was it, that you were looking at this or 2010?---There was - I was given his paddock program for an extended period and I think it got right up to his intentions of 2012 or '13.

All right. And these paddocks you selected why?---Because they were the ones that were, supposedly, where he was going to grow Roundup-Ready canola.

In 2013?---I can't tell you without referring to it.

All right. Referring to what?---The paddock plans.

I see, I see. Now, what you're talking about here in relation - can I say, are you critical of his crop rotation in these two paddocks over the years? Do you say that that reflects insufficient diversity for weed management purposes?---Yes.

You would propose times of leaving a paddock in fallow, wouldn't you?---There are a whole lot of things that you can do.

But that's one thing you can do, isn't it?---Yes, it would be one thing you could do. You could leave it out for a year. I don't think I recommend that in our general course of business.

All right. Under (iii) you say:

A more sustainable rotation incorporates diversity and should include a legume phase with a pasture, pulse, or manure crop.

?---Yes.

So you would just be putting a crop in there to plough into the ground. Is that - that's essentially what a manure crop is, isn't it?---Well, a legume based manure crop does a number of things to your farm system: one of which is integrated weed management; another one of which is moisture conservation for the following crop; and the third one is a build-up of nitrogen for your soil. A manure phase can give you up to 300 units of nitrogen per hectare, which is, you know, very valuable in dollar terms.

In the long term?---Yes.

Yes. Not in the short term, of course, because you don't get the income from that - - -?---If you were short of
- - -

Sorry, I will just finish the question. Because you don't get the income from the paddock in that year that you would have if you had planted a crop. That's so, isn't it?---In a manure crop that's the case.

Yes?---However, you could plant a high density legume and cut it for hay.

Yes, and it would be a question of that farmer doing the sums to see whether or not that would be economically - they would be economically better off that year by doing that rather than planting a crop. Would you agree?---Yes, in the narrowest possible sense you're correct.

Yes?---If you're running farm business, you should be looking at the longer term and managing your overall business risk, which is a much longer window.

Well, you need to stay in business too, don't you, Mr McInerney?---Of course you do.

So you have to have an eye on actually getting enough income through the door to stay in business in the long term?---Absolutely.

You would agree?---Absolutely.

So you would accept, wouldn't you, that whilst it might be desirable to have crop rotations of the type you have

described from time to time and in any given situation, the economic realities for a particular farmer might involve them making different decisions?---If they have an appropriate farming system with an appropriate rotational sequence, a short-term decision can be made because of seasonal conditions or financial imperatives. However, if you continue down that pathway of not having the right things in your system, you're going broke anyway.

That's not my question really. The question is this, you can understand a farmer because of different exigencies - the nature of the season, the nature of the season before, there might have been a drought year before or a series of drought years before, their own personal financial circumstances, marital problems leading to divorce, those - all a range of things that might influence why they cannot follow the ideal of putting in a legume phase instead of a crop in rotation in the way in which you suggest?---In the short term, yes.

Thank you. Now, if we go to your first supplementary report on page 4 please. Just can you pick up that paragraph that commences:

Given that Mr Baxter was aware that herbicide resistant Wimmera rye grass was reducing his profitability.

Do you have that?---Yes.

You say you are dismayed that his business was 100 per cent reliant on herbicides to control HIWR in 2010?---Yes.

And that was an assumption that you made, was it?---That was on the information we were provided and some general inquiry we made about whether he had any herbicide resistance testing or whether he did any other practices.

A general inquiry of whom?---Slater & Gordon.

I see. And that's what they told you?---There was no herbicide resistance testing and as far as I'm aware there were no non-herbicide practices involved.

All right. You're aware that he swathed his RR canola crop that year?---Yes.

And that, of course, provides another tool in weed management, particularly for rye grass, doesn't it, because it's a means of cutting the grass before the seeds sets?---It's not 100 per cent effective; that's the issue that you've got to look at.

Well, I don't think you're suggesting that any - - -?---Not on their own, no.

Sorry, if you would just let me finish. Any one of these methods in and of itself is 100 per cent effective or should be used exclusively?---That's correct.

Your position is actually completely the opposite, isn't it, where you say, "Well, you need to use a range of different tools," and this would be one of them, wouldn't it, swathing your rye grass?

KENNETH MARTIN J: To control weeds.

CAHILL, MS: Yes.

NIALL, MR: Swathing rye grass?

CAHILL, MS: Sorry?---Swathing canola.

KENNETH MARTIN J: Swathing - - -

CAHILL, MS: Yes, but the - - -?---Sorry.

- - - rye grass is - - -?---Yes.

Is cut in the process of the swathing?---Yes, though any rye grass that's there is - windrow about that high. Any rye grass heads that are above that at that point in time will be cut and brought into the body of the windrow.

So - - -

KENNETH MARTIN J: Why does that help?---Well, depending on the growth stage of the rye grass, you've - if it's at, say, the early milk stage, where it's all squashy, it will run out of enough moisture to finish filling the seed because it has only got a short amount of stem and the seeds will - obviously, having been cut, can't access soil moisture any more. So how effective it is is all dependent upon the growth stage of the rye grass at the time.

So the earlier you get the rye grass in its cycle before it seeds, the better?---The better off you are, yes.

In terms of controlling it in future?---Yes, yes. The whole idea is to stop accessions to the seed bank.

Yes?---Having windrowed the canola, you can then harvest it and leave a narrow trail and then you can burn that trail

as well and that will cook any - it will cook some of the seeds that were viable.

CAHILL, MS: So, Mr McInerney, you would agree, wouldn't you, that swathing your canola is one method with others that you could use to try to control Wimmera rye grass in a crop paddock?---Yes.

Thank you. And swathing, as a practice, has benefit for that reason?---Amongst others, yes.

Yes, of course, amongst others. You have said something - a little bit about the benefits of swathing in your reports, haven't you?---Yes.

And you agree, don't you, that swathing is the preferred practice when harvesting GM canola?---No. I don't think I said that anywhere.

KENNETH MARTIN J: Harvesting canola generally?---Yes, yes.

CAHILL, MS: I'm sorry, yes?---Yes, sorry - - -

No, no, that's entirely my fault. Swathing is the preferred practice for harvesting canola?---In terms of integrated weed management, yes.

Yes, but it has - were you speaking more generally though, that it's - - -?---Yes, look, it has other benefits it brings forward: the timing of harvest, the evenness of maturity of your crop, and it actually helps with harvest logistics and bringing your canola maturity forward so you can harvest it and then move on to your other crops.

That's right, isn't it, because you don't - you know, the problem with - you've got a farm of canola and it all matures at the same time, if you're going to direct harvest, the problem is being able to do it all at once?---And it also leaves your other crops more exposed to weather events - - -

Yes?--- - - - for longer periods.

And the more your crop is exposed and the more weather events, is it the case that there's more potential for pod shattering?---Windrowing started in canola mostly because of the uneven ripening of the Brassica napus species. So by windrowing it and cutting the moisture supply, you're actually (indistinct) the maturity, if you like. So on one

hand it's true that it matures unevenly and you might get more pod shatter if you're direct heading; on the other hand, all of our trials are direct headed as well so over time we have sort of self-selected for a more shattery type of canola.

It's still an issue to an extent though, is it, pod shattering, through direct heading?---Pod shattering is an issue anyway, yes.

Yes. But one can still justify swathing in preference to direct heading on that basis amongst others. Would you agree?---The decision to swathe or not is usually made by the farmer based on their overall practices and the yield potential of the crop and the cost involved. In my report, I make reference to a sort of a - you know, the kind of size of crop you can handle with a machine without undue risk of shattering. And there's - you know, there's costs in - you know, I'm - you were talking before about economics. It costs about 30 bucks a hectare to windrow. You also need to pickup front, which is another piece of equipment. So a lot of farmers will make a decision based on, you know, what suits their system.

Understood. But in terms of weed management, which is I think where you were focusing your answer initially, so that we're not reliant exclusively on herbicides and become overly reliant on glyphosate, you would recommend swathing over direct harvesting in a weed management or Wimmera rye grass management context, wouldn't you?---With my client base, yes.

Thank you. Apart from swathing, the cultivating of or the production of RR canola is also another useful tool in managing Wimmera rye grass, isn't it?---If used strategically.

Exactly. I mean, you wouldn't want to use it exclusively. You wouldn't recommend that, would you?---Absolutely not.

But as a strategic tool, one of several in your armoury, you would recommend it, wouldn't you?---Yes, I have recommended it.

To your clients?---To one, yes.

All right. And obviously the most likely candidate for such a recommendation would be a farmer who has a particular paddock or number of paddocks that have a Wimmera rye grass infestation, which is resistant to herbicides other than glyphosate?---Yes.

Thank you. Just bear with me for a moment please, Mr McInerney. And you make the point, don't you, that you can also achieve these sorts of - you can achieve weed management with - of Wimmera rye grass without using RR canola?---Yes.

And that's an effective - an equally effective means?---It's a better means because you're not putting glyphosate under as much pressure.

But that doesn't detract from the fact that as a strategic tool, the production of RR or the cultivation of RR canola is nevertheless something that is an effective means, in tandem with other tools, to manage Wimmera rye grass problems?---Yes.

And for - on a case-by-case basis, it may be, as you have done in the case of recommending to your client, the best choice for a farmer in a particular season, if they're deploying other tools as well?---There's a really good case study in Western Australia on the Australian Glyphosate Sustainability website, where a farmer elected not to use glyphosate tolerant canola because he already had developing resistance. So in conjunction with things like herbicide resistance testing then, yes, I think your point is fair.

You still have a concern, don't you, that the use of RR canola could possibly hasten the development of Roundup-Ready resistant rye grass?---If you don't know the resistance profile of the population you have got and you use Roundup-Ready canola, then it is probable that you will hasten the resistance of glyphosate resistant - sorry, you will hasten the onset of glyphosate resistant rye grass. It's certainly something we have seen in New South Wales, where we had - we've started growing commercial crops in 2008. So we've sort of had a little longer time to - - -

KENNETH MARTIN J: Commercial GM canola crops?---Commercial GM canola crops in 2008, yes.

CAHILL, MS: If you just go to page 6 of your second supplementary statement, Mr McInerney. At the top there of page 6, you're responding to Dr Rudelsheim's point about - where he discusses increased herbicide use as a consequence of the production of Roundup-Ready canola?---Yes.

And your comment is this, is that Roundup-Ready canola is actually using glyphosate in a different way to the way it has been used in - well, has been used historically. That's your point, isn't it?---Yes. The change in use

pattern is that Roundup-Ready canola enables you to use glyphosate as opposed to emergent spray. And traditionally it has been used as a knockdown spray because it has been toxic to all of our crops.

And you make the point that because it's being used in this different way, it's not in itself likely to lead to excessive use of glyphosate in the national industry?---The guidelines surrounding the use of Roundup-Ready canola insist that you don't use glyphosate as your knockdown spray the following season.

Yes?---So provided you do it properly, it shouldn't increase the quantity of glyphosate used.

And you're aware, aren't you, that the licensor of Roundup-Ready canola has a set of resistance management principles that they publish and provide to growers as to practices to adopt to minimise the resistance?---Yes, I'm aware of that. Yes.

And the reason you're smiling is why?---I sort of had a flashback to a Harry Potter movie where you didn't mention Monsanto, I don't think, so I've just - might have taken you out of context.

KENNETH MARTIN J: So you understood licensor to be Monsanto?---Well, Monsanto were the creators of the product, initially New Farm.

Glyphosate you mean?---Yes. Sorry, glyphosate, yes, branded as Roundup-Ready. Yes.

All right.

CAHILL, MS: All right. Now - - -?---The other thing I might have been smiling about was the set of guidelines that aren't necessarily supervised very well in the field.

So what's your point there, that farmers don't follow them?---Can I have my bag from wherever it went? No, all right. Okay. The guidelines are not necessarily followed as closely as you might like in some instances.

In your experience?---It's a bit like speed limits on the highway.

You wouldn't be able to say what Mr Baxter's practices are though?---Certainly not.

Now, do you have your - I'm sorry to flip you between these
- - -?---You're all right.

- - - but it's just the way it's going. If you can come
back to that first - - -?---Actually, in terms of
Mr Baxter's things - - -

KENNETH MARTIN J: Just wait for a question if you
wouldn't mind?---Sorry, yes.

CAHILL, MS: The first supplementary report at page 9.
Now down the bottom at 3.3(b), have you got that? Page 9
of your - - -?---First report.

First report.

KENNETH MARTIN J: December 2012?---The first.

2013, is that - - -?---First supplementary report.

CAHILL, MS: That's it, sorry.

KENNETH MARTIN J: December 2013?---3.3(b).

CAHILL, MS: Yes. This is just reiterating that point we
have just discussed, isn't it? You agree with Dr Preston,
largely, about the - Professor Powers, I beg your pardon.
You agree largely with him about the factors influencing an
individual farmer about whether or not to grow RR
canola?---Yes.

And you reiterate that point - or maybe this is the first
time you made it, that RR canola has a unique strategic
role in combating Wimmera rye grass?---I think that - that
particular point, I think, was made in my very first
report. This is the second report. But either way - - -

But where you - is it where you differ from Professor
Powers that you say, well, that is the compelling reason to
plant RR canola and, in your view, there are no other
reasons?---The only reason to use Roundup-Ready canola is
as a strategic tool in combating resistance. There's no
economic advantage in it.

And you say - sorry, I withdraw that. Your position is
that there is no satisfactory evidence that growing GM
canola, particularly RR canola, gives uniformly and
consistently higher yields to the farmer?---There is no
objective evidence of that, no.

You are quite sceptical when people say that the yields are better. Is that a fair way to put it?---Well, in the National Variety Trials they don't show any - any advantage over the other types of canola.

Can I just ask you about the National Variety Trials. You are aware, aren't you, that when those trials are conducted there is a selection of sites where there are no weeds, they choose sites without weeds, don't they, for the National Variety Trials?---Yes, they want to allow the crops to get as close to their genetic potential as they can.

The sites they select have no weeds, they have no diseases and there's no herbicide residue problems, are there?---You would be looking for a low weed population. To say there's no weeds is probably an exaggeration and you would be looking for a trail site that, all other things being equal, will allow those varieties to express their true genetic potential as well as the seasonal conditions allow.

So would you be open minded to the possibility that in a field where - a paddock where there is a big Wimmera rye grass problem for a farmer, that they would experience better yields using RR canola than another type of canola because of the ability to use glyphosate to control the rye grass?---Yes. I think I have inferred that pretty strongly by saying there's no other reason to grow it.

But the yields, one can certainly envisage that in a paddock of that type, with a weed problem, the yields for the farmer would be better using RR canola than a canola variety that doesn't permit the use of glyphosate?---You're not talking about the genetic potential in that situation, you are talking about the paddock situation and that's

- - -

Completely, yes?--- - - - precisely the reason why the NVT trials are conducted in what, for all other intents and purposes, might be regarded as a level playing field.

I see. So what you are saying is that in a level playing field, there's no evidence of a better yield but in a particular application for which it's intended, which is where there's a weed issue that needs to be managed, it's quite likely that the yields will be better?---It's not intended to be used in a paddock that has been overrun by weeds because the surest way of creating resistance to a particular product is to use it in high selection pressure, which is where you have got lots of weeds. So it's not right to say it's intended for use in that - in that - in

that situation. That may be how it ends up being used, but that's also why we end up with glyphosate resistance.

Sorry, I put that badly then. You would say it's best used as a strategic tool in weed management generally?---Yes. Use it on a paddock once to get - to get - to get a bit of a head start and then move onto other techniques.

Yes. But you might come back there and use it again or you might use it in a different paddock?---You would certainly use it as part of your rotation. The rotation, obviously, is going around your farm.

Yes. From time to time, but you wouldn't put it in the same paddock year after year?---You shouldn't, no.

No. I don't think you even can, can you? I think it's - the licence conditions don't say that - - -?---It certainly doesn't fit the licensing requirements.

KENNETH MARTIN J: You mean application of Roundup.

CAHILL, MS: No, the planting of - - -

KENNETH MARTIN J: The planting of GM?---Continuous planting of Roundup Ready.

CAHILL, MS: Canola?---In the same field.

Season after season. Is that right, Mr McInerney?---Yes, that's right. Yes. You would also run into disease problems.

KENNETH MARTIN J: I see the time, Ms Cahill.

CAHILL, MS: Yes, I can finish there for the moment, your Honour, and I won't be very long with Mr McInerney after, probably half an hour, 45 minutes at the most.

KENNETH MARTIN J: All right. That's helpful. Thank you for that. All right. Mr McInerney, we will need you back here after lunch at 2.15 pm. You are in cross-examination so please don't discuss the case with anybody in that period. All right. Adjourn till 2.15 pm.

(LUNCHEON ADJOURNMENT)

KENNETH MARTIN J: Please be seated. Ms Cahill.

CAHILL, MS: If it please your Honour. Now, Mr McInerney, can you please open up your first supplemental report at page 10. Just at 3.3(c) there, you're answering a particular question, essentially to respond to something that Professor Powles was talking about, and you're discussing there the interaction between rainfall and a break in the season, and sewing canola crops, aren't you?---Yes.

Now, in the second paragraph, is the point that you're making this: if, by the end of April, the soil is still dry, there haven't been any significant rains, to - so RR canola than some other type of canola can be a convenient choice, because if you - you can then dry sew, and if it rains later and weeds emerge, you can spray them with the glyphosate?---Yes.

Which is an option that wouldn't be open to you if you were using a canola variety that wasn't resistant to glyphosate? Yes?---No. That's not quite right. You could dry sew TT canola and apply the atrazine later, when it rained. The issue you would confront with that is, if you applied - if you apply the full rate of triazine herbicide, re-sewing later would be problematic because it would be toxic to something like barley. So you might have spent all your pennies at once. But if you dry - - -

KENNETH MARTIN J: But you couldn't use glyphosate if you dry seeded?---Sorry?

You could or you couldn't use glyphosate if you dry seeded?---If you chose to grow Roundup-Ready canola, you would be able to put glyphosate on later, when the crop and the weeds came up together.

Yes. If it's non-GM canola?---If it's non-GM canola of, say, the triazine tolerant type, you can also dry sew it. Your options would be a little narrowed in terms of weed control later if the season - like last year, for example, it started raining in, say, June.

(indistinct) late season?---If it's a late season. So if it was then - if you then decided it was too late for canola but you had already put the triazine on, you couldn't switch to something like barley, whereas if you went with the Roundup-Ready type, you could abandon your sewing and switch to barley when it rained.

CAHILL, MS: Thank you, Mr McInerney. And does that mean then that you might, in the lead up to sewing, a farmer might have an idea about what the best choice is for his

crop that year, whether it's a RR canola crop or some other - let's say it's some other crop, a canola variety - but then because of the way in which the season unfolds, in particular late starting rains, it would - it could be a good choice to move to RR canola?---You would - at that late stage you would find it difficult to get Roundup-Ready seed and licensing in place - - -

Right?--- - - - unless you already had it in place. The other thing is that your paddock setup should be starting to occur several years before, so the choice - the flexibility in a given season is not really about what you do on the break or you don't do on the break, as such.

All right. Do you know when the traditional break in the season is in Kojonup?---Late April.

Not in the second week of May?---I wouldn't have said so, no.

All right. So it's fairly finely balanced then, is it, whether - - -?---Yes.

- - - whether you're going to be looking at dry sewing or not; it's - - -?---No. The seasonal break in Western Australia is a fair bit more reliable than other places.

Right. Now, we discussed before lunch the benefit that you had identified in using RR canola as a strategic tool in weed management and the benefit of swathing as a tool in weed management, and you identified some other benefits of swathing as well, didn't you?---Yes.

Now, in terms of Mr Baxter and what you've said about his farm and his farm management practices in your reports, is this the position: you're critical of him for not having tested his weeds for herbicide resistance, is that right?---Yes. That would have been a better practice.

KENNETH MARTIN J: When?---He - sorry. What I would regard as best practice would be that the first time he had a herbicide failure that wasn't attributable to some sort of environmental condition, he should have been looking for a herbicide resistance test. Ironically enough, the Australian herbicide research initiative is based here in Western Australia, so it's not - I wouldn't have thought it was that difficult to organise. And certainly by the time - somewhere in his witness statement I think he talks about nine paddocks losing about 30 per cent of their yield to weeds. By that stage, at least, I would have thought it prudent to do so.

CAHILL, MS: So he hasn't followed best practice, in your opinion, by not having his weeds tested for herbicide resistance?---No.

But he's certainly not alone, is he - - -?---No. He's got plenty of mates as far as that goes.

- - - in what he's doing. Yes. Now, you're also critical of him for being overly reliant on herbicides in his weed management program. Is that a fair comment?---Yes.

He's also no orphan in that department either. Is that a fair comment?---No. That would be correct. Yes.

So he's - in your view, he's not following best practice in those two ways in relation to weed management?---Yes.

But you don't criticise him for a decision to grow RR canola, do you?---Not in a strategic sense, no.

No. And you don't criticise him for swathing his RR canola, do you?---In the strategic sense, in (indistinct) weed management tool, no.

No. Both of those are tools that are quite reasonable and should be deployed in a strategic way as part of a holistic weed management program for a farm, would you agree?---Sorry. Both, being the growing of Roundup-Ready?

And the swathing?---No. I don't think you need to grow Roundup-Ready if you've got a good strategy.

All right. But it's something that you can use?---Yes. You can use it.

Yes?---It's not essential.

I'm not suggesting it's essential. It's something that is reasonable to use as part of a holistic weed management program?---Yes.

To the extent that you criticise Mr Baxter, it's not because he grows RR canola or swathes that RR canola, it's because he doesn't do other things as well to manage his weeds in a holistic way?---He didn't in 2010, which is what we're talking about. Yes.

Right. But that's the criticism you have of him in 2010?---Yes. Essentially, he doesn't appear to - there's no particular evidence, based on his paddock programs or

his paddock histories, that he has any integrated weed management strategy in place.

All right. And that's where you say he's not following best practice?---Certainly not.

Now, can I take you - if you've still got your first supplementary report, just go back to - I'm sorry. I beg your pardon. Second supplementary report. Page 5, I think it is. Now, just at the top here, Mr McInerney, you're referring to Dr Rudelsheim's reports, aren't you?---Yes.

His report, should I say. Sorry. And you're referring to page 8 of Dr Rudelsheim's report, and you - I think - is this right: you're criticising him for having referenced a source of data in relation to GM canola in Australia?---No. Dr Rudelsheim referenced a paper by two English researchers, named Brookes and Barfoot. And in their paper, they relied upon one grower survey conducted by Monsanto after the 2008 harvest in the Eastern States.

Yes?---And given that that was then published in a peer reviewed article on - I think I used the word "dismayed" there at some stage in this - that - that such information that lacks objectivity and rigor has been used that way.

In what way?---Well, a grower survey isn't exactly objective information.

It was part of a wider set of data, dealing not only with GM canola, but GM modified crops generally, wasn't it?---Brookes Barfoot paper was a review of GM technology applied around the world from 1996 to 2011.

Thank you. And you're focusing in particular upon the GM canola data relevant to Australia?---Yes.

And you're critical of the fact that it passed through a peer review process and published as an academic paper?---Which Dr Rudelsheim then relied on in his report.

So is the criticism of Dr Rudelsheim relying upon a peer reviewed academic paper or the fact that it was peer reviewed and passed as an academic paper to be published as peer reviewed?---It's certainly a criticism of the Brookes and Barfoot people. I suppose, to me, it showed that Dr Rudelsheim wasn't very familiar with genetically modified canola production in Australia, that he - that he relied on that information.

Might the paucity of the data in relation to Australia have reflected the short period of time that canola has been growing in Australia - GM canola has been growing in Australia?---It did. Yes.

Thank you.

KENNETH MARTIN J: Sorry. I can't find the word "dismayed". Where do I see that?

CAHILL, MS: That was a word that Mr McInerney used just then. Is your Honour - - -

KENNETH MARTIN J: No. I thought it was used - I understood the evidence to say it was used in the text, but perhaps I got that wrong.

CAHILL, MS: No. I think Mr McInerney was saying he was dismayed, but shall I get him to clarify that?

KENNETH MARTIN J: If that's convenient.

CAHILL, MS: Yes. Mr McInerney, just to - if you picked up on that exchange between me and his Honour - his Honour and me - - -?---Yes. Look, I think I did use it in the text somewhere.

So you've used the expression that you were dismayed about the content of the peer reviewed academic paper?---I think so. Yes.

All right. You weren't attributing that to - - -?---Here we go. Sorry. "Disturbing". I used the word "disturbing". Bottom of page 8:

There's no scientific rigor in the survey results and
- - -

KENNETH MARTIN J: "More than a little disturbing". Is that the one?---Yes -

Is more than a little disturbing that peer reviewed academic paper quote such a limited reference, which was then relied upon by Dr Rudelsheim.

CAHILL, MS: But you don't know whether there was any other evidence or data that they could rely upon in relation to Australia?---If they had it, they should have used it.

Sorry. That wasn't my question. You didn't know whether they had any other data?---Sorry. To my knowledge, there was no other scientifically accepted data at the time.

Thank you. Now, this page 5 - sorry - if we go over the page. Now, one of the other points that you had issue with Dr Rudelsheim about, was the profitability of using RR canola. Is that a fair summation of the position?---Yes. Yes. That was actually what the Monsanto survey referred to.

All right. Now, is your position that it's simply too early to say whether or not RR canola crops are consistently more profitable than other canola varieties?---At this point in time I think it's pretty clear that they're not more profitable.

All right. So are you saying they're less profitable?---Generally speaking, yes.

All right?---Unless - unless you put it in a paddock where you have very heavy weed pressure.

I see. And that's going back to the national variety trials?---And our experience in the Eastern States. Yes.

Have you had direct experience here of RR canola in the great southern?---No.

It's reasonable though, isn't it, for farmers anywhere in Australia, in a canola growing region, to use RR canola to see whether or not it is more profitable for them?---I have no doubt that that's a reasonable proposition for them to do. But, as I've answered earlier, it should be used in a strategic way so that we don't put glyphosate at risk.

But if a farmer is sitting there, making his decisions about his crop plans going forward over the next few years, he's entitled to take up - he or she is entitled to explore the possibility that a new technology may - that is available on the market, might provide for them, in their particular situation, superior returns to current varieties?---Yes.

And you don't have any quibble with that?---None at all.

So the fact that it might not, in your view, be demonstrated empirically now that generally RR canola is more profitable, it's no reason to suggest that people shouldn't try it out to see whether it is or it isn't for

them?---No, you know, in the context of their licensing agreements and those sorts of things, no, there's no reason they shouldn't use it.

KENNETH MARTIN J: So when you say more profitable are you referring just purely to yield per acre?

CAHILL, MS: No, cost inputs as well.

KENNETH MARTIN J: Cost inputs.

CAHILL, MS: Is that how you understood my question, Mr McInerney?---Yes, I understood your question to mean yield, price, freight differentials for having to segregate as well as inputs like herbicides.

Yes?---The fertilisers would be, broadly speaking, the same.

And you have a different of opinion with Professor - Dr Rudelsheim, I'm sorry, about the cost of herbicide inputs. Is that right?---Dr Rudelsheim was talking, I think, more about the absolute loading of herbicides on the field as in the amount of - - -

I see. It requires less herbicide?---Yes. He was talking - - -

Rather than the cost?---Yes. He was talking about that. And elsewhere it is reported he then references that the overseas experience is that they have run into resistance with glyphosate so they have had to start using the herbicides they used to use.

I see. So this is the point, is it, that Dr Rudelsheim, his position is that there is historically less requirement for herbicides overall when one is using RR canola, is that right?---That's what he's talking about, yes.

Yes. And do you disagree with that?---In the sense that if you use Roundup-Ready canola strategically, or Roundup-Ready cotton strategically, you should have a lower herbicide or pesticide loading on the paddock.

But your point is that we shouldn't just assume that that's always going to be the case because as glyphosate-resistance increases, potentially, that may change the herbicide requirements for an RR canola crop in any particular location?---Yes. Look, there's unpublished research data in Australia at the moment that showed in a paddock survey, that over 50 per cent of the paddocks had

developed in glyphosate resistance and the farmers didn't think there was a problem.

But you have already given some evidence, haven't you, about how you don't see RR canola in terms of its particular application - sorry glyphosate in terms of its particular application in the RR canola context as leading to an increase in glyphosate resistance?---If it is used strategically it could be quite happily fitting into the system - and I keep using the words strategically for exactly that reason.

Yes. Thank you. Page 10 of this second supplemental report. You are responding to Dr Preston's witness statement or report at this stage and in relation to question 1 you have some comments about the survival of the canola seed bank in a paddock. And in the third paragraph, last two sentences, you talk about - in this paragraph you are talking about walking a paddock to look for volunteers - I think you called them rogue plants. By that you mean a volunteer, don't you?---Well, hand roguing is getting used
- - -

Yes, I understand but we have been - - -?---In this context it would mean volunteer Roundup-Ready canola plants.

Thank you. And walking through a paddock and removing the volunteers by hand?---Yes.

And you say that this would need to be carried out at least twice through the growing season?---yes.

And that would be sufficient, would it, if you did it, say, twice and then saw if there was a need to do any more?---Yes.

Yes?---Yes. Now page 11, talking about oat cleaning there?---Yes.

And you disagree with Dr Preston, do you, about the ability to clean oats of canola seed?---Well, Dr - well, Chris is actually talking about serial grain. So he's referring to all serials, not specifically oats.

Right?---I actually asked the question of what was the crop grown for next season, that's how come I knew it was oats.
So - - -

So did you comment on this because you made an assumption that the GM canola seed might have got into Mr Marsh's oats in this year, 2010?---No. I commented on it because

cleaning canola out of oats is a little different to cleaning canola out of wheat and barley, so I was trying to be specific for the purposes of the court.

It can be done though, can't it?---To what standing and by whom is the ultimate question. I actually spoke to - hang on, just hang on a minute. That part of my report has been redacted, I think is the term, where I discuss that. It's on the top of the next page.

Yes, yes, you are right. So - - -?---So am I allow to answer it or - - -

Well, I don't want you to tell me about something you have learnt from somebody else?---Right. Okay.

But this is the question?---Yes.

You can - poppy seeds - sorry canola seeds are about - look a bit like a poppy seed, don't they?---Yes. One to two millimetre, black and round.

And oat seeds are much larger, aren't they?---Oat seeds are, yes.

Yes. And it's possible to sieve canola seeds out of oat seeds, isn't it?---The harvester will do most of that for you - - -

Yes?--- - - - as you go through the paddock.

Yes?---Then you could use a combination of cleaning techniques and I would have thought that as an organic farmer trying to clean Roundup - you know, this is assuming, you know, that this is all true, right. If you got organic oats contaminated with Roundup-Ready canola and you put it across a thing called a gravity table, which is probably about the most sophisticated grain cleaning tool we have got, the rough oats sample might have on it still a small tail or part of the awn, which makes a little tiny hollow pocket and it is possible, conceivable that seed might lodge in that. To me the issue would still be though that you have got a combination of organic and non-organic product mixed together, so it would have to be cleaned, as I understand it, through an organically certified seed cleaning equipment.

All right?---And the question might be then, a commercial one rather than a technical one, of would the - would the organic seed cleaning people want to risk the contamination with non-organic - - -

That's a - - -?--- - - - to try and keep the emotion out of it that might arise.

That's a commercial issue?---I think it might be, yes.

Have you had any experience yourself in relation to conventional canola not being able to be removed sufficiently from oat seed?---To make certified seed - - -

We're not talking about organic here?---Right. Okay. In my personal experience, most of the time, we can clean canola seed from cereals - - -

Yes?--- - - - to an acceptable commercial level.

And what do you call acceptable commercial level?---At 98 per cent, 99 per cent.

Thank you. Thank you. Now, just finally - sorry, and whether or not it's capable of being cleaned to a higher level of purity is a commercial issue?---I'm not sure what the organic certification standards are, so I can't answer at the - - -

I'm not asking you about - - -?---Right. Okay.

- - - organic certification standards. I'm asking you if you were to try and clean it to a higher level of purity, that would be a commercial issue, wouldn't it? Be more expensive?---Yes. Sorry. You would have to - and you would have to take it to a seed cleaning plant. You wouldn't be able to do it with on-farm equipment.

That's right. Professionally. You could have it professionally cleaned?---Yes. But you probably still wouldn't get past 99 per cent.

All right?---They wouldn't certify it beyond about 99 per cent because they wouldn't want to end up in this kind of setting.

I beg your pardon?---They wouldn't want to end up being sued for - for saying they had clued the seed to 100 per cent and then have somebody come along and say, "I found a seed."

It can be tested though, can't it, as to what's in it?---Yes. We have laboratories that are tested - accredited to do that all over Australia.

Thank you. Now, just finally, in the conferral memorandum with Professor Powles, there was a document that you had attached to that, wasn't there?---Yes, there is.

And that's the basis for the document that that calculation, which is exhibit 13D, for Donald. You have used them - - -?---In the spreadsheet - in the spreadsheet - - -

- - - the date from that in the spreadsheet?--- - - - I put together. Yes. Some of it for sure, yes. We also used some information from Dr Bill Roy about seed bank decay.

You and Professor Powles?---Sorry, this is in relation to Professor Powles conferral?

Well, let me just - - -?---Or the preparation of our spreadsheet.

When you say our spreadsheet, who are you referring to?---My spreadsheet.

Right. So let's look at your spreadsheet first?---Right.

Down the bottom you say:

Based on research by Dr Bill Roy.

?---Yes.

And it's compiled by Alister Draper?---It's either Alister or Allison, one or the other.

It says Alister here?---Yes. Thanks, mate.

I think it's Alister. Got that?---Yes.

So are you referring there to the document that was attached to the memorandum of conferral between you and Professor Powles?---Yes, in part, yes.

And what else are you referring to?---The work done by Dr Bill Roy on seed bank decay.

And where does one find that?---I can show you some of it - not in here, but I can show you some of it. Yes.

Well, where did you get it from?---I got it from our herbicide resistance workshop that we developed in the mid 2000s, and I developed that information from information

from Dr Bill Roy and the Australian Herbicide Resistance Initiative, which, at the time, was called the Weed CRC, I think.

Now, the attachment to the memorandum of conferral is a summary document, isn't it, of a much larger document that Mr Draper prepared in 2003 about different weed management techniques?---Yes.

Yes?---Yes. Professor Powles and I agreed this was a reasonably neat summary of most of them.

And you've read that larger document, have you?---Yes. A long time ago.

And it's a document that provides - basically compiles a large set of data from different trials of weed management techniques in various regions, predominantly in Western Australia, but also elsewhere. Is that right?---I think so. Yes.

And none of those trials were in Kojonup, were they?---God, I hate it when witnesses say, "I can't remember." I don't think so, no.

This is the document, isn't it, that you're referring to, that the attachment is a summary of? One for his Honour?---Yes. That's it.

Yes. And this document is just a compilation of field trial results?---Pretty much.

Yes. And what it makes clear at page 6 - I'm sorry - page 5, is that you have to treat this very much as a general guide. Would you agree?---Yes.

It can't have any specific or direct application to any particular site, can it?---Yes, it can.

Only as a general guide, would you agree?---Certainly. It gives you, for example, for seed catching, a most likely effectiveness of 60 per cent of seed and a range of 45 to 75.

Well, can we just have a look at that? Can we just have a look at that? Let's have a look at seed catching on page 6. There's a range of results between 38 per cent and 80 per cent, depending upon the region, the following crop, and so forth - the method of harvesting. You would agree with that?---Yes.

Yes. And if we go over to stubble burning at page 7, in relation to annual rye grass, the percentage kill or removal of weed seeds set, ranges between no significant reduction to 97 per cent, depending upon where you are and other conditions?---And how you go about it. Yes.

Yes. And that's a percentage of removal of weeds seeds set. If we go to page 8, tickle cultivation, we're not talking about percentage of removal of weed seeds set there, are we? We're just talking about the percentage less weeds in the crop?---We're talking about the percentage of weed seeds in the seed bank that we prevented from germinating.

It says, "Percentage of less weeds in the crop," doesn't it?---That's right.

Yes. And in the notes at page 5, they make the point, don't they, that one needs to be alive to what is actually being measured in the different examples; whether it's a reduction of weed seeds set, whether it's a reduction of weeds in crop, and so on. You would agree with that?---Yes. Yes.

Yes. So when we come back to the document that's attached to the memorandum of conferral, the caveats at the bottom of the document are clear about the use that one can make of such data. You accept those limitations, wouldn't you?---Yes.

Nothing further, thank you, your Honour. Sorry, I will tender that - that large document.

KENNETH MARTIN J: Is the table actually found in the large document?

CAHILL, MS: No.

KENNETH MARTIN J: I see. So it's - - -

CAHILL, MS: Well, I couldn't find it.

KENNETH MARTIN J: - - - a further work, analysing that primary source.

CAHILL, MS: Yes.

THE WITNESS: It was a - it was a summary presented or published to give to farmers a quick handout.

KENNETH MARTIN J: Okay. Thanks for that. Yes. Because it effectively is the source for the Efficacy of Weed Control Practices for Resistance Management in a Nutshell table, which is the subject of the joint memorandum, I will make the broader document that has just been cross-examined on, Efficacy of Weed Control Practices for Management of Herbicide Resistance, Annual Rye Grass and Wild Radish, exhibit 14D.

EXHIBIT 14D Respondents
Efficacy of Weed Control Practices for
Management of Herbicide Resistance,
Annual Rye Grass and Wild Radish

KENNETH MARTIN J: Yes. Re-examination, Mr Niall.

NIALL, MR: If your Honour pleases. Mr McInerney, you were asked a series of questions about the use of swathing in the context of weed control, and you were asked whether you would recommend swathing so that the person receiving the recommendation would not be reliant on herbicide treatment, and you responded to that - the question of, "Would you recommend it," "Yes, to my client base." Now, in relation to your client base, does that include any organic farmers?---No.

Do you know whether any of your client base farms are adjacent to organic farmers?---I do know the answer to that, and the answer is no, they're not.

In the event that one of your clients was growing canola next door to an organic farm, would your recommendation in relation to swathing be any different?

CAHILL, MS: Two objections to that. The first one is
- - -

KENNETH MARTIN J: Yes. Please don't answer, Mr McInerney. I'm just going to deal with this.

CAHILL, MS: My friend is leading in a way which is really impermissible in re-examination, in my submission.

KENNETH MARTIN J: Well, I wouldn't uphold an objection based on leading, but what's the second objection?

CAHILL, MS: That that doesn't arise out of cross-examination.

KENNETH MARTIN J: All right. What do you say about that?

NIALL, MR: Well, the proposition that was put to the witness was, "Would you recommend swathing," and he said, to his client base.

KENNETH MARTIN J: Yes.

NIALL, MR: And I'm just testing - - -

KENNETH MARTIN J: And you've clarified that. That's quite clear.

NIALL, MR: Yes. And then I'm putting the further proposition, if the client (indistinct) was different, would the recommendation be the same or different.

KENNETH MARTIN J: As regards swathing a canola crop?

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

KENNETH MARTIN J: A GM canola crop.

NIALL, MR: Yes.

KENNETH MARTIN J: I will allow the question.

NIALL, MR: Perhaps I will just repeat the question?---Please.

If one of your clients was - had a canola crop next door to an organic farm, would that affect, in any way, the advice you gave in relation to swathing?---Yes, it would.

In what way, Mr McInerney?---Can I give an analogy here about herbicides and drift, or not?

Well, just answer the question that I have asked?---Okay. One of my concerns about growing GM canola next to an organic crop is the possibility of contamination, exactly what we're sitting here today for.

And the question I asked was how would that affect the advice that you gave?---Standing crops are less likely to blow over a fence.

Now, you were asked some questions about - a bit later about whether it was reasonable to use Roundup-Ready canola as part of a holistic weed management and your response to that was:

Don't need to grow it if you've got a good strategy.

What do you mean by the concept of good strategy, Mr McInerney?---If you're one of the fortunate people that have encountered herbicide resistance to FOPs and DIMs 10 or 15 years ago and adopted non-herbicide techniques in your rotational system, you don't need to grow GM canola because you don't have that volume of weeds left on your farm any more. Because one of the things about non-herbicide techniques like, you know, hay cutting (indistinct) making (indistinct) an hour of burning of windrows is that they're all about reducing seed numbers. And if you stop accessions to the seed bank, eventually you run the seed bank down to manageable numbers.

And in relation to the material that you've read in relation to Mr Baxter, what do you say about whether or not he had a good strategy for holistic wheat management?---He didn't.

And in what way?---Several of his paddocks had what I would describe as a duoculture of - - -

KENNETH MARTIN J: Sorry, a - - -?---A duoculture. Like instead of a monoculture of wheat, wheat, wheat, wheat, wheat, it was canola, cereal, cereal, and sort of canola again; mostly wheat notes in the cereal phase. And that doesn't allow enough diversity in the system and there's also no evidence that I've seen so far that he used things like chaff carts or windrow burning or hay making or anything else.

NIALL, MR: And given that answer, was there any significance in your view about the suitability or desirability - suitability, I'm sorry, of Mr Baxter growing Roundup-Ready canola?---I would have a pretty strong suspicion that he has fallen into the trap of a lot of other people and he is targeting fairly high wheat numbers with glyphosate.

And what's the consequence of that, Mr McInerney?---Glyphosate resistance.

And then the consequence of that?---You lose one of the most important knockdown herbicides we've got. There's only two groups of knockdown herbicides, the group L and the group M. The consequence of that is things like dust storms like you guy had in Melbourne in 1983.

And is there any consequence for - - -

KENNETH MARTIN J: Sorry, whose guys had in
- - -?---Sorry, Melbourne.

Right?---Famous dust event of the east.

That's quite a distance away?---Yes, I did reference Subiaco Oval in one of my reports though since I'm over here but, yes. I mean, glyphosate and SpraySeed essentially allowed the no-till revolution in Australia 30 years ago, which meant we didn't have to cultivate paddocks any more.

NIALL, MR: And would that, the matters that you have just identified, have any impact on the crop yield?---When we cultivate soil we lose a little bit of moisture; so yes, it does. And not being able to use glyphosate in any capacity would certainly compromise most farming systems in southern Australia, whatever side of the country you're on.

And what effect, if any, would there be for an individual farmer if his or her farm was infested with or affected by glyphosate resistant rye grass?---Their planning would become much more complex and their cropping and livestock system would become more diverse. It would have to enable them to continue in business. Now, they would have to incorporate things like hay cutting and strategic cultivation, and if they didn't have livestock, they would have to use livestock.

When you say use livestock, in what way?---There would be paddocks there that you couldn't crop because of the glyphosate resistant rye grass. Therefore, you would have to utilise that rye grass as feed and it's actually quite high quality forage so - - -

They're the only questions I have, your Honour.

KENNETH MARTIN J: Yes, thank you. I have one question and I will allow counsel on either side to question further if there's anything that arises out of it. This concept of resistance to glyphosate as a herbicide that you speak of, over what period does that resistance phenomenon manifest, a season or seasons or what? How is it measured temporally?---In my reports, the initial research indicated that we could use glyphosates excessively 15 times before we developed a herbicide resistant problem. Your Honour, if you look at page 12 of my initial report there's a graph printed there of the increase in confirmed cases of glyphosate resistant annual rye grass between 1996 and 2012 in Australia. It sources the Australian Glyphosate

Sustainability Working Group and you will no doubt recognise a logarithmic growth curve.

Sorry, just the page again?---Page 11 - sorry, page 12 of my initial report. So in laymen's terms, it has taken off like a rocket. In the bottom right-hand corner of that graph you can see our next problem in some parts of Australia. You can see wheat called great brome just starting to appear in the bottom right-hand corner as being glyphosate resistant. It's pretty hard to beat nature.

But just bringing it back to an individual paddock, can you put a temporal number of years on how long this manifests?---Yes, look, the research basically says if you're just using Roundup along as a knockdown year after year - - -

Yes?--- - - - which is often the case in continuous cropping systems, 15 to 20 applications will start to reveal glyphosate resistance.

15 to 20 applications?---Yes.

All right, thank you. That has answered my question. Anything, Ms Cahill?

CAHILL, MS: No. Thank you, your Honour.

KENNETH MARTIN J: Anything, Mr Niall?

NIALL, MR: Yes, just shortly, your Honour. You've mentioned to his Honour once there's 15 to 20 applications you get - glyphosate resistance manifests. Once it's manifested, how long does it take for it to become a problem?---If at that point in time you immediately rotate herbicides with Paraquat or SpraySeed, you can forestall it, but it is a problem from the time it appears.

That's the only matter I have, your Honour. May the witness be excused.

KENNETH MARTIN J: Yes. All right. Mr McInerney, that completes your evidence. You are now excused from the witness box and you're free to leave the court. Thank you?---Thank you.

(THE WITNESS WITHDREW)

NIALL, MR: If your Honour pleases, the next witness is Ms Gore, Diane Gore.

KENNETH MARTIN J: Any objections we need to resolve - - -

NIALL, MR: There - - -

CAHILL, MS: One - - -

KENNETH MARTIN J: - - - before we deal with her?

CAHILL, MS: Just the one, your Honour.

NIALL, MR: There is, your Honour. Just before - - -

KENNETH MARTIN J: Let me find it if I can. Yes,
Mr Niall.

NIALL, MR: No, your Honour, I will let my learned friend
- - -

CAHILL, MS: It's just paragraph 11, your Honour.

KENNETH MARTIN J: Paragraph 11.

CAHILL, MS: Page 3, small (d) for Donald. The words in
the first two lines:

It was not practically possible to my knowledge to test
large areas of the farm for the presence of GM seed of
plant material.

And we say that that is a conclusion that is
unsubstantiated; alternatively, expert opinion without
qualification or foundation. To clarify, to the extent
that the statement is being relied upon as to the truth of
the statement made there.

KENNETH MARTIN J: This is one of the NASAA inspectors as
I understood it, isn't it?

CAHILL, MS: Yes.

KENNETH MARTIN J: And she conducted her examination -
inspection - - -

CAHILL, MS: She's a certifier.

NIALL, MR: Certifier, your Honour.

KENNETH MARTIN J: As a certifier.

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NIALL, MR: So she doesn't inspect the property but she
acts on the inspection reports and we read that sentence to

explain one of the reasons for her decision, as the prefatory words to the paragraph as a whole make clear, and we make the submission that the witness is able to state the reasons for her decision. So, in a sense, that may well meet my learned friend's difficulty.

KENNETH MARTIN J: Yes. I think there's a factual component to that assertion that seems to me to be relevant for her to qualify her evidence about. To the extent that it needs to be probed in cross-examination, it can be probed, so I will allow that to stand.

NIALL, MR: If your Honour pleases. That's the only matter for your Honour, I think, to deal with in the witness statement, and I call Ms Gore.

KENNETH MARTIN J: All right. If we can have Ms Gore called. And I will hand to your Honour's orderly - your Honour's associate a copy of the statement for the witness.

KENNETH MARTIN J: Yes, Ms Gore, if you wouldn't mind coming forward please to the witness box and being sworn or affirmed, as you choose.

GORE, DIANE LYNETTE sworn:

KENNETH MARTIN J: Yes, Mr Niall.

NIALL, MR: Ms Gore, would you tell his Honour your full name, please?---Diane Lynette Gore.

And your address?---224 Liebelt Road, Biggs Flat, South Australia.

And have you prepared a statement, dated 15 February 2013?---Yes, I have.

And in front of you, do you have a copy of that statement, and, on the fourth page, is that your signature?---Yes, it is.

And in paragraph 1, you identify yourself as working full-time as a certification officer for NASAA?---Correct.

And you currently work for a NASAA or NCO?---No, I do not.

KENNETH MARTIN J: Sorry, you don't? Is that what you said?---No.

our inspection coordinator, and then she notifies the certification officers that it has arrived, and then the documents - associated documents that the inspector may have gathered at the inspection, are put together with that report, ready for the review of that inspection.

And when you conduct a review of an inspection, what documents do you use as part of that review?---We use the inspection reports and any other supplementary documents that the inspector has forwarded. Sometimes there are labels or information about inputs. There's also the exit interview sheet that must be completed at the end of each inspection.

And what happens to the inspection report after a review officer is completed with it?---It is just filed.

I tender the inspection review sheet at 416 through to 419, your Honour.

CAHILL, MS: That might have gone in yesterday, your Honour.

KENNETH MARTIN J: I beg your pardon?

CAHILL, MS: I think it might have gone in yesterday, your Honour.

NIALL, MR: I had it on my list of one of the things that I had to put through to a witness. But in any event - - -

KENNETH MARTIN J: Document 82 in the index is actually 416 to 421.

NIALL, MR: Yes, your Honour. I beg your pardon. 421.

KENNETH MARTIN J: Well, to the extent that it wasn't already there, it is now.

NIALL, MR: If your Honour pleases, that's the evidence-in-chief. If you just wait there, Ms Gore.

KENNETH MARTIN J: Yes. All right. Cross-examination, Ms Cahill.

CAHILL, MS: Thank you, your Honour. Now, Ms Gore, you just mentioned that you left - is it NCO or NASAA that you were working for?---NCO.

Which is a related entity to NASAA?---That's right.

It's the certification arm - - -?---Yes.

Is that the right way to describe it?---Yes, it is.

Now, before you left NCO, who was your supervisor?---That's Sachin Ayachit.

And how long - - -?---That's the certification manager.

Yes?---He came, I think, at August 2012.

And before him?---Was Diana - I've forgotten her surname already - forgotten her surname.

A name that you've forgotten?---(indistinct) - - -

But what's her first - what was her first name?---Diana.
Diana.

All right. And did those people have - did they review the work you did in reviewing a report?---Not necessarily. The person who reviewed our reviews, mostly, was Jan Denham or Phil Rowe.

And why was that? What was Jan Denham's role?---Well, they were overseeing the reviews; they were the overseeing
- - -

And that was Jan Denham and who else?---Phil Rowe.

Thank you.

KENNETH MARTIN J: R-o-e? R-o-w?---R-o-w-e?

R-o-w-e?---Yes.

Okay.

CAHILL, MS: And what was Jan Denham's title, Ms Gore?---Jan has several hats within NASAA/NCO, and for this particular - she would be nominated by the board, perhaps, to be the overseer of the reviews.

And - sorry. And do you know how long she was in that position? For so long as you were there. You
- - -?---Yes. That's right. I can't remember how many years ago, but two years or something ago, the review process changed, where we - every inspection report was reviewed by two review officers.

Yes?---It went to one. But in order for our creditor to be happy, then there had to be an oversight - they had to do 5 per cent reviewing of all the reviews - the oversight person or people.

I see. So can I just make sure that I've understood that. When you - you say there was a change to the system or arrangements about two years ago?---Yes.

So would that be approximately in the first quarter of 2012?---Would have been - it would be more than two.

All right?---Yes. Yes.

So if you just try to think - - -?---I really can't remember.

- - - think back, approximately when that was?---No. It would be probably four years, if I really - - -

Four years?---Yes. It would.

So, obviously you can't remember - - -?---No.

- - - specifically. But if I said, using that four years - about four years - - -?---Yes.

- - - around early 2010; would that sound about right?---Yes. It could be about right.

And the system changed so that there were then two review officers reviewing every report?---There were. Yes.

Yes. So someone at your same level in the organisation, you would review a report with and make a decision, and - about certification, grant renewal or not?---Yes.

And someone - a coordinate or peer of yours would do the same?---That's right.

And then, in addition to that, was it randomly 5 per cent of all reviews would be overseen by somebody like Jan?---That system came in once it was only one reviewer.

I see. So when was that?---Yes. Well that's - that's probably about four years ago when that started. Before that, there were two.

Sorry. I've completely - - -?---Yes.

- - - misunderstood you. I thought the system that came in four years ago required two officers?---No.

No?---No.

So that was before then. Then you moved to one officer?---Yes.

And you have a supervisor who oversees - - -?---That's right.

- - - your role - - -?---Who randomly chooses files to review.

But doesn't necessarily review every one?---No.

I see. Now, Stephanie Goldfinch, is she basically most senior person in NCO?---She was when this decertification happened, yes.

In late 2010?---2010, that's right.

And did her role change?---Stephanie left perhaps in September 2011.

I see. Thank you. And did someone assume her position?---I believe that Diana came, but I think she only came in about February 2012.

And is she still in that position?---No. Diana was only there for three months or so, and then - then she left, and Sachin came in August.

I see. So - - -?---Yes.

- - - Sachin now holds the position that Stephanie previously did?---Well, the structure at NASAA changed. So Stephanie was in charge of certification matters but also the general running of the business, and when she left, they divided it into a general manager and a certification manager.

And so Sachin is the certification manager?---So there were sort of two. Yes.

And then there's a separate person who runs the business side of things?---Yes. When Stephanie left, Sam Ponder was the general manager, and he was there for about 12 months, and now Ben - there's another man there now, Ben - - -

And what's his name?---Ben Coperman.

Thank you. All right. Now, coming back to you, paragraph 4 of your witness statement, you identify there that you weren't - in relation to this particular matter and the Marshes farm, Eagle Rest, you weren't involved in the original decertification decision; you came in after that time, didn't you?---Mmm.

Now, your first involvement in this matter, was that in May 2011? Hard to remember without - - -?---With the request for the exception - for the - - -

Is that your first recollection?---Yes.

All right. Let's go to page 371 in that volume that you've got open, please. Just ask you about - first of all, about this document. Do you recognise it?---Okay. It's obviously there. I don't remember the particular email, but - - -

All right. Now, let me just ask you a more general question. Was it a matter of quality management for NASAA that there was quite a strict regime for recording phone conversations?---Yes. Yes.

And if you took a phone call from a licensee or really anyone else to do with a matter of NASAA business or NCO business; you were required to document that, were you?---That's correct.

Were you required to document it immediately, or within a fairly short time of having had the conversation?---Yes. Well, it's good practice to do that. Yes.

And that's what you normally did?---Yes.

All right. And this was the way in which - an example of the way in which these conversations/phone calls were typically recorded, is that right?---That's right. There's a particular section in the database that is for this.

All right. So you recognise this as that kind of a document?---Yes. That's right. Yes.

And do I understand that you can't remember this particular phone conversation?---No, I can't.

- - - but you can't dispute that you had this conversation, based upon looking at the record?---No. That's right. Yes. That's right.

And you've had an opportunity to read that now?
Yes?---Yes.

Thank you. Do I take it from this phone conversation, as it's recorded here, that you had discussed with Stephanie Goldfinch, after Mr Marsh had made the inquiry, whether he would have to go through pre-certification again?---That's - looks like what's - yes. That looks like what happened.

Do you remember having that discussion with Ms Goldfinch?---No, I don't. No.

All right. Now, it says:

However, the current national standard requires five years.

Was that something, can you say whether you said or Ms Goldfinch said?---That the current national standard requires five years?

Yes?---That's just fact. Yes.

Five years in what way?---That if a crop or - is - has GM and you have that on your property, then it has got to be five years before you can have certification again.

You say that that's what the national standard says?---Yes. That's the NASAA standard as well.

All right. And is it your understanding that both the NASAA standard and the national standard provide that if any GM material has touched the land, then where it has touched, it has got to be five years before that land can be certified again. Is that right?---Yes. Considering, you know, like, the GM contamination, it's a contamination issue. So where it has touched in this case, yes, you would think that it would be five years.

Or must there be volunteers growing for the five year requirement to kick in?---Well, see, the presence of GM on a certified property is prohibited. So whether it's just there or whether it's growing would - is an issue.

Right. So when you say it's prohibited, do you say under the national standard?---Under both standards.

And the NASAA standard. They both, on your understanding, prohibit the presence - - -?---Yes.

- - - of GM. Off the top of your head, can you remember the specific clauses of either standard which provide that?---No, I can't.

Okay. Now, just staying with this phone message, you mentioned the national - sorry, I beg your pardon - there is a reference here to:

However, the current national standard requires five years. He -

presumably Mr Marsh -

asked for a copy of this and a copy of the AS6000. They can be emailed, but please do not otherwise use the email.

Can you explain that last sentence, about, "Please do not otherwise use the email," what that's a reference to?---As far as I remember, Steve had an email address but didn't like it to be out public for everyone to have.

I see?---I don't think that he even wanted it on the - on the NASAA database that's on the - online, sort of like that.

All right. Thank you. Now, can you go to - well, before I go there, when you got to the point where you became involved in decisions about whether to recertify this property, you presumably had to familiarise yourself with the history of - - -?---Yes.

- - - what had happened from the time of November/December 2010, going forward. Did you do that?---Yes.

And did you do that by reference to the previous inspection reports?---Yes.

And any correspondence that was on the NCO file, is that right?---That's right.

And did you discuss the matter with anybody when you first became involved?---It's very likely that I did.

And do you remember who that would have been?---Another certification officer in the first instance, probably Stephanie as well, when Stephanie was there.

Stephanie Goldfinch?---If she was still there at that point, otherwise Deana or whoever was there.

Now, if you go to page 377 please. This is quite hard to follow, so - - -?---Yes.

- - - just bear with me. If you could go down six lines?---Mm.

Do you see Saturday, I think it's 8 October 2011?---Yes.

To Diane Gore?---Yes.

Subject to contamination and derogation?---Mm.

This is, apparently, an email to you from Mr Marsh?---Yes.

Do you remember it?---Yes.

It's the case, isn't it, that you were informed and became aware by this email on or about 8 October 2011, that having searched his paddocks, paddock 11, he had found no canola plants so far?---Mm.

Paddock 12, he had found three GM canola plants so far?---Mm.

And paddock 13, found one GM canola plant in the edge of the bush where sheep have camped?---Mm.

And it goes on, if you - he talks about having to do more searches. And then he says:

Paddock 7, 8, 9 and 10 (paddock 10 had four GM canola plants germinate after the January storms) have not yet been searched. We turned the sheep in on paddock 7 and 8 to try and eat off any GM canola that may have grown and flowering before they set seed. He is going to consider pasture chopping or ploughing in paddocks 9 and 10.

Those were things that you knew about as from 8 October 2011, do you agree?---Yes, I do.

All right. Thank you. And then not long after this do you recall that Claire Coleman went and inspected Eagle Rest and you ultimately - or I will put it differently, not long after she did that inspection, you received her report, didn't you?---That's correct.

And that report, you concede, begins at page 385?---Mm.

Do you recognise it?---Yes, certainly.

And that's the document that you refer to at paragraph 9 of your witness statement, isn't it?---That's right.

Now, you read that report and formed your decision not to recertify based on that and the test results that you refer to at paragraph 10 of your witness statement. Is that - - -?---That's right.

- - - how it goes. And did you discuss your decision with Stephanie Goldfinch before you reached it?---When did I do the review?

Is that something you are able to remember without looking at documents?---No. If Stephanie was still there, certainly I would have discussed it with her, I think.

But you have no recollection of whether you discussed it with her or not?---No, I don't.

Now, if you come to document 416?---Yes.

This is the document Mr Niall just showed you?---Mm.

That's your review sheet, isn't it?---That's right.

And your actual decision wasn't made until 30 March 2012. Is that so?---That's, yes, that's the date that's on the document. That's when I would have done the review.

So that's obviously several months after the inspection, on 24 October - - -?---Mm.

- - - of the previous year? It's normal, isn't it, it's usual practice of NCO for the report to be concluded and the decision communicated to the licensee with - in a matter of about three weeks after the inspection. Would you agree?---I don't think it would be that - that quick. It wasn't that quick and we were behind with our reviewing. We were over - - -

What is the usual timeframe?---We like to have them done within six weeks, the reviews.

Yes. And is that usually achieved?---It hadn't been at this point because we were far behind with our reviewing.

What was the - - -?---Just workload.

- - - the usual delay at this stage?---I can't remember. I cannot remember.

KENNETH MARTIN J: So are we talking about annual reviews or are we talking about someone who is decertified and wants to be reinstated?---I think probably what would have happened, before I had done this official reviewing is that the inspection report would have been read and because the contamination, it had only happened the 12 months before, that is, you know, the recertification wouldn't be considered to be happening within that short timeframe anyway. So although we were behind with the reviews, we would have done a preliminary read of the inspection report.

CAHILL, MS: So is your evidence that NCO wasn't prepared to entertain recertification as at the end of 2011?---Yes.

Under any circumstances?---Well, given the report.

Which report?---We don't make - we don't make decisions without an inspection happening and taking note of what is in the report. The inspectors are our eyes on the ground.

Yes. And that's really where my question is directed, Ms Gore Ms Coleman was sent out to inspect the property. Is that just in relation to paddocks 1 to 6, really, because there was no intention on NCOs part to recertify paddocks 7 to 13.

NIALL, MR: That doesn't fairly reflect the evidence, if that's what - - -

CAHILL, MS: I ask that question.

KENNETH MARTIN J: I think the witness can answer the question in terms of what has been - with the proposition, either agree or disagree with it?---When - when contamination happens onto a certified property, you cannot be recertified as organic within three years. So this was - the inspection happened 12 months after. They can go to, what we call, in conversion if everything is happening okay, after 12 months, but because there had been plants found on there and the tests had shown positive, it's very unlikely that we - and considering the NASAA standard says five years, national standard says five years, for us to make that any shorter term, I don't think NCO would have done that.

CAHILL, MS: You just mentioned three years a moment ago. Did you mean to say - - -?---Well, that's for general contamination issues. This is GM, so therefore the five years comes into play.

So can I be clear about what your understanding was at the time of the standards?---Mm.

Any contamination, as you call it, by something other than GMO material, if that contamination occurred, then in respect of the land that had been contaminated, it would be three years before it could be recertified?---Yes. Dependant on results and - - -

Well, what do you mean, what do you - - -?---Well, if, for instance, there was an over-spray issue.

Yes?---So we would have to have soil tested and the levels would have to be acceptable.

After three years. But it wouldn't matter what the test results said in the first three years, that person - that operator would not be recertified. Is that right?---That's right.

Right. And then when it came to GMO material, your understanding of both the national standard and the NASAA standards was when there was contamination of land with GMO material, it would be a minimum of five years before recertification?---It would be possible going - if everything came up clean.

But that's why I said a minimum?---That's right.

And then once the five years had elapsed, then you would look at whether or not everything was clean as - I think is the word - the other words you just used. Right. So in this case, when you approached the issue of consideration of Mr and Mrs Marsh's certification after the inspection on October 2011, there was no consideration in your mind at all of recertifying or even considering recertification in respect to paddocks 7 to 13?---No, because there were no indications that it could be with the GM that was used.

Well, under the standards you say it couldn't be because it had been contaminated?---That's right.

Is that right?---Is that right.

KENNETH MARTIN J: So when you say no you mean yes, in answer to the question.

CAHILL, MS: Are you confused?---Yes.

Your position is that there was no possibility of recertifying paddocks 7 to 13 in 2011, because they had to

remain decertified for a minimum period of five years; is that right?---That's right, yes.

And that's because of contamination by the presence of GMO; is that right?---Mmm.

And contamination means just the presence. Or it can mean more than that, but it at least means the presence of GM material - - -?---Material.

- - - on the land?---That's right.

Even if it's not growing on the land?---That's right.

And in terms of quantity, it doesn't matter how little GM material is on the land; is that right?---That's right.

So a paddock could be decertified because of the presence of a handful of swathes, or even just one or two; is that right?---I mean - just - if it wasn't this particular ones that had - - -

Yes?--- - - - swathe material everywhere - - -

Yes?--- - - - if it could be shown - and I mean this has happened in overspray situations, where it has been shown that the overspray has only happened 20 metres into the next paddock. You know, so that part of the paddock is decertified.

All right. So you can - - -?---Okay. So - - -

- - - decertify parts of paddocks?---Yes, you can.

That's not an usual concept for you - - -?---No.

- - - at all?---No.

And have you done that yourself in your certifying - - -?---Yes.

- - - experience? And you are aware that other certifiers have done that?---Yes.

But nevertheless, if there's say an overspray of 20 metres, as in your example, then that 20 metres area remains decertified for three years?---That's right.

Right. And the GM contamination, if we are talking about one or two swathes in the corner of a paddock, what you are

contemplating is that the corner of the paddock would be decertified for five years, but the rest would remain certified?---Well, you would have to - we would have to be comfortable knowing that that is the only place that there is an issue.

I see, yes?---Yes.

So if all - - -?---Because with an overspray it's probably easier to know that it isn't another 100 metres inside
- - -

I see?--- - - - rather than when it's windblown.

So if you had an incursion of GM canola blown into a property, and all that could be seen - we are just speaking hypothetically here - was one or two canola swathes in the corner of a paddock, unless NASAA was comfortable that that was the limit of the swathes, you would probably decertify the whole paddock; is that right?

NIALL, MR: I object to the question if the premise of the question says purely hypothetical. Now if the proposition that is being put is that they are the only two swathes in contemplation at all that have arrived on two - on the single paddock, then that's one thing. But - - -

KENNETH MARTIN J: I think that - that's the hypothesis, isn't it?

NIALL, MR: Well, it should be made clear to the witness. Not just looking at that paddock that there are no longer swathes around.

CAHILL, MS: I think the question was fairly put, your Honour. It was the witness who - - -

KENNETH MARTIN J: Well, if that premise wasn't understood, I think it is now.

CAHILL, MS: Yes.

KENNETH MARTIN J: So - - -

CAHILL, MS: But this is - - -

KENNETH MARTIN J: All right. Put it again, Ms Cahill.

CAHILL, MS: Yes.

KENNETH MARTIN J: On your premise.

CAHILL, MS: The - what I just put to you, Ms Gore, a moment ago, was the proposition that entire paddock could be decertified for the presence of one or two canola swathes in the corner. Remember that?---Mmm.

And your response was to say, "Well, in the analogy of an overspray of 20 metres, you can..." - - -?---Mmm. Mmm.

Sorry, let - just let me finish?---Yes, sorry.

"...you can decertify only part of the paddock." Which then led me to the question of canola swathes in a corner of a paddock, and whether you could decertify just the corner of the paddock where those swathes were. You said you would have to be comfortable that there were no other swathes elsewhere?---Right.

Yes?---I mean then there are other matters too, that the area has to be fenced off.

Yes?---Marked. And that sort of thing. So - - -

But this is the position hypothetically, isn't it?---Yes.

There's an incursion of GM canola onto an organic farm?---Mmm.

Certified - NASAA-certified organic farm. But all that can be observed in this hypothetical situation is one or two swathes lying in the corner of a paddock. The question of whether you just decertify the corner or you decertify a greater area depends upon whether you feel comfortable, that's NASAA, that the - as to how confined the GM presence is. Is that right?---Well, it's not only a matter of feeling. There would have to be some - like the inspector would have to agree with that assumption.

Yes?---There's testing done. Or photographs.

Testing of what?---Well, of vegetative matter if that's what we are looking for in what you - - -

Do you mean like swathes for example?---Yes.

Yes. To see whether or not that is GM material?---Yes.

Yes, understood. All right. And so in this explanation in this evidence that you have given, do I take it then that you understand contamination by GMO material to mean just the presence on the land - perhaps something more - but

that's certainly sufficient to constitute contamination in any quantity; is that right?---Yes, it is.

Thank you. And do you say that - sorry, is that your understanding of what the NASAA standard and the National Standard provide?---Well, both of those standards say that there is no tolerance for GM material in an organic system. Full stop.

And that's how you interpret that expression?---And whether it's on a farm or in a processing unit, there can be no GM present.

Okay. And just to be clear, that's how you interpret that statement in the standards - - -?---It is.

- - - to which you have just referred?---Yes.

Yes. All right. Can we come back to your report?---Mmm.

And if you could just explain to me - I'm sorry, if we just go back a second before we get there. Talking about this. The time that it took for your report to be completed after the inspection in October. That's a period of more than five months, isn't it?---Mmm.

And would you say that at the time because of work pressures at NASAA that was a normal period of time?---I can't - I can't remember what we were generally doing.

Did the normal or average length of time between inspection, report, and review, and decision, did that change depending whether it was an application for certification, or whether it was an renewal of certification, or whether it was a decertification, or whether it was a recertification?---In regard to this one, because it was decertified, it would have been higher up the priority than just a normal recertification review, I would think.

All right. What about an annual inspection which discloses the use of a prohibited substance in the previous year? Would the priority in relation to that one be elevated?---When the inspection reports come in, the inspection coordinator reads the inspector's summary at the end, to see whether they raise any issues like that, and she would flat that with the certification officers to put that one further up the chain.

All right. I see?---So we would be told, you know, one like this for instance would be a higher priority than just someone with issues, other issues.

Someone with a clean sheet - - -?---Yes, that's right.

- - - that it's just a straight renewal - - -?---Yes.

- - - with no additional - - -?---That's right.

- - - conditions, or decertification of any stock, or anything like that?---That's right.

I understand. Thank you. Now we will bring you back to your report at 416, and if you could just explain to me first please this material inserted on the right-hand side of the box that says "operator category"?---Yes.

KENNETH MARTIN J: Sorry, which box are we talking about, Ms Cahill?

CAHILL, MS: Do you see the box a third of the way down, Operator Category, your Honour? Page 416.

KENNETH MARTIN J: Yes.

CAHILL, MS: It's the large box in the middle of the page. Operator Category on the left-hand side and then on the right it says, "Producer" - - -

KENNETH MARTIN J: I see.

CAHILL, MS: - - - "stopped due to questions."

KENNETH MARTIN J: Yes.

CAHILL, MS: So it's that part beginning "producers." If you could explain that please, Ms Gore?---I think this is relating to Steve's questions about when he might be recertified and we - this is the review. Okay. We asked the Organic Advisory Board of NASAA whether - - -

So is that what the OAB stands for?---Yes, yes.

That was going to be one of my questions.

KENNETH MARTIN J: Sorry, who is that, the Organic - - -?---Advisory Board. So it's NTOs - Organic Advisory Board. They were - at that point I think there were four members. So when we were doing reviewing or we had

questions from operators about the interpretation of standards, we would ask them for their advice.

CAHILL, MS: I see. And who was on the organic advisory board at this stage?---Yes, I'm pretty sure Jan Denham, Phil Rowe, and then there were two other people and I think Kate Hamer was one and I can't remember the fourth person.

So - - -?---So we would have sent them an email or we - probably most likely, to ask them because Steve hadn't deliberately planted this material or whatever, would the five years be standing because he was asking, you know, when he was going to get his certification back because of, you know, monetary issues, whatever, whatever. And so we had asked them - - -

Okay, and - - -?--- - - - for that. Because usually when we finish a review, if the operator has asked any questions we answered those queries at that point and when the documentation - the recertification documentation is sent to the operator, that those answers are sent there as well.

I see. So just to be clear - - -?---Yes.

Where it says:

Stopped due to questions from Steve not addressed by
OAB -

Does that explain perhaps why it took so long for this review to be finalised?---That could be one of the reasons, yes.

That you were waiting for some advice from the Organic Advisory Board in relation to one or more questions that Steve asked of you. Is that right?---Yes, that's quite likely.

And you needed guidance and clarification from the Organic Advisory Board about those questions Is that right?---That's right.

And one of the questions was whether the minimum five years of decertification in the event of GMO contamination applied to him because the introduction of the GMO material to his property was accidental. Is that a fair way to put it?---Yes, I think so.

Were there any other questions that you put to the Organic Advisory Board?---I can't remember.

And they obviously came back to you at some stage with advice?---Well, it says here 30.3.12 that was addressed. So maybe that's when they replied.

KENNETH MARTIN J: Well, that's the date of your report, isn't it?---That's right. That would be. You know, that's why I could finish it on the day I guess.

CAHILL, MS: And would that advice likely have been in writing?---Likely to be, yes.

And would it likely - - -?---I can't remember whether - I mean, without - because, you know, remember I haven't been there now for seven months and - - -

Yes?---It would be in the system.

And would you - sorry. Maybe if you could just look through your report and tell me if that advice appears in your report at all?---30 March. In the information to client section on page 419, in section 4 there it says:

Following your next inspection, a reconsideration of the certification status of each of your paddocks will take place.

That could have been the advice we were given - - -

I see?---That at this point no recertification but - - -

So is it a fair - sorry. Is your evidence this then, that as far as you can recall, as at the date that you completed this report, it remained your understanding, with the assistance of what you had been told by the Organic Advisory Board, that Mr and Mrs Marsh remained under the restriction of a minimum of five years of decertification of paddocks 7 to 13 because of the presence of GMO material?---Yes, it is.

Now, it didn't matter, did it, whether or not or to what extent GMO material was germinating on Eagle Rest at this stage? Is that irrelevant given the five year rule?---I would say yes.

Thank you. And if we go to pages 386 and 387 of Ms Coleman's report, which you would have read. Just tell me if you would like to take a moment to just read through the typed material at the bottom of page 386 and on to 387 before I ask you a question. Ready?---Mmm.

So there you had some information from Ms Coleman's inspection that went directly to the number of volunteers that had been detected in the period from - well, up to the date of the inspection?---Yes.

And she commented, in effect, that there were three plants in paddock 11?---Mmm.

One spindly one on the boundary of paddock 13?---Mmm.

Another one in paddock 13. Some of those she took samples of?---Mmm.

And she commented that there were surprisingly few volunteers, given the extent of the incursion the previous year?---Mmm.

You were aware of all of that?---Mmm.

But your evidence is this, isn't it, as I understand it, that none of that matters if the land has been contaminated by GM in the first place, it's five years minimum decertification. So a lot of volunteers or few is irrelevant at this stage of the process. Is that right?---That's right.

All right. So the purpose of the inspection then in relation to paddock 7 to 13 was what, at this stage?---When an operator has a farm that is partly organic, partly not certified, the inspector always has to look at the whole
- - -

I see?--- - - - property - - -

I see. So - - -?--- - - - no matter what.

The only purpose in inspecting those decertified paddocks at this stage was really to ensure that that wasn't impacting upon the certified portion. Is that a fair way of putting it?---We were also checking up, I guess, on these matters - - -

Yes?--- - - - to see what - what was there as a third - - -

But was - - -?--- - - - third party, sort of. You know, I mean, Steve had given a report about what he had found, but then the inspector was expected to go well over these paddocks as well.

And verify or not what Mr Marsh had told NASAA, is that right?---That's right. Yes.

That's right?---And you can see too that she had taken photos, which was requested to do.

So what, to your recollection, was the extent of observable presence of canola swathes on paddock 11 from the time of the incursion through to 24 October 2011?---I don't remember.

Is - - -?---I don't remember that.

All right. Well, there's - you would have looked back through the reports, wouldn't you, when you - - -?---When I was doing the review.

Yes?---Yes.

And the first report is one of a Ms Kathe Purves at 293. Have you read that?---I haven't read it recently.

You haven't read it recently?---No.

Not in preparation for coming to give evidence?---I wasn't given it.

I see. But you would have read it at the time?---Yes.

And you would have then read at the time not only that one, but also the next one of Claire Coleman, which is at page 32 - 325, yes. Thank you. You would have looked at that report at the time?---I would have. Yes.

And do you think you would have looked at that - those two reports with a view to forming an assessment of how many swathes might have been on the land at the time of the incursion, observed?---How many?

And where they were?---I'm not sure that I would have gone into the detail about the numbers because the people - - -

Is that because the - sorry?--- - - - that, you know, did that review at that time would have considered all of that.

All right. So was your position then this, that the decertification decision had been made, that decision had been dealt with. As far as you were concerned, that five year rule was now imposed and there was nothing anybody could do about that?---At the time when I would have done

the review, I would have read these reports very carefully and if I had had any concerns, I certainly would have raised them with both Wing Pang and Stephanie.

With who?---Wingpang is another certification officer.

Yes?---Who was involved in the initial decision.

Yes, and he, as far as you're aware, still works at NASAA, doesn't he?---Yes, he does.

KENNETH MARTIN J: Sorry, what's his name?---He's a Chinese man and I never say his name correctly but it's Wing Pang You is his name.

CAHILL, MS: So Wingpang is one word and You, Y-o-u - - -?---Surname.

- - - is his surname. I think he goes by the name of Luke, doesn't he?---Yes, he does.

As in Luke You?---Yes.

But his real name is Wingpang, not Luke?---Wingpang, yes.

Yes. And he was involved in the original - - -?---Yes, he was.

- - - decertification decision with Stephanie Goldfinch, wasn't he?---That's right.

And he still works at NCO?---Yes, he does.

And you haven't been there for a while but as far as you're aware there's no reason why he could not have come to this court to give evidence about the decertification decision that he made?---I have no idea.

You have no idea?---No.

But there's no reason you know that would stop him from coming?---No.

Thank you. Now, 391 please.

NIALL, MR: While my learned friend is moving to that, I would like my learned friend to tender the report at 293 to 309.

CAHILL, MS: Tender it only on the basis that it goes to the fact of something that Ms Gore looked at. If my friend

wishes your Honour to have regard to it as to the truth of its contents, he will need to call Ms Purves, another person whom, it seems from our point of view, there's no reason why she could not have been called to attest to the truth of the contents of the documents she produced.

NIALL, MR: Your Honour, my learned friend has cross-examined on it. I'm entitled to call for it to be tendered and it's tendered for all purposes in my respectful submission.

KENNETH MARTIN J: What do you say about that? That's a rule in Walker v Walker as I understand it.

CAHILL, MS: Well, it's - I'm not sure that's right. I have put to this - this witness - this witness that that's a document that she looked at at the time. That doesn't mean that it's - goes in as to the truth of its contents, your Honour.

KENNETH MARTIN J: Well, the document at 293 - 2039, which is numbered as 50 in volume 2 of the trial book, will be adduced into evidence. I will hear submissions in closing in terms of the magnitude of what it can be used for. Prima facie, I think Mr Niall is right in terms of it having been cross-examined in its (indistinct) purposes, but there's a lot of law on that, and I will hear submission on it.

NIALL, MR: If your Honour pleases. Just saying (indistinct) at 325 to 331.

KENNETH MARTIN J: 325 to 331, document 50 is in on the same basis.

CAHILL, MS: Well, we have no - Ms Coleman, as we understand it, is coming to give evidence. So we don't have any difficulty with her. Presumably, she's - her witness statement, she's attesting to the truth of it.

KENNETH MARTIN J: All right. It's in on a plenary basis.

CAHILL, MS: Now, 391 - just to be clear about this, this is, again, part of Ms Coleman's report, Ms Gore, and she's reporting there the extent of the work being done by the Marshes to monitor the germination of volunteers in the - on their farm. And again, on your understanding, even with great vigilance with that five year rule, there was no opportunity to get any earlier recertification?---No. Not at that point.

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

And it wouldn't matter how vigilant they were and how few volunteers germinated, that five year rule is firm?---That's the rule. Yes.

So even if there was no germination at all and all the swathes were collected, still the five year rule would apply, is that right?---I think that's what we were asking clarification from the organic advisory board about, because it wasn't intentional; it was accidental. So can this five year rule be - is it absolutely set in stone or not, and because there has never been any testing of this, I think, you know, they were considering it. But, I mean, this was only 12 months after.

All right. They - - -?---Organics is very strong on the three years - absolute three years. You know, you can have - people would ring up all the time and say, "Nothing has happened on my property for 15 years," 35 years, 50 years, "We have virgin scrub, we have," whatever. The three year rule is still the three year rule.

But it's five years in the case of - - -?---Of the GM. That's right.

- - - GMOs. Yes. All right. And that's a very clear rule, you say - - -?---Yes, it is.

- - - in the NASAA standards?---Yes, it is.

If you could go to volume 5 of the bundle, please, and turn to page 1293.

KENNETH MARTIN J: 1293?

CAHILL, MS: Yes. Volume 5, your Honour. That's the NASAA standard there?---Mmm.

Could you just identify the five year rule for me, please?---Yes. It's 3.2.8 on 1318 - page 1318.

Continuing:

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

- - -?---That's right.

That's the five year rule that you've just been referring to?---That's right.

Thank you. All right. Now, just coming back to Ms Coleman's report at page 403.

KENNETH MARTIN J: 403, did you say, Ms Cahill?

CAHILL, MS: 403, your Honour. Just to be clear here, Ms Coleman is talking about the possibility of sheep having eaten some GM material that has germinated since the incursion last year, however since none has been noted as germinating in the paddocks closer to the neighbouring farm - that's numbers 9 and 10 - (indistinct) suggest that the amount likely to have been consumed to be minimal. Again, that really doesn't matter, having regard to the five year rule?---Well, we would - yes. You're talking about the sheep there as well.

Yes?---They're - - -

But they're on decertified land, aren't they?---They are, that's correct.

So the sheep are then therefore decertified?---Yes. The animals can only have the - whatever certification the land has.

Yes?---So if they're not on certified land then they can't be certified.

All right. Thank you. Now, there were volunteers that were tested, weren't they? There's some reference there at 406. Have you got 406 there?---Yes.

Can I suggest this, Ms Gore: residue sampling is really only applicable, isn't it, in relation to chemical residue?---Well, that's the heading in the inspection report - residue - - -

But it doesn't really apply to GMO plants on a property, does it?---Well, they weren't looking for residues at this point; they were looking to see whether they were GM material. And that's just the heading, so it - you know, that may need to be changed in the NASAA template.

But normally, what one would understand as residue testing is where there has been an overspray onto some land or into some crops or pasture, and one wants to know whether there is any residual chemical in the crop or the soil or the pasture, is that right?---Mmm.

So, not directly applicable, the language, "residue sampling"?---I guess that Claire felt that this was the only section of the inspection report template where the sampling could be put.

All right. And the fact that - over the page at 407, the fact that the Marshes had demonstrated that they were prepared to continue to vigilantly monitor, to contain everything, pull up the volunteers, to uphold the integrity of the standards. With that five year rule, that really was not going to be sufficient to - - -?---No.

- - - allow recertification any earlier?---Really not.

All right. Now, in you report which starts at 416, you - at 417, talk about previous non-compliances?---Yes.

And there are four major non-compliances that you identify?---They are brought forward from the previous year's - - -

I beg your pardon?--- - - - report.

I see. So that's not your work?---No, but we have to report whether or not they have been closed out, so have they been addressed.

I see?---And so the answer is, yes, that they had been.

Corrective action had been verified at inspection in relation to the 3.2.9?---So after an inspection report, if a non-compliance is found, the operator is told about it; then they have to tell us what they are going to do about, which is all very nice but when the inspector then next goes for reinspection, they have to look at records or they have to verify that the operator actually has done what they said they were going to do. That's why that is followed up at the next review.

But the why there, at the bottom of page 417, signifies that the Marshes have taken corrective action in relation to the 3.2.9 non-compliance?---I think that it - I mean, we would have to look back into their inspection report but it just means that whatever they could do they have - they have done - - -

I see?--- - - - for that, but that won't change the status. That isn't - they don't - the status - change is only done by the reviewer this time around, if there's going to be any.

I see. Now, there's a reference to 3.2.9 here as the standard which has not been complied with?---Mm.

But it was your understanding, was it, that 3.2.8 was the applicable standard, not 3.2.9?---Well, the 3.2.8 talks about the timeframe. The 3.2.9 talks about where NASAA considers there is an unacceptable risk so that's what the reviewers had based the decertification on.

I see And that unacceptable - - -?---So at that time they hadn't - I don't know if they had stated timeframes. They had just - because there's an unacceptable risk, they had decertified them.

And, again, the unacceptable risk of contamination comes from your understanding that contamination includes the mere presence of swathes, GMO swathes lying on the land?---That's right.

Understood. Thank you. Now, can I just ask you at 419, Ms Gore, about the information at numbered paragraph 2 regarding the feeding of sheep?---Mm.

Is that information that was provided to you, or advice or guidance, from the Organic Advisory Board?---Can't - I cannot remember. Quite possibly. I can't remember.

KENNETH MARTIN J: So is that number 2, "Can we feed our decertified sheep"?

CAHILL, MS: Yes. That's it.

KENNETH MARTIN J: Right.

CAHILL, MS: Ms Gore, Mr Marsh has a question, which was whether he could feed his decertified sheep on certified organic land decertified grain, which was produced off the contaminated land?---Yes.

And that was the answer that was given?---That's right.

And essentially, because they're decertified sheep, the answer was that that was really outside NASAAs purview?---Well, it is and - but they were feeding them on certified land. That was the issue and, you know, they gave the answer there about doing it in troughs or, you know, restricting the area where the grain was fed on the certified land.

All right. So what was the - - -?---We were trying to be helpful - - -

Yes?--- - - - as we could, to help Marshes.

And so what were the concerns that were being addressed in this management plan that was agreed? What was - so you had decertified sheep on certified land eating - - -?---You can have decertified sheep on certified land as long as they are fed certified grain or - - -

Yes, and here it was decertified grain, wasn't it?---That's right, and - - -

So what was the concern that you were trying - or the risk you were trying to mitigate specifically here?---Well, putting any further - you know, like, contaminating any of the land - certified land.

How would that happen?---Through their poo and their wee.

But what was going in their mouths?---Or if the grain is spilled - - -

So you were - - -?--- - - - and there was contamination in it.

Had that been tested? Had that grain been tested?---Grain. Well, it's decertified grain, so I don't know that it had been tested.

So - - -?---But it was decertified. So if it's not organic then there's an issue because - - -

So in NASAAs mind, is this fair to say, there was a possibility that there was some GMO material in that grain?---It's decertified grain, so it's not organic so there are risks for whatever - wherever it comes from.

And there was approval for some - with some restrictions that decertified grain that might have GMO material in it to be used to feed sheep on certified land?---Mmm.

All right. Now, just in relation to these forms, there's a section, isn't there, in these forms which is additional material not for publication?---Yes.

And what's that about? Why do you have that?---We have that - that information doesn't usually go back to the operators. It doesn't get put on any letters that they get

sent. It's for internal memos that are to do with that review for that year.

And that appears here below your signature?---Yes.

Right at the bottom of page 419?---Yes.

And that - what's the determinant as to whether it goes into the not-for-publication section or the publication section? Why would you put something in the not-for-publication section?---Because it might be just an internal question.

I see?---With an NCO.

Your Honour, I can pause there for today if that's convenient.

KENNETH MARTIN J: Yes, it is. How much longer do you think you will be with this witness, Ms Cahill?

CAHILL, MS: Probably only about half an hour to 45 minutes.

KENNETH MARTIN J: All right.

NIALL, MR: This witness has come from interstate, your Honour. Is there any chance we could finish her today?

CAHILL, MS: We can keep going if your Honour can.

NIALL, MR: But I'm in your Honour's hands and my learned friend's hands.

KENNETH MARTIN J: Regrettably, I have got to be at a meeting in the other building at 4.30 so - but I would if I could but I can't. I'm happy to start a bit earlier tomorrow if the witness can get on an earlier flight or something.

NIALL, MR: Thank you, your Honour. We have some video witnesses tomorrow.

KENNETH MARTIN J: Yes.

NIALL, MR: So - - -

KENNETH MARTIN J: Sorry, just give me the batting order for - - -

NIALL, MR: Yes. It's pretty much as it was planning to be originally. So it's Mr Ayachit by video at 10.30 for one hour.

KENNETH MARTIN J: Yes.

NIALL, MR: And then Professor Van Acker at 11.30 by video for one hour and then we will call Ms Goldfinch, and if we're still - - -

KENNETH MARTIN J: Over the video?

NIALL, MR: No, she will be here.

KENNETH MARTIN J: She will be back, okay.

NIALL, MR: She will be returned, and then the two Mortons are available on short notice if we run out of time, and then we have got Ms Gore to complete. Well, I'm just thinking about how your Honour might - - -

KENNETH MARTIN J: How long did you say you might need, Ms Cahill?

CAHILL, MS: Half an hour to 45 minutes, your Honour.

KENNETH MARTIN J: Well, if we started at 9.30 - - -

CAHILL, MS: I can do that.

KENNETH MARTIN J: - - - then if you knocked it off in 45 minutes we could have a short break and then link-up for the video link to Mr Ayachit.

NIALL, MR: Yes, your Honour. That's convenient.

KENNETH MARTIN J: All right. Is that convenient to you to be here at half past 9 tomorrow, Ms Gore?---Yes.

All right. Thank you. You are in cross-examination at the moment, so that's an important part of the case. You shouldn't speak to anybody about the merits of the case - - -?---Yes.

- - - in that period. All right. We will adjourn in this matter for the resumption of the cross-examination of Ms Gore at half past 9 in this courtroom tomorrow morning.

(THE WITNESS WITHDREW)

AT 4.18 PM THE MATTER WAS ADJOURNED UNTIL

FRIDAY, 14 FEBRUARY 2014

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