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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 MONDAY, 17 FEBRUARY 2014, AT 10.30 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.

(Reporter's note: missing audio from 10.14.24 to 10.30.23)

CAHILL, MS: ... yet to give evidence, is not to access the - or attempt to access the transcript on the website, and we can, of course, communicate that - you know, it's going to affect us primarily, because it's our witnesses - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - who are yet to come - and we can communicate that to those witnesses so that they're aware of your Honour's direction.

KENNETH MARTIN J: All right. Well, that would be helpful. Thank you. Mr Niall.

NIALL, MR: We don't have any difficulty with the arrangement that your Honour indicated. Our preference would be for the transcript to go up at the close of evidence - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - but we're in your Honour's hands.

KENNETH MARTIN J: Well, I don't propose that it go up prior to the plaintiff closing its evidence, and that might be hopefully today. But in terms of the other components of the transcript, suppose it primarily affects the defendant from then on, in terms of their witnesses not seeing what's up there. So perhaps we can just think about that a bit more.

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

KENNETH MARTIN J: All right. Thank you. All right. Are we ready to proceed with the further cross-examination of Ms Goldfinch.

NIALL, MR: Goldfinch.

KENNETH MARTIN J: All right. If we could have Ms Goldfinch back in.

GOLDFINCH, STEPHANIE JANE:

KENNETH MARTIN J: Yes. Welcome back, Ms Goldfinch. Have a seat. We will get you some water?---Got some, thank you.

Good. All right. Ms Cahill, when you're ready.

CAHILL, MS: If it please your Honour. Ms Goldfinch, when we left you last Friday, you had given some evidence about the - a suspension decision, and you told us that that decision had been made after you had consulted with some members of the NCO board, who comprised, at least, Jan Denham. You remember that evidence?---Yes.

And then, if I can ask you now about the decertification decision that came a couple of weeks later, which is at page 333 of volume 2. Do you have that there?---Yes.

Now, on Friday you told us that you didn't consult with a committee about the decertification decision. Did you consult with a person or persons about the decision before you made it?---I don't recall - well, there's no need to consult with a committee, and I certainly don't recall consulting with anyone, because it was really just the waiting on the test results. So it wasn't so difficult to make the decision.

So if I can understand that, the consultation you had had with others had occurred at the suspension stage, is that right?---Yes.

And, having reached the view that the certificate or parts of the farm should be - the certificate should be unsuspended in relation to those, it was if the test results came back positive to GM trait in the samples that had been taken, it then just logically followed that the decertification would follow. Is that right?---Well, I wouldn't go that - so far as to do that.

All right. So what would be the circumstances that would have meant that parts of the paddock wouldn't have been - parts of the farm wouldn't have been decertified if the results came back positive to GM trait in those plants?---It would have just been the parts of the farm where no GM had been found.

So let me understand that. Paddocks 7 through to 13, the certificate had been suspended, yes?---Yes.

Except for 11, which you say was an oversight?---No. There was a mistake in one of the documents where 11 was omitted from.

Yes. Sorry. That's what I meant. But it had been meant to be suspended from certification - - -?---It was suspended.

I see. You had suspended it, just not - - -?---There was just one piece in the text - in one part, but not all the other parts. So it was in all the other parts, but one line of it was missing.

The decision had been made to suspend paddock 11, but it just wasn't reflected in the document - - -?---It was reflected.

Sorry. If you just pause, Ms Goldfinch - - -?---Sorry.

- - - so I can finish the question. You had made the decision to suspend certification of paddock 11, but that just hadn't found its way into the document that you communicated your decision to Mr Marsh?---No.

Thank you.

KENNETH MARTIN J: No, as in you agree with the proposition just put to you? Is that right?---No. That's not correct.

CAHILL, MS: All right.

KENNETH MARTIN J: You disagree with the proposition?---Yes.

CAHILL, MS: Okay. So can you just explain to me then what you mean?---There was one clause in the letter where 11 was omitted by accident.

Yes. But it - - -?---All the other clauses contained 11, so it was quite clear that 11 was to be included.

In the suspension decision? Is that what you're referring to?---I will have to go back and check which document that was.

I'm sorry. When you said - you're referring to clauses and paddock 11, what document were you referring to?---May I look?

Do you mean your review decision?---May I look?

KENNETH MARTIN J: Sorry. What do you want to look at? The - - -?---I just need to be certain which document I'm talking about.

And you're looking in the volume 2, are you?---Yes.

All right. That's fine.

CAHILL, MS: Does it help to look at 314? Is that what you're referring to?---Yes, 315.

And so you're pointing to the New and Unresolved Noncompliances section?---Yes.

And there's a reference to paddock 11 there, where it talks about paddock 11 being contaminated, paddock 7, 8, 9, 10, 12, and 13 are suspended?---Yes.

And your point there is that 11 is not mentioned?---That's correct, yes.

And then if we go over the page to 316 - - -?---Well, before you do that, if you remain on 315, if I may.

Going down to Certification Denied?---Yes.

Yes, and so - - -?---You can see paddock 11 is there.

11 says:

Lose organic status, currently suspended pending further investigation.

And then we go over to 316. It says:

Paddocks 7, 8, 9, 10, 11, 12 are suspended until further investigation by NCO are complete -

Etcetera. So it's mentioned there, and then if we drop down to the last two lines in that box it says, paddock 7 identifies the area, 8 identifies the area?---Yes.

9, 10 and then there's 11?---Yes.

12 with the area, 13 with the area. Then it says:

Plot, 2.2 hectares between 10 and 12 and plot, 4.5 hectares in the middle of 11. 7 and 10 lose organic status.

What's the reference there to the plots?---I'm not sure.

Was that a reference to just the part of the paddock that was given over to pasture?---I can't be certain at this time.

Because you recall the inspection report you received from Claire Coleman identified that there was no evidence of

contamination in the crop on paddock 11. You recall that?---There was evidence of contamination in the paddock.

Yes, but if you listen to my question. No evidence of contamination in the crop was what had been contained in the report. Do you agree?---I have to go back and read the report.

All right. If we go back then to page - sorry, I will withdraw that. I will withdraw that; I'm confusing you. This is the suspension decision. You didn't have Ms Coleman's report by this stage?---Thank you.

I apologise. I had that sequence wrong, Ms Goldfinch. So you can't recall why just the plot was identified here?---I would like to see the certificate and see what it says on that to confirm.

That's at page 323 and you will see that 11 is omitted there, both at page 323 and 324?---Yes, no, I was meaning the certificate but that's irrelevant. I was getting the sequence wrong as well.

So here is the actual - - -?---Yes.

- - - decision?---That's correct.

And the omission of paddock 11 is just an oversight you say, a mistake?---Well, at this time 11 was not suspended.

But is that because of a mistake on your part of did you intend not to suspend it?---All I can go by is what's written here.

Yes?---And it says:

11 remains organic at the time of suspension.

Yes, and do you say that that was an intentional decision or a mistake?---I don't think it's a mistake.

Because on Friday you said it was?---I'm not sure that I was - yes, I needed to refer - I think I mentioned - just now I mentioned where the mistake was.

Yes?---So that's what I was talking about.

So where's the mistake?---Where we were just referring.

Yes?---Where we went through the review - - -

So if we go back to 315?---The review statement.

If we go back to 315 and 316, where is the mistake?---I've already pointed it out.

Would you just show me please where the mistake is?---I'm just getting confused because on page 315, New and Unresolved Noncompliances talks about the paddocks which were contaminated.

Yes?---And it doesn't mention paddock 11 being suspended but that is in line with the suspension letter of 10 December.

Yes, and then if you go down to Certification Denied, which is what you took my attention to a moment ago, it mentions paddock 11 as:

Losing organic status, currently suspended pending further investigation.

And then over the page:

Paddock 11 suspended until further investigation.

And then down the bottom of that table there, that section, it mentions paddocks with their area in brackets next to them. It has got paddock 11 in the top line with the area of 40 hectares and then a plot of 4.5 hectares in the middle of 11 losing organic status. So against that background when we come to 323, Ms Goldfinch, was the statement that paddock 11 remains organic there a mistake or deliberate?---I couldn't be certain, I'm sorry.

Is it possible because of what you had read in Ms Purves' report you had determined that it wasn't - there wasn't a basis to suspend certification of paddock 11 at that time?---May I look at the report?

Yes. That commences at - - -?---294.

That's right.

KENNETH MARTIN J: Sorry, just give me the page again.

CAHILL, MS: 294, your Honour.

KENNETH MARTIN J: This is the Kathe Purves inspection report.

CAHILL, MS: Yes, yes.

KENNETH MARTIN J: 293 I think it actually starts.

CAHILL, MS: I think Ms Goldfinch is looking at where the description of the paddocks on inspection begins, your Honour.

Can I assist you, Ms Goldfinch, by suggesting you might - are you ready?---Yes, so - can you remind me of the question please?

Was the suspension decision communicated to Mr Marsh that indicated that paddock 11 remain organic - remained organic a mistake or a deliberate decision to keep that paddock certified?---I believe it was the correct decision at the time of the suspension for the suspension.

And that's because of what you see at page 297, isn't it?---297 and the last page, 308.

And essentially the position was this, isn't it, on the basis of the inspection report, at its highest there were concerns for paddock 11 but there was no evidence of swathes on that paddock reflected in the report?---At that time, that was correct.

Now, coming back to the decertification decision, the investigations between suspension and decertification comprised simply of the samples that had been taken by the inspector being tested for the presence of GM. Is that right?---No, it was to observe further the extent of the contamination and to take the samples and I wouldn't think either was more important than the other.

Well, the only reason Ms Coleman went out - sorry, I will withdraw that. The only reason that a second inspection was - took place was because of the loss of the samples that Ms Purves took. Isn't that right?---That was the principal reason. Well, it was the instigator but due to the circumstances with the wind and the ability of the swathes to blow in the wind, she did what any well-trained inspector would do and observe further the extent of the contamination.

Ms Goldfinch, had the samples Ms Purves took not been lost, you would not have sent Ms Coleman out to do an inspection, isn't that right?---I don't think I can say that I would not have. You know, anything may have happened. There may have been a reason that we could come up but that she was going as it was, so - - -

Isn't the position this - because the samples had been lost that Ms Purves had taken, it was necessary to get some more. You sent Ms Coleman out and you said to her while she's taking the samples, she must prepare a report that indentifies the extent of the contamination?---I don't recall what I said. I didn't say anything verbally to her, the inspection officer spoke to her.

You didn't tell her anything about what she was supposed to do?---I don't recall speaking to Claire. It's the job of the inspection officer to communicate with the inspectors. She would have been given instructions to collect the sample.

The inspection officer, who is that?---Debbie Clarke who provides the instructions and the paperwork for inspectors.

And she wouldn't have spoken to you about what kind of an inspection should be undertaken and on what basis?---No, it would have been discussed.

With you?---I imagine so.

Yes. And you had a discussion with Ms Clarke, didn't you, where you said that Ms Coleman should inspect and report on the extent of the contamination?---Are you able to remind me of that? Do you have some evidence of that?

Ms Goldfinch, would you answer the question please?---Well, I can't remember whether - what I said to Debbie Clarke five years ago.

So is your answer, "I can't recall"?---That's correct.

And it's not five years ago, is it?---Well, whatever it is, it is.

It's just a little over three years ago, isn't it?---2010. Three, I beg your pardon.

Yes?---Seems like 5.

Now, if you go to paragraph 22 of your witness statement, please. You're referring there to Ms Coleman's report? Yes?---Yes.

And if you go to page 325 of volume 2?---I'm sorry if I don't answer, because sometimes I understand your questions to be rhetorical, but I guess I'm supposed to say yes to everything.

Are you at page 325?---Yes.

It's the commencement of Ms Coleman's report. And where it has got "reason for the extra announced inspection" there - do you see that?---Yes.

You cannot recall how it came to be that Ms Coleman understood the reason for the inspection?---No.

NIALL, MR: I object to the question, your Honour - - -

KENNETH MARTIN J: Yes. I uphold the objection.

CAHILL, MS: Thank you. Now, you had obviously received Ms Coleman's report prior to making the decertification decision?---Yes.

And you took this inspection report into account when you made the decertification decision?---Yes.

But do I understand your evidence this morning, that because the suspension decision had been made in relation to all bar paddock 11, as long as the test results came back positive for GM, all those paddocks, other than paddock 11, would be decertified?---Was that prior to reading Claire Coleman's report that you're referring to?

You tell me. You tell me, Ms Goldfinch. Took the inspection report into account, but as long as - - -?---No.

Okay. So there were other factors that would influence whether or not paddocks 7 to 10, and 12 and 13, would be decertified, is that right?

NIALL, MR: I object to the question on the basis it would - the question should be either, did, if it's - otherwise it's - - -

KENNETH MARTIN J: Yes. I understand. I think the objection as to form must be upheld, Ms Cahill.

CAHILL, MS: Now, a moment ago, you told me that you were really just waiting on test results. That was your evidence. Is that so?---Whenever we get an inspection report we have to read it, and there may or may not be anything further that we have to take into consideration.

And was there anything further in this report that you took into consideration before deciding to decertify paddocks 7 to 10, 12 and 13?---There was canola found in paddock 11.

I haven't asked you about paddock 11. I asked you about paddocks - - -?---Well - - -

- - - 7 to 10, and 12 and 13?---Those paddocks - sorry. Can you repeat the question, please.

Was there anything further that you took into account, besides the positive test results, before deciding to decertify paddocks 7 to 10, 12 and 13?---Yes. The evidence mentioned in the report.

About what?---The extent of the canola.

So can you just show me what you relied upon, please, in relation to those paddocks?---Well, the inspector talked about, on page 325, where she visited and what she saw.

Yes?---And that goes through to page 326. There's a whole - - -

Yes?--- - - - page and a half of what she saw. So that was all taken into account, every bit of it.

Yes. Yes. But in what way? How did that influence your decision to decertify or not decertify paddocks 10 to - sorry, 7 to 10, 12 and 13?---Well, that was pretty clear, that they needed to be decertified, and the amount of seed as opposed to swath material was a high risk factor.

All right. So just point out to me, please, in the report, where she referred to the seed and what she said there that influenced your decision?---Kathe Purves mentioned in her report the amount of seed, which is taken into account.

Yes. We're just focusing on Ms Coleman's report at the moment?---And the seed couldn't have disappeared, so that obviously remained present.

We're just talking about Ms Coleman's report now. If you could focus on that, and you have it in front of you, and you can just identify for his Honour where the reference to seed is that influenced your decision to decertify paddocks 7 to 10, 12 and 13?---Well, at the bottom of page 325, it says:

Most of the pods had shattered and seeds were visible.

That's in paddock 10, is that right?---Yes.

So what about in relation to paddocks 7, 8, 9, 12 and 13?---Well, in some of those paddocks, I think sheep had

been eating them, so it couldn't be determined how much was still there. So that's paddock 10. Paddock 11, further stems were found.

Yes. We will come to paddock 11. But we just - at the moment, if you could just please stay with paddocks 7 to 10, 12 and 13. Now, you've identified something in the report about seeds in respect of paddock 10. What else, that you read in that report, influenced your decision to decertify the paddocks, other than paddock 11?---Paddock 12 had samples of seed which were collected.

Yes. Do you know how many? Did it say?---No. You wouldn't be able to determine, based on the soil and the seed, and the size of the seed and the colour of the seed, and whether there were cracks in the - - -

I see. You - - -?--- - - - soil and - - -

- - - wouldn't be able to say whether there's a little or a lot?---You wouldn't be able to count it.

Well, you wouldn't be able to say whether there's - - -?---That's what you - - -

- - - a little or a lot, would you?---I wasn't there. So I couldn't say anything.

Based on this report, you wouldn't be able to form a view about whether there was only a small amount of seed or a lot of seed in paddock 12. Would you agree?---Well, it wasn't relevant to the decision, but I agree with the statement.

Because one seed is enough, is that right?---Yes.

Thank you. Paddock 7?---Seed was collected in paddock 7.

And is that in the same position as paddock 12? One seed would be enough, so it - - -?---Yes.

- - - did not concern you to consider the volume of seed that might be in that paddock?---GMO materials are prohibited on an organic farm.

So is your answer, "Yes, that did not concern me"?---No. Everything concerns me - - -

So the - - -?--- - - - about GMO on an organic farm.

So the amount of seed on paddock 7 did concern you and was relevant - - -?---Yes.

- - - to your decision, because it makes a difference, does it, whether there's one seed on a paddock or hundreds?---No. It doesn't make a difference.

KENNETH MARTIN J: A difference to what? To your position as a - - -?---As to whether the contamination is present.

From the perspective of suspension. Is that where it goes?

CAHILL, MS: And decertification, Ms Goldfinch?---Yes.

Yes. Paddock 8?---Bottom - paddock 8 - - -

On page 326, you're referring there to where it says:

Paddock 8, and others, have all had stems of canola found in them.

?---No. I need to review the text carefully to see whether she mentioned paddock 8 being inspected.

KENNETH MARTIN J: Half of the property being knowingly affected?---So, she mentioned - paddock 8 - paddock 8 in the last paragraph on page 326.

CAHILL, MS: Yes. The paragraph I just took you to, that reference to stems?---Yes.

And, again, you weren't concerned to inquire as to how many because how many was irrelevant to the decision of whether or not to decertify. Is that right?---No, that's not correct.

So they - the number of swathes or stems in a paddock is relevant to whether or not you do certify. Is that right?---Yes, you only need one.

I see what you are saying. As long as there is one plant, you will decertify. Is that right?---The combination of Kathe Purves' report and this report and the samples are all taken into consideration for decertification.

Just come back to that question please, Ms Goldfinch - you will decertify, will you, if there is one GM plant found on a paddock?

NIALL, MR: I object to the question on the basis of relevance, your Honour. There's no suggestion that there was only one swathe on the property, it doesn't bear - nor one seed. It doesn't bear any reference - - -

KENNETH MARTIN J: In the scheme of things, I consider relevance. I will allow the question.

NIALL, MR: If your Honour pleases.

CAHILL, MS: Could you answer the question please?---I need you to repeat it please, it's such unusual questioning.

Where - as long as there is one swathe, one stem of GM plant on an organic paddock, you will decertify. Is that the position?---One stem of GMO material on a paddock is contamination with GMO and it's prohibited.

Yes. And will you decertify in those circumstances?---We only ever make decertification decisions based on actual facts. We don't make them hypothetically because every case is different.

So I will ask it this way then, Ms Goldfinch. If you were in the position today of having to make a decertification decision in respect of a paddock that had only one GM canola plant resting on it, would you decertify?---Well, I'm not sure that you would be able to determine only one was resting on it, given the circumstances of the wind blowing material.

Please assume that, Ms Goldfinch, for the purpose of - - -?---Well, I'm sorry, I can't assume that because it's not scientific.

Ms Goldfinch, please assume that there is one and one only swathe on a paddock. Would your decision be to decertify, yes or no?---I can't answer yes or no to that question; I can only answer as I answered the previous question?

Yes or no, Ms Goldfinch? Please answer my question yes or no.

NIALL, MR: Well, the witness has said she can't answer it yes or no, your Honour.

KENNETH MARTIN J: Well, Ms Goldfinch, if you don't think you can give a yes or no answer, can you explain why you can't?---Well, I - yes, I just said that - - -

Just start afresh and explain?---Yes.

If you wouldn't mind?---Yes. So every decision for decertification is made on a case by case basis based on the circumstances of the situation. And if we are talking about one stem of canola, I assume you mean it's in the context of being blown there by the wind, it's not possible to say yes or no to answer that question because it's not going to be a question of just one stem; it's not possible to be able to determine how much seed is on that paddock. It's a question of risk.

CAHILL, MS: So you're assuming then, are you, that there must be more?---You can't assume there's only one.

I see. If there is one, you can't assume there's only one, is that your evidence?---I don't see how you can determine on a farm like that, that there is only one piece of canola.

All right. So if there's three, you can't assume there's only three. Is that how the logic goes?---Not having been there and seen it, I wouldn't assume anything. But as I said, with things blowing around in the wind, in a paddock of 40 hectares, I know from experience how much the terrain varies and etcetera, etcetera. Unless you vacuum everything up, it's just not possible to determine the number.

Even if you try to determine it by identifying the GPS location of every swathe and carefully go over the paddocks?---No, it's just not possible.

Not possible. And that would present to you, would it, an unacceptable risk of contamination in your view?---Well, unfortunately with GMOs, it's a contamination. So - - -

So is your answer yes?---Can you repeat the question please.

That would present to you, would it - - -?---What would?

One swathe in a paddock, an unacceptable risk of contamination because one would have to assume there would be more or you can't assume that that's the only one?---That's correct.

So you would decertify in the case of finding one canola swathe on a paddock?---You may well indeed.

Well, you would, wouldn't you, Ms Goldfinch?---Well, it would depend on the circumstances of the situation.

I thought you just told his Honour that if there's one, you can't assume there's only one?---That's correct.

And that in those circumstances, if you assume - if you can't assume that there's only one, it's an unacceptable risk of contamination. Is that right?---The fact that there's one is an unacceptable risk of contamination.

Thank you. So when we come to paddock 11, there were three stems there, weren't there, and nothing in the crop? You were told there was no evidence of contamination in the crop, weren't you?---Paddock 11?

Yes.

NIALL, MR: That's not what the document says, your Honour, and it should be put exactly if my learned friend is going to cross-examine on it.

KENNETH MARTIN J: All right. So we're looking at the bottom of - - -

NIALL, MR: Bottom of - - -

CAHILL, MS: 326.

KENNETH MARTIN J: 326.

CAHILL, MS: You were told that the wheat crop in paddock 11 appeared to be free of contamination, weren't you?

NIALL, MR: In my submission the whole sentence should be read to the witness. It's clear that it's a - - -

KENNETH MARTIN J: I think that's right.

CAHILL, MS: Continuing:

The wheat crop in paddock 11 appears to be free of contamination, despite canola stems having been found down slope of the crop.

Do you see that?---Yes.

So you were told, as far as the inspector was concerned, that the crop appeared to be free of contamination. Do you agree with that?---That's what it says, yes.

And at 328 you were shown where the extent of the wheat crop in paddock 11 was?---Yes.

And you were shown by the reference to G where the stems had been found - - -?---Yes.

- - - on paddock 11. Yes?---Yes.

And F references at page 326 the stems that were found on the boundary between 10 and 11. You accept that?---Yes.

So you were aware that the stems that had been found were in a small portion of paddock 11. You would agree with that?---The stems that were found, yes.

Thank you. And your conclusion was that Mr Marsh had complied with the NASAA standards to the best of his ability, wasn't it?---Yes.

What was the reasoning for decertifying the crop in paddock 11 at this stage?---I believe it was due to the risk.

So what risk was that?---Of contaminating - of contamination being found in that crop.

All right. Do you mean an intermingling of canola - GM canola seeds or plant material with the harvested crop?---Yes.

And you didn't turn your mind to whether that crop - harvested could be cleaned and tested?---Yes, we did.

When you say we, who other than you turned the reviewer - the other reviewer - so who was that? Because we're at decertification stage now, Ms Goldfinch, not suspension stage?---Well, we discussed it in the certification office, Diane Gore, Luke You, and myself, and I - - -

At the time of decertification - - -?---Yes.

- - - Ms Goldfinch, because you said this morning that you didn't discuss the decision with anybody?---I didn't discuss it with a committee.

I didn't put to you this morning that you discussed it with a committee. You will remember I reminded you of your evidence on Friday, where you said you had discussed it - had not discussed it with a committee. I then asked you directly whether you had discussed the decision with any person or persons?---On Friday?

And you said no?---Do you mean Friday or this morning?

You said that this morning, Ms Goldfinch. So what's the position? Did you discuss the decertification decision before you made it with any person or persons, yes or no?---Well, you mentioned a committee this morning and we didn't discuss it with any formal committee.

Ms Goldfinch, pause please?---We discussed it with the reviewers.

Ms Goldfinch?---I discussed it with the reviewers.

Ms Goldfinch, pause please. This morning I put to you squarely that your evidence on Friday was about not discussing the decertification decision with a committee. I think put to you squarely the question of whether you had discussed it with any person or persons and your answer was no. Are you now changing your evidence?---I believe you mentioned a committee this morning. That's the only reference I can recall.

So if I - - -?---Other than the precedent committee about standards issues.

If you are asking - if I'm asking you the question now, what is your answer? I will ask you again. Did you discuss the decertification decision with any person or persons before you made it?---I can't recall.

You can't recall?---That's correct.

So if we come back to the possibility of testing the crop, having it cleaned and tested, did you give consideration to that possibility as an alternative to decertifying the crop in paddock 11?---No, I discussed it with Jan Denham. I discussed it with Steve Marsh about cleaning the crop.

Before decertification?---Yes.

So you discussed it with Jan Denham?---I can't recall if it was before suspension but in any case, it was before decertification.

And Steve Marsh?---Steve told me, when I asked him about his cleaning situation - - -

Yes. Did you raise this possibility of cleaning and testing the crop or was it Mr Marsh's idea?---I can't recall who raised it.

So what did Mr Marsh say to you about that?---Well, it's written in the document - the hand written document. He says he purchased his own seat, cleaning equipment.

Yes?---I think was all that was discussed.

So there was - and how was that relevant to your decision, whether or not to require the crop to be cleaned and tested as an alternative to decertifying?---It was just a discussion about the whole operation of the farm, as the farm is always a whole system.

Were you discussing it as an alternative to decertifying the crop in paddock 11?---I wouldn't put it in that context. No.

Did you have a discussion with Jan Denham about the possibility of cleaning and testing the crop in paddock 11 as an alternative to decertifying?---Unfortunately, I cannot recall the specific nature of that.

The suspension decision was the subject of a review document that you and Mr You signed, you recall that?---Yes.

Did you fill out a similar document in relation to the decertification decision?---I don't recall. I don't generally fill them out. Certification officers fill them out.

Well, you were doing the decertifying. This was the certification decision that was only being made by you, wasn't it?---It wasn't my role to fill out one of those forms.

Ms Goldfinch, when an officer of NCO makes a decision about a certificate, they normally fill out one of those review forms, don't they?---Yes, they do.

And you were making a decision about a certificate on or about 29 December 2010 in relation to Mr Marsh, weren't you?---Sorry. What was the date you mentioned again?

On or about 29 December 2010?---Some of the non-compliances were already identified in the initial review, prior to suspension.

Yes. Come to paragraph 27 of your witness statement - sorry - 26 and 27. You decided on or about 29 December 2010 to decertify paddocks 7 to 13, didn't you?---Yes.

Is that decision the subject of a review form that you filled out?---I don't recall.

It should be, shouldn't it?---No. The review form of the 8th has already identified the non-compliances.

That was in relation to a decision to suspend, Ms Goldfinch, isn't it?---It's in relation to the circumstances of the farm. The suspension is not a final decision; it's just a sanction.

Thank you. So where do we find the review form in relation to the decision to decertify, the final decision?---It's a combination of this form and the letter of decertification.

But this form only relates to the suspension, Ms - - -?---No. It relates to the whole situation, because a suspension is not a decision; it's a sanction.

The whole situation?---The whole process.

The whole process of what?---Implementing certification standards and rules.

All right. Now, at paragraph 27, what you set out there is the factors that were important to you when you decided to decertify, yes?---Yes. That's what's written there.

And were they the reasons that you recalled at the date that you prepared this witness statement, or did you go back to some record to remind you of what your reasons were at the time?---One always has to review the relevant documents prior to making a decision.

So the question is this: at paragraph 27, you're saying, as at the date of your witness statement, which is February 2013, what factors were important to you in deciding to decertify?---Yes.

Is that just what you remembered then, or did you make some record on or about 29 December 2010 about those factors?---I can't recall making a record.

So this was just your memory as at February 2013, is that right?---It's a combination. The witness statement is a combination of mainly what's written in documents.

But you didn't have written down in a document, other than the actual decision that you wrote to Mr Marsh, any of your reasons at the time for decertifying, is that so?---The

reasons are stated in the document and in the previous document of 31 - page 314.

So - - -?---The only thing that had changed was the extent of the contamination and the fact of the contamination being verified.

So the reasons for decertifying are set out 314, 32, through to which page? 316?---Yes.

And then what else? Where else are the reasons set out?---In the letter dated 10 December, and - - -

So that's at 321, going through to - - -?---323.

Well, all right. Is - I see. Sorry. That's a different document. So it's at 323 through to 324?---Yes.

And then what else?---And again at - - -

3333?---Yes. And - - -

And 3334?--- - - - 334 and 335.

So 335 - - -?---That's just a reflection of 333.

Thank you. And you say that those are all the documents that record the reasons for decertification. Is that right?---Yes.

Thank you. Now, coming back to paragraph 27, your evidence there, is that just derived from going back to those documents and looking at them to remind yourself of what the reasons were for decertifying?---There's also, of course, the testing certificates, which indicate the presence of GM canola.

All right. So the documents that you've just noted, plus the test results?---Yes.

Did you go back to those documents and refresh your memory in order to provide the evidence you've done at 27?---Yes.

You don't have any memory of your reasons, other than by going back to those documents. Is that right?---That's right. It was three years ago.

So if we go to 27A, you say:

The following factors were important to my decision to decertify: (a) the extent of the presence of GM canola

-

and you refer to the inspection reports. You say:

They noted an extensive incidence of canola swath plants over large parts of the farm.

?---Yes.

But what you're referring to there is not the concentration of number of swathes, but just the area over which they were found. Is that right?---Yes -

Extensive incidence of canola swath plants over large parts of the farm.

Yes. But we established on Friday, didn't we, that you didn't know, nor was it relevant to you, whether there were a great many or only a few swathes in any particular location or any particular paddock?

NIALL, MR: I don't accept that as a fair summary of the evidence, your Honour. The witness said, on a number of occasions, that it was relevant, and then she sought to qualify that relevance. So to - - -

KENNETH MARTIN J: Well, we dealt with concentration, I think, for - - -

CAHILL, MS: A long time.

KENNETH MARTIN J: - - - a long time on Friday. Let's not go back there.

NIALL, MR: Thank you, your Honour.

KENNETH MARTIN J: The transcript says what it says.

CAHILL, MS: Yes, your Honour. Indeed. So you're only talking about area there, aren't you, not concentration?---No. I think it's fairly clear that it's just the amount over the selected area - the indicated area.

So the amount is relevant?---The amount is relevant.

In particular paddocks?---It doesn't matter how much it is, it's all prohibited.

So the amount doesn't matter?---The amount matters.

So - - -?---Whether it's one or five billion.

So amount would - - -

KENNETH MARTIN J: One will do it but five million will also do it.

CAHILL, MS: Yes, yes. The amount matters because one plant is enough, that's your evidence, I think, isn't it?---I believe I have said that.

Right. Thank you. So that is your evidence, yes?---Yes.

Thank you. Now, 27(b), you refer to the fact that Ms Purves's report noted at the time of the inspection that a strong southerly wind was blowing and canola plants in one paddock were blowing like tumbleweed. That's paddock 10, isn't it?---I would have to go back and read the report.

At page 297. Have you got that there? Would you like me to point out - - -?---No, I'm just refreshing myself as to the tumbleweed reference.

Yes. Would you like me to point it out for you?---No, not at the moment. I will get confused when I'm trying to read something. The report says extensive incidents of plants with full and broken seed had sighted in paddock 7, 8, 10 and 12.

I'm coming back to 27(b) of your witness statement, Ms Goldfinch. You are identifying here the factors that were important to your decision to decertify and you have referred to Ms Purves's report noting that a strong southerly wind was blowing and canola plants in one paddock were blowing like tumbleweed. The one paddock you are referring to is paddock 10, isn't it?---If I had a computer I could just type tumbleweed in and it would take me straight to it.

Would you like me to show you where it's referenced in 297?

KENNETH MARTIN J: Fourth dot point from the bottom?---The report says the southerly wind was blowing and paddock 10 was blowing like tumbleweed.

CAHILL, MS: Yes. So the one paddock you are referring to in 27(b) is paddock 10, isn't it?---Yes.

Thank you. It was because of those two facts in (a) and (b) that you concluded there was an unacceptable risk of contamination across paddock 7 to 13, is that right?---It's just what's written in the witness statement.

And that's the case, isn't it? It was those two facts - - -?---It says, "The following factors were important". It doesn't say they were the only factors.

Just go to 27(c), Ms Goldfinch. Your evidence says, "Because of those facts", which is a clear reference to (a) and (b), I concluded that there was an unacceptable risk of contamination of parts of the property from the GM canola?---Yes. Particularly the - part (a):

The inspection reports noted extensive incident of canola swathe plants over large parts of the farm.

Thank you?---

Seed pods cracked and numerous seeds scattered on the ground and evidence of sheep having eaten canola heads.

Yes. So we come back to it mainly being (a), is that right?---No, it's all of it.

Or both. It's just (a) and (b), isn't it?
Ms Goldfinch?---They were important to the decision, yes.

Well, it's because of those facts that you concluded there was an unacceptable risk of contamination. That's your evidence, isn't it?---That's the way the witness statement has been written.

So - - -?---It's not incorrect.

It's not incorrect?---But I don't think the witness statement precludes any other information.

Right. Now, just in terms of 27(c) and the unacceptable risk of contamination, if we look at the contamination, you had in your mind here contamination of land, didn't you?---Land and sheep.

And sheep. And also the crop?---Of course.

Was there anything else that you had in your mind as being potentially the subject of contamination apart from land, sheep and crop?---Well, the seeds will have germinated and then there would have been GM canola growing on the farm as weeds.

That would be in the land, wouldn't it? That would be contamination of the land?---Yes.

Yes. So can we come to that. If we just look at what you had in your mind as contamination or potential contamination of the land, that would have been in the sense of plants lying on it, yes? That would be one way in which the land was contaminated?---Seed - - -

Yes. Sorry. I will raise some others and then ask you if there are any more, so you don't need to be comprehensive. I'm just asking you if you agree with me that one way you envisage the land being contaminated was by having plants lying on it?---That's one way, yes.

Thank you. And then also seeds in the soil, that was another way that you envisage the land being contaminated?---Yes.

And then volunteers, if they grew - - -?---Yes.

- - - from the seed, then that would be contamination in your view?---Yes.

In relation to the contamination of the sheep, we established on Friday that any canola seeds or canola plants on their bodies you would regard as contamination of the sheep?---Yes.

If they ate the sheep - at the canola, that would be contamination of the sheep?---GM material is prohibited to be fed to sheep on organic farms.

KENNETH MARTIN J: If they ate the plant or ate the seed or ate everything.

CAHILL, MS: Well, either. If you ate a seed or a plant - - -?---That's correct.

- - - then in either case, that would be contamination of the sheep?---It's prohibited on an organic farm to feed that material to livestock.

Yes. Would you regard it as being contamination of the sheep, if it ate a GM canola plant or a GM canola seed?---Yes.

Thank you. And then in relation to contamination of the crop, did you have in your mind that plants resting on or in the crop, while it was in the ground, could be contamination of the crop?---Yes.

And seeds - - -

KENNETH MARTIN J: The plants on an unharvested wheat crop?

CAHILL, MS: Yes. Seeds lying in the soil where a crop was or lying on the unharvested crop, that would be contamination of the crop?---Plants and seeds on the crop, on the soil, wherever you like.

All right. And any volunteers that might grow in the middle, you know, amongst the crop, that would be contamination of the crop as well, would it?---Yes.

All right. Now, if 27(a) and 27(b) are the factors that you took into account in concluding that there was an unacceptable risk of contamination, you obviously didn't take into account whether or not the plants that were lying on the land or the sheep or on the crop, whether they could just be picked up and taken away. You didn't think about that, did you?---Well, of course you didn't and it was concluded that you couldn't just do that.

It was concluded - - -?---I have already alluded to that, I believe.

So it was concluded that - - -?---It would be concluded. I concluded.

Because it was - - -?---You can't just pick it up.

You can't - - -?---Like I said before, you would need a vacuum cleaner and - - -

We are just talking about the plants at the moment?---It's just not possible - - -

Not the seeds?--- - - - to pick up anything.

Okay. Just plants and not seeds. You didn't think about whether or not you could just pick up plants, plant material?---Of course you can pick up plant material but you probably wouldn't be able to pick up all of it, it breaks, it falls into small pieces.

Did you think about that at the time that you made the decision to decertify?---Yes. I was more - - -

You did?--- - - - concerned about the seed, however.

So that was an additional factor that you took into account, apart from what's set out at 27A and 27B?---Not sure when I took that into account, but it was taken into account.

But your view was that it was just impossible to pick up everything?---I think most reasonable person would conclude that.

So was that your conclusion?---Yes.

Thank you. And did you turn your mind to whether any volunteers that grew could just be pulled out before they set seed?---Well, one does consider what the future of an operation may be in terms of certification, and that would have been considered.

Well, did you consider it before you made the decision to decertify?---No, because it was a stage in the process on the evolving situation of a farm, where it hadn't yet arisen.

Right. So you didn't take that into account?---It wasn't relevant at the time in terms of removing it as live plants, because the live plants hadn't grown yet.

But as a means of controlling the GM canola going forward, you didn't take into account the possibility that if, in the future, a volunteer plant popped up, Mr Marsh could simply pull it out before it set seed?---It's not my position to give advice to Mr Marsh; it's Mr Marsh's responsibility to determine what he does with any plants or weeds or crops on his farm.

So is your evidence, because he hadn't suggested any such thing, you didn't take it into account?---No.

So that's not - you did - - -?---That's a strange question.

You didn't take into account whether, in the future, volunteers could be pulled out, did you?---It wasn't a situation of the future; it was a situation of the current situation - the current circumstances at the time. Certification evolves over time, and decisions are based on certain amounts of time. And, in this situation, at this time, there were no plants being grown - canola plants growing on the farm, and therefore I did not consider whether they could be removed. What I think you're referring to is that material had to be removed, and that is just - in terms of the standards, where future certification, whatever it may be - and I can't predict

that at this time - will necessarily involve removal of contaminating material.

Contaminating material?---Yes.

Did you give any consideration to whether or not there was any capacity for genetic transfer or transfer of genes from the material on the farm - the GM material - to any of Mr Marsh's livestock or crops?---I'm not a microbiologist and I couldn't determine that. I know that you can't feed GM material to livestock, whether they're certified or not, on an organic farm.

Sorry. Did you give consideration to whether there was any potential for gene transfer between the material that had been blown in and Mr Marsh's produce?---With respect to the grains being grown, it was a general - general sort of understanding that canola pollen does not interfere with cereal grain pollen.

So did you take that into account or not?---It wasn't relevant.

It wasn't relevant?---Because there was seeds and plant material on the farm, not just pollen. The pollen had already come and gone.

So what was the significance of the plant and the seeds? Why was that contaminating?---Well, the seeds can contaminate the sheep, the crop, and they grow and become weeds.

Yes. But how do they contaminate a crop if they don't cross-pollinate?---The seeds - the physical seed could be in with the physical crop seed.

All right. And if you clean that out, would that be, in your view, sufficient?---It's a similar circumstance to being able to remove every seed from soil.

Cleaning seeds out of produce - a crop - a harvested crop is the same as trying to clean seeds out of soil, do you say? Is that right? Is that your evidence?---It's - what's the word - it's just one of those - I can't think of the word. You know, it's a comparison.

Analogy?---Analogy. Thank you.

Yes. So how does the - if you clean - if you can clean a canola seed out of a harvested crop, is it still contaminating the crop, in your view?---Well, it's not

whether you can clean one seed, it's whether you can clean every seed.

If you can clean every seed out, is that contaminating the crop?---The crop was still standing at the time.

Yes. Talking about a harvested crop?---That was for Mr Marsh to determine what he did with the crop after - in the future. Certification - it's not my role to determine what he does with his crop afterwards.

But you had decertified the crop, hadn't you?---Mmm.

So you didn't turn your mind to whether it was necessary to decertify it because it could be cleaned of any canola seed?

NIALL, MR: Of every canola seed, or - was that the question? I just didn't catch it.

CAHILL, MS: Every canola seed.

KENNETH MARTIN J: Yes.

CAHILL, MS: You didn't turn your mind to that?---I did. Yes.

You did?---I've already mentioned that, I believe.

I see. So you turned your mind to whether you could clean every canola seed out of the harvested crop, and your conclusion was that you couldn't?---I concluded it was unlikely.

All right. And that was sufficient to justify decertification of the crop?---No. Because there were many other factors involved, as we've discussed.

In decertifying the crop?---Decertifying the farm.

The crop, Ms Goldfinch. What other factors, apart from cleaning out every seed, being able to test for the presence of GM in that crop, did you say influenced your decision to decertify the crop?---It was the presence of seed with seed.

You had to be satisfied that there was an unacceptable risk, didn't you, of contamination, Ms Goldfinch?---I had - I was satisfied there was a risk of contamination.

It had to be an unacceptable risk, didn't it?---Any contamination is unacceptable. Any contamination.

Do you mean any risk of contamination is unacceptable?---A risk is different to actual contamination.

Yes. And if you had a crop that could be completely cleaned of canola seed and canola material, do you say that, nevertheless, there was a risk of contamination?

NIALL, MR: I object to the question that there is no factual evidence - no factual basis for the premise. There's no evidence that my learned friend has called to establish the proposition. So, in my submission, it's not a fair basis to put it when the proposition does not have a foundation in the evidence.

CAHILL, MS: I can rephrase.

KENNETH MARTIN J: All right.

CAHILL, MS: Ms Goldfinch, if - it was your position that if the seed - the harvested crop was cleaned and tested for the presence of any GM traits, that would, nevertheless - there would, nevertheless, still be a risk of contamination?---That wasn't my proposition and that wasn't relevant at the time I made the decision.

It wasn't relevant whether you could clean and test the crop?---As the counsel referred to, it's no evidence that it can be cleaned.

Sorry. Do you mean no evidence in this case?---I didn't see - I haven't seen any evidence.

You didn't see - - -?---I haven't seen any evidence, to this point, that - and I'm not saying it's not possible - but I haven't seen any evidence.

Just be clear, Ms Goldfinch. I'm not - - -?---That it can be cleaned.

I'm not asking you about the evidence in this case. I'm asking what was in your mind at the time that you decided to decertify. You well appreciated, didn't you, that a crop, once harvested can be clean. You knew that, didn't you?---Grain crops are generally cleaned, yes.

Thank you?---But not always, and they can be tested.

Not always. They can be cleaned, can't they,
Ms Goldfinch?---Cleaning doesn't necessarily mean totally
removing - - -

Ms Goldfinch, pause please. You well know that grains can
be cleaned when they're harvested, don't you?---I know that
grains can be cleaned but cleaning doesn't necessarily mean
it removes all contamination.

And you know that harvested grains can be tested, don't
you?---Tested for what?

The presence of GM?---Of course they can.

So you could clean the grain and you could then test the
grain, and if those two things were done, would you say
that there was still a risk of contamination?---Testing
wouldn't be relevant be it's - we're not talking genetic
contamination, we're talking physical contamination.

So you couldn't test a handful of grain to see whether or
not there was any GM material in that. Is that what you're
saying?---You could and there may be or there may not be.

All right?---But that's not what you do with the amount of
- the actual physical contaminants may not be picked up by
the - when they withdraw the sample; that doesn't mean
that there's the absence of it.

So your point is this, is the test might give a false
negative. Is that right?---The test may give a negative
result.

And your concern is that there be no GM at all in the
product?---I believe that would be the consumer's concerns
and, yes, it's my job to apply certification so that the
consumers who are purchasing it don't have to be concerned
about whether they're eating it or not.

And no risk at all. You are not prepared to accept any
risk of a test being a false - giving a false
negative?---Testing wouldn't be used in that circumstance,
so I can't answer that question, the way you're asking it.

Why is the risk unacceptable in that circumstance?---The
risk of what?

Contamination?---With physical presence?

Yes. When you have cleaned and tested the grain?---Well, I don't think you would test but after you have cleaned it, you can't rule out that there isn't - - -

Okay?--- - - - physical material present - - -

So the - - -?--- - - - which consumers wouldn't want to eat.

So the risk is unacceptable where you can't rule out the risk. Is that your evidence?---Well, you can't rule out that there is no presence.

That's an unacceptable risk. Is that your evidence?---Presence of physical contamination is unacceptable.

Yes, and physical contamination means it - just being next to or touching land, livestock, crop. Is that right?---With - in the terms of a GM plant, yes.

Thank you. Now, were there any other noncompliances under NASAA that you had in your mind, apart from standard 3.2.9 when you decertified for the GM incursion?---The question was, was there anything else I had in mind.

Yes.

KENNETH MARTIN J: The standards - - -

CAHILL, MS: Any other noncompliance with the NASAA standard or was it just 3.2.9?---There are other areas of the standard that could have been raised but this was the most important.

Was this the one that you had in mind?---This was in mind, yes.

And did you have any others in mind at the time?---This was adequate to cover the situation.

Did you have any others in mind at the time?---Well, there are other standards that talk about prohibition of GM material. For example, eating it by sheep, growing it or - willingly or non-willingly, etcetera, but they're not - - -

You say there's a standard - - -?---When you - - -

- - - that says that you can't - - -?---You try and - - -

- - - grow it unwillingly or you will be decertified?---If you grow - if you willingly - wilfully grow GM material - - -

Yes?--- - - - of course you will be decertified.

But if you don't, if you accidentally grow it because there's a volunteer, you say that's a breach of the standard as well, do you?---Yes.

All right. Now, you told us on Friday that you didn't turn your mind to the national standard at the time that you decertified and that's still your evidence?---Well, the national standard is always at the back of the NASAA standards. So it's already covered, as I mention.

You didn't specifically turn your mind to the national standard at this time, did you?---I didn't specifically read it.

No, but you're very familiar with the national - - -?---As far as I recall.

You're very familiar with the national standard and you use that standard in your current work, don't you?---I do currently. I didn't at the time use that standard specifically.

But you're familiar with it presently, aren't you?---Yes.

Yes. And if you go to volume 5 please, page 1408?---Yes.

Can you show me which - have you got volume 5 there?---I have got 1408.

Thank you, thank you. Can you show me which standard or standards in your view had not been complied with or conformed with as at 29 December 2010 in relation to Mr Marsh's operation? If it helps, Ms Goldfinch, and it may or may not, the genetic modification section begins at 1421?---Yes, I have already found it. Standard 331.

331?---Yes.

You say that that standard had not been complied with?---That's correct.

Mr Marsh had used GMOs, had he?---The use of - this was written prior to there actually being any GM situations in Australia. So the use of - also encompasses intentional or unintentional.

So the phrase in your view:

The use of GMOs or their derivatives is prohibited - encompasses accidental or unintended incursion of GMOs onto somebody's farm?---Yes, because if Steve goes and ploughs his paddock, he is going to be ploughing GM, isn't he?

All right. Any other one?---332, Steve implemented that.

So had he breached that or not?---No.

No?---335, 334, they're all - - -

So they're all breached?---They're all relevant. They're not - - -

I just want you to identify the noncompliances in your view?---331. 333 was complied with. 332 was complied with. 334 wasn't relevant at the time because - no, that was relevant because the sheep ate it.

334 was relevant?---Yes, yes.

Had he not complied with that?---It wasn't a question of him not complying but the fact of the seed being on the property, which sheep ate, made him unwillingly noncompliant.

I see. So 331, 334. What else?---That's it.

So 335 didn't apply?---At that time.

There's no noncompliance there?---The way that standard is written, that wasn't relevant. The NASAA standard was used.

So could it be noncompliant under the NASAA standard but not under the national?---No, I don't think so.

It couldn't. Could not, is that your evidence?---Well, look, this is pedantic. I mean - - -

NIALL, MR: I object to the question on the basis of relevance, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: What this witnesses' view about whether - how the two - my learned friend opened this case six days ago,

telling your Honour that your Honour will only need to go to the text of the document. And we've spent a long time asking for people's opinions as to the meaning of the document, and this is another example, and, in my submission, it's not relevant.

CAHILL, MS: It goes directly to the question of the unreasonableness of the decision, your Honour. Your Honour will recall in our particulars that we would press to provide, very close to the trial, the matters that we rely upon, including the inconsistency with the national standard, which, of course, is primarily an objective question. But then when we talk about the unreasonableness of the decision, having regard to the factors that were present at the time of the incursion, of course, there's much to do with the individual decision maker's approach to an interpretation of the NASAA standard.

That's one thing, and there has been plenty of evidence that your Honour, we say with respect, has quite properly heard in relation to that. If that's so, then, logically, this evidence must also be relevant, especially because of the evidence of the need for conformity between the two standards.

KENNETH MARTIN J: Well, it seems to me you've got your decision in respect of the non-compliance and the decertification explained on 29 December, by reference to infringement of the NASAA standards.

CAHILL, MS: Yes.

KENNETH MARTIN J: Now, you've legitimately probed the underlying basis for the NASAA standards by reference to the national standards, but, I think, now to go further and to probe about, effectively, a question of interpretation by reference to the meaning of the national standards, is
- - -

CAHILL, MS: It's really only - sorry, your Honour.

KENNETH MARTIN J: - - - traverses, I think, into irrelevance.

CAHILL, MS: All I'm endeavouring to ascertain from this witness is whether she considered that it was necessary to assess a non-compliance under the NASAA standard by reference to what is or - - -

KENNETH MARTIN J: Well, as I understood her evidence on Friday, she said she didn't have to think about the

national standards because they were embodied in the NASAA standards - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - and that was the basis for her decision making. Do I - - -

CAHILL, MS: But I think the answer that - - -

KENNETH MARTIN J: So - - -

CAHILL, MS: - - - was just given though was - - -

KENNETH MARTIN J: Well, that - - -

CAHILL, MS: - - - quite inconsistent with that though, I think. That was the point.

KENNETH MARTIN J: You can make a submission about that.

CAHILL, MS: All right, your Honour. I will leave it. Now, 27(d) of your witness statement, Ms Goldfinch. You were saying here that you considered - in effect, your evidence is that you didn't think you were able to decertify a part of a paddock. Is that right?---Yes.

And your evidence last week was that, to your recollection, that situation had never arisen in your work previously, to the point of this decision - you had never decertified a part of a paddock?---I don't recall saying anything with those words.

You said you couldn't recall any instance of decertifying a part of a paddock. That was your evidence on Friday?---That's right. I couldn't recall it because it's a long time since I've been involved in that, but it doesn't mean that it wouldn't have been done.

So it was open to you to do that, did you consider, at the time? Yes, or no?---Well, the answer is clearly the consideration was given. So, yes, it was considered, whether part or whole - rather than whole, and it was concluded the risk and possibility of, and as I've already mentioned, impossibility of being able to remove material, let alone find it, was the reason for the whole paddock being decertified.

Well, there was an additional reason that you've mentioned in your witness statement, isn't it? You thought it was theoretically possible, but the basic unit of certification

was a paddock with precise boundaries, and it would be hard - this was the effect of your evidence, wasn't it - it would be hard to just decertify part of a paddock, because then nobody would know which - what was in and what was out with any precision?---Yes. It's not possible in this case due to the nature of the physical contamination.

All right. And your point was that it wasn't possible to graze - sorry - it wasn't possible to crop on only part of a paddock, is that right?---Well, clearly it possible to crop on part of a paddock.

So it's not practicable to graze sheep on part of a paddock. Do you say that's now correct or not?---Well, sheep can - will graze anywhere they like, as long as there's no fence there.

Barrier?---But if there's a fence they will stay there - generally, they will stay within it.

And paragraph 28, you say that you considered that you had really no option but to decertify. With the - - -

KENNETH MARTIN J: The affected paddocks.

CAHILL, MS: The affected paddocks. Yes. Yes, your Honour. With the benefit of hindsight, do you still consider that you had no option at the time?---Yes.

All right. Now, with the benefit of hindsight, you don't think that you had an alternative of monitoring the germination of volunteers and requiring them to be pulled up before they set seed?---That would have been a future event.

You didn't think - even now, you don't think that that was an option you could have entertained?---Well, it's the farmer's business to determine what he does, and he's most likely to discuss it. But it - what happen in the future isn't part of the decision at the time.

You didn't think about condition - sorry. You don't now think that you could have imposed conditions upon his certificate to address the risks of contamination?---Not due to the nature of this contaminant at the time.

All right. Can you turn to page 343 of volume 2, please?---Yes.

Did you write the first three paragraphs of this press release?---I believe this was written by Jan Denham and David Silkstone.

Did you write the three paragraphs at the top? Yes, or no?---I was involved in commenting on the press release.

So did someone else write the first three paragraphs and you commented on them?---I believe so.

All right. The quote - - -?---It wasn't my job - that - that David Silkstone was the communications manager in - in working with the chairman, Jan Denham, to produce this document.

Is the quote attributed to you in the fifth paragraph - is - is that your own quote?---Yes. I believe that.

And did you write the paragraph immediately after that?---I did not write the press release.

The paragraph after the quote - - -?---I did not write the press release.

After the quote, the paragraph there, did you write that paragraph?---I don't recall writing that paragraph.

Did you approve the press release before it was - - -?---It wasn't my role to approve it. It was Jan Denham's role to approve it.

You were given the press release before it was issued, weren't you?---I was given the opportunity to comment on it.

And you did?---Yes.

Do you disagree with any of the contents of the press release?---In what context are you asking?

Do you disagree with any of the contents?---Well, I haven't read it for a long time.

Can you please do so and then tell me?---I don't disagree with any of it.

Thank you. Can you go to page 372, please. That's your email, isn't it, of 5 May 2011?---Yes.

And your statement in that email to Mr and Mrs Marsh that standards 3.1.12 and 3.3.4 of the national standard, referring to a minimum of five years elapsing before products - certified products can be produced on an area where GMOs have been grown previously, that's what you thought at the time, that those standards applied to his situation after the incursion?---At the time of the email, those thoughts apply to the possibility of Steve being able to export any material from the farm - - -

So just let me - - -?--- - - - as organic. That's entirely what that's referring to.

Well, he can only export if it's certified. Would you agree?---That's correct.

And so your point was to regain certification of the decertified paddocks, he would have to wait a minimum of five years. Is that right?---At the time, that was the decision, yes.

Well, the decision. Was it something that you thought applied?---The understanding. Yes.

Yes, and had you discussed that with anyone else at NCO or NASAA before you wrote this email?---5 May. I don't recall.

Had you got any guidance from the Organic Advisory Board about that topic before you - - -?---I don't - I can't recall.

Nothing further, your Honour.

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

NIALL, MR: Just two questions, your Honour. Ms Goldfinch, on Friday - this is transcript 537 - dealing with the period of time between the suspension decision on the 10th and the decertification decision, you were directed to some testing of the samples during the period from suspension to decertification. And you were asked this question:

But you were not intending to undertake any other type of investigation, were you?---Not at that time, no.

You weren't intending to research the longevity or persistence of canola volunteers, were you?---I did some research on GM canola actually at the time.

Between the date of suspension/decertification?---No, I don't recall when it was but it would have been in November or December.

Do you recall what research you undertook?---I recall looking up Roundup-Ready canola because it wasn't - exactly sure what we were dealing with initially to try and verify that that was the organism we were dealing with, and just some details about where it was approved to be used and that sort of thing.

Any other research?---I don't recall any other specific details.

Thank you. They're the only questions I have for re-examination. May the witness be excused, your Honour.

KENNETH MARTIN J: Yes. Very well. Thank you, Mr Niall. Ms Goldfinch, that completes your evidence. You are excused.

(THE WITNESS WITHDREW)

NIALL, MR: Your Honour, the next witness is Ms Denham and Ms Nichols, my learned friend, will take.

KENNETH MARTIN J: Yes, very good.

NICHOLS, MS: Your Honour, there has been a number of objections, most of which are resolved. It may be convenient if I indicate to you which paragraphs of the witness statements are not being read.

KENNETH MARTIN J: Yes. Just give me a moment to - - -

NICHOLS, MS: Yes.

KENNETH MARTIN J: - - - clear the debris and I will turn up that witness statement. All right, Ms Nichols, I have got three witness statements I think for Ms Denham.

NICHOLS, MS: Yes. The first one is dated 14 February 2013. Does your Honour have that there?

KENNETH MARTIN J: Yes, I do.

NICHOLS, MS: Yes. The first paragraph is paragraph 28.

KENNETH MARTIN J: Yes.

NICHOLS, MS: And we are not reading the words:

To ensure that its quality systems are benchmarked in accordance with best practice.

KENNETH MARTIN J: All right. So the proposed amendment to paragraph 48 (indistinct):

NASAA is routinely audited by DAFF.

NICHOLS, MS: Correct.

KENNETH MARTIN J: All right.

NICHOLS, MS: We do not read paragraph 29.

KENNETH MARTIN J: 29 is excised in its entirety.

NICHOLS, MS: We do not read paragraphs 38 or 39.

KENNETH MARTIN J: 38 and 39 are excised in their entirety.

NICHOLS, MS: We do not read paragraph 52.

KENNETH MARTIN J: 52 is excised in its entirety.

NICHOLS, MS: 55.

KENNETH MARTIN J: 55 is gone.

NICHOLS, MS: 57 and 58.

KENNETH MARTIN J: 57 and 58 are gone.

NICHOLS, MS: As to paragraph 59, we read the first sentence. We don't read the second sentence but we do read the third.

CAHILL, MS: Sorry, I'm - Ms Nichols is mentioning paragraphs we haven't objected to, your Honour. I'm not quite sure how that goes - or that we have withdrawn our objections. I'm not sure what Ms Nichols is intending to do with the witness, who has given their whole evidence.

NICHOLS, MS: Well - - -

CAHILL, MS: And they have said that this is the evidence they want to give.

NICHOLS, MS: There have been extensive objections made and all of these paragraphs, which I am not reading, have been objected to. There was a document provided to your Honour's chambers this morning at about 9.30 and that didn't refer to all of the paragraphs to which objection had been taken and which we had conceded. So I am just going to continue to read the paragraphs that I propose not to read. That is why I'm not reading them and if there are some matters that my learned friend wants to cross-examine in, she may do that.

KENNETH MARTIN J: All right, very well.

NICHOLS, MS: I am not - - -

KENNETH MARTIN J: So let me just clarify before that observation was made by the defendants. The second sentence in paragraph 59, which once read:

The national standard was the basis for AS 6000/2009.

Is gone?

NICHOLS, MS: I beg your pardon, your Honour. We read that sentence.

KENNETH MARTIN J: Yes.

NICHOLS, MS: We don't read the sentence starting:

There is little difference between them.

KENNETH MARTIN J: I see. The third sentence is out.

NICHOLS, MS: That's right.

KENNETH MARTIN J: All right.

NICHOLS, MS: We don't read paragraph 60.

KENNETH MARTIN J: 60 is out.

NICHOLS, MS: We don't read paragraph 71.

KENNETH MARTIN J: 71 is out.

NICHOLS, MS: We don't read paragraph 73.

KENNETH MARTIN J: 73 is out.

NICHOLS, MS: And at paragraph 83 - - -

KENNETH MARTIN J: 83.

NICHOLS, MS: - - - we don't read the final sentence.

KENNETH MARTIN J: So:

Subsequent to the 2010 examination -
is out.

NICHOLS, MS: Yes.

KENNETH MARTIN J: To the end of that sentence.

NICHOLS, MS: And can I just return your Honour to paragraph 63.

KENNETH MARTIN J: Back to 63.

NICHOLS, MS: An objection was made to paragraph 63 and 64. If they were to be read on the basis that they were intended to be a conclusive statement about the meaning of those standards, they are not to be read in that way and therefore the objection has been withdrawn.

KENNETH MARTIN J: So they're effectively read on the basis of the witness' understanding at the time relevant to
- - -

NICHOLS, MS: Relevant to the decision making.

KENNETH MARTIN J: - - - what has already been explored in terms of the reasonableness of the process.

NICHOLS, MS: Indeed, that's how they're read. That deals with the first statement, your Honour.

KENNETH MARTIN J: 63 and 64, all right.

NICHOLS, MS: Is it convenient to deal with the second statement in that way?

KENNETH MARTIN J: Yes, let's deal with the whole package.

NICHOLS, MS: Yes. That one is signed but it has not been dated, unfortunately. It's called Supplementary Witness Statement.

KENNETH MARTIN J: That's right.

NICHOLS, MS: The first paragraph that we don't read is paragraph 4.

KENNETH MARTIN J: So paragraph 4 is excised.

NICHOLS, MS: Paragraph 5, 6, and 7 are excised.

KENNETH MARTIN J: 5, 6, 7 are out.

NICHOLS, MS: In paragraph 8, in the second sentence, we won't read the words "which conform to the national standard".

KENNETH MARTIN J: So the second sentence of paragraph 8 will simply read, "that involves application of the NASAA standards."

NICHOLS, MS: That's correct, your Honour.

KENNETH MARTIN J: Yes.

NICHOLS, MS: We don't read paragraph 22.

KENNETH MARTIN J: 22 is not read.

NICHOLS, MS: We don't read paragraphs 25 or 26.

KENNETH MARTIN J: 25 and 26 are not read.

NICHOLS, MS: And that deals with that statement and we read the entirety of the final statement which is entitled further supplementary statement.

KENNETH MARTIN J: And that one is dated - well, it was sent under cover of the Slater & Gordon letter of 5 February 2014?

NICHOLS, MS: That's correct. There is a version of it which is signed and dated 4 February 2014. Does your Honour have that one? It's the same document.

KENNETH MARTIN J: I'm sure that I did do - - -

NICHOLS, MS: I will hand a copy to your Honour.

KENNETH MARTIN J: All right. Thank you for that.

NICHOLS, MS: Thank you, your Honour.

KENNETH MARTIN J: Does that resolve all the objections?
No.

CAHILL, MS: There's a few more, I'm afraid, your Honour. If we go back to the first statement. Objection is taken to paragraph 36 and the point that we simply make that unless the conclusion - it's obviously a conclusionary statement and unless it is - the conclusion is limited to the basis that is provided at 37, if it intends to go beyond 27, then it is conclusionary and objectionable. It's unfair to, insofar as we won't be able to test it fairly in cross-examination without knowing the basis for it. And apparently the plaintiffs are not prepared to confine the conclusion in 36 in that way.

KENNETH MARTIN J: So it's 36 - just reading it again, is that talking about domestic sale or exports?

CAHILL, MS: I think it's domestic but the plaintiffs will have to tell you one way or the other, your Honour, because
- - -

KENNETH MARTIN J: Well, there's a reference to Coles and Woolworths in 35 which would seem to indicate domestic.

CAHILL, MS: And presumably for export, you must be certified because that's the whole AQIS regime.

KENNETH MARTIN J: Yes.

CAHILL, MS: So by process of deduction, it must be a reference to domestic. But to simply say we can't sell our produce unless it's certified is a very broad conclusion. It needs to have a basis. We say, well, if your basis is simply that which is set out at 37, 38 now no longer being read, well, that's one thing, but if you intend to have - for it to have a wider substantiation that is unstated, then that's a conclusion without substantiation that's impermissible.

KENNETH MARTIN J: All right. Ms Nichols, what do you say about 36?

NICHOLS, MS: The basis is given in 37 within the context of 32 to 35, however, it's also fortified by the further evidence given by Ms Denham in her third statement - if your Honour would have a look at paragraph 14 of that statement. Paragraphs 14 to 16 to which no objection has been taken.

KENNETH MARTIN J: Yes.

NICHOLS, MS: And it also finds a basis in paragraph 40 of the first statement for which no objection is taken. It is therefore a statement with a basis and the basis is apparent from the statement.

KENNETH MARTIN J: I see.

CAHILL, MS: If it's limited to identified bases, that's fine, but there was no - there was no indication from those paragraphs that they refer to paragraph 36. Your Honour will see - - -

KENNETH MARTIN J: I think contextually, bearing in mind what I have now been shown - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: 36 can stand and if you have a difficulty with it, you can cross-examine.

CAHILL, MS: Indeed. As long as the bases are known that they weren't demonstrated in the supplementary statement, that they were referable to 36, your Honour.

KENNETH MARTIN J: Right. So 36 stays on that basis.

CAHILL, MS: Right. 83, the third sentence, the point here is that statement can only be admissible to the extent that it's an expression of the witness's belief or understanding. She not an expert and can't purport to speak on a wider topic of - so as to inform your Honour of that as a matter of fact. So we are content for it to go in as a statement of what her personal understanding was at the time but not as to expert evidence about that issue.

KENNETH MARTIN J: Well, I read 83 by reference to the preface "To my knowledge as an explanation in terms of the field of knowledge about such issues."

CAHILL, MS: But the point was that it wasn't conceded that it would be put on the basis that it was only the extent of her belief in 2012.

KENNETH MARTIN J: Well, I think 83 can stand.

CAHILL, MS: Thank you, your Honour. Now, in the supplementary statement, your Honour, that first supplementary statement - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - effectively paragraphs 18 to 20 are in contest. They are assertions, statements of opinion without substantiation. To just simply say something is so in the witness's experience is clearly insufficient. There is a document referred to at the bottom of paragraph 20. The provenance of which is - is not identified. And why, your Honour - it's in the - it's the last document in the bundle, but why it's something that your Honour can and should rely upon is not explained and for those reasons we object to all of those paragraphs and the document.

KENNETH MARTIN J: Let me just read it before I hear from Ms Nichols again. Yes, Ms Nichols?

NICHOLS, MS: I will deal first with paragraphs 18 and 19. What Ms Denham here is doing is giving evidence about the importance of organic certification to the organic industry and she is a person who is qualified to do that. And the basis of her observations of the organic industry is set out in her first statement - and can I ask your Honour to have a look at that, starting with paragraph 1.

Ms Denham there sets out her own experience as a farmer and a member of the Murray Valley Citrus Board and then states that she's a member of the board of directors for each of NASAA and NCO. She has been involved as a Victorian director since 1992; has being chairman of both organisations. Is a member of the NASAA Standards Committee. She explains what she does. Over the page she explains that she was a member of the AQIS organic advisory committee when she was chairman of NASAA and, in that capacity, she had input into the drafting of the national standard.

She has also been a member of the AS 6000-2009 group convened by Standards Australia. Going down to paragraph 17, she explains NASAA's functions which include subparagraph (c) representing the organic industry but by participating in national, international and regional events and supporting industry research and maintaining and developing relationships with national and international organic bodies. She goes on to say that NASAA has a very extensive membership, and that certification of NASAA covers about 7 million hectares.

At paragraph 30 she indicates that NASAA certifies hundreds of operators every year, and at 31, she has personal experience of the role that the DAFF approved certification plays in the sale of organic produce in the domestic market. She then, as your Honour knows, goes on

to talk about her own experience as an organic producer. And at 40 to 41, and 44 to 46, she gives evidence about NASAAs relationship with international bodies, and its requirement to be certified by those bodies.

And it's from that basis, bearing in mind her senior position within NASAA, that she is able to speak about the role that certification plays to the organic industry. And you will recall that we opened the case on the basis that the context within which the standards exist are an important consideration when your Honour is considering both the construction of the standards on the question of purpose and on questions of reasonableness.

And, in my submission, Ms Denham is qualified and provides the basis to give the observations she gives, which is an observation about the functioning of this industry. And I should say, if I can deal with paragraph 20 in Ms Denham's third statement, she provides a further basis for that. Can I ask your Honour to look at paragraph 21 of her third statement.

KENNETH MARTIN J: Third statement? Yes.

NICHOLS, MS: Yes.

KENNETH MARTIN J: Yes.

NICHOLS, MS: And I should just clarify that I think we've communicated to our friends that we're not seeking to read the organic market report for the truth of its contents, but simply something that Ms Denham had referred to. And we've indicated that we wouldn't read the last sentence of paragraph 20.

KENNETH MARTIN J: Yes. Ms Cahill, did you want to respond at all?

CAHILL, MS: Yes. Just to say this: if what this is intended then to be is expert evidence, it still wouldn't be admissible because it doesn't meet the Makita test of articulating the reasoning and basis for the opinions that are expressed therein. The suggestion in relation to paragraph 20, that the report should go out, it's not relied upon as to the - for the truth of its contents; then means that paragraph 20 in its entirety should go, because that's the basis upon which Ms Denham apparently articulates the textual material in paragraph 20.

NICHOLS, MS: Your Honour, I should say that this is not expert evidence as such; it's evidence of observation by a

person who is experienced in the industry, and she has provided for the basis for that observation. And that evidence is permissible; it need not meet the test in Makita.

KENNETH MARTIN J: Yes.

NICHOLS, MS: It's lay evidence of observation. And I should also say that the basis for paragraph 20 is given in paragraph 21 of the third statement to which I directed your Honour, where Ms Denham says that:

As a member of these boards, and as a former and current chair of NASAA and NCO, I am required to have a working knowledge of the factors that drive and support the organic industry, and the size of the industry in money terms, which I have derived in the course of that role by communicating with members of the organic industry in Australia and internationally -

and hardly surprising that Ms Denham says so, given the role that's described in her first statement.

KENNETH MARTIN J: Yes. Well, I evaluate now 18 to 20 in the proposed second witness statement of Ms Denham - this is the supplementary witness statement. The observations in paragraph 18 and 19 I think need to be evaluated somewhat differently to the factual assertion in paragraph 20 as regards a billion dollar industry, or an Australian organic industry worth more than 1.26 billion. As regards paragraph 20, I would be prepared to allow it to stand if the source of the material was provided. So I'm a bit concerned about the excision of the substantive document
- - -

NICHOLS, MS: Well, we're - - -

KENNETH MARTIN J: - - - but if you're happy for that to go in, then - - -

NICHOLS, MS: Yes. We certainly are, your Honour.

KENNETH MARTIN J: - - - 20 can stand.

NICHOLS, MS: We will leave that in.

KENNETH MARTIN J: That takes care of 20, which I see as a different ilk to the comment contained in paragraph 18 and 19. The comment is somewhat general and in character, particularly as regards certification being essential to the organic industry. It presents to me more as in the

nature of argument rather than comment; it's not said to be expert evidence. If there is an aspect of admissible evidence within 18 and 19, then it seems to me it needs to be elicited differently to how 18 and 19 are currently framed. I give you leave to elicit that evidence viva voce, but, as framed, 18 and 19 of the second statement can't stand, but 20 can.

NICHOLS, MS: Thank you, your Honour. Be grateful for that leave.

CAHILL, MS: In relation to the final supplementary statement, your Honour, there's just two objections. Paragraph 19 - you will remember we had that objection to paragraph 83 that you allowed to stand, your Honour.

KENNETH MARTIN J: Indeed, I did.

CAHILL, MS: There's this point at the end of paragraph 19 - can I just say that your ruling probably takes care of most of this objection, but we do have a continuing issue with the last two lines, in particular the words "and my reading of research papers on the length of time over which canola seeds decline". Unspecified and we say just objectionable for that reason. The second - - -

KENNETH MARTIN J: Just give a moment to digest this long sentence.

CAHILL, MS: Yes.

KENNETH MARTIN J: Yes. Look, I will let 19 stand. Obviously, you've got the liberty to cross-examine in terms of what unidentified research material was read.

CAHILL, MS: Thank you, your Honour. Paragraph 21. This should link into your ruling on paragraphs 18 and 19 of the supplementary statement. So, to the extent that further evidence needs to be elicited from the witness in order to make good those propositions, we simply say that there's nothing in paragraph 21 that's sufficient to achieve that objective.

KENNETH MARTIN J: Well, if we excise the first sentence of 21 of the third witness statement, then the balance of what's said there doesn't really have that advocacy - - -

CAHILL, MS: No. Thank you.

KENNETH MARTIN J: - - - content about it.

CAHILL, MS: Thank you, your Honour.

KENNETH MARTIN J: So, Ms Nichols, I will - - -

NICHOLS, MS: Yes.

KENNETH MARTIN J: - - - excise the first sentence of paragraph 21 of the last statement on the same basis.

NICHOLS, MS: Yes.

KENNETH MARTIN J: All right.

NICHOLS, MS: I call Ms Denham.

KENNETH MARTIN J: All right. Can we have Janet Denham.

DENHAM, JANET BOURKE affirmed:

KENNETH MARTIN J: Yes, Ms Nichols.

NICHOLS, MS: Your Honour, I needed to provide to you, for the witness, copies of the statements with the excisions marked.

KENNETH MARTIN J: I see, all right. Well, that would be helpful. We will pass that to the witness.

NICHOLS, MS: Ms Denham, can you tell his Honour your full name and your address please?---Janet Bourke Denham. My address is 292 Ellerslie North Road, Palinyewah, New South Wales.

What positions do you hold within the organisations NASAA and NCO respectively?---Currently at this time I'm chair of both organisations.

Have you prepared for the purposes of this proceeding a witness statement entitled Witness Statement of Janet Denham, which you have signed and is dated 14 February 2013?---Yes.

You have just been provided with a copy of some statements. Can you please have a look at the first document and you will find that it has got some excisions marked in black. Can you see that?---Yes.

And on the last page, do you find your signature and the date?---Yes.

NICHOLS, MS: Thank you, your Honour. Ms Denham, do you have, finally, a document there entitled Further Supplementary Witness Statement?---Yes.

And you will notice - I beg your pardon. Is that signed by you and dated 4 February 2014?---Yes.

Have you recently reread it?---Yes.

And is the content of the statement true and correct?---Yes, it is.

I tender the statement, your Honour.

KENNETH MARTIN J: Yes, very well. The further supplementary witness statement of Janet Bourke Denham of some 21 paragraphs, bearing the date 4 February 2014, will be exhibit 20C.

EXHIBIT 20C Plaintiffs DATE 4/2/14
Further supplementary witness statement
of Janet Bourke Denham

NICHOLS, MS: And with your Honour's leave, I may just ask some brief questions orally to address what was paragraphs 18 and 19 in the second statement.

KENNETH MARTIN J: Yes.

NICHOLS, MS: Ms Denham, have you had occasion during the course of your professional duties to consider the roles that certification plays in the functioning of the organic industry?---Yes, I have.

And in what context?---Well, basically, I have - as the board, we have to understand the requirements of our accreditation so that we ensure that our - the operation side of the organisation meets those requirements.

And in terms of the importance or otherwise of the fact of the existence of certification standards to the organic industry, what is your opinion?---The standards in the organic industry's certification are the lynchpin of the organic industry because they set out for the consumer what an organic product is.

When you say the lynchpin, what do you mean by that and why do you say that?---Well, it undermines the whole process of the certification of organic food and products.

When you say it undermines, what do you mean by that?

KENNETH MARTIN J: Sorry, undermines or underlines?---Underlines.

NICHOLS, MS: I might have misheard the evidence?---Sorry, underlines.

KENNETH MARTIN J: I thought you might have said that.

NICHOLS, MS: Pardon. Can you perhaps repeat that evidence, Ms Denham, I think I misheard you?---The standards underline the whole organic certification process, which - that is, sets out the rules for certification, what you're allowed to do, and what you must comply with for certification.

And accepting that that is the certification process, what is the relevance or significance of that process to the functioning of the organic industry as you have observed it?---My observation around - from all around the world is that that is the critical part of the industry. That is the thing, as I said, that actually sets out what an organic product is.

Why do you say it's the critical part of the industry?---Well, because it sets out what you - the product, how it has grown, how it has developed, how it has processed, so that consumers can know that this is what happens within an organic certified product.

And why do you say it's important for the consumer to know what happens in relation to the production of organic products?---I think it's education for consumers all around. I mean, if they're buying an organic product, they should be entitled to know what makes it organic.

All right. And what has been your observation about the consequences, if any, that would be visited upon that system if organic standards were to introduce tolerances for prohibited substances?

CAHILL, MS: I object to that question because the standards do that.

NICHOLS, MS: All right.

KENNETH MARTIN J: The premise of the question is objected to.

NICHOLS, MS: All right. I don't think I need to pursue that question, your Honour.

KENNETH MARTIN J: Yes, very well. That's the evidence?

NICHOLS, MS: I don't intend to lead further evidence.

KENNETH MARTIN J: That's the evidence-in-chief? All right. That's the evidence-in-chief, Ms Denham. Now, cross-examination, Ms Cahill.

CAHILL, MS: Thank you, your Honour. Ms Denham, do you have your first statement in front of you there?---Yes, I do.

Just when you - actually, yes. The first statement. Just when you were going through and making those corrections - I think it was your supplementary statement, actually, your first one, you mentioned that you changed, in paragraph 9, in the first line "NASAA" to "NCO"?---Mmm.

Should it also be "NCO" in the second line? So "NCO does not simply test the farm produce"?---Yes, it should be.

KENNETH MARTIN J: Sorry. Just give me that paragraph again, Ms Cahill.

CAHILL, MS: Para 9 in the first supplementary statement. And then over the page at 12, you changed, in the first line, "NASAA" to "NCO"?---Yes.

And should it be "NCO" in the second line as well? "Conducting soil tests"?---Yes.

And then the first line from the bottom of that paragraph, should it be NASAA or NCO who has the policy of zero tolerance?---That would be NASAA, because NASAA owns the standards.

I see. Thank you. So that's talking about not the approach to certification or decertification, but rather how the standard is to be interpreted?---Yes.

I understand. Thank you. Now, just coming back to your roles - you were asked about your roles. You're presently the NASAA chairperson?---Yes.

And you were between 1996 and 2003?---1996 and 2003. Yes.

And then you came back as chairperson in 2010 and have remained so to the present, have you?---Yes. That's correct.

And when you were reappointed chairperson in 2010, that was prior to this incursion event that's the subject of the proceedings, is that right?---Yes. That's correct.

Was it early in the year or?---It was in the October.

I see. So not long before?---No.

And you were on the NCO board as a director between 2009 and 2010, although you weren't the chairperson at that time, is that right?---That's right.

And, once again, at the time of the incursion, you were on the board as a director of NCO?---No. I resigned - I had to resign as a director of NCO prior to going back onto the NASAA board, because the constitution of NCO at that time
- - -

Had to be separate?---Separate.

So do you remember when you came off the NCO board?---I came off the NCO board in the October. It was two days before the annual general meeting of NASAA.

I see. So you left NCO late October and then, within a couple of days, came on the board of - - -?---Early - well, a couple of days.

I'm sorry?---It was mid-October when the annual general meeting was on.

I see. And so there was just a couple of days when you weren't sitting on either board?---Yes.

Understood. Now, if we can come to paragraph 17 of your first statement, please. And there, you set out the functions of NASAA?---Yes.

Now, in terms of the relationship between NASAA and NCO, is the position this: the whole reason NASAA has NCO there as a separate body, albeit that it's a (indistinct) subsidiary, is because it's important to keep that certification function separate and independent from NASAAs other functions and activities. Is that right?---That's correct.

Yes. Because those other activities that NASAA has includes providing support to NASAA's members?---It could do. Yes.

Yes. Do you provide - does NASAA provide information and guidance to members about matter relevant to the organic industry and organic production?---Yes.

And there's also an activity that NASAA has, which involves advocating on behalf of its members and the organic industry generally. Would you agree?---Yes.

And that can involve, from time to time, lobbying government or government bodies, other industry stakeholders?---Yes.

Yes. And that's why it's important to keep the certification function separate from those sorts of activities?---Yes.

And, as a member of the board of NASAA, you would agree, wouldn't you, that there's potential for conflicts of interest in relation to the certification function if you don't keep those activities separate?---Yes.

Thank you. Now, paragraph 8 of this witness statement, you talk about the NASAA standards committee, and that's a committee that's part of NASAA, not NCO. Is that right?---That's correct.

And you are a member of that committee?---Yes.

And have you been for a long time?---No. Only since I went back on the NASAA board.

So about October 2010?---Yes.

All right. And who else is in that committee?---There are three other members - four others, sorry, from the industry that represent - representing different aspects of the industry, like livestock, horticulture, etcetera.

I see. And so who - do you represent a particular industry on that board?---I would be there - I'm mainly as the chair.

So you - sort of an overarching role?---Yes.

And you're responsible - and when I say "you", I mean the committee - for making any amendments to the NASAA standard that might be necessary in light of changes

internationally. Is that right?---Changes to the NASAA standards goes through a process, where, if the committee recommends a change, it will be put out for public comment, and then the committee will review the public comment, and then it will come back and go to the board for the ratification of the board for a change to the standards.

I see. When you say "public", do you mean the members of NASAA?---No. General public wide.

So do you - - -?---So it can be consumers (indistinct) we advertise - - -

Okay?--- - - - and anyone can put in a comment.

So you put it in papers, newspapers, and things like that?---Yes.

All right. And if there were a modification or an amendment to the national standard, would that be a reason why the NASAA standards committee would look at changing its standard?---Not necessarily.

But it might. It would look at it, wouldn't it?---It would look at it, but it would still also be a change to the NASAA standards, so it would go out for public comment as well.

Yes. But you, being the standards committee, try to achieve uniformity between the national standard and the NASAA standard, don't you?---Yes.

Yes. And you know the national standard very well, don't you, because you had some involvement in drafting it?---Yes.

And do you consider that the NASAA standard is in conformity with the national standard?---Yes, we do.

The provisions are substantively the same?---Yes.

The NASAA standard - this came out in your witness statement, I think - the NASAA standard actually came first though, didn't it, historically?---Yes. Yes. Historically, it did. Yes.

Yes. But in quite - presumably, quite a different form from how it is today?---Yes. It was a very short document, originally.

And so the original NASAA standard was then modified when the national standard came in, to provide that uniformity between the two. Is that right?---Yes.

Yes. Thank you. Now, before it was excised from your witness statement, you mentioned at paragraph 60 three standards, which was the NASAA standard, the national standard, and the Australian standard, and then also the IFOAM norms. Now, the IFOAM norms include an IFOAM standard, don't they?---They include the IFOAM basic standards.

Yes. And it has been a relatively recently that a new version of the IFOAM standard has come out, is that right?---That's right.

At the time of this incursion event in December - November/December 2010, I think it was a 2005 version, which was - - -?---That's - - -

- - - the applicable standard at that time - IFOAM standard?---Yes. That's right.

Yes. And do you consider that the IFOAM standard, the national standard and the NASAA standard all have, relevantly, the substantively same provisions in relation to the treatment of GMOs - - -?---Yes.

- - - and what's compliant and what's not compliant in that regard?---Yes.

And do you consider that each of those three standards - I mean the NASAA, the national and the IFOAM 2005 standard, all contained substantively the same provisions for what the consequences are in terms of GMO contamination?---I'm not sure that I understand what you're saying.

I've put it badly. I think it's my fault. Sorry.

KENNETH MARTIN J: Consequences for who?

CAHILL, MS: Consequences in terms of certification or decertification, any sort of sanction that can be imposed by those standards in relation to GMO contamination?---In relation to the prohibit - prohibition of GMO and - and the setting out of the general provisions are all the same but none of the standards actually - because it's prohibited it is deemed that that is the statement of it's prohibited.

And so in terms of what then happens if there's a non-compliance with the standard in relation to the topic of GMOs, if I can put it that generally, do you say the provisions - that the standards have the same consequences or not?---The standards would have - the - the standards - they would all have the same - there is a consequence there from them all because it is prohibited in all standards.

Yes. so that each standard provides sanctions for non-compliance or non-conformity, don't they?---Yes.

And do you say that those provisions are all the same in each of those standards substantively, if not the words
- - -

KENNETH MARTIN J: Ms Nichols, do you object?

NICHOLS, MS: Your Honour, I object to this line of questioning. If Ms Cahill has a proposition she wants to put to Ms Denham about the consistency or inconsistency of the documents concerning consequences or concerning - - -

KENNETH MARTIN J: So you object to the generality of the questioning - - -

NICHOLS, MS: Yes, she should - - -

KENNETH MARTIN J: - - - by reference to the amorphous concept rather than by reference to a particular rule. Does that - - -

NICHOLS, MS: Indeed. And I repeat what was said earlier today about the fact that the case was opened on the basis that this would be a question for your Honour. If there's a particular provision to which she wants to draw attention, Ms Denham should be taken to it.

KENNETH MARTIN J: I understand the objection. What do you say, Ms Cahill?

CAHILL, MS: I can rephrase, I think, your Honour, will just be the quickest way to deal with these things.

KENNETH MARTIN J: Right.

CAHILL, MS: If you have got your third statement there, please, Ms Denham. See paragraph 9(c) on - the page isn't numbered, it's the second page?---Mm.

That doesn't speak about the IFOAM norms but it does talk about the national standard and the NASAA standard. And

you say there that NCO intends and considers that the NASAA standard is consistent with the national standard. Consistent in what way?---It is consistent with complying with the national - the requirements of the national standards are covered within the IFOAM standard, within the NASAA standard, I apologise. And then we will put additional standards, whether it be environmental or we have other things that are not in the national standard.

So there can be non-compliance under the NASAA standard, even where there is not non-compliance under the national standard because you have additional standards? Is that right?---The additional standards (indistinct)

It's all right. I think it's just a distance thing.

KENNETH MARTIN J: Can you just get a little back from it.

CAHILL, MS: Yes?---Sorry.

We have had the reverse problem up until now, Ms Denham. No one has been able to hear us and now you are very loud, so nobody can win?---Yes, sorry. Do you want me to go back with - - -

So what we were talking about was NASAA and the national standard and you had mentioned that you had additional things in the NASAA standard and I had asked you whether that meant that there could be a non-compliance under the NASA standard, even in circumstances where there wasn't one under the national standard.

NICHOLS, MS: Your Honour, I object to the question again on the same basis. The evidence that has been given at paragraph 9 of the statement is manifestly to explain where the relationship between the NASA and national standards fall in the context of NCOs role in certifying for organic produce certificates. And that commences at paragraph 8. So the evidence is really about the structural relationship of the standards overall, given that NCO has that role in certifying organic produce certificates. It's not evidence about parts of the standards in particular and it's clearly not intended to address certain provisions of the standards but, again, if Mr Cahill wants to discuss or illicit from Ms Denham her views about the consistency between the standards on particular points, parts of those standards with which he is concerned should be put to Ms Denham.

CAHILL, MS: Your Honour, I am not confined to - - -

KENNETH MARTIN J: It's, again, an objection to the width of the question, I think.

CAHILL, MS: Well, your Honour, I'm not confined to cross-examining Ms Denham on her witness statement in those parts which have been read. Ms Denham - I asked her a question about the standards which was not objected to. Her answer was that the national standard has additional provisions. I have now asked her - - -

KENNETH MARTIN J: The national standard does.

CAHILL, MS: I'm sorry. I beg your pardon, the NASAA standard. I have now asked her about that and that's an unobjectionable question flowing from the evidence that the witness herself has given.

KENNETH MARTIN J: All right. I will allow that question because the premise has been established but I think more generally we have got to descend - - -

CAHILL, MS: Yes. Yes, your Honour.

KENNETH MARTIN J: - - - if possible to a particular provision.

CAHILL, MS: Yes, I understand. Yes. So we just have to find where I was, Ms Denham. These additional provisions that you speak of, they create the potential for non-compliance under the NASAA standard which would not amount to non-compliance under the national standard, is that right?---It would depend on what you are talking about in non-compliance. The basis of all of the NASAA standards are the national standards. Where we may put an additional may be on an animal welfare issue made, for an example. So although an operator might have a non-compliance in that area, it might be to repair the animal welfare issue, but they still would not be losing this, it would be a corrective action.

I see. I see. Because, as you say here in 9(c), at the end, your certification is a certification that the produce has been prepared in accordance with the national standard, not the NASAA standard. Is that the explanation that you give for that answer? So - - -?---That's talking - that's talking about this - when I made this statement here, was when I was talking about the issuing of organic produce certificates.

Yes?---So that's what we had to declare when we were issuing the organic produce certificates, is that it's compliant to the national standard.

But you don't consider that you could decertify somebody or withdraw a certificate in relation to produce or to their operation or to parts of their land if it weren't a non-compliance under the national standard?---Sorry, could you repeat that?

So, you would have to be satisfied that there was non-compliance under the national standard before you could withdraw certification?---There's a difference between non-compliance and - I think this is a bit muddy, because you are talking about withdrawing certification for non-compliance. Non-compliance does not necessarily mean that you are withdrawing certification.

No, there's a range of sanctions, isn't there?---There's a range of sanctions.

I understand. But if decertification or withdrawal of certification was a sanction that was open to you under the NASA standard but not the national standard, could you decertify in those circumstances?---That wouldn't - - -

NICHOLS, MS: Your Honour, I object to the question.

KENNETH MARTIN J: Same objection.

NICHOLS, MS: Same objection again.

KENNETH MARTIN J: I uphold that objection. And - - -

CAHILL, MS: The time.

KENNETH MARTIN J: - - - it's also time for lunch.

NICHOLS, MS: Your Honour before we rise, if I can just inquire, we have a logistical issue with Mr Ayachit. We have video connection booked until 4.15 today. As we speak, we are making inquiries about whether that can go over to tomorrow and we are hopeful, of course, that Mr Ayachit's cross-examination can commence and conclude today. I am just flagging that there may be an issue if it goes in tomorrow and it may be that Ms Cahill can give us an estimate, if she's able to, but if she's not, we appreciate that that's - we might just have to see - - -

KENNETH MARTIN J: Well, I will let counsel confer about that.

NICHOLS, MS: Yes.

KENNETH MARTIN J: And I will deal with that at the resumption. From the court's perspective, I think we can probably establish the video link tomorrow.

NICHOLS, MS: Yes.

KENNETH MARTIN J: I'm not sure about Mr Ayachit in terms of his - his personal circumstances but if there's an application to interpose his evidence this afternoon due to that - - -

NICHOLS, MS: Yes. All right.

KENNETH MARTIN J: - - - then I will address it.

NICHOLS, MS: Thank you, your Honour.

KENNETH MARTIN J: All right. Adjourn to 2.15 pm.

(LUNCHEON ADJOURNMENT)

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

CAHILL, MS: Thank you, your Honour. Ms Denham, if you have got your first witness statement, paragraph 64 through to 71?---Yes.

Now, there you are giving evidence of what you understand is the actual intention of NASAA that lay behind the drafting of each of these standards, is that right?---Yes.

And if I can just ask you about paragraph 64, the principle that you refer to there which you say is reflected in standard 3.2.5, is that principle published anywhere?---The principle?

Yes?---Is at the commencement of that section 3.2 of the NASAA standards, it sets out the principles of that standard which is 3.2.

I see. So that's what you are referring to there?---That's right.

You are not referring to anything other than what's in the standards?---No.

Thank you. Now, if we can just come down to paragraph 65?---Yes.

Sorry. I beg your pardon, paragraph - I'm sorry, 63 is what I was meaning to refer to. I lost my place. Paragraph 63, that's where you use the expression zero tolerance and you say that the NASAA standards express the principle of zero tolerance. Now, can I just ask you, if we can get some definition about what you mean by zero tolerance there. Is one thing you mean by it that there can be no GMOs at all in any produce that's produced from the operation?---No, not only any product.

Yes. I'm not suggesting that there wouldn't be other things but that's one thing that there is zero tolerance about. There can be no GMOs in any product. And do you say that there can also not be any GMOs in any inputs into the production process?---Yes.

So water, fertilisers, anything like that, there can be no GMOs in that, medicines given to animals. Yes?---Yes.

And is there also zero tolerance for any GMOs on the land?---Yes.

Resting on the land?---Yes.

And in the case of GM canola, that would include GM canola plants without seeds?---That - GM canola plants without seeds would have to be something that we would have to investigate, but the GM, I would - from my understanding, if it was covering it, it most likely would have seeds as well.

All right. So there would be zero tolerance for GM canola plants with seeds resting on the land?---Yes.

And is your evidence you are not sure about whether there would be zero tolerance for GM canola plants without seeds resting on the land?---I'll correct that and I say it wouldn't be tolerated.

So there would be zero tolerance for that? All right. What about GM canola plants without seeds or pollen resting on the land. Zero tolerance for that or not?---Yes.

Yes, all right.

KENNETH MARTIN J: Sorry, on organic land - - -

CAHILL, MS: yes.

KENNETH MARTIN J: - - - that's - what?

CAHILL, MS: Certified organic land.

KENNETH MARTIN J: All right.

CAHILL, MS: Production area that's certified. I think you understood what I meant, didn't you, Ms Denham?---I presumed you were talking about certified land.

Yes. Yes. Now, GM canola material - a GM canola plant growing on certified land, you would have zero tolerance for that?---Yes.

And irrespective of whether that plant had formed seeds or pollen, is that right?---Yes.

And by zero tolerance, do you mean that you - that NASAA would not allow even one plant to grow on a certified operation in those circumstances?---Well, it would depend on the circumstance of that, how that one plant got there and there would have to be an investigation on how that plant got there to know what was the outcome of that.

All right. And why is it relevant to know how it got there?---Well, if it's only one plant, it's how you would treat it.

All right?---Is the issue.

So could you just expand on that a little?---Expand on?

So if it's just one plant, why does it matter how it got there?---Because if it's just one plant - it's like any GM coming onto an organic farm. If you found one plant you would have to do an investigation, same as if there are a number of plants, there would be an investigation as to how it got there, what was the likelihood of that happening again, could it be removed if it hadn't - the seeds were still - they weren't mature. You could remove and so there's a whole lot of different investigative steps that would be taking place.

I see. So perhaps if a person just brought a GM canola plant, a single GM plant onto a certified operation and placed it gently on the ground and walked away, that might not result in decertification of that land area?---Well, there would be an investigation but I accept it would be very highly unlikely that would happen.

I see. Now, GM canola resting on the back of a sheep, would that be contamination - sorry, would you be zero

tolerance for that?---Sorry. I can't understand what you're talking about.

Say a GM canola plant blew in from a neighbouring farm and landed on the back of a sheep.

KENNETH MARTIN J: Like a swan.

CAHILL, MS: Yes. Would that - would there be zero tolerance for that?---Well, I would - there would be zero tolerance because I would doubt that it would stay on the back of the sheep for very long, it would be on the land.

But if it did, if it was pulled off by the organic farmer before it landed on the ground, would there be zero tolerance for the fact that it has rested on the sheep's back?

NICHOLS, MS: Your Honour, I object to the question on the basis that if Ms Cahill is asking the witness whether NASAA would decertify, that's one thing; whether she's asking - alternatively, if she's asking about the meaning of the principle of zero tolerance, that's another, but both references have been made in this short sequence of questions and it should be made clear what she is asking in my submission.

CAHILL, MS: I'm asking about zero tolerance, your Honour. If you would like me to ask the question - - -

KENNETH MARTIN J: As a principle - - -

CAHILL, MS: Well, because this is what the - - -

KENNETH MARTIN J: Zero tolerance as a principle goes nowhere unless it leads to suspension or decertification. So what's the point of the question?

CAHILL, MS: Well, I'm cross-examining the witness on paragraph 63 of her witness statement. And, your Honour, is right, with respect, it goes - it ultimately leads to the issue of decertification but I'm asking her about what she - - -

KENNETH MARTIN J: It's just too vague like that. I uphold the objection.

CAHILL, MS: You mention here an organic production and processing system, Ms Denham?---Yes.

What do you actually mean by that? What are the components of it?---Organic production systems?

Yes?---That's farming systems, the producing - the growing of the food. The processing systems are the on valuating - on processing that would occur.

Yes. But on a certified operation such as Mr Marsh's, what would be the components of a production and processing system? Would it include the land?---It includes the land.

And the livestock because he had sheep on his farm?---Yes, it includes the land, the livestock and the production

- - -

The crops?---And the production system includes also the inputs that are taken into the land, what is used to grow the food that's on the land.

Does it include the air above the land?---No.

No, okay. Thank you. Now, do you have a clear understanding in your own mind as to what is meant by contamination under the NASAA standard?---Yes.

And can you tell his Honour what you understand that to mean?---Contamination is where something is polluted by bringing in harmful or objectionable products into that system.

All right. And when you say something, in the context of a certified operation, what are you referring to, something that is - the something or things that could be polluted?---Contamination, most generally (indistinct) the other cases have been chemical contamination of organic farms.

Of the land or product?---The land.

Or product?---Land and product.

KENNETH MARTIN J: It's not really defined in the standards, is it? Contamination is not defined?---No.

So how do you get your understanding of it?---Because that's what - I basically got my understanding from what's stated in the dictionary.

I see.

CAHILL, MS: The IFOAM basic standards has got a definition of contamination, hasn't it?---Yes, I think so.

And you informed yourself from that definition or from the dictionary or both?---I must admit, I used the dictionary more.

Now, you would agree - just on the basis of the dictionary definition that you have employed, you would consider contamination by GMO of a product to include where there has actually been a transfer of genetically modified organisms from one organism to another. So, for example, a cross-pollination, that's contamination, isn't it, in your view?---That's cross-pollination?

Yes?---It would depend where it was.

All right. So it might or might not be?---Well, it depends where the cross-contamination occurs.

Okay. What about the intermingling of genetically modified material with, say, harvested grain? So you've got maybe some GM canola seeds or some small pieces of GM plant material amongst some harvested wheat grain. Would that be contamination in your view?---Yes, it would be if it was detected.

Yes, all right. And if it wasn't detected, it wouldn't be?---Well, I mean, if it's not detected how do you know that it's there? So you can't - - -

All right?---Can't say it's contamination if you don't
- - -

You can't say it's contamination if it's not detected?---If you don't know it's there.

All right. And just coming back to some questions I asked you a moment ago, you would understand that a GM plant - canola plant without seeds or pollen resting on the land would be contamination of the land?---Yes.

And with seeds it would be contamination of the land?---Yes.

And with pollen it would be contamination of the land?---Yes.

All right. And then a volunteer growing on the land - volunteer GM canola plant would be contamination of the land?---One plant you're talking about?

Yes?---One plant. It would be but it might - but you would have to - it's - - -

What the consequences are we will come to in a moment, but just in terms of whether on your understanding that would be contamination of the land under the standards?---Under the standards it's something that's not allowed - - -

So is it contamination of the land?---Well, it would be at that point, yes.

Yes, and that doesn't matter whether it has set seed yet or not?---No.

Or developed any pollen or not?---No.

And then a GMO plant resting on a sheep's back, would that be contamination of the sheep?---I find that - I don't think I could answer that question because it would be very hard to know that it was there.

All right. So if you couldn't detect it, you couldn't conclude that it was contamination?---I can't answer that question because I think that would be highly unlikely to happen.

If there's pollen - GMO pollen floating through the air of a certified operation, is the air contaminated?---The air is part of it but if the pollen doesn't stay - you know, land on the land, well, then it's not contaminant.

It's not. But if the pollen lands on the land, that's contamination of the land?---It would be if you knew that it had occurred.

And if a sheep breathes in some pollen that's in the air, is that contamination of the sheep?---It's a very hypothetical question that I think very unlikely to occur.

If it did occur, there's a neighbour who is growing GM canola and the pollen blows on the wind across the certified operation and the sheep breath in the pollen, would the sheep be contaminated?---I just can't answer that question because I think that you wouldn't even know if it occurred. You wouldn't even know that it occurred.

So if you don't know it has occurred, you can't say there's contamination. Is that your evidence?---Yes, because how would you be able to see a sheep breathing in pollen?

All right. And then if a sheep eats a canola plant or some - GM canola plant or some GM canola seed, is that contamination of the sheep?---The land would be - is contaminated - - -

Yes?--- - - - which would be dealt with, which would then have an effect on what happened to the sheep.

All right. If we just consider the sheep in isolation - - -?---Well, you can't consider the sheep in isolation because they're part of the farming system.

All right?---They have to be on land.

So let's assume a sheep gets - sticks its head through a boundary fence and eats some GM canola off a roadside and it has eaten some GM plant material. Has the sheep been contaminated?---Well, I would be saying if that was an organic farm and it was on the outside of the farm, I would have done something to - about that GM canola outside the fence so the sheep would not get to eat it.

But let's say it did, would the sheep be contaminated?---It would have eaten a contaminated feed.

Yes, but does that make the sheep contaminated?---That's such a hypothetical that I don't know that I can answer that without - - -

Hard to say. Is it hard to say?---It is. It's - contamination is not only to do with just what happens; it's about looking at a whole system and all the implications of it and how - I think it has been inferred of how things might be contaminated to infer that we would say this is going to be decertified. It's not the case. You would look at all the isolated incidents. That sheep may be removed and we may after investigations say that that sheep can't be sold as organic, which quite regularly happens with livestock.

All right. But just on that limited information, you wouldn't be able to say one way or the other whether it's contaminated or - - -?---Without an investigation, no.

Sorry, it's one thing, and we will come to it in a moment, about the consequences of a sheep having eaten some GMO material. We're just at the moment trying to get clear what your understanding of contamination is and what that means. Do you say that a sheep, having eaten a GM canola plant from the roadside, is contaminated with the GMO

material or not?---The animal has eaten something that it is not allowed to eat.

So is it contaminated?---It has actually eaten a prohibited import.

Yes. So is it - - -?---So it's part of - it could be stated it's contaminated but it's part of the whole prohibited inputs list.

So do I - I gather from your evidence, Ms Denham, that you would need to think about it a little more before you would want to say whether it was contaminated or not?---Like in all of these cases, you never just come out and make a decision straightaway and say this is contaminated, this is this. What happens in any organic systems is there is an investigation and there is the decision made according to all the evidence and not just one isolated part of it.

Just on that, if we can come to paragraph 66 to 70 of your witness statement please. And you're talking there about the NASAA standards and how they are not to be applied as a inflexible set of rules. And generally what you are trying to say here is that you have to look at each case as a unique on, is that right, and then just apply the standards on a case by case basis?---What I'm saying there, the issue of how you look - the standards are written, to say what inputs are allowed, what are not allowed. What you have to do though is when something occurs, there will be different ways in which you will address that.

Yes?---So we cannot write a rule that says every time one thing happens we will follow that rule because it doesn't work in farming systems.

All right. So just, if I can distil that into two parts. First of all, there will need to be an assessment about whether there has been a non-compliance with the standards in any particular situation, you would agree?---Yes.

And is that also something that must be assessed on a case by case basis?---Yes, because there's never ever exactly the same events occur in any two cases.

All right. So each case is unique?---It's a case of its own and it's investigated.

And in your experience, no two cases are the same?---Generally not, no.

And so one needs to look carefully at all of the relevant circumstances and make an assessment about whether or not there has been a non-compliance or a non-conformity. Is that right?---Yes. Against the standards.

Yes?---We still don't change the standards.

I understand that. But the question of whether or not those facts amount to a non-compliance or non-conformity with the standard, whether that's the NASAA standard or the national standard is something that you have to determine on a case by case basis?---To come to, to know whether it is a non-conforming.

Indeed?---Non-conformity would be the same in all case, but how you investigate it and find out whether it is the non-conformity or not may change.

I understand. And then, also in terms of what the consequences, if you find that there is a - or make an assessment that there's a non-compliance or a non-conformity, then similarly the issue of what the consequences will be have to be assessed on a case by case basis. Is that right?---The consequences will be the same as to whether there's - and it will be depending on whether you are able to clear - clean up the contamination.

Right?---It may be that the contamination, you will take out certain areas of land but it's clear that if it's a contamination, then it will depend on how extensive it is.

Yes?---Whether it can be cleaned up immediately will depend on the outcome of it.

All right. And you are familiar with standard 3.2.9 of the NASAA standard, aren't you, which talks about an unacceptable risk of contamination by GMO?---Yes.

So is the point - can I put it this way, you might - there might be two operators who - side by side, not physically, but two operators who are members of NASAA who at the same point in time have a non-compliance or non-conformity with standard 3.2.9, but what the consequences of that non-compliance or conformity - non-conformity might be in respect of each operator, might be different depending upon the individual circumstances of each of their respective cases. Is that right?---Yes.

Thank you. Now, at paragraph 68, you are making the point there at (a) aren't you, that where it comes to 3.2.9, quite contrary to what you have just told me, you must

withdraw certification in that situation?---If the - well, before you have been talking about contamination. If we are going to talk specifically about GMO, we need to look at different things. The questions you - some of the questions asked are just general contamination. You can withdraw certification but if it's only one plant, it may only be a small area around that one plant. So the decertification varies. Decertification isn't the decertification of the whole farm. It's the decertification according to what the contamination is.

All right. But 3.2.9, if you find a relevant non-compliance, the only consequence is decertification, isn't it? There might be an issue about what you are decertifying but that's the only sanction that you can impose, isn't it?---If the standard says - if I remember correctly, if my 3 point - - -

Shall we go to it. I don't want to - - -?---3.2.9, unavoidable risk.

Yes. If you go to volume 5 and turn up page 1318, it will be there, hopefully?---1318, sorry.

You have that there?---Yes. I just went to the wrong page. Yes. Where there's an unacceptable risk.

Yes. That was my next question. It's the case, isn't it, that the discretion that NASAA has under 3.2.9 is working out whether or not the risk is unacceptable, would you agree, not what the consequences of an unacceptable risk are?---And if the risk can be managed, as it also says in 3.2 - - -

I see?--- - - - if - even though it might be one of it, it can be managed, will be handled differently to if it can't be, it's a higher risk.

All right. So two farmers, certified operators, at the same point in time who have an incursion - if we can use that expression neutrally to denote that some GMO material has found its way somehow into the farming system - they could have different outcomes depending upon whether NASAA formed a view that the risk of contamination was or was not unacceptable?---It would also more likely be on the severity of contamination.

Yes. By which you mean what, Ms Denham?---By that I mean, whether, as you raised before, whether it's just one plant.

Yes?---Or whether it's over a large lot of swathes that have flown in and cover a number of paddocks, so - - -

All right. And just on that, do you have an idea in your head about - and I'm not meaning for you to be precise here, but the type of quantity within a range that would start to move it more likely towards the result of decertification or unacceptable risk?---That's - there's not - I can't answer that question because it's one, again, that unless - you are asking me to make an answer on something that I haven't been - you haven't been able to ascertain all the facts behind the contamination. So before - to make - say to me - for me to say that this amount will mean this, unless we look at all - - -

The circumstances?--- - - - the circumstances, how it happened as well, was it something that, say, one plant that has come in and you look at the evidence around the area. There's no GM crops grown for 50 kilometres. You would say this is probably a highly unlikely event to occur again. One plant, you can remove it, even if it's dropped seeds, you can soil, so - I think that's the problem, that I cannot say that this is - this amount will lead to a more severe than this amount. It's - - -

All right. So one plant with a farm, a canola - GM canola farm nearby, say, across the road, might be viewed differently from one canola plant without that?---Yes, because the standards say that anything within 10 kilometres does pose risks.

All right. Okay. Now, just in terms of what is - what might constitute an unacceptable risk and what might not and the sorts of circumstances that might bear on that, is there any material that NASAA publishes that would enable a member of the community, in particular the farming community, to get some guidance about how NASAA might view those - view 3.2.9 and apply it?---Well, I think that the rest of - the earlier start of 3.2 lays out some of the things farmers must do when they coming to - the risks that they see. That is, check - making sure their seeds are not GMO, that they get declaration from suppliers so the standards actually say - and farmers themselves, and part of this is also risk-based management. The farmers have to develop their own risk-based management plans to ensure that they don't get contamination from GMOs.

Yes. That would be directed more towards organic farmers, though, who are seeking - or seeking to maintain certification. Would you agree?---I'm talking about organic farmers now.

Yes. What I was directing my question towards is members of the public generally, including farmers who are not certified farmers who might, for example, farm in the neighbouring district. Does NASAA publish any material that would provide guidance to the public at large about how it would promote or - sorry, I put that badly - how it would approach the assessment of whether or not risk - a risk was unacceptable within the meaning of 3.2.9?---A farmer - could you repeat that question, please.

Yes. Does NASAA publish, to the public at large, any information or guidance about how, and in what circumstances, it is likely to assess an unacceptable risk of GMO contamination?---No. We don't do that. We publish our standards and we would refer people to our standards, which have a number of not only the GMO issue of (indistinct) windbreaks and other ways of protecting farms, because, once again, if you set - we put the normal things down like windbreaks, buffer zones - they're the normal procedures, but we don't actually publish anything to say that, if you have this much of something, that is an unacceptable risk.

Right?---But we do say that risks - if a farm within 10 k, it's a risk.

Now, when we come to paragraph 70 of your witness statement, Ms Denham, you're talking about the consequences of a given contamination event. In relation to 3.2.9, the consequence is always decertification, isn't it, if NASAA - sorry - NCO has assessed the risk as - of contamination as unacceptable?---That's - we're not talking there. I'm talking about the consequences of a contamination event, then if it can't be determined by testing, then we may look at, and give some timeframes, if - of when organic certification may be coming back in.

Yes. So you must decertify, but then there's a question as to how long a time period must elapse before that operator can be recertified?---Yes.

Yes. And you say that the timeframes given for achieving first certification can be used as a guide, is that right?---It depends whether it's - if it's an - if you're talking - we're talking contamination generally, or specifically?

Well, what are you talking about here, Ms Denham? You say consequences of a given contamination event cannot be readily determined. Some guidance may be taken from the

timeframe for obtaining organic certification?---For example, if it was a contamination from a chemical overspray - - -

Yes?--- - - - then would be - then it is a minimum one year, and then there would be testing carried out until we knew there were no residues in the soil, and so then it would be back - because that's not a farmer's own fault. If a farmer had created contamination himself by using a prohibited input, they're out of certification for at least three years.

So let me understand that. In relation to chemical contamination, is that a fair way to describe it in shorthand? Chemical contamination?---Well, a prohibited input is applied to the land.

If the farmer is - the certified operator is responsible for the application of that substance, it's three years, but if it's accidental, it's one year?---And if it's - if it's the farmer himself who does it, it is decertification of the whole farm, because that's a - he has broken a contract with the standards. If it's a contamination of a certain area, it will be only the area that's affected with that contamination.

And is that - those more onerous consequences, is that - it's intended to be punitive, is it?---It's intended because the person has knowingly used a product that is not allowed under the standards.

What's the rationale behind that? Because, ultimately, it's about labelling produce for the benefit of consumers, isn't it?---Yes.

So how does that consequence of three years where it's deliberate and one year where it's - - -?---Because it's a - the farmer's no fault of his own. He didn't deliberately do it; someone else has applied it to his land.

So why would you give - why would you require three years of decertification for a deliberate act?---Because they've knowingly applied to the land a product that is not allowed under the standards.

So coming back to paragraph 70, where you say:

Guidance may be taken from the timeframe for obtaining organic certification -

You mention three years in relation to, say, chemical overspray. It's five years under the standard for GMOs, isn't it?---Five years in the standards. The five year rule is if someone had - if land - if their land has had GMO grown on it.

GMOs growing? Yes?---And it has been knowingly grown.

Knowingly - - -?---It's planted - like, someone has planted the GM crop on that land.

Right. Not volunteers?---Not volunteers.

But guidance can be taken from the knowingly growing standard of a minimum of five years, can it, when looking at the consequences of decertification for an accidental case of GMO contamination?---This comes into the same category as I explained before, in that it wasn't of the farmer's doing. The farmer did not intentionally plant the GM canola; it has been contaminate on his farm, and so there is always then looking at the - the - bringing the land back in as soon as possible.

I see. I see. Now, those sorts of considerations, are they published anywhere for members of the public to receive guidance about how NASAA treats these different situations?---No. They're not published.

All right?---That's also to do with privacy laws and that.

Sorry. What do you mean by that?---Well, if it's to deal with a farmer, we can't publish their information about their certifications.

Sorry. You might have misunderstood what I meant. NASAA doesn't, for example, publish anything on a website which explains to the public at large that NASAA's response to an accidental event of contamination is likely to be less severe than where the operator has done it deliberately?---No. That's in - - -

Now, paragraph 76 of your witness statement, you say that you were not involved in the assessment of the contamination on the Marsh property in 2010 and 2011. Were you in - did you discuss at all the decision to suspend certification or to decertify with any other person before those decisions were made?---I - I think Stephanie did have conversations with me about the issues that there were, but I was not involved in the decision making.

Did you express your views to her about - - -?---No.

Sorry. I will just finish the question - about whether or not certification should be suspended or withdrawn?---No.

So what was the discussion you had with Stephanie about?---It was just about the issues and the processes, about - I think one of the conversations was about the first sample that was taken for testing was lost, so that they then needed to go and have another sample.

So you didn't express any view to Stephanie Goldfinch or anybody else about whether or not you thought part of Mr Marsh's farm should be suspended - the certification should be suspended or subsequently decertified?---No. And the reason for that is that under our accreditations, one of the things is that NASAA - and as I was chairman of NASAA at the time - can have no due inclines over NCO.

Right. Has that changed?---No. That's still the same.

So keep the functions quite separate?---Mmm.

You - I just pick up on this now while you mention that. Before lunch you said that you left the NCO board when you became chair of the NASAA board in October 2010 because it was required to keep the two separate. Is that right?---Yes.

And has that changed now because you're both on the NCO board and the NASAA board, aren't you?---Yes, in 2010.

All right. So - and you're chair of both entities, is that right?---Yes.

So there was a change in 2012 when you were allowed to have that whole - both positions?---Still with the fact that the activities of NASAA cannot have an influence on the activities of NCO.

I see. All right. Can we go to page 343 of volume 2 please. Now, do you remember this press release?---Yes.

And who drafted this, Ms Denham?---This was drafted by David Silkstone, our communications manager at the time, with input from myself and comment from Stephanie.

All right. And what was your input apart from the quote that appears at the bottom of 343?---Well, I read through it with David. I made some corrections in areas. I can't remember exactly what the corrections were now. I don't

think I've - well, I probably would have them on my computer but - - -

But you're quoted accurately, are you, at the bottom of 343?---Yes.

And you made that statement there in that press release in your role as NASAA chairman, didn't you?---Yes.

And the purpose of that statement, you were fulfilling, in effect, an advocacy role on behalf of members in the organic - NASAA members in the organic industry. Is that right?---Yes.

And what you were wanting to impress upon the government is - the West Australian government was that this event that had happened on Mr Marsh's farm and the consequent loss of decertification highlighted the need for government regulation to prevent that situation occurring in the future. Is that right?---It was to - I've (indistinct) and (indistinct) on there it was actually to - request for government to look at, making sure that there were systems in place so that this wouldn't happen to an organic farm again.

But what you were advocating for, the substance and detail of it was you were wanting to urge the government to regulate the GM canola industry?---No.

Is that right?---No, I haven't said that at all.

No, but I'm asking you what the purpose was behind this?---The purpose was for - getting the government to sit down with the industry to work out and with the - the GM industries, well, and work out systems that we could both coexist together.

All right?---And ensure that we didn't have this happen again.

Now, 347, if you could go there please.

KENNETH MARTIN J: Sorry, can I just clarify, 344, after the third paragraph we see the two words "end quote"?---Yes.

So is that all quoting you, Ms Denham, down to three - - -?---Yes, you will see there's - the quote paragraphs end at possible.

All right. So what's attributed to you is the last paragraph on 343 and the - - -?---The three - - -

- - - top three paragraphs of 344?---Yes, your Honour.

Thank you.

CAHILL, MS: And we're calling for stricter regulations of people growing GM crops?---Sorry, which - where are we up to? I've got - - -

344.

KENNETH MARTIN J: So it's a two paged press release.

CAHILL, MS: Yes. So over on 344, they're saying:

Greater protection is needed for those who do not wish to be involved with GM crops. This occurrence clearly shows that farmers involved in growing GM crops need much stricter regulations and supervision to prevent future events.

That was what you were pressing for, wasn't it?---Yes, but when - I'm saying this in the way that I was saying it as well. It's not just to say that someone regulates without - we need to sit down. Part of this is about everybody sitting down and working out what is the best system we can - - -

Well, you wanted a full and open inquiry - - -?---Yes.

- - - into the contamination but you were clear that what you wanted was not greater regulation or restriction upon the organic industry but regulation - greater regulation and supervision of the GM industry. Isn't that right?---Yes.

Thank you. Now, if we go to 347. And I think - no, that's just the one page I think. Yes, just the one page. Now, you've got your NASAA chairman hat on here again?---Mmm.

Would you like a moment to read it and - - -?---Yes, please.

And then just let me know when you're ready?---All right.

So here you have your NASAA chairman hat on again and advocating for and on behalf of NASAA members and the organic industry. Is that right?---When I was writing this letter mainly was because that - we felt that comments Mr

Redman had made on the Country Hour, he was wrong with some of the comments he had made about the standard - the organic standards.

And their application to Mr Marsh's situation?---Yes.

Is that right?---Yes.

Did it not - did you not think that this would have been better left to Ms Goldfinch to respond to?

NICHOLS, MS: I object to the question on the grounds of relevance. Who within NASAA issued a press release dealing with a comment by the minister is, in my submission, irrelevant to the issues in this case.

KENNETH MARTIN J: Press the question?

CAHILL, MS: I would have to ask the witness to leave. So I think I can deal without it.

KENNETH MARTIN J: All right.

CAHILL, MS: I will move on, your Honour. So you're clarifying the standards and how they were applied in this particular instance, yes?---I was explaining what the contamination was.

Yes, and you say in the second paragraph:

NASAA feels that it's important that the issues regarding standards and certification implications, in cases such as this, need to be clarified.

?---And this is writing a personal letter to Mr Redman after the comments he had made on the radio.

You didn't think that the decertification decision was wrong at this stage, did you?---No.

You thought it was right, didn't you?---I thought it was applicable.

Yes. And you had been apprised of the circumstances of the event, hadn't you? You had been told what had happened - - -?---Yes.

- - - on Mr Marsh's farm? And had you formed the view that there was also a nonconformity or noncompliance with the national standard?---Yes.

Can you tell me which one?---The national standard,
section 3 point - - -

Would you like to go to it? It's at - have you still got
volume 5 open? It's at page 1408. I think the GM section
is at 1421 if that helps. So which standard do you say
there had been noncompliance with?---The noncompliance is
(indistinct):

The use of genetically modified organisms or their
derivatives is prohibited.

So that's 3.3.1?---3.3.1.

And how do you interpret use? That means something akin -
does that cover an accidental presence situation?---No,
it's the same situation as if it was chemicals. It's a
non-allowed input and so that's when you address the issue
with decertification.

So sorry, just to be clear, your view is that in the case
of accidental presence of GMO material on a certified
operation, there's noncompliance with standard 3.3.1
because the use of GMOs is prohibited?---Yes.

Thank you. Any other standards under the national standard
that you say were not complied with by - in these
circumstances?---No, but basically that's the principle
that you would say it was contamination was the fact that
it's totally prohibited.

All right. Well, the use is totally prohibited. That's
what it says, isn't it?---Well, we use it - and from
inference from that is the presence of.

I see. From the words "the use of GMOs or their
derivatives is prohibited", you infer that that means -
sorry, or their presence, that "use" inferentially also
includes the presence of GMOs. Is that right?---Yes.
That's the way that we would interpret it.

Thank you. And just on that, if you go to paragraph 23 of
your first supplementary witness statement. There, in the
first line, you say:

Moreover, the national standard, which NASAA is bound
to - - -

- - -?---Sorry. Sorry.

Sorry. Got the one? It's the first supplementary.
Paragraph 23?---Mmm.

Continuing:

Moreover, the national standard, which NASAA is bound
to apply -

Do you mean NCO there?---Sorry. Yes.

Yes. But - - -?---Yes. It's the NASAA standards, which
NASAA owns.

No. It's - no:

...the national standard, which NASAA is bound to apply
- - -

- - -?---Yes.

That should be a reference to "NCO", not "NASAA", isn't
it?---Well, it could actually be a reference to NASAA,
because NASAA owns the standards and sets the standard.

I see?---So it's NASAA who has to make sure that the
standards comply with the national standard, because we own
the standard.

But your point here is that you have to you - you, being
NASAA, have to apply the national standard, don't
you?---Yes.

And you would apply it in a situation such as the one that
Mr Marsh found himself in, is that right?---Yes.

Thank you. And it's NCO who would have to apply the
national standard in terms of assessing non-compliance and
the consequences of that, is that right?---Yes, and the
NASAA standard.

The national standard and the NASAA standard?---Yes.

I understand. But they're substantively the same, aren't
they, in your view?---Yes. Yes.

There shouldn't be any situation where you can be
decertified under the NASAA standard but not under the
national standard?---No.

No?---No. Not in my knowledge. No.

Thank you. Can we come back to that letter of - at 347, please. Now, here what you're doing, in part, is distinguishing the event of incursion that confronted Mr Marsh with the situation had it been conventional canola, rather than GM, that had blown onto his property, yes?---Yes.

And is the point that you're making here that the outcome would have been quite different had it been conventional canola, because that's not prohibited?---No.

Is that right? So conventional canola is allowed in a organic system?---Conventional canola, it wouldn't be considered a contamination, because conventional seeds can be used by farmers if - and - and conversion can occur through that process.

Can you feed conventional canola to sheep?---No.

You can't?---Sorry. Conventional canola. Sorry. If - yes. It wouldn't affect if the sheep ate that.

So you could actually feed - just allow the sheep - if there was an incursion of conventional canola, you could allow the sheep to eat that all up?---You - you probably would - this is a certification decision you would make. I would be saying that you would be - having your sheep removed from the area, they may have eaten a little bit of it to start with, and then you would remove the sheep from the area until it was cleaned up.

They can't eat the lot of it? They can't eat all the canola that's there - the conventional canola?---No. Because it would depend on how much, because there's certain limits of amount of feed that they must have which is organic feed.

I see?---So there are rules about how much feed - there are some allowances for small - small allowances of conventional feed, say, in example, in drought.

I see?---But there is also a percentage of how much feed
- - -

So the farmer - the organic farmer couldn't get rid of that conventional canola from his paddock by having his sheep eat it?---He probably could if they weren't certified.

But not if they were - - -?---No.

They would be decertified if he got them to clean the paddock up?---Well, it wouldn't be seen as good practice. Let's put it that way.

Well, would they be decertified?---If they had eaten it all, that would still - - -

Not sure?---There might be a quarantine for them.

I see?---Probably be a certain period of time for quarantine, which is normal when anything like that occurs to livestock.

Yes. All right. Now, you say here, in the middle of the page:

If the swathes were conventional canola plants, the impact on Mr Marsh's farm would not have been as great -

first dot point -

Because conventional canola plants are not genetically engineered, hence not specifically prohibited, and it would only require that these plants be removed, such as any weeds that invade an organic farm.

Is that - do you still adhere to that position?---Yes.

Well, are you saying that weeds must be removed from an organic farm?---Well, most farmer's weeds are - most farmers are trying to remove weeds from their farms.

Well, most farmers try to reduce the weed burden because it interferes with their crops and their yields, isn't that so?---Yes. Well, that's why I'm saying that people like to remove them.

And when they've got sheep grazing, sometimes farmers like to have weeds there, like Wimmera rye grass, because it's good fodder, you would agree?---Yes.

But organic farmers aren't, under the standards, obliged to remove weeds, are they?---No.

No. So where you say here:

It would only require that these plants be removed, such as any weeds that invade an organic farm -

where do the standards say that conventional canola must be removed, or something like conventional canola must be removed?

NICHOLS, MS: Your Honour, I object to the question.

KENNETH MARTIN J: Yes.

NICHOLS, MS: Ms Denham is being cross-examined about the conformity - the relationship between the standards and a press release. In my submission, it's hardly relevant to the issues in this case, which concern actual decertification and re-certification decisions.

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

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

KENNETH MARTIN J: Very well.

CAHILL, MS: Is feeding - deliberate feeding of conventional canola to sheep contamination of the sheep?---It - - -

NICHOLS, MS: I object on the basis of - - -

KENNETH MARTIN J: Object again.

NICHOLS, MS: - - - relevance again. There's no suggestion in the evidence that this is an issue in this case.

KENNETH MARTIN J: Yes. I think I have to uphold that objection. It's just - - -

CAHILL, MS: If it please your Honour.

KENNETH MARTIN J: - - - too divorced from the facts under consideration.

CAHILL, MS: The purpose of - one of the purposes of this letter, Ms Denham, was again to press the government to have an inquiry about the contamination that had occurred on Mr Marsh's farm. Is that right?---Sorry, what - - -

At 347 of volume 2?---Sorry. Yes.

The purpose of - one of the purposes of this letter was to, again, press the government to hold an inquiry into what had occurred on Mr Marsh's farm. Isn't that right?---Yes.

And with a view to encouraging the government to consider further regulating the GM industry, is that right?---In this letter, I was writing to Mr Redmond because he had made comment that at that time, when he was on the radio, saying that he was willing to work with the industry to resolve the issues, and we welcomed that; and that's when we - I've said in this letter that holding a full inquiry would help resolve the issues relating to this so that we didn't see it happen again.

All right. Was there an Organic Advisory Board that was part of NASAA or NCO at this time?---The Organic Advisory Board was part of NCO.

Yes. Were you a member of the Organic Advisory Board of that time? Of the - of the event on Mr Marsh's farm?---No. Because the Organic Advisory Board did not deal with Mr Marsh's case.

It did not?---No.

All right. Can you come to, in volume 2, page 416, please?---Yes.

Just before we get there, Ms Denham, can I just ask you this question: are you saying you weren't a member of the Organic Advisory Board or that it didn't deal with this matter?---It didn't deal with this matter, and I was a member of the Organic Advisory Board. It only ever had one meeting in early 2010.

All right. All right. So this is a review sheet filled out by Ms Gore. Do you have it at 416?---Sorry. Which volume?

Volume 2?---Sorry. Yes.

So she filled this out in March 2012 and it was in relation to an inspection in October 2011. Now, can you see the section that says Operator Category?---Yes.

And across to the right, "Stopped due to questions from Steve not addressed by OAB 31 - " well, don't think there's 31 days in November but lets not worry about that, "31.11.2011 3312 addressed"?---Mm.

So where you part of an organic advisory board that was asked any questions in relation to this matter between November 2011 and March 2012?---As far as I'm aware it never came to the advisory board.

Do you mean as far as you recall?---Yes. Because the advisory board has only ever been communicated with at the time of its meeting in March, if my memory is correct, in 2010 and then it went into - it was into not - it didn't do anything - whatever you call the word where something goes into - - -

KENNETH MARTIN J: Dormant?---Dormancy, yes. Thank you.

CAHILL, MS: And if you go to page 419?---Mm.

Do you see down the bottom, "Additional review notes, not for publication"?---Mm.

And where it says, "Will the land be certifiable after five years from the date of contamination 30.11.2010, or will it be five years after no GM positive canola is found?" And then the answer is given there, that you can read. That wasn't an answer given by the Organic Advisory Board to your knowledge?---No, not to my knowledge and if - if this was to be addressed by anybody, it would have been addressed to the NASAA Standards Committee who is the one that makes interpretations on the NASAA standards.

Which you were part of?---At that point in time, yes.

And do you recall being asked that question at that time?---No.

Never?---No. And the - what happened, the process was that they would have forwarded it on to the - to the communications manager who would have put it out to the standards committee.

But you don't have any recollection of that, in fact, happening?---I have never received - no.

Okay. And there was quite some delay between the inspection in October 2011 and the ultimate decision of Ms Gore consequent upon the inspection, which was not until 30 March 2011 - 2012, I beg your pardon. Was your evidence that you wouldn't be able to explain why that delay occurred because you weren't involved in the certification issues?---I was not involved and I was by then - that's in October - I was the NASAA chair, so that was - - -

So that was?---I was not part of NCO.

All right. So not involved at all?---No.

When did you come back onto NCO?---November 2012.

Okay. So here at 420, what Ms Gore has done is annexed to, or included in the report, a number of emails that have some relevance to the matter generally?---Mm.

And if you see, towards the bottom of the page, where it says, "Hi, Jan" and that's Mr Silkstone in September 2011 writing. And you are being forwarded some information for your consideration about giving guidance to Mr Marsh about when he's going to get his certification back. How did you respond to that?---I responded to - and I checked this last night. I responded to David to say that this was not NASAAs responsibility and he was to forward it to the certification and officers in NCO.

All right. Now, paragraph 76 of your witness statement, your first one, you say you weren't involved in 2010, 2011, but you did participate in reviewing an inspection that was conducted by Claire Coleman in April 2012. Yes?---Yes.

So that was several months before you went back on the - went back on the NCO board, when you were still the chairman of NASAA.

Yes. And you were able to do both of those roles?---That wasn't in as a role of a chairman of NASAA. I had been for many years part of the reviews - were always a committee of people outside staff that did the reviewing. And at that time they were very short-staffed and we were in between employing new staff and so I did a few reviews to help and that was with a different hat on. That was not as the chairman of NASAA, that was as my expertise of having been a reviewer in the past.

And this happened to be one of them that you did?---Yes.

Is that right?---Yes.

And you had previously publicly advocated for greater regulation in light of - and an inquiry in relation to Mr Marsh's circumstances. Yes?---Yes.

And you felt able to make a certification decision here independently?---Yes, I did make - I think I did - was able to make it independently.

You didn't have any qualms about that at the time?---No.

Right. Now, if we go to page 448, this is where your review begins, isn't it?---Yes.

And at 450, Ms Denham, your decision, in effect, is conveniently summarised here, isn't it, under information to client, in particular, in numbered paragraph 1:

Organic status will not be reinstated until such time as the GM canola is eradicated and verified by inspection during the cropping season.

?---Yes.

Did you mean every single seed, every single plant?---That decision was made, and why I made that was on research work - I'd looked at research papers in 2011 and from there, one was Chris Pearson, another was A. Drugher from Germany, whereas the seed bank would remain from time of growing canola crop, the seed bank in the soil would be quite a reasonable height for about two years. So I think the decision was made on the basis that it was not unreasonable to have to growing seasons before reinstatement of certification occurred.

That doesn't say any of - this doesn't - - -?---No, and I was remiss in not putting my reason in the review.

Well, the information that's to be sent to the client is:

Organic status will not be reinstated until such time that the GM canola is eradicated.

Was that your position or not at the time?---That was my position at the time.

And did you mean by "GM canola is eradicated" every single canola seed on the property?---It would be eradicated to a manageable level.

That's what you meant?---Yes.

Eradicated to a manageable level?---Whereas - where it was not - there weren't more seed incursions growing so that there was - - -

No more volunteers?---Right. No more volunteers, sorry.

For how long would you require that to be demonstrated?---Well, considering reading those research papers, I figures that at least two growing seasons would be reasonable to have it reassessed then at the next inspection.

And over the page you make the point that 3.2.8 is only in relation to - the NASAA standard only relates to intentional sowing of GM crops?---That's correct.

All right. So that five year rule wouldn't have application?---No.

KENNETH MARTIN J: Wouldn't have application?

CAHILL, MS: Would not have application, is that right?---Yes.

And if you just keep your finger in that page and go back to 419 please? You can't - you know I took you to the additional review notes not for publication a moment ago. That answer to that question that's been posed there about 3.2.8, someone has said that it's yet to be decided whether it's five years or not. You can't offer any assistance to identify who might have answered the question in that way?---No, I haven't - until I saw these, I didn't know that that had occurred.

All right. Now, paragraph 79 of your first witness statement?---Yes.

You say that in reviewing the 2012 inspection report, considering whether any changes were warranted, you took into account the circumstances of the contamination, which I assume you mean the original contamination?---Yes.

And what were those circumstances that you took into account?---It was the extent of the contamination.

And what do you mean by that? Do you mean just the area over which material was found or do you mean the amount?---The area over which it was found.

And not so much the amount of material that was found in any particular area?---In some areas it would be that as well because in some areas it was heavier than others.

Which ones?---I'm sorry, I can't remember off the top of my head which paddocks.

How would you - well, what would you need to look at to refresh your memory?---It would be the original inspection report probably.

All right. You can go back to that. There were two, weren't there? There were two inspections done before the decertification?---Before the suspension?

Yes, I beg your pardon, before - no.

KENNETH MARTIN J: No.

CAHILL, MS: There was one before suspension and then another before decertification. The first one is at 293. The second one is at 325?---I took it on the basis of this information, that the paddocks effected were 7, 8, 9, 10 and 12 and then there was concern with 11.

Yes?---And later on 11 was included in the - - -

Yes, but just in terms of how much was in each paddock?---It's the fact that it was across that whole area. It is not - - -

All right, so I'm just getting to the bottom of whether it was relevant to know how much was in each paddock. Was that relevant to you to know?---It would be - it's relevant for the first decision making process.

Which is the suspension?---Which is the suspension and then the decertification. Then the decision then to move on to is made on a basis of that original decision.

Yes. So I'm just asking you about paragraph 79 of your witness statement. You said you took into account the circumstances of the contamination and I asked you what circumstances. You said the extent. I asked you whether you meant the area - just the area or whether you also meant the amount and I thought you said the amount was also relevant?---Yes, it was relevant and - - -

So what did you know about the amount?---It's only the descriptions and the photographs that I have seen that
- - -

All right?--- - - - that were in some of the areas. So that's what I had to rely on, was the information that was here, same as the first decision was relied - - -

So where the report only mentions a small number of plants, that was still enough?

NICHOLS, MS: I object to the question. If Ms Cahill is going to refer to parts of the report, she should be taken

to it and an opportunity be given to the witness to have a look at the report in its entirety.

KENNETH MARTIN J: So you say the question is unfair because the witness should be taken to the document.

NICHOLS, MS: Correct, and she should have an opportunity to read the document as well.

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

CAHILL, MS: Yes, I will take her to the document. I was just trying to speed things along, your Honour. So if we go to page 325. If you just take paddock 11 as an example, Ms Denham, at page 326. Do you see the third paragraph that commences:

We then travelled along the fence line.

?---Mmm.

And halfway through that paragraph:

We also found stems in the gully at the boundary with paddock number 11. And you can see location F on the map, photo 9.

And if you go to 328, we will see location F and then photograph 9 is at page 331, a pretty unhelpful photograph there. You will also then see:

We also found stems in the gully at the boundary with paddock -

Sorry, I have already read that. Continuing:

From there, we walked into paddock 11 and found further stems in the pasture there, location G on the map, photograph 10.

And you will see where G is at 328?---Yes.

And you will see at 328 where the crop on paddock 11 at 328 - you see where the crop is designated. Do you see that?---Which one are you talking about?

Paddock 11?---Yes.

See where the crop is designated on the map?---Yes.

And so the swathes are found away from the crop and then we come to the bottom of 326. It says:

The wheat crop in paddock 11 appears to be free of contamination, despite canola stems being found down slope of the crop.

Saw that. So did you form a view from this about the number of canola swathes that had been found on paddock 11? Did you form a view? I should just show you this. Sorry, my learned friend is quite right, my learned junior. You have seen the third paragraph that commenced:

We then travelled.

I have taken you to the two references to paddock 11. Continuing:

And found further stems in the pasture there, location G, photograph 10. This paddock had a wheat crop and part of the approximate extent of which is marked on maps, since the operator didn't want to crop too low down where there was potential for waterlogging. We walked up into the wheat crop and found no further stems of canola. The three stems found here appear to be the extent of the contamination in this paddock.

The three stems, did you take that into account?---This question really needs to be really asked of a person on the basis they've made the certification decision.

So I'm coming back to 79 of your witness statement. You said that you took into account the circumstances of the contamination?---In 2012.

There was no additional instance of contamination in 2012, was there?---No.

So, sorry, do you mean in 79 you didn't take account of what happened in 2010?---I took account of what happened in 2010 when I was reviewing the 2012 inspection report.

Thank you. So did you take into account that only three swathes or stems had been found on paddock 11?---Yes.

Yes, and that didn't affect your decision not to recertify paddock 11?---No.

And why was that?---Because it was on the basis that I said to you I thought that this was part of - that the evidence - the research that I read, the real issue - be two growing

seasons between - because the seed bank in low and minimum till soils usually stays around regular rates and for at least two years.

From three stems. Yes, is that your evidence?---There's no evidence that there weren't seeds there as well because you have - you see the seeds. You might not have even seen the seeds.

All right. So even though you don't see seeds, that doesn't mean that there isn't contamination?---Well, they were looking at the extent where you saw some evidence there that you could justify saying that it needs to be in - that paddock needed to be out as well.

All right.

KENNETH MARTIN J: So the problem with seeds on the soil that you can't see is they're potential germination in subsequent seasons. Is that - - -?---That's right, yes.

Is that what you're concerned about?---That's what we're concerned about.

Thank you.

CAHILL, MS: Now, you say in paragraph 80:

The presence and extent of contamination -
meaning the presence of GMOs on the property:

...is more difficult to access than a chemical overspray.

And I understand you to be saying because when there's a chemical overspray you can test the soil?---Yes.

Could you not test the soil to see whether there's any seeds in it?---But you can but you would have to test - I mean, you would really have to take - to know where the seeds were, you can work out seeds because I mean in the research they do it. But in this case, to ascertain, you would have to have gone across the whole area.

And you don't have to do that where there's a chemical overspray?---A chemical overspray you can take random samples.

And you can't do that in relation to canola seeds?---But we - you could do random samples, but this is - that wouldn't give you the extent of where the canola seeds were.

But it would in the case of an overspray?---Yes, because you can do a random - with normal, general, there are protocols in place for taking samples of soil to get an accurate estimate of what is in the soil - the contamination of the soil.

But where you've got three stems in one small area of a paddock, you couldn't do random tests in that paddock of the soil to see whether the canola was at the other end - canola seeds were at the other end of the paddock; you couldn't do that?---Well, I (indistinct) looked at the process, but I would have - - -

Haven't thought of that?---No.

All right. And you didn't think of it at the time when you made this decision not to recertify any portion of the decertified paddocks?---No.

Now, at paragraph 82 of your witness statement, you say:

It's impracticable to crop a portion of a paddock -

Is that your - does that remain your evidence?---It was probably - it's harder to decertify an area - a part of a paddock than it is - - -

I'm sorry. You said - - -?---Yes.

- - - here:

It's impracticable to crop a portion of the paddock -

Is that still your evidence?---That was probably meant to mean - what I'm meaning in there is that it's harder to define the portion of the paddock that is - it's - if you say we're removing part of certification from part of the paddock and allowing paddock in, it's harder to determine.

But NASAA has done that before, hasn't it? It has decertified an area of a paddock?---Usually that - if it's a larger area, we won't; it will be a whole paddock. But if it's a small area, it will be - the requirement will be to fence it off.

Small? What's small?---Well, for example, it might - if you were looking at some GREENGUARD for plague locusts,

where the locusts on the property might be only in a small area, so you would use it there and fence that off so it's not used - not - - -

Yes?--- - - - is out of certification.

Page 513, please, Ms Denham. That's the recertification decision of November 2013, isn't it?---Yes.

You see the bold type in the middle of the page?---Mmm.

And the second paragraph:

...also refer to the non-compliance re the use PIBO.

- - -?---Mmm.

And there were 5.4 hectares of paddock 4 that were decertified because Mr Marsh used PIBO back in 2012, isn't that so?---Yes.

Portion of a paddock?---Portion of a paddock. Yes.

It can be done, can't it?---Yes, it can be done. A smaller area can be - - -

5.4 hectares is small, is it?---It's a - yes. It's a smaller area in a property such as that. Yes.

All right. Could you do it for larger portions?---Well, when it gets to a larger portion, that's where it's much more easier just to take the whole paddock of certification.

Right. But where you've got three stems just in one small area in paddock 11 near a boundary, there's no reason why that couldn't be decertified, is it, and leave the rest of the paddock?---That would be a decision the person - I - I - yes. I can - - -

You would accept that?---Yes.

Thank you. Paragraph 84. Now, your decision not to decertify, at that time, any part of the decertified land was, (a) because of the extent of the original contamination?---Yes.

Is that right?---Yes.

But it was the area, not so much how many plants or seeds were in any particular location, is that right?---By 2012,

that was when basing on the fact that - that - I do not see that it was unreasonable because of the research that had been read, that two growing seasons should be - there should be two full growing seasons before there was a reconsideration.

All right?---And this was in April, and there had only been one growing season at 11 and 12 at that stage.

So just coming back to (a), the extent of the original contamination, you talk about vast areas of the farm. That's the area over which the plants were spread, not the concentration of the plants within those areas that was relevant to you?---Yes. They would vary.

Yes?---Yes.

The impossibility of removing all of the GM plants detected in 2010?---Yes.

Had you been told about the efforts Mr Marsh had made in April 2011 to remove the plants?---This - that statement has been made about was there in 2010 - - -

Yes?--- - - - so you have no evidence of what - how much seed was left if - even if the plants were all removed, how much seed was there.

Sorry. Just focusing on what you've said here:

...because of the impossibility of removing all of the GM plants detected in 2010 -

Had you been told about the efforts Mr Marsh had made in April 2011 to remove all the plants?---There were - no, I hadn't (indistinct)

Thank you. And then you say:

Because of the fact that there had been some germination of GM canola in 2011 -

how much had there been?---Well, I would have to go back and read all the reports again, as I can't remember those figures.

There were nine, weren't there?---Could be nine. Fine.

There were nine, weren't there?---Yes.

And that was from the thousands of seeds that may have been scattered over that vast area, yes?---Yes.

And because there had been nine volunteer plants germinate between December 2010 and April 2012, that was a factor that you thought meant there should not be recertification at this stage. Is that right?---The factor was that - is - is the viability of the seed and the life of the viability of the seed in the soil. There might have only been nine up to that point of time, but there was no evidence that there wouldn't have been more if the next season were really good growing and the seeds germinated at that time.

And did you turn your mind to how many?---No, I didn't turn my mind to how many.

Whether it would be another nine or 900?---Well, that's until - till the event, there's actually no way that I could know, and I couldn't answer that question.

And you didn't turn your mind to whether it would be sufficient to mitigate the risk to simply pull any volunteers out as they germinated, before they set seed or produced pollen, is that right?---No. Because that - that's fine if they - if we knew that there were only going to be nine volunteer plants, then you could make a decision. But there is absolutely no evidence to know how many volunteers may have grown in the next growing season.

But if you had a farmer who was prepared, with his wife, to walk 10 metres apart up and down each of those paddocks on a routine basis to vigilantly monitor volunteers and pull them out before the seeds set, that wouldn't be sufficient for you?---I'm still saying - I will still say that there's still no evidence as to how many - and if there were thousands of plants that germinated, would they be able to have kept up with that?

And that was - the potential for that scenario to develop was something sufficient for you to rely upon to not recertify at this time, is that right?---Yes.

So - now, you say at the conclusion of paragraph 84 that you considered that it was appropriate that the status of the property remain unchanged. Now, if you've still got that second volume in front of you, could you go to 432, please. Now, here we are in the middle of Ms Coleman's inspection report of 19 April 2012. Residue and contamination risks, those are all - he's quite - he is compliant with the standards under F for residues and

contaminations, is what the inspector has told you, yes?---Yes.

And at the bottom, genetically modified organisms:

Risks of GMO contamination: compliant. Does the operator effectively manage GMO risk: compliant.

Yes. You saw that when you made your - before you made your decision not to recertify?---Yes.

But the inspector had formed the view on inspection that the operator was effectively managing GMO risk?---Yes.

And if we go to 444, the inspector was telling you at number 4A the operator was fully compliant and there were no non-conformities and no critical non-compliances. That's what you were told, yes?---I would suggest also, in reading this report - which one is he saying compliant?

You see section 4, under "Not for publication" on page 444. Numbered paragraph 4, New Non-Compliances:

Is the operator fully compliant: yes. There are no non conformities and no critical non-compliances.

?---I read that in the context of this report, if you go back to page 427, that is an additional inspection for parallel production. All producers who have parallel production have to have additional inspections.

Yes?---And even though the compliance - the contamination is not an issue that was addressed - when looking at what's going on in the farm, the contamination is still the ongoing overriding issue and this - so the compliance - I read this as - was that all parallel production issues are compliant.

Well, just come back to 433:

Does the operator effectively manage GMO risk?
Comments: the property is still being intensely monitored for germination of canola since the last incursion of GM material. Movement of sheep is also limited.

So you knew from what the inspector told you that Mr Marsh was effectively managing the risks consequent upon the incursion; isn't that right?---Yes. But I will go back to the - as I said to you in the first place - that I do not

think it is unreasonable that there were two growing seasons before there was a consideration of recertification.

So it was your view, at the point that you made this decision, that there was still an unacceptable risk of contamination?---Well, there was a - it was unknown whether there was still contamination there - seeds there that could germinate.

So an unknown risk of contamination?---Yes.

Is there still?---I beg your pardon?

Is there still an unknown risk of contamination on that property, in your view?---It has been through the two - there is - it's less a risk, I would say, that - - -

Sorry. Is it unknown - is there an unknown risk of contamination that remains on that property?---There - there may be an unknown risk.

All right. And there was at this time when you made your decision?---As I said, I think that it was not unreasonable two growing seasons before there was a consideration of recertification.

And is that really the basis of your decision?---Well, that's - and that's based on the research papers I read.

All right. So it didn't matter what Mr Marsh did or didn't do in those two years, you weren't going to recertify within that two-year growing - within that two-year period?---That's why I said it should be assessed at the end - in six months' time when it was - - -

All right?--- - - -the next inspection.

So when you say at 84 that those were the matters A through D that you considered in reviewing the inspection and that it was therefore appropriate that the status of Mr Marsh's property remains unchanged, that's not quite right. Really, all that influenced you was that there needed to be two growing seasons; is that right?---It was based on the evidence - not on the evidence, I'm sorry. That was based on my reading and the seed banks of canola seeds in soils after a crop has been grown and the fact that the seed bank can remain at quite reasonable levels after two years in minimum load, silt soils before it starts - the seed bank starts to decline. And I don't think that's unreasonable for us to have two growing seasons to assess that.

Ms Denham, did you think it assisted NASAAs objective of lobbying government to have greater regulation of GM production to have Mr Marsh remain decertified at this time?---No. I - that was not even entered into my mind.

Was your decision communicated to Mr Marsh, this decision to keep his status the same?---There would have been a letter from - I didn't write the letter, but there would have been a (indistinct) would have sent him a letter that remained it the same.

All right. Now, at paragraph 85 you say you weren't involved in the annual inspection in late - sorry. I withdraw that. That you weren't involved in the process of considering Mr Marsh's certification status consequent upon the late 2012 inspection; is that right?---Yes.

And you made that statement at the date of this witness statement of 14 February 2013?---Yes.

Did you have any involvement after the date of this witness statement in the decision to recertify Mr Marsh?---No. None.

And if we go to 479 - all right. What I'm taking you to here, Ms Denham, is a document that starts at page 476 and it's Mr You and Ms Gore, they've reviewed an inspection of October 2012. You've got that. Have you seen this document before?---Only just recently.

All right. So if you go to page 479, and it says in the second paragraph from the top:

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

Are you saying OAB has never meant to consider that question?---No.

Is your answer no, it hasn't?---No. No. It hasn't. It has only ever had one meeting and that was March 2010.

Now, this decision - if you turn over the page at 480 - this decision was made - Mr You gave his - made his decision in December 2012. Ms Gore in January 2013. The decision appears to have not been notified to Mr Marsh until September 2013. You see that?---Yes.

Can you say why?---I have no idea. I am not involved in running certifications, so I cannot answer that question. You will have to ask the appropriate people.

Was it delayed because it assisted with NASAAs lobbying of the government for greater regulation of GM producers and production for Mr Marsh to remain decertified for as long as possible?---I think that it's quite obvious that it wasn't that, because there was only the communications in two thousand and - early 2011 with Redman and that press release, and other than that we have never - and there is no correspondence, no action, nothing since that time. So I don't think that had anything to do whatsoever with the decision.

So you can't - so you had no involvement at all from this point on in the circumstances in which Mr Marsh's organic status was considered and changed; is that right?---That's right.

KENNETH MARTIN J: His non-organic status?

CAHILL, MS: Well, organic status one way or the other. His status as an organic farmer. What I'm meaning - I will be clear, your Honour. You had no involvement at all in the assessment of whether or not Mr Marsh should be recertified?---No. I did not.

At any point from the time that you did that review in April 2012; is that right?---No. That's right.

All right. Now, Mr Luke You, he remains employed by NCO, does he?---Yes.

And where does he live? Which state. Mr You: which state does he live in? You don't know?---South Australia.

He lives in South Australia?---Yes.

And does live in Adelaide?---Yes.

All right. And Ms Purves, is she still employed by NCO?---Yes.

And do you know where she lives?---Western Australia.

All right. And Ms Coleman, she's still employed by NCO?---Sorry. Ms Purves and Ms Coleman are not employed by NCO. Correction, please. They are contracted.

All right?---They're contractors for NCO.

And they still work in that contracted capacity for NCO?---They still work in that contract job.

And they're both based in Western Australia?---Yes.

In the Great Southern, is that right?---I wouldn't know where they - I mean, I know Kathe is but I'm not sure about Claire - where she lives.'

Thank you. Nothing further, your Honour.

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

NICHOLS, MS: Yes, just briefly. Ms Denham, you have mentioned several times in your evidence that you had regard to some research. Are you able to identify what that research was?---That was Chris Pearson, did research in the seed bank and soils after canola crops were owned and that was done in Southern Australia, about 2008.

But was it published research?---Published research, yes. And then there's a public research paper which - almost similar outcomes was from Gruger in Germany.

KENNETH MARTIN J: Sorry, I missed that last name?---Gruger, G-r-u-g-e-r.

NICHOLS, MS: And - - -

KENNETH MARTIN J: Thank you.

NICHOLS, MS: - - - what information did you obtain from those research reports that was relevant to your decision?---Both of the research papers came in it's low till and minimum till soils. The seed banks would remain fairly constant for about two years and then would start to (indistinct) quickly. Heavily tilled soils, the seed bank could be there for 10 years. So low and minimum till was the best way to reduce the seed bank of canola.

All right. You were asked some questions about the possibility of soil testing for seed. Did you form a view in the course of your considering the recertification issue about the practicability one way or the other of testing the soil on Eagle Rest to ascertain the extent of the presence of seeds on the farm?---That wasn't - no, because I considered that I didn't - well, I didn't think about - I didn't consider it.

You were asked some questions about your evidence at paragraph 88 of your statement about the practicability of decertifying parts of paddocks. What factors in your view would make it impracticable to decertify parts of a paddock in that situation?---In my interpretation, that that makes it difficult. It would mean - it makes it difficult to know where the line is, that what type has been decertified and what hasn't been decertified.

And are there any factors relating to that issue that are relevant to distinguishing this circumstance from, say, a circumstance where the soil has been contaminated by an overspray of chemicals?---Sorry, would you repeat that?

Yes. Are there any factors that are relevant to distinguishing the circumstance with which you were confronted on the marsh farm to a situation in which the soil has been contaminated by an overspray of chemicals?---There are similarities in their contamination, how you address those issues and how you look into what has occurred and to make your determination. Probably the issue of overspray of chemicals is an easier one to ascertain because of the - how - the testing is much easier to do from my understanding.

And can you elaborate on that?---The testing for - - -

Why it is that you say - - -?---Well, because it doesn't - it has spread more evenly across the whole soil. So you can take a cross sample and merge and you can get a result out of what the contamination level is in the soil. But with seeds it would be difficult because you might have a huge lot here, a small lot in this bit, and then nothing in between. And if you pick the wrong spots when you were taking the samples, you would come up with no seeds but yet there may be lots of seeds there.

Part of your evidence was that - when you were asked a question about the hypothetical notion of conventional canola on an organic farm, you said that:

Conventional seed can be used by a farmer and conversion occurs through that process.

What did you mean when you said conversion occurs through that process in the context of a conventional canola seed?---Yes (indistinct) if - farmers at all times are encouraged to use organic seeds if they have to get seeds. But if they're not - if they can't, they can get an exemption to get untreated seeds to use for growing their crops. But then, of course, the next year when they save

their own seed that has been grown under an organic system, seeds are - and so they would be classed as organic seeds then when they save their own for the next time.

And is that conversion process permitted in respect of GMOs?---No.

Excuse me, your Honour. Now, I asked a question about whether NASAA published its standards and your evidence was that it does. How do you publish the standards and in what media?---They're on the website and - - -

CAHILL, MS: I'm sorry, I didn't ask that question, your Honour. I didn't ask if NASAA published its standards.

KENNETH MARTIN J: I think the question was, was there publication of explanatory material in respect of the application of various other standards.

NICHOLS, MS: I think the answer was that the standards were published.

KENNETH MARTIN J: Yes, it was.

NICHOLS, MS: So I apologise; I put that badly.

KENNETH MARTIN J: It wasn't exactly response of answer but I will allow the question?---Sorry, where the NASAA standards are published? Where are they?

NICHOLS, MS: Yes?---Yes, they're published on the web. They're free on the website - on the NASAA website.

You were asked some questions about standard 3.2.9 and you gave some evidence that there would be a consideration about how long the period of time for decertification would be. Would you explain briefly what is the process for being recertified once decertification has occurred?---Well, that's when the assessment - I mean, as we said to Steve Marsh, you lay out what are the conditions and then it's monitored and when you feel that it's applicable, then to reinstate when the property is reinstated.

Thank you, Ms Denham. Nothing further, your Honour.

KENNETH MARTIN J: Yes. All right, thank you. There is actually one question that I have that you might be able to help me with, and then I will give counsel the opportunity

to question if there's anything arising out of it. Do you have your first statement there, Ms Denham?---Mmm.

It's really just about NASAA. You say at paragraph 11:

It's a not for profit company limited by guarantee.

?---Mmm.

And then you say at paragraph 18:

NASAA currently has approximately 80 members and 830 certified operators.

A company limited by guarantee doesn't have shares as I understand it. Is that right?---Yes.

So - - -?---And you can't - - -

- - - how do you get to be a member of NASAA, that's my question?---It's a member organisation. So you pay a membership fee - - -

Do you apply?---You apply and then the members - the members elect the directors, the members vote, have the AGM, the members endorse the budget.

And yet your eligibility for membership depends on NASAAs constitution. Is that right?---Yes, but not NASAA certification though.

I'm quite - - -?---Not NCO certification.

No?---You cannot - under ISO65, you cannot comply - people who want certification cannot be compelled to be a member of an organisation to receive that certification.

Understood, but in terms of the eligibility for membership of NASAA as a not for profit company limited by guarantee, membership is open to - in accordance with NASAAs constitution?---Yes, they must - - -

Anyone?---Anyone can sign but they must sign that they agree with the aims and objectives of the NASAA constitution.

All right. So subject to that, I could apply for membership of NASAA?---Yes. We are most willing to accept your membership.

I will keep that in mind. Thank you very much. Anything arising out of that? No. All right. Thanks very much, Ms Denham.

NICHOLS, MS: May she be excused.

KENNETH MARTIN J: You can be excused.

(THE WITNESS WITHDREW)

NICHOLS, MS: Your Honour, the next witness is Mr Ayachit.

KENNETH MARTIN J: Yes.

NICHOLS, MS: We have ascertained that we do have a video link to India in the morning. So - - -

KENNETH MARTIN J: He's in India, is he?

NICHOLS, MS: He is.

KENNETH MARTIN J: All right.

NICHOLS, MS: And we're really in your Honour's hands as whether you want to commence now or tomorrow. We can deal with objections which have - - -

KENNETH MARTIN J: Why don't we deal with the objections - - -

NICHOLS, MS: Have been resolved but I need to tell you which parts of the statement we're not reading.

KENNETH MARTIN J: All right.

NICHOLS, MS: If your Honour will pardon me a minute, I will just - - -

KENNETH MARTIN J: Certainly. Let me just find (indistinct) statement. That would be helpful. There's only the one statement I think, isn't there?

NICHOLS, MS: There is, yes.

KENNETH MARTIN J: All right. Got that.

NICHOLS, MS: All right. At paragraph 10 we don't read the word "strict" which appears in the first line.

KENNETH MARTIN J: So "strict" is excised from paragraph 10.

NICHOLS, MS: Paragraph 14, the second sentence reads, "The NASAA standard is inherently flexible to enable". We don't read the words "is inherently flexible to". To make that sentence grammatical, the word "enable" should read "enables".

KENNETH MARTIN J: Yes.

NICHOLS, MS: At paragraph 15, we don't read the words in the second sentence "and international standards" and - sorry, yes, "and international" - sorry, "and other domestic and international standards".

KENNETH MARTIN J: so the whole of the second sentence in 15 is out?

NICHOLS, MS: No.

KENNETH MARTIN J: No?

NICHOLS, MS: The words, "This is consistent with the IFOAM norms for organic production and processing" remain in.

KENNETH MARTIN J: Yes. All right.

NICHOLS, MS: And the remaining words come out.

KENNETH MARTIN J: That follow. Full stop after capital P - "Processing."

NICHOLS, MS: That's correct. At paragraph 26, we don't read the words in the first line, "As well as all major international standards".

KENNETH MARTIN J: So paragraph 26 should read, "The NASAA standard requires a minimum"?

NICHOLS, MS: That's right. And at - I should just make an indication about paragraph 15 of the statement that this is consistent with the IFOAM norms for organic production and processing, is read simply as the witness's evidence about that, obviously not as intended to be conclusive evidence about the consistency one way or the other.

KENNETH MARTIN J: Yes. All right.

NICHOLS, MS: I think that deals with all of the objections.

KENNETH MARTIN J: All right. Thank you. And, Ms Cahill, how long do you think you will be with Mr Ayachit over the video?

CAHILL, MS: Much shorter. It will be well within the hour, I think, your Honour, and just depending on the witness could be, you know, half an hour really.

KENNETH MARTIN J: Very well. And he will have a copy of the amended version of his witness statement to - - -

NICHOLS, MS: I think we can transmit one to him this - well, we could transmit one this evening if he gives evidence tomorrow, but he presently doesn't have the struck out - - -

KENNETH MARTIN J: All right.

NICHOLS, MS: - - - version. Can I indicate one more thing about Mr Ayachit, he has access to the court book on database and as I have explained to Ms Cahill, he will need to be directed to the document number as it appears in the index to the tender bundle. So if your Honour hears reference to, say, document 5, that's the number appearing in the left-hand column on our tender bundle index. Mr Ayachit can then go to the page number.

KENNETH MARTIN J: Very well. I follow.

NICHOLS, MS: Thank you.

KENNETH MARTIN J: Mr Niall?

NIALL, MR: And then after that, your Honour, there's the two Mortons, Ms Janine Morton and Mr Johnny Morton.

KENNETH MARTIN J: Yes.

NIALL, MR: And Mr Davis by telephone and that will conclude the plaintiff's case.

KENNETH MARTIN J: That's the case. All right.

NIALL, MR: Apart from - I will tidying up some tenderings and various documents and things.

KENNETH MARTIN J: Sure. Sure. All right. Well, that looks promising for possibly lunch time tomorrow on that basis, I would have thought so, then we could get into the defendant's evidence.

CAHILL, MS: Sorry, your Honour. Yes, we will be ready to go.

KENNETH MARTIN J: So we should see Mr Baxter tomorrow afternoon.

CAHILL, MS: Yes.

KENNETH MARTIN J: All right. Excellent. Very well. On that basis, with a view to taking Mr Ayachit's evidence at half past 10 tomorrow morning, we will adjourn till that time.

AT 4.08 PM THE MATTER WAS ADJOURNED UNTIL
TUESDAY, 18 FEBRUARY 2014

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