THE SUPREME COURT OF

WESTERN AUSTRALIA

COURT OF APPEAL

CACV 67 of 2014

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

McLURE P
NEWNES JA
MURPHY JA

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 24 MARCH 2015, AT 10.29 AM

Continued from 23/3/15

MR M. McCUSKER QC, with him MS L.M. NICHOLS and MS C.M. PIERCE, appeared for the appellant.

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

THE ASSOCIATE: In the Supreme Court of Western Australia, Court of Appeal, Marsh and another v Baxter, CACV 67 of 2014.

McCUSKER, MR: Just before my learned friend resumes, your Honour Justice Murphy asked for a copy of the decertification letter. I've got copies, and I can hand them up now. My learned friend's happy for me to do that. Thank you, your Honours.

NEWNES JA: Thank you.

MURPHY JA: Thanks.

McLURE P: Ms Cahill.

CAHILL, MS: If it please the court, before I resume my submissions, just reporting in with the results of my overnight homework. There was some follow-up findings in the course of the exchange, and particularly with President McLure, that I was going to identify from the trial judge's reasons.

McLURE P: Yes.

CAHILL, MS: The first was in relation to how identifiable canola was on the appellant's property. The references there are at 669 and 738. 669 is at blue appeal book page 134, and in the middle of the paragraph the court will pick up the sentence that says:

> These volunteer plants were readily identifiable since canola was not otherwise grown on Eagle Rest.

And then at 738 it's to be inferred about the identifiability of the canola from the general conclusion about the ability to pull those volunteers out. I also - - -

MURPHY JA: I think there are also findings at 534 and 687.

CAHILL, MS: Yes. Yes.

MURPHY JA: Yes.

CAHILL, MS: Thank you, your Honour. The next fact was in relation to the ability to clean any seed product on the appellant's farm – to clean it of canola seed – and the two

paragraph references are 639 and 640 – 640 and 639. In relation to - - -

McLURE P: So that's just a statement of the evidence, is it?

CAHILL, MS: The – at 639 and 640.

McLURE P: Yes. Normally a finding is identified as a finding, but did the trial judge just accept all of the expert evidence, did he?

CAHILL, MS: Well, he says specifically at the last sentence at 640 - - -

McLURE P: Because it's agreed.

CAHILL, MS: - - - "I accept this evidence."

McLURE P: Okay.

CAHILL, MS: In relation to the wheat crop and its alleged contamination, the court will remember that exchange I had with President McLure about whether there was any finding about seeds being in the wheat crop. At 125 and 693 the court will see there – first of all, going to 125, there were the three cut plants, and nothing suggests, if one goes over the page at BAB30, that sentence, it says:

> Nothing suggests that the three cut plants could not have been physically collected and removed before seeds from their seed pods scattered.

And that didn't happen until April 2011. And then when we got to 693, at blue appeal book page 139, it's clearer there:

> No evidentiary suggestion that the seeds from any GM canola swath that reached paddock 11 reached the wheat crop, or had germinated in that paddock to produce a volunteer.

McLURE P: Before it was harvested.

CAHILL, MS: Yes. So - - -

McLURE P: And I assume harvested at the – what, in the 2010 - - -

CAHILL, MS: Because this was at harvest season, of course.

McLURE P: Yes.

CAHILL, MS: Yes.

McLURE P: So that the wheat would have been harvested around the same time.

CAHILL, MS: Without any - - -

McLURE P: Yes. Without - - -

CAHILL, MS: - - - seed.

McLURE P: Yes.

CAHILL, MS: Now, the last factual matter was in relation to the biological significance – more pertinently for my purposes, the biological insignificance of a canola – a GM canola swath versus a conventional canola swath, lying on the ground before it sets seed, and I think I will acknowledge that what I put to her Honour President McLure yesterday probably went further than the finding, which appears at 184, which is a recitation of the evidence of Professor Van Acker about – and that's – and then goes on to be discussed in 185 and 186 – but it's this exchange during the course of cross-examination about an absence of biological significance of the GM canola plant. Absent its ability to, in effect, cross-pollinate through its seed with an acceptable recipient of that gene.

McLURE P: Which was never in an issue, was it, because there was no suggestion of genetic transfer, so the fact it could do it before or after the seed really didn't go to an issue at trial.

CAHILL, MS: Yes. So the point of that cross-examination passage, though, that's extracted at 184, is to identify the lack of – I used the expression in cross-examination – biological significance of the plant, in and of itself, without the seed. Can I then proceed to where I was yesterday, if the court pleases, before the adjournment for the day, with the NASAA standards.

Can I just recap. The point I was endeavouring to make before we broke last night was that the architecture, or objective of these standards, is when one considers it in overview, a principle to provide for and regulate a principled method of agricultural practice that does two things. First of all, and primarily, it focuses on what an operator engaged in this practice of organic farming must and must not do in order to adhere to this method.

The secondary focus is on the product that is produced as a consequence of pursuing this agricultural practice of organic farming, and that focus is to render the product that is labelled for sale as certified organic, to be as free as possible from substances that are not to be – not permitted to be used in the system of organic farming. This has two aspects - - -

McLURE P: I don't know that that's a fair statement of the standard either, because it expressly states that there's zero tolerance for a number of matters – for a number of - - -

CAHILL, MS: Chemicals - - -

McLURE P: - - - inputs or whatever, but it's not true to say that there's a sort of a de minimis level for everything. In some cases there's zero tolerance and the standard makes it clear.

CAHILL, MS: For chemicals.

McLURE P: Well, I wouldn't have thought that it was. It just says where there's no ML – where there's no maximum limit - - -

CAHILL, MS: It's a heavy metals and pesticides, your Honour, in chemicals - - -

McLURE P: No, the definition of maximum limit, where there's no specified limit for a particular, and you say that's just chemicals.

CAHILL, MS: Well, the – certainly the zero tolerance relates to chemicals.

McLURE P: Right.

CAHILL, MS: Not to GM.

McLURE P: Well, anyway - - -

CAHILL, MS: Can I develop that, your Honour, for the reasons and the court, when we go to, in particular, sections 3.1 and 3.2. 3.1 dealing with contamination generally. That topic in section 3.2 dealing with GMO generally. What one sees is this architecture: first of all, the focus on the operator, primarily what he or she does or doesn't do – may or may not do.

And secondly, to reduce, as far as possible, the risk of contamination, one finds the elucidation of this concept at the outset of section 3.1, recognising that in the environment in which organic agriculture is practised, there is an inevitable impossibility of ensuring that there is no contaminant – guaranteeing no contaminant in any product labelled and marketed for sale as certified organic.

So it requires then the standard – the operator to do two things in order to minimise that risk of contamination of product. One is to do all that's within their control to reduce the risk of contamination. The second is to require decertification of product where there is known and demonstrated contamination of the product. Those are the two things. But what the standards do not extend to is requiring a guarantee that there is no substance – prohibited substance – or substance incompatible with organic agricultural practices, present within the system – if one wants to use that sort of language – on the land, for reasons outside the control of the operator. In other words - - -

McLURE P: Are you going to refer to particular paragraphs?

CAHILL, MS: Yes.

McLURE P: I've read the standards. I have to say, I didn't immediately draw those - - -

CAHILL, MS: Yes.

McLURE P: - - - conclusions, so I think you're going to have to - - -

CAHILL, MS: Yes.

McLURE P: - - - identify specifically these clauses that you rely on.

CAHILL, MS: That's my intention directly, your Honour. If it please the court, this is what I'm doing here, is setting out the overview of what we say the standard says. Can I just bring that to this conclusion in overview. What the standards do not do is provide for zero tolerance, in the sense that it has been articulated by the appellants in this case, and in the sense that it was sought to be applied by NASAA, pursuant to 3.2.9.

Zero tolerance in the sense that the mere and accidental presence of a substance prohibited in the pursuit of organic agricultural practice is not permitted. Can I come - - -

McLURE P: That just can't be right. What does it matter whether it's – it's on – let's take something that's uncontroversial. Chemicals. What does it matter how it got there, if what you're doing is certifying to consumers that it's organic? That's what I don't understand.

CAHILL, MS: It's because what organic means is fundamentally and foremost that it's a method of production. So it adheres to certain principles that, for example, value social justice. They value - - -

McLURE P: Right. You referred to that as – before, but the whole focus of the standard is the use of natural products in the soil and in the system. So you have a system that begins with the soil and ends with the product at the consumers, and what's concerned – as I read this – is concerned to achieve, is a product that has these characteristics. And if you don't have those characteristics you lose your certification. Now, if that's the case, whether it got there deliberately via the operator, or accidentally by someone, for example, spraying the crop, what does it matter?

CAHILL, MS: It matters because, with respect, your Honour, we disagree with your characterisation of what the point of the standards are, and what the point - - -

McLURE P: Well, that's probably really fundamental - - -

CAHILL, MS: Yes.

McLURE P: If it's as I put it, then there was no relevant distinction between the manner in which the contamination occurred. This isn't a contract for which you're responsible for outcomes and you're liable for damages if there's a breach. This is achieving an objective standard so that consumers will know, with certainty, that there's been no departure from a process of growing food. Now, that's as I read it. If that's wrong, I understand your point.

CAHILL, MS: So if we go directly to the provisions, and - - -

MURPHY JA: Are you going to take us to the contract, or the standards?

CAHILL, MS: The standards initially.

MURPHY JA: Because I think at some point we have to get back to the contract.

CAHILL, MS: All right. Can I – if I can just - - -

MURPHY JA: Yes, I don't mean to deflect you, but - - -

CAHILL, MS: - - - direct the court initially to the standards because, of course, it's 3.2.9 that is relied upon as the standard that's relied upon for the basis for decertification. Now, page 1750, volume 4 of the green appeal books, there's two important provisions which we say must be read together. Section 3.1 and section 3.2. Section 3.1 is important because it deals with the issue of contamination generally. And the general principles which explain the architecture are explicit in the second paragraph:

> That the standard cannot guarantee that produce certified as organic will be completely free of residues.

And it then goes on in the next paragraph to explain how the introduction of contaminants can occur. I say, in my words, despite best endeavours. It then goes on to say:

> However, this standard aims to produce the necessary safeguards to ensure the lowest practicable risk of residues.

Now, under the recommendations, importantly, one will see in the fourth paragraph:

> Contamination that results from circumstances beyond the control of the operation does not necessarily alter the organic status of the operation.

That, we say, is key because it's a clue to this point we make, that what these standards are telling a consumer is that this product has been produced according to a method of agricultural practice.

The operator has adhered to certain specific ways of producing a product that value the environment, emphasise the benefit of the use of renewable resources, natural windbreaks. Animal welfare is a particular emphasis. People who buy organic can have the comfort and certainty that it has been produced in this way. Second - - -

MURPHY JA: Well the word "organic" is defined as just a labelling term. That's on page 1737.

CAHILL, MS: Yes.

MURPHY JA: Produced in accordance with the - - -

CAHILL, MS: Exactly.

MURPHY JA: NASAA standard.

CAHILL, MS: Exactly. Produced in accordance with the standard. So the emphasis is upon the way in which it is produced, and what the standards are primarily, are talking about this method of production; what the operator may do and may not do. Now, when we come to section 1 – the standards, and 3.1.6 – which I think is where your Honour President McLure may have been focusing on the word zero tolerance.

McLURE P: No. I actually got it from the definition of minimum limit.

CAHILL, MS: Yes.

McLURE P: And it says where there's no minimum limit, then there's a zero tolerance.

CAHILL, MS: Yes. Now - - -

McLURE P: And this relates to chemicals, I would have – when I read 3.1, I thought it's referring to chemicals.

CAHILL, MS: Yes.

McLURE P: Yes.

CAHILL, MS: That's right. And chemicals - - -

McLURE P: Well, chemicals that are used in conventional farming.

CAHILL, MS: So chemicals, of course, are qualitatively quite a different thing from GM canola. Chemicals are things that are commonly understood as having safe limits, and times at which they can be applied and times that they can't within a period of harvesting. The evidence before the trial judge, and which he found, was that canola was – RR canola was legal and it was safe. It's a food. It's not a chemical. It's not an input. It's a food. And it's a safe legal food.

So there's no apples and apples comparison between the contamination that might be caused by a chemical, and zero tolerance for that, with something that is a safe legal food that is present on a paddock. Now, importantly - - -

McLURE P: Why do they make express provision for genetically modified organisms in all of the standards then, if it's safe and legal and it's not like a chemical and what are we talking about GMO for. Can you just tell me, as a matter of principle, why all of the standards have this prohibition on GMO?

CAHILL, MS: In the product.

McLURE P: Well - - -

CAHILL, MS: And the use of it.

McLURE P: You might – if that's not the construction that's favoured – it doesn't say product. It says in the system.

CAHILL, MS: Yes.

McLURE P: So you're putting a submission that says this is – there is no justifiable reason to treat GMO than any different way – than any other natural product, and yet, of course, that's directly inconsistent with the standards.

CAHILL, MS: Your Honour, my submission here is directed towards the proper construction of 3.2.9.

McLURE P: No, but you're making your decisions by reference to value judgments, and the value judgments are contested. That's the point I was trying to put to you yesterday.

CAHILL, MS: So if your Honour President McLure is putting this to me, as I understood the question was this: why is GMO treated in the way in which it is in these standards? The first question - - -

McLURE P: Well, that's the sort of dog whistle submission that you're making. This is lawful. This has no risk - - -

CAHILL, MS: That's a finding.

McLURE P: - - - to – no, this is what you're putting. And as a result we should read the provisions relating to

genetically modified organised in that way, ie, this is nonsense, and we will read it down. Now - - -

CAHILL, MS: We don't use the language of nonsense, your Honour.

McLURE P: No, but you're really putting your construction submissions – accepted by the trial judge, because I think he did the same – by reference to a value judgment, as to what is all the fuss about GMOs. Right. But that might lead you to a different outcome. That's the only proposition I put. If you accept that some sections of the community do not want to have GMO food, for whatever reason, and that must be the case because the economics say that's the case - - -

CAHILL, MS: That's what the standards provide for. They don't want to eat GMO food. We're completely ad idem about that.

McLURE P: All right. Well, I just want to make the point as clearly as I can, that it seems to me that the submissions you put on construction are largely informed by your value judgments about the use of GMO. Now, if that's true - - -

CAHILL, MS: We disagree with that.

McLURE P: - - - we've got to be careful.

CAHILL, MS: Yes. We respectfully disagree with that. What we're identifying here is as between section 3.1 on the one hand, and 3.2 on the other, we're dealing with qualitatively two different aspects of the objectives of the standard, and the certification of the agricultural process. One can see in relation to section 3.1 the – there is an emphasis, and I will descend to the particulars in a moment – upon the risk of contamination of a product with chemicals.

The GMO, what one is focused upon, is a method of agricultural production that is not natural. So automatically when one brings it back to the architecture behind the standard, there is an obvious reason why GMOs would be dealt with differently from chemical residue in the soil that may be taken up by a plant. The reason is this: because absent any GMO product in the finished organic agricultural product, for which the standard provides – and there's no issue between us about that – there's decertification if there's known contamination of the product.

That didn't apply here. But absent that, the operator hasn't deployed this unnatural method of agricultural production and used it in their system. They're not trying to feed it to their sheep because they think that genetically modified canola has superior health benefits. It's outside their control. It's just sitting on the land. It doesn't infect the soil with a residue that is then taken up by the livestock through plant material, or through the plants.

That is why there is a relevant distinction between the treatment of chemicals in section 3.1 and the treatment of GMOs in section 3.2. Critically, this is why zero tolerance is not mentioned in 3.2. Now, even when zero tolerance is mentioned in section 3.1, it's very revealing as to what the consequences are where there is no zero tolerance, because what 3.1.6 says:

> We're only talking about zero tolerance for a chemical here, not for a GMO.

The second sentence says:

> Soil tests that reveal contamination of the specified chemical must be followed by tissue testing to verify no chemical residue for that chemical.

Now, tissue testing can only refer to one of three things: animal tissue – testing of animal tissue, which must be a reference to agricultural product. Testing of pasture, if it's just weeds and vegetation that emerge in the paddock, or testing of vegetable agricultural products, such as the oats that are grown and so forth. When one looks at the maximum permissible levels in annexure 7, which are identified at – to the standard – which are identified at 1835, it's pretty clear, we say, that of those last two alternatives in relation to plant tissue, the reference must be they're intended to be to agricultural product.

And we see that, we say, from, in particular, the two dot points – the text of the two dot points at the bottom of the narrative. So it's said the maximum permitted pesticides in soil and tissue are 10 per cent of those listed as permissible, except heavy metal in root crops and tubers. So immediately you've got a reference to crops there:

> Soil contamination level criteria will be determined by NASAA with reference to the crop grown in that soil.

> Crop residue levels will determine if those crops can be certified.

So here we've got chemical in the soil being taken up in the tissue and the product is decertified only upon testing to see whether the contaminant is in the tissue. We go on in the second bullet point, which makes the position even clearer, in our submission, as to the purpose of these standards:

> Where pesticide residues fall above these levels, are located in certified crops, which cannot be explained by –

This is important:

> ...historic adjacent –

We draw emphasis there. So there you would have something like a chemical overspray from Mr Baxter's farm:

> ...or environmental background factors, those products and operators through the production handling chain will be subject to immediate suspension.

So not so important if it comes on to your property for reasons outside your control, but if you can't explain, as an organic operator, that it's outside your control – if it's not evident that it's outside your control – well then the sanctions start to kick in, because what these standards are first and foremost directed towards is the actions of the operator to reassure the consumer that it is the operator who has farmed this product according to organic principles. So the – and that point is simply re-enforced - - -

McLURE P: Some land can't even be certified, can it?

CAHILL, MS: I beg your pardon?

McLURE P: Some land – not all land can be organic. It has got nothing to do with the operator or how you've operated. It's just that where you are and the history of the use of it, or some naturally occurring features, this land can't be certified.

CAHILL, MS: Yes.

McLURE P: So it has got nothing to do with anyone's fault, other than an objective standard that this land is not capable of being used for organic purposes.

CAHILL, MS: And we say that that standard, read consistently with the clear objectives that are identified in section 3.1, would require that standard to be exercised only in circumstances where the unsuitability related to the potential for the product to be contaminated, and therefore unsuitable for sale. This comes back to this secondary purpose. First and foremost it's what the operator does. Secondly, it's whether there's any contamination – known contamination – in the agricultural product. Those are the two purposes of the standard.

McLURE P: So this object of achieving biodiversity is not really a part of the object – of the standard.

CAHILL, MS: Well, it precludes the use of genetic engineering, your Honour. Sub-paragraph (12) in 1.4.

McLURE P: No, no. Biodiversity – the objects are stated in the standard that go beyond the product, it seems to me.

CAHILL, MS: Is your Honour referring to page 1740, subparagraph (12)?

McLURE P: Yes. The aims and principles.

CAHILL, MS: Yes.

McLURE P: So the object of - - -

CAHILL, MS: You've got this genetic - - -

McLURE P: To maintain genetic diversity of domesticated and native plants, animals and other organisms on the farm.

CAHILL, MS: Yes. And then it's explicit. This precludes the use of genetic engineering, but what it doesn't say anything about is whether or not, for reasons completely outside the control of the operator, there is any consequence for the mere presence of genetically engineered material on their farm, which may in some way reduce the diversity of the vegetation or the fauna on that land. This is absolutely re-enforcing of the position we say, with respect. That what it focuses upon is the practices of operator, and what's outside their control is treated in a very different category.

McLURE P: Can I just put something else to you which probably needs to be considered. This is a standard for export.

CAHILL, MS: Yes.

McLURE P: And, of course, the exporter has to comply with requirements in the importing country, and so this has ramifications outside Australia. So we know parts of Europe refuse to have any GM agriculture at all. So - - -

CAHILL, MS: I'm not sure that that was a finding at the trial.

McLURE P: Well, I think – well, perhaps not, but I mean - - -

CAHILL, MS: There's no evidence of that.

McLURE P: - - - but we know from our - - -

CAHILL, MS: I will pause to put on the record, your Honour, there is no evidence of that for the purposes of these proceedings.

McLURE P: All right. So there was no evidence as to the markets in which these goods were delivered.

CAHILL, MS: And if one is intending to - - -

McLURE P: No, no, but you're making some submissions – positive submissions – that go to the benign nature – there's nothing to worry about GMOs, to construe what is an international standard, you see, and all I'm putting to you is that that's a very narrow compass when you have to look at what is going to be imported outside Australia. Because this is what this is for.

CAHILL, MS: Well, that's not what this is for. That's what the national standard is for, your Honour, and the national standard doesn't come close to permitting decertification in these circumstances.

McLURE P: Let's just stick to that this is a certification for export.

CAHILL, MS: Yes.

McLURE P: This is what this NASAA standard is.

CAHILL, MS: But relevantly and critically for the purposes of this case, the significance of the NASAA standard is that it achieves the minimum requirements for importing – for exporting, which is the national standard. Now, it need not have 3.2.9 in it in order to permit it to export or to certify goods for export.

McLURE P: Anyway, that's your notice of contention you will come to in due course - - -

CAHILL, MS: Well, I - - -

McLURE P: - - - but the reality is someone who's certified by – whose products are certified by NASAA, is the certificate for export.

CAHILL, MS: Yes. As is someone who is certified under the national standard, and that's what it signifies to an importing country from Australia, that these goods meet the minimum requirements of the national standard. Your Honour says it certainly is a contention, one we do formally contend that there should have been a finding – an express finding that the national standard didn't permit decertification. We make that contention out of an abundance of caution. If one looks at 238 - - -

McLURE P: Well, you either make it or you don't. We have to deal with it.

CAHILL, MS: Well, the point I'm endeavouring to make here is that at 238 of the trial judge's reasons it does seem that his conclusion was that the national standard did not permit decertification.

McLURE P: Just on this issue, though, there was no evidence at trial at all on the different approach in different countries to GM agriculture? I find that really - - -

CAHILL, MS: There's Mr Slee's evidence at paragraph 64(d) of the reasons for decision.

McCUSKER, MR: Your Honour, could I assist. In the green appeal book at page 1995, the recommendations of the European Commission – green appeal book 1995.

McLURE P: Yes, but the recommendations of the European Commission are not followed in a number of European countries who - - -

McCUSKER, MR: That's so.

McLURE P: - - - oppose any GM. The only point I'm trying to make, Ms Cahill, is that we might live in a bubble, but this is an export standard and - - -

CAHILL, MS: The national standard - - -

McLURE P: - - - it's common knowledge about the controversy that genetic engineering generates. You're looking perplexed.

CAHILL, MS: Well - - -

McLURE P: You say we should just ignore it?

CAHILL, MS: What I submit is this: that the standards say what they say, and we are in the process of making submissions about that. We know that the product was found by the trial judge – the GM canola was found to be safe and it's lawful. To then impose concepts such as, well, people don't like genetic engineering or GMOs, is, with respect, far too general and not supported by evidence to allow it to intrude into this analysis.

McLURE P: The construction.

CAHILL, MS: And the reason is this: because one would need to understand well whether – if one actually looked into it, heard the evidence, got some – I don't know, expert evidence or whatever – what people out there in the broad actually did think about genetic engineering. They might think they don't want to eat genetically modified food. They might think that they might want to choose whether to eat genetically modified food or not, and therefore labelling is very important to them.

McLURE P: Well, our standards require labelling for GMOs; the food standards in Australia and New Zealand.

CAHILL, MS: People might think that there are certain types of GM products that they are happy to consume or use, or not, but it's a qualitative leap to then assume that generally out there in the population there is any significant group of people who take the position that if a GM canola swath was sitting resting on the bench, that there was somehow something unhealthy, unsafe, unreasonable about that. There's no evidence at all about that at trial - - -

McLURE P: No, no, but the point I'm trying - - -

CAHILL, MS: - - - and it can't affect the construction.

McLURE P: - - - to put to you is that there are different views on the appropriateness of genetic engineering in agriculture, and it would be – I would have thought it's just undeniable – anyone who reads anything outside the court would understand that there's some controversy about

it. Now, that may – and you're putting it on the basis there's absolutely no controversy, and what are we all talking about, and we've got to read the NASAA standard in that context.

The only proposition I'm putting to you – I'm not going to the merits or otherwise of peoples' views as to the desirability or otherwise of genetic engineering, other than to note that it remains controversial in some quarters. That's all I'm saying. And is that outside the boundaries of what's permissible for this court?

CAHILL, MS: We say yes. What's permissible for this court to look at, is to the extent that there's an acknowledgment that there are different positions (1) in the organic industry and another in the conventional farming industry, about the appropriateness – let's use that generic expression – of using GM or producing GM material. That controversy and the scope and the limits of it are expressed in the standards. That's what we say.

NEWNES JA: We approach the construction of the standard without any preconceptions one way or the other, do we not?

CAHILL, MS: Indeed, and one finds the controversy in the proper construction – the limits of the controversy. That's what we say, your Honour.

MURPHY JA: Well, if we were to take judicial notice of any facts, we would have to know pretty clearly what the facts were - - -

CAHILL, MS: That's our proposition.

MURPHY JA: - - - that we're asked to take of.

CAHILL, MS: That's our proposition.

McLURE P: Well, you wouldn't then – anyway. Your submission as to the construction is heavily weighted by the view that there is no reasonable basis for an objection to GMO - - -

CAHILL, MS: No.

McLURE P: - - - agriculture.

CAHILL, MS: No, your Honour. That has nothing to do with it. That has absolutely nothing to do with it.

McLURE P: Well, if you look at your submissions, it's pretty hard to separate the value judgment from the construction.

CAHILL, MS: Our submission as to the proper construction of the NASAA standard and the national standard rests firstly on the language, as it always does, in relation to a document of this type. Secondly, in relation to the factual findings that are not challenged, and we know that GM was found – and it's not challenged to be – GM canola, is a safe legal product. That's a relevant matter in the construction of the language of the standards, and that's as far as we go. So there's no value judgments there. That's an unchallenged factual finding, and the office of GM technology has spoken on that.

Can I come back to section 3.1, and where I left off before that exchange was in relation to 3.1.6. Very critical, we say, that 3.1.6 uses this language of zero tolerance. Section 3.2, in relation to GMOs, doesn't use it at all. That's the first thing. But then when it does use zero tolerance in relation to chemicals, it uses it in a very confined and specific way, and the only way it can sensibly be construed, especially against the background of annexure 7, to which it logically refers, is that where there is zero tolerance it means zero tolerance for that chemical in the product. And that's a powerful influence on the way in which one construes section 3.2. I turn then to 3.1.12, which emphasises again - - -

NEWNES JA: I'm sorry, what was that number?

CAHILL, MS: 3.1.12, your Honour.

NEWNES JA: Thank you.

CAHILL, MS: And this emphasises again this, in principle, distinction that the standards make between the actions or omissions of the operator on the one hand, to minimise the risks of contamination, and direct action to increase contamination. Those are the sorts of things that are prohibited and lead to decertification, whether or not the contamination is in the product.

So that bright line, we say, can be seen – the deliberate negligent introduction of contaminants, whether or not it ultimately ends up in the product is less important, because what's important here is what the operator's doing, and that's inconsistent with organic agricultural practices. But where it's accidental, outside of the operator's control, then what one must see is

contamination in the product before the product will be decertified. Now, coming to section 3.2 - - -

McLURE P: Just to make that clear, NASAA doesn't certify the products, does it? It relies upon the integrity of the product from the integrity of its system. That is, the certification of the land.

CAHILL, MS: That's right.

McLURE P: Just to make that clear.

CAHILL, MS: So what needs to be – and this will become relevant when we look at the language of section 3.2. Your Honour President McLure is, with respect, quite right. The certification of the land, or the operation, or both, then carries with it a right to label that – the product as certified, and what can then happen is a withdrawal of certification for product.

McLURE P: Certification of the land.

CAHILL, MS: Well, there can be a termination of total withdrawal of certification, including of the land, in the event of decertification, as defined. But one will see in section 3.2 a linguistic distinction between, on the one hand, withdrawal of certification, and decertification. Withdrawal of certification, we say, must be a reference to withdrawal of certification of product.

McLURE P: Well, I read it as – this doesn't concern itself with products. The standard – the whole purpose of the standard is to provide a mechanism whereby you can be confident about the product. So they don't test products unless there are issues relating to breaches of the standard. So when you go to export your canola – or your – whatever you're - - -

CAHILL, MS: Oats.

McLURE P: - - - producing, they don't test the product, because they have put in place a system that produces products that you can rely on as being appropriately organic.

CAHILL, MS: But that means only – that's only one aspect of it, with respect, your Honour, that it doesn't have any prohibited substance in it. The other aspect is that it has been produced in a way that is consistent with organic principles. Sheep have been well looked after. They've been able to forage naturally. Hens have been kept in

sufficiently large spaces and not cooped up. Those sorts of things are what the label, certified organic, also means to the consumer.

McLURE P: I understand that, but – anyway, I will just repeat myself, so I don't need to do that. I just need to put to you the proposition.

CAHILL, MS: And my learned junior just reminds me to draw to the court's attention at GAB 1749, standard 20 – 2.20.12.

McLURE P: What are you drawing to our attention?

CAHILL, MS: 2.20.12 - - -

McLURE P: 2.20.12.

CAHILL, MS: - - - on page 1749. And this has relevance in terms of this discussion about the qualitative difference between the contamination of product with a chemical, and the use of GMOs, or the presence of GMOs in an agricultural organic product. So what's relevant here in terms of labelling, and the importance to the consumer, is not that there's no GMO in the product, as far as the organic standards are concerned, but that it hasn't – the product has not been produced using genetically modified organisms.

So we're coming very clearly to this qualitative difference between chemicals on the one hand and GMOs on the other. That what's significant in terms of this principle method of agricultural production that is described as organic, is that GMOs are not used in the process. The reason why that's important to those who are adherence to the principles of organic farming, is because genetic modification does not represent a natural method of agricultural production.

And that's why there's a relevant distinction in the standards between GMOs which are treated differently from normal plant or – I'm sorry, I put that badly. Traditional plant breeding techniques, which nevertheless modify genetically plants for human purposes, but do so in a way that respect the gene trait transfer acceptances – I put that word – that's the wrong word – but the way in which gene trait transfer occurs naturally in the environment.

So section 3.2 needs to be understood and read against that background. It's very clear, we say, looking at 2.20.12 and then reading the architecture of section 3.2 in

the general principles, as to what this is all about. It talks about organisms – GMOs have no place in organic production and processing systems. That's not some nebulous concept here. What's being said is that there's no place for using these in your system of production. Organic production and processing system. A method of agricultural practice. There's no place for using GMOs in that process. The point is reiterated and put beyond doubt in the second paragraph of the general principles, and it makes this point, that even if you haven't got it in the product, at the end of day if you've deliberately or negligently used these GMOs, then it's outside organic production principles.

Critically, there's the use of this word "exposure" of the system, and that is used in contradistinction to the word "contamination". What this tells the court, in terms of the construction exercise, is that the mere exposure of the system, whether you describe it as the method of production, the land, the pasture that grows, the crops, the mere exposure, does not amount to contamination without more. If that's what the section 3.2 had intended, it would have said so. So - - -

MURPHY JA: So you read the words "deliberate or negligent exposure" by the operator - - -

CAHILL, MS: Well, obviously. We would say there's - - -

MURPHY JA: Well, Mr McCusker, I think - - -

CAHILL, MS: - - - no sensible construction otherwise.

MURPHY JA: Mr McCusker, I think, read it differently.

CAHILL, MS: Yes. With the greatest of respect, we say that's just not a sensible reading. Not the least for the reason that it seems to exclude any accidental or inadvertent presence. It seems that therefore accidental exposure would be within GMO – within organic farming principles – and that can't possibly be what was intended. I think Mr McCusker was driven, at the end of the day, to submit to your Honour Justice Newnes that those words "deliberate or negligent" should simply be ignored in order to make sense of the provision. That, we say, just strains against every normal principle of construction of a document of this character.

McLURE P: So your position is, as long as it's not in the finished product, and as long as the operator wasn't

deliberate or negligent, then there's no difficulty with exposure to GM material - - -

CAHILL, MS: That's right.

McLURE P: - - - or use of GM material. So if - - -

CAHILL, MS: You can't – you can never use it.

McLURE P: Well, sheep eat it.

CAHILL, MS: You're not using it, we would say in those circumstances.

McLURE P: Okay. So the only prohibition is against, what, using it – the human being using it positively - - -

CAHILL, MS: In your system.

McLURE P: - - - in your system. So if it gets into your system by a means other than the operator, no problem.

CAHILL, MS: And the reason – that's right.

McLURE P: But that's the – no, I'm just trying to - - -

CAHILL, MS: That's right.

McLURE P: That's – yes. Okay.

CAHILL, MS: And the reason for that is because – and I apologise, I will just stop if you find me to be repeating myself, but - - -

McLURE P: No. I - - -

CAHILL, MS: But it's because it's a different objective here from the chemical contamination.

McLURE P: But you can see how the identification of the objective drives the answer on the construction, which is the point I was making to you earlier.

CAHILL, MS: Yes.

McLURE P: And I don't know that there's anything more to be said about it, other than, I think, we've fleshed out what the issues are.

CAHILL, MS: Yes. So we come to 3. – sorry, recommendations. The important point that we make about

the recommendations here – and it's a funny thing to appear, this – for this particular paragraph to appear here as recommendations, because if one reads the explanation of what recommendations are, at the commencement of the standards they're intended to be things that might actually become standards at a later time and you should adopt as appropriate.

In any event, the language of it is, we say, quite revealing as to what type of contamination and in what – and into what is being discussed here. And the language of vectors, in particular, which is typically – certainly on my understanding, more associated with them – the vectors of transmission, like a mosquito bite, or something like that – that is a vector of transmission of a disease into the human bloodstream.

This is language which is – we would say on an objective construction – intended to connote genetic contamination where you actually have gene transfer from one organism to another. We say that that comes from the use of words such as vector, and we say this as well, that if it meant anything else, one would see – and simply meant something like, well, you had better make sure that you know that – you know about how canola swaths can blow from one point to another, or might be carried by kangaroos, or birds, or so forth.

One would expect to see some corresponding or analogous paragraph in the contamination section, and that we don't have. So obviously this recommendation is not intending to speak to the normal incidences of coexistence – or consequences of coexistence one sees in normal farming practices of weed incursion, plants coming through on sheep droppings, airborne seeds, oversprays from an adjacent farm – chemical oversprays – those sorts of things.

And absent that analogous provision in the contamination section, we say this is a clue – and a very strong clue – when coupled with the language, that it refers to genetic contamination. Now - - -

McLURE P: That's what you say contamination means, don't you?

CAHILL, MS: Yes.

McLURE P: That's your submission.

CAHILL, MS: Yes. We're prepared to – we say that that's what it means.

McLURE P: That's your primary position.

CAHILL, MS: Yes.

McLURE P: Contamination means the transfer of the genetic material.

CAHILL, MS: Indeed.

McLURE P: Yes.

CAHILL, MS: Yes. And there's one other possibility, we say. It doesn't arise on the proper construction, but we would accept that conceivably it could apply, is where you would have some GMO in a product that could not be extracted from it. And an example here might be organic honey, and let's say organic bees foraged on genetically modified pollen, and the honey that's produced may not be able to entirely filter out all of the genetically modified pollen.

McLURE P: So you're prepared to accept co-mingling in some respects.

CAHILL, MS: To the extent that it can't be extracted.

McLURE P: Separated out.

CAHILL, MS: So that the product would have this GMO material in it, and there would be nothing anyone could do about that. That seems to be consistent with what one would normally understand to be contamination, but not in relation to anything other than product, because that's what the standards tell us, we say.

Now, it's important, of course, just working one's way through the section 3.2 standards, that the bulk of them, 3.2.13 through to 3.2.5, for starters, all concern deliberate or negligent use or exposure to GMOs by the operator. So this is all very much focused on, again, this primary principle about what the operator does or doesn't do in terms of using the GMOs.

3.2.5 is linguistically very important, as is 3.2.3. 3.2.5 first, operators must not knowingly permit exposure or fail to take action against the application or exposure to GMOs. Now, no language of contamination there. So application of or exposure to GMOs is something shy of contamination, linguistically, in this section. And one sees that, I think, in relation to the buffer zones which

her Honour President McLure asked me to look at overnight – and I will come to in a moment.

The other linguistic significance is in 3.2.3, where you've got the certification of organic crops will be withdrawn. Now, this harks back to the point made a moment ago about how certification of products is carried with the certification of the land and the operation. And so what happens then, that entitlement to label products as certified and to treat them as certified, have them deemed as certified, then needs to be withdrawn.

Suddenly there's a positive act that needs to be taken to withdraw certification of those products, because it hasn't been positively conferred specifically on the product as a consequence of the certification of the operation. That's relevant - - -

McLURE P: Well, it just means you can't grow GM crops on the same land as – on the same farm as organic crops.

CAHILL, MS: What it says is, if you're a certified operation and you then grow an organic crop - - -

McLURE P: Or if organic crops are grown – if genetically engineered crops are grown on the same farm.

CAHILL, MS: Yes.

McLURE P: So you can't – organic is just inconsistent with having genetically modified - - -

CAHILL, MS: What it says is that - - -

McLURE P: - - - agriculture on the farm.

CAHILL, MS: What it says is that it the certification of the organic crops will be withdrawn, and what it – I apologise again if I'm repeating myself – but it shows that the language – sorry, the language shows that there needs to be a positive act of withdrawing certification of a product, and that language has some similarity with 3.2.9, because that talks about organic certification shall be withdrawn.

I think it was the point that your Honour Justice Murphy made yesterday, that the definition of decertification is somewhat different. That's a total withdrawal of certification, and necessarily includes a decertification of the land and the facilities. That's at page 1735. Now, if - - -

McLURE P: Are you saying that you can grow GM on the same farm as non-GM – as organic, and that the only thing that you will lose is you can't use the certification in relation to the crops? Is that – I'm just trying to understand what you say. My understanding is that you can't grow GMO crops on an organic farm, full stop.

CAHILL, MS: Well, I'm not sure I'm addressing that point. I don't think I know the answer to that off the top of my head.

McLURE P: Well, I thought that's what 3.2.3 was. You won't get certified if you're growing genetic engineered crops on your land and, in fact, it has to be a buffer period of five years or something before it can even become organic, and if once you've been certified you decide you're going to grow it, then that's a prohibition. That's 3.2.3, the certification of organic - - -

CAHILL, MS: Of organic crops - - -

McLURE P: - - - will be withdrawn.

CAHILL, MS: - - - will be withdrawn. That's the point.

McLURE P: Yes.

CAHILL, MS: It says nothing about what will happen to the land or the operator. It talks about the crops. And linguistically that's significant because it is used in contradistinction to the language of decertification, which means a total withdrawal, and 3.2.9 - - -

McLURE P: So you say the land remains certified. It's only the crops that aren't.

CAHILL, MS: Well, that's what happens in 3.2.3 and 3.2.9 is the consequence.

McLURE P: Well, that's a question of construction, isn't it?

CAHILL, MS: Yes. So 3.2.9 - - -

McLURE P: If that's wrong, well, that's wrong.

CAHILL, MS: Yes. But the logic of the use of the similar language in 3.2.9 connotes that it is intended to mean withdrawal of the certification of the crops. If it meant more, it would use decertification. Now, 3.2.6, of course, this is another thing that the operator must do, trace back

the inputs. So these are things that he or she actually uses. 3.2.7, again, it's all to do with what the operator must or must not do. Reducing contaminant risks.

When one reads those five bullet points, as to what contaminant risks must be, the last bullet point makes plain, we say, that the focus is in – on contamination of crops, and the risk of contamination of crops. 3.2.8 is a unique provision, as your Honour Justice McLure identified. It simply precludes organic production until five years after the harvesting of any GM crop on the farm. But it's informed as to the object behind it by those provisions at sections 2.7 and 2.8, involving conversion and parallel production, which are at 1744.

Now, there's important reference in 2.8, under the general principles, where there's this dealing with parallel production. Producing exactly the same crop. Well, there's a nod to genetic transfer between two crops that are organic and non-organic. We're not addressing specifically the question of GMO here, but it could certainly include it. But – first of all, producing the same crops. That's important if you've got this idea of genetic contamination.

It is – substantially increases the risk of inadvertent mixing or contamination of – here we have it again – certified product. There is no doubting, in our submission, the clear and consistent focus of these standards upon the concern exclusively with contamination of product, or risk of contamination to product. So to the extent that one sees contamination – language of contamination of the system, contamination of the land, it's all directed towards whether that creates a risk of contamination to product.

That same sort of point about the focus on the contamination of the certified product appears in the general principles at 2.7. See the second sentence there:

> Split certification increases the risk of contamination of certified product, and operators should, upon application, detail to NASAA how they intend to eventually convert the entire farm.

But it's contamination of product yet again that is the critical feature. So we say that 3.2.8 needs to be understood as to its purposes against that background of the general principles that deal with - - -

McLURE P: Here you're talking about co-mingling as well.

CAHILL, MS: Yes.

McLURE P: Because clearly this is addressed to that transition stage where you can have GM and non-GM and what you can and can't do. So contamination of certified product, because that's throughout the whole system, including harvest, transport, storage, etcetera, you can't have co-mingling. It's not genetic transfer that's the issue. It's having organic with non-organic. That's what these standards are concerned with.

CAHILL, MS: They keep coming back to the contamination of certified product, and if one were in the position of – as we are here, where there was no risk - - -

McLURE P: No, you want to focus on the genetics. All I'm saying is it's co-mingling. You have to have separate transport systems, separate storage facilities, so that your organic doesn't mix up with your non-organic.

CAHILL, MS: Yes.

McLURE P: And that's the contamination point. That's all it is.

CAHILL, MS: In the product.

McLURE P: It's not genetic change. It is you're putting non-organic with organic, and you can't do it.

CAHILL, MS: In the product.

McLURE P: Yes. Well – or you can't have your little volunteer canola GM plants getting mixed up with the wheat or the rye or the whatever. That's what it means, doesn't it?

CAHILL, MS: In - - -

McLURE P: But you say no - - -

CAHILL, MS: No.

McLURE P: - - - that's not contamination.

CAHILL, MS: This talks about certified product, and that's the - - -

McLURE P: Anyway - - -

CAHILL, MS: Now, we come to 3.2.9. I've made that point about the linguistic significance of the withdrawal of certification. From all that's gone before, we say that contamination must sensibly be understood here, where the object of restricting GMOs is because of this underlying principle of them being not a natural thing to use in agricultural production, necessarily means that this must be limited to genetic contamination of a product, otherwise it doesn't conform to that clear objective, we say.

So whilst it's perfectly understandable that the genetic contamination – or unacceptable risk of genetic contamination, such that you may have genetically – we don't have any organic canola in Australia, but if we had organic canola that was at risk of being genetically modified and labelled as organic, when it had an unacceptable risk of actually being genetically modified in some or whole, it's understandable that 3.2.9 is there to achieve that. That's consistent with the objectives.

But to create a construction – I've put that badly. To construe this quite inconsistently with the themes of the entirety of the standards, not just section 3.2 and section 3.1, for reasons outside the control of the operator, this would operate because of a contamination in the land, which means nothing more than the mere presence, we say. Well, that just can't sensibly work. It's also directly inconsistent with, we say, 3.2.11. It's quite hard to read 3.2.9 that way when you've got 3.2.11 sitting there. So there's no requirement in 3.2.11 to decertify in the case of accidental contamination of product.

MURPHY JA: It would be different if there was a deliberate or negligent creation of an unacceptable risk, on your case.

CAHILL, MS: Yes.

MURPHY JA: Of contamination – including mixture in the farming system.

CAHILL, MS: No. It needs to be in the product, in a way that it can't be cleaned out.

McLURE P: It's the genetic transfer, or alternatively the honey example.

CAHILL, MS: Yes. The irremovable.

McLURE P: Yes.

MURPHY JA: Why doesn't it just mean that the creation of an unacceptable risk by the operator?

CAHILL, MS: Of.

MURPHY JA: Of contamination. Of even in a broader sense will permit certification to be withdrawn?

CAHILL, MS: In – when your Honour says contamination in the broader sense - - -

MURPHY JA: Contamination in the sense of anything that came into the production and processing system which doesn't necessarily end up with a genetic transfer of the GMO.

CAHILL, MS: So your Honour would include with that mere presence of GM canola.

MURPHY JA: Well, not – no, but creating a risk of contamination. Creating the circumstances – for example, not doing the things that 3.2.7 talks about.

CAHILL, MS: Yes. Yes.

MURPHY JA: And creating a situation where the risk of contamination in that broader sense occurs, because you then create a risk of a production system, which will have GMO material within it.

CAHILL, MS: So an example here might be where – if this is an example – so that I understand your Honour's question – an organic farmer might, for example, procure a supply of animal vaccine and negligently, or without sufficient diligence identify the derivatives of that vaccine. You've got a huge stock of it. Ordered it in bulk. So that although he hasn't deliberately intended to introduce GMO vaccines to his livestock, the continued use of them amounts to contamination of the livestock.

MURPHY JA: Well, that may be. I'm just, as a matter of language, thinking about whether 3.2.9 is about the operator, rather than - - -

CAHILL, MS: Yes.

MURPHY JA: - - - anything else. Because 3.2.1 - - -

CAHILL, MS: Yes, I see the point.

MURPHY JA: - - - one would think is about the operator. 3.2.2 looks about the operator. 3.2.3 doesn't say the operator shall not do it, but that's the implied negative covenant there. 3.2.4 is about the operator. 3.2.5 is about the operator. 3.2.6 doesn't say the operator shall do it, but I think that's probably the intention. 3.2.7 expressly says the operator. 3.2.8, if that was breached, that would be an operator's breach.

CAHILL, MS: Yes.

MURPHY JA: 3.2.10 requires notification by the operator.

CAHILL, MS: Yes. And so - - -

MURPHY JA: So I just - - -

CAHILL, MS: Yes.

MURPHY JA: - - - as a matter of language, and picking up your point about deliberate negligent production within the system. There's 3.2.9. I'm just exploring - - -

CAHILL, MS: Yes.

MURPHY JA: - - - whether that's about deliberate or negligent creation of circumstances which create an unacceptable risk.

CAHILL, MS: Your Honour, may I say two things about that. First of all, that construction would be consistent with the general principles, and there would also be a symmetry then in the provisions themselves, because what that would do is identify 3.2.11 as the limits and scope of the circumstances in which there will be a consequence – a certificate consequence in relation to circumstances outside the control of the operator.

And there's certain logic to that, in terms of the construction of the standard. So everything else deals with what the operator does or doesn't do. 11 and 12 don't. They are the two circumstances in which it matters not whether the operator has done or failed to do anything that they should have. Risk of contamination is – unacceptable risk of contamination is one, and the second is – sorry, I withdraw that. Contamination of organic product is the touchstone in both of them.

McLURE P: We're going to have to finish this afternoon, Ms Cahill, so there's – if you want to - - -

CAHILL, MS: I will speed up.

McLURE P: Well, where you spend your time is up to you, and if you don't want to make oral submissions in support of your notice of contention, then so be it, but if we don't get to that, it seems to me that if you're going to seek findings of fact, then we need a proper - - -

CAHILL, MS: Yes, I understand that.

McLURE P: You understood that.

CAHILL, MS: I understood that, and we will do that. I assume your Honour will make some directions.

McLURE P: That's fine. So all I'm saying is that there's a time issue and - - -

CAHILL, MS: Yes.

McLURE P: - - - I will leave it to you, of course.

CAHILL, MS: I regret that. I'm sorry.

McLURE P: Yes. No, no, it's quarter to 12, that's all, and - - -

CAHILL, MS: Yes. Section – the proper construction of the standard, I think, is fairly critical.

McLURE P: Absolutely central. I'm not suggesting otherwise.

CAHILL, MS: We see the issue of whether or not there's a duty of care, how that's to be analysed as critical. I was intending to spend a little bit of time on that, the relevant principles. Perre v Apand – and given the High Court's exaltation to pursue analogical reasoning, I think it's fairly important to look at Perre v Apand in some depth. There's issues about vulnerability, in particular, that I need to – well, I was intending to explore with the court.

Nuisance I think I can deal with fairly carefully – fairly succinctly, I hope. I think the issues there are fairly confined. So if I could perhaps just finish off a couple of points on the standard and then perhaps deal with the issue of reasonable foreseeability in terms of duty, vulnerability, and then a Perre v Apand point generally, and then I might deal with everything else in a fairly succinct way.

McLURE P: If you're right on the proper construction of the standard, then I think there's essentially a concession that they must fail – probably on both negligence – the appellant must fail on negligence and nuisance. So - - -

CAHILL, MS: I do need to deal with the alternative position, though, in duty, yes.

McLURE P: Well, you've got your unreasonableness position - - -

CAHILL, MS: Yes. And I've got a - - -

McLURE P: - - - and then you've got – even if there's a breach of the standard, there's – you say there's no negligence or nuisance, don't you?

CAHILL, MS: Yes. So that's where I think I might best spend my time, subject to where the court – I would be of most assistance.

NEWNES JA: Yes.

CAHILL, MS: And I will go wherever I can best assist, but I think the circumstance where – where it concluded that 3.2.9 applied, in the way in which the appellant's contend, whether or not there can be a duty of care in those circumstances is something that I was intending to make some submissions about in some more detail than the rest.

MURPHY JA: One thing that I would like you to spend a couple of minutes on at some stage convenient to you is the contract.

CAHILL, MS: Yes.

MURPHY JA: So whenever you want to move off from the standards, I would like to just take you to the contract.

CAHILL, MS: Yes. Thank you. I will just – perhaps I can do that very shortly - - -

MURPHY JA: Yes.

CAHILL, MS: - - - because I really just wanted to raise one more thing about the NASAA standards. And that's in relation too section 3.3, with the windbreaks. And this picks up on something that her Honour President McLure said yesterday about the definition of buffer zones. Now, here, this is the section that deals with windbreaks and buffers

zones. Importantly, it's not just in the context of GMOs here. This is any sort of contaminants.

It's a generic provision in that sense and, again, the recommendation is instructive about what the focus of contamination is. So we're here at 1752. And the recommendations there say:

> Living room breaks and shelter belts should be provided to protect crops and livestock from contamination, and assist in the reduction of soil erosion.

So yet again we see this focus when it comes to contamination. Contamination of what – products and livestock. Now, the buffer zone definition that your Honour drew my attention to yesterday is at 1735.

And, very interestingly, it doesn't use the language of contamination. So here is another linguistically significant point. The buffer zone is something that prevents contact with prohibited substances. One could see a buffer zone to prevent contact of GM material, because that's not allowed to be used by the operator in the system, with the certified operation. So buffer zone prevents contact. And when we go to 3.3.1:

> The purpose of a buffer zone is to be provided to protect certified areas from contamination from adjacent properties, where appropriate.

So you have that use of contamination in contradistinction to contact. And this again re-enforces the likelihood that mere presence or mere contact of what could be, at its broadest, described as a prohibited substance, does not amount – it's not intended to amount to contamination.
3.3.3 talks about using the outside rows of a crop as a buffer zone. And it says, well, they can be – they need to be quarantined and can't be sold as certified.

It says nothing about decertification of the land, where land has been used as a buffer zone. So obviously if you have – maybe you might use a boundary paddock, for example, as a buffer zone. 3.3.3, and nothing else in that section 3.3, would permit decertification of the land because of the contact of the prohibited substance on the land, and that's a very important clue about the limitations of 3.2.9. It's pretty important too to elucidate that point, we say in the context of the facts of this matter.

If one goes to paragraph 93 of the trial judge's decision, one sees that Mr Marsh here in this case, when he moved that organic wheat crop to paddock 11, he planted it quite deliberately in the northern part of the paddock, and left the southern part bare, and he did that in order to provide a buffer zone. So at 90 – the finding at 95 – sorry. 93, I beg your pardon. There's reference there to Mr Marsh creating a buffer zone, and the point is made again at 531.

And so what we have here is that Mr Marsh actually had a buffer zone, and it was only in the buffer zone in paddock 11 that the swaths were found. This was the paddock – if the court remembers – where the three swaths were found in the southern part where the buffer zone was, but didn't make their way to the crop. Yet, under 3.2.9 – a purported application of 3.2.9 – the entire paddock, including the crop, was decertified because of an asserted unacceptable risk of contamination.

That just doesn't conform to section 3.3. If there had been – if he had planted a buffer crop to limit the way in which the swaths moved through his property – through his crop – well, section 3.3.3 tells you that that part of the buffer crop might be decertified, but it certainly doesn't permit a decertification of the buffer zone. And so it re-enforces, by practical example, on the facts of the case, the way in which mere contact with the land, mere presence on the land, of a substance that the operator is not entitled to use in his methods of organic agricultural production, does not amount to contamination, or a risk of contamination.

Those are the submissions on the NASAA standards. I think your Honour Justice Murphy had a question for me about the contract.

MURPHY JA: Yes. Something I raised with Mr McCusker. It would appear that the trial judge thought that the contractual power being exercised was 3.2.9 of the standards.

CAHILL, MS: Yes.

MURPHY JA: And I just wondered how he gets there.

CAHILL, MS: Sorry, your Honour, I'm just having a little trouble hearing you.

MURPHY JA: Yes. The feeling is that 3.2.9 was the contractual power - - -

CAHILL, MS: It's not an infringement – yes.

MURPHY JA: - - - that was exercised. And I just wondered how he got there on that. 3. – sorry, 6.1 was the one that Mr McCusker referred to about complying with the standards. It's page 1378.

CAHILL, MS: Yes, sorry, I'm just pulling up the right book. I'm sorry. Yes, thank you, your Honour.

MURPHY JA: So Mr McCusker says go to 6.1 and see that you need to comply with the standard.

CAHILL, MS: Yes.

MURPHY JA: And then 8 is about possible non-compliance with a standard.

CAHILL, MS: Yes.

MURPHY JA: Then 9 is about sanctions, and one of the sanctions is suspend the use of the licensed items, and/or – relevantly perhaps – certification. So suspend certification.

CAHILL, MS: Yes.

MURPHY JA: 9.1(i) seems not to apply.

CAHILL, MS: Yes.

MURPHY JA: Was this a 9.1(ii) case?

CAHILL, MS: No. Because there had been no breach. All this provided for, under 3.9 – 2.9 – was a withdrawal in certain circumstances. Now – and particularly as the appellant's wish to deploy 3.2.9 for reasons outside the operator's control. So necessarily on their construction there was no non-compliance or infringement. That marries, of course, with page 1746 of the standard.

MURPHY JA: Well, the sanctions seem to involve – if you leave out the reference to use of the licensed items – you can suspend certification under 9.1 immediately. You can suspend under 9.2 on 30 days notice. Where you have suspended, in either case, you've got to say what has to be done. Was that done in this case?

CAHILL, MS: No. No, your Honour.

MURPHY JA: Then in 10 there's a termination if you haven't made good after 9.2. And then there's consequences of termination, and then 10.7 introduces another concept which is terminate the certificate. But my question was, on the judge's understanding, was there a 9.1 suspension happening?

CAHILL, MS: No. I don't understand that to be what the trial judge was saying.

MURPHY JA: No. And the plaintiff's case at trial, was that a 9.1 suspension?

CAHILL, MS: Not – I don't think so. It was – I think it went no – it was put no higher than 3.2.9 permitted this decertification. Of course, the point that we make emerging from your Honour's analysis is that the absence of a power to decertify within the meaning of the standard really re-enforces that point about what 3.2.9 is talking about when it talks about this pool of certification, and that's further re-enforced by section 2.12 of the NASAA standard, which describes the sanctions and the way in which decertification must occur for a serious infringement. So read - - -

MURPHY JA: Perhaps this is a matter for Mr McCusker, but I would have thought that 3.2.9 would not have any operation unless it was pursuant to a contract.

CAHILL, MS: Yes.

MURPHY JA: And I'm just not clear in my own mind what provision of the contract was relied upon - - -

CAHILL, MS: Well, there is no provision.

MURPHY JA: - - - to decertify, to terminate, to withdraw, whatever was done.

CAHILL, MS: There is no provision, your Honour, but the reason is – lies within 3.2.9 itself, because you can't decertify either under the NASAA standard, if it had some extra contractual operation, or under the contract, other than for – it's like a serious breach analogy, in contractual terms, and that's not what 3.2.9 is about. Read harmoniously with those provisions, and the definition of decertification, the language and the deliberate use of the language "withdraw certification" is plain. It means withdrawal of certification of product.

Can I have a moment, please. If it please the court, can I move to the grounds 2 to 5 – or 1 to 5, dealing with the question of negligence. I won't spend any time on ground 1. It's not really of that much moment. Just save this: this criticism of the trial judge's focus on physical damage cases, in our respectful submission is perhaps reading a little more into the trial judge's reasons than was intended. In our submission, we understand the trial judge really to be saying no more - - -

McLURE P: Sorry, are we now on duty?

CAHILL, MS: Yes.

McLURE P: Yes.

CAHILL, MS: Sorry. We really understand the trial judge to be saying no more than this – that this is one of those types of cases that falls into that basket that's different from negligent misstatement, disappointed beneficiaries. Whenever you're looking at these sorts of cases you've usually got footings that don't do what they should, or you've got damaged potatoes, or seed that's been infected – in the case of Dovuro v Wilkins – or – there's always a physical consequence somewhere in the relevant factual landscape. It wasn't determinative of what he – of the analysis that he then undertook, and we say really those words did no more than identify the territory of pure economic loss within which these facts presented themselves.

Can I switch the order – the numerical order of these grounds – and deal with ground 3 and ground 4 first, because the logic of it is that ground 3 deals with reasonable foreseeability. Obviously the first necessary, but not sufficient condition. There's a logic starting there, because if there was no reasonable foreseeability, then some – that's the end of the matter.

Ground 4 deals with vulnerability, one of the relevant salient factors. It seems logical to me to deal with them – reasonable foreseeability, vulnerability, and then consider the question of duty overall, against the background of the submissions I've made in relation to that. Coming then to ground 3. Of course, one of the key points about ground 3 and reasonable foreseeability is that it only deals with half the necessary story, because there were two things that needed to be reasonably foreseeable here. Specifically, the risk had two aspects to it that needed to be reasonably foreseeable. One was the movement

of the swaths over to Eagle Rest. The second was the risk of decertification as a consequence.

Now, this ground 3 deals only with the first and not with the second. That's fatal, in any event, to the finding of no reasonable foreseeability. So this negligence claim cannot get off the ground as a consequence. That's the first point.

McLURE P: Well, I think in ground 2 foreseeability is raised as well, isn't it?

CAHILL, MS: But in the context of what's said about it in ground 3, your Honour.

McLURE P: Well, foreseeability is a requirement of a duty of care.

CAHILL, MS: Exactly.

McLURE P: Okay.

CAHILL, MS: And in ground 3 these appellants condescend to lay before the court the basis upon which the trial judge is said to have erred in concluding that there was no reasonable foreseeability of this risk, and it does not challenge the finding to the extent necessary to resolve the fundamental problem. It doesn't - - -

McLURE P: Well, I'm not sure about that, because ground 3A – ground 2A also challenges the finding of foreseeability.

CAHILL, MS: Yes.

McLURE P: Anyway, I mean, we're not going to get hung up on technical matters. Yes, what has to be foreseeable. We understand your submission that there's two limbs to it, the fact and the consequence. But you – anyway, you say this was not foreseeable - - -

CAHILL, MS: Yes.

McLURE P: - - - either the fact or the consequence.

CAHILL, MS: Not reasonably.

McLURE P: Yes.

CAHILL, MS: Yes. Not reasonably foreseeable on either basis. Now, I won't dwell, for the reasons we've

discussed, on the position in relation to if our argument about 3.3.9 is accepted. The position if the appellants are right about the proper construction, comes back to what the evidence said about this risk of decertification, and what Mr Baxter ought reasonably to have foreseen. Now, the finding at 3 - - -

McLURE P: Well, he had actual knowledge. Let's assume that the loss of certification in relation to certain paddocks was a breach – was consistent with the - - -

CAHILL, MS: 3.2.9.

McLURE P: - - - the code – the standard. Mr Baxter was made aware of the possibility of withdrawal of certification.

CAHILL, MS: That we challenge.

McLURE P: You challenge that.

CAHILL, MS: Yes.

McLURE P: So what's actual knowledge then?

CAHILL, MS: So what did he actually know?

McLURE P: He knew that – we know what the appellant told him.

CAHILL, MS: Yes. And that was limited in 2008. The evidence was, as it was found, and which is not challenged, at 395, subparagraph (c) of the trial judge's decision. The limit of what Mr Baxter was told was that if it was blown or carried on to Eagle Rest, the organic certification could be affected or lost. There was no indication of whether that meant over product, over the land, over the entire system.

McLURE P: Anyway, your submission is that knowledge requires knowledge of the detail of how the decertification can occur. Is that what your submission is?

CAHILL, MS: Well, it needs to be risk of the decertification – sorry, it needs to be reasonably foreseeable, the risk that has been identified, and this is where we start, and I need to take you to some other evidence to show how his reasonable – the risk that could have been reasonable – reasonably foreseeable to Mr Baxter, evolved over time with what he was told by Mr Marsh and what Mr Marsh did.

So, first of all we have 2008. It's not specific about whether he means for the mere presence of GM on his property. He might mean that, but it's not clear. He might mean something less. He might mean decertification of product if there's genetic contamination. So there's an ambiguity, if you like, or a lack of specificity about what he's told at that time. What we do know from these findings is that he's certainly not told in 2008 that his land or his operation will be decertified, or is at risk of being decertified for the mere presence of GM material on his land.

Then we come to the second piece of evidence upon which the appellants rely, and that's the Farmanco notes, the DAFWA notes, that are not admitted as to the truth of their contents.

McLURE P: They don't have to be.

CAHILL, MS: But even if they are, and we go to them at volume 3, page 1389 to 1400 is the most relevant, because this is the one that deals with the coexistence of organic farming and GMO crops.

McLURE P: So this is around about the time – there's been an absolute prohibition on genetically modified crops under the state legislation. Everyone's talking about is that going to be changed. Everyone – you can read the facts. It's obviously – in the agricultural community it's a really live issue. Everyone knows what it's about. The notice given in January to permit the use of RR canola, or whatever it's called.

CAHILL, MS: Yes.

McLURE P: And then almost immediately your client – well, does it – sows it in March, or whenever it is.

CAHILL, MS: April.

McLURE P: April.

CAHILL, MS: Yes. On the advice of his agronomist.

McLURE P: Well, you would have to be – anyway. This is a big issue in the agricultural community, known to everyone, isn't it?

CAHILL, MS: Well, I'm not sure what your Honour means by that.

McLURE P: Well, if you read the - - -

CAHILL, MS: What the fact sheet says - - -

McLURE P: - - - department – if you look at the statutory architecture, and you look at what the department's saying, it just re-enforces what you would entirely expect a new and controversial – and I'm saying nothing other than controversial – change in the agricultural production regime.

CAHILL, MS: Well, your Honour, we assue those sorts of – with the greatest of respect – value judgments that aren't supported by the evidence, because when one comes to this fact sheet and one wants to draw from it some sense of a controversy, or concern about GM crops, this sheet actually says something quite different.

McLURE P: Well – but if you look at the genetically modified crop-free areas legislation, and you read the second reading speech, it's there in stark terms, Ms Cahill.

CAHILL, MS: When you come to this guidance note, which is what the appellant's rely upon, we see there under GM crops is the department of agriculture and food in the state talking about the rapid uptake of certain GM crops in some countries. The high adoption rate reflects the benefits that these crops offer to farmers. The – in the second-last paragraph on page 1389, the safety of GM crops is specifically mentioned by the department, and since 2000 the several types of cotton GM and flours that have been approved for release.

Talking about the wide uptake in GM cotton, and that's now widespread in the industry, and the benefits that it poses in the last paragraph on page 1389, because it decreases the need for insecticides and more effective herbicide control over weeds. It talks about 95 per cent uptake of Australian cotton growers planting GM canola in '07/08, and how that was approved in 2008 in Western Australia.

It then goes on in the next page to talk about the position in relation to RR canola. Now, so we say that that's the evidentiary background that's relevant when your Honour is describing, with respect, such things as controversy - - -

McLURE P: Well, I'm just putting you on notice of my reading of the evidence and the background to the statutory

architecture, which I think makes it pretty obvious that – of what's happening around this time, without any value judgment, but obviously it has been controversial.

CAHILL, MS: When we come to the actual discussion over the page at 1390, in relation to the coexistence issues, if I can put it that way generically, we see the prohibition of – a reference to the prohibition of the use of GM material in organic products. That's mentioned twice in that first paragraph under the heading Organic Farming and Genetically Modified Crops.

International organic standards vary on their tolerance of accidental presence. Some standards such as in Australia have no defined tolerance, whereas the European Union standard limits the accidental presence of up to .9 per cent. You can actually have GM material up to .9 per cent in Europe, according to this standard, which is coincident with the amount of adventitious introduction of GM canola into conventional canola that's permitted in Western Australia. So - - -

McLURE P: You – anyway, it doesn't - - -

CAHILL, MS: So here we have something that's telling Mr Baxter about genetic contamination, or intermingling, and a tolerance in Europe, and importantly, that there's no defined tolerance in Australia, which means that there is no zero tolerance. There is no zero tolerance in Australia. That's what Mr Baxter would have learnt if he had read this document at the time. Very important for questions of reasonable foreseeabilities, the government department fax sheet upon which the appellant's sought to rely.

Now, it goes on to say that some producers are concerned that canola – GM canola may lead to accidental presence of GM material, not just in their organic products. It also refers to their farming systems. It then goes on to talk about the information that can be provided from Canada. Some discussion there and critically this passage – third-last paragraph on 1390:

> Bureau of Agriculture and Research Economics reported in 2007 that little or no organic canola is grown in Australia so it's not anticipated that commercial cultivation of GM canola will have significant impacts.

Well, that's terribly important in terms of understanding the risk of decertification; the reasonable foreseeability of it. The reader – the reasonable reader

of this would well have understood the risk was in decertification, by reason of genetic contamination with organic canola – cross-pollination. So it goes on to talk about how you might have some cross-contamination with wild radish in a pasture. Maybe an organic farmer might have a sheep that eats a genetically modified weed. That's regarded as a remote possibility. It's explicitly articulated as a remote possibility here.

Now, over the page under the heading Organic Certification, organic certifiers assess GM contamination risk on a case-by-case basis, and there's nothing there in those bullet points which reflect the principles and the standards articulated in the national standard that would give any clue that the mere presence of GM canola on land, not in product, would create a risk of decertification.

Talk to your neighbours, on 1391. All producers have a duty of care – you will see in the second paragraph there – towards the neighbours. Best way forward is for all to discuss these issues and come to mutually agreeable solutions. Well, that happened in this case. And it's terribly important, in terms of the findings on reasonable foreseeability, that when Mr Baxter resolved to grow this GM canola on his boundary, he told Mr Marsh, at a busy bee at Mr Marinoni's farm. Mr Marinoni was the other organic farmer in the district – the only other one. And he told him these are the findings of fact that the trial judge made, and he moved – Mr Marsh moved his proposed organic wheat product from the boundary, up to paddock 11, with the buffer in the middle, because Mr Baxter had said he was going to do the GM.

Now, what does that tell a person in the position of Mr Baxter about reasonably foreseeable risks of decertification? He's not told in response, "No, please don't grow it on the boundary, because I've already told you that if it gets on to my farm there will be decertification." No, he says, "I will move my wheat crop."

McLURE P: Is there a finding that he discussed that?

CAHILL, MS: Yes.

McLURE P: That I'm going to move my wheat crop because you're just going to - - -

CAHILL, MS: Yes.

McLURE P: - - - sow this stuff on the boundary.

CAHILL, MS: Yes, that's at - - -

McLURE P: I suppose that's a reasonable response to a person who's just going to go ahead and do what he did.

CAHILL, MS: I beg your pardon? Sorry, I didn't understand.

McLURE P: No, no, I'm just – you're saying that there was this engagement.

CAHILL, MS: Yes.

McLURE P: That Mr Marsh then said, Mr Baxter, well, if you're going to grow it on your boundary, I'm going to move my crop to – further away from you.

CAHILL, MS: Yes.

McLURE P: Is that what you're saying?

CAHILL, MS: Yes. And the finding is at – yes, 420 and 421. Thank you. And I've got another reference here, I think.

McLURE P: Yes. That doesn't appear to support what you've just said - - -

CAHILL, MS: No, I - - -

McLURE P: - - - but - - -

CAHILL, MS: No, I've got the – I do have the reference. I just need to find it. It's – just bear with me a moment, please – if it please the court. Yes, 91, 92. Blue appeal book 24. See that finding in the last sentence of paragraph 92, if it please the court.

McLURE P: That just says Mr Marsh reacted to Mr Baxter's advice that he was going to sow - - -

CAHILL, MS: Exactly.

McLURE P: I thought you said there was an engagement – a communication where Mr Marsh said to Mr Baxter, well, if you're going to do that, I'm going to change – I'm going to move my crop. That's just what he did in response to what Baxter - - -

CAHILL, MS: I will have to check the transcript. It's referenced there - - -

McLURE P: Anyway - - -

CAHILL, MS: - - - at 219 to 220.

McLURE P: - - - I don't think at the end of the day it's going to make any difference, but - - -

CAHILL, MS: Any difference to reasonable foreseeability, your Honour says.

McLURE P: Whether your submission was accurate or not.

CAHILL, MS: The point is this: that that was the conduct in response to the statement about what he was going to do, which was a requirement of the Monsanto licence. He was required to inform his neighbours of his intention to grow the GM. And it was consistent – albeit there's no evidence that Mr Baxter read the DAFWA fact sheet, but nevertheless it's quite consistent with DAFWA's guidance to discuss these things with his neighbours, and that was the reaction, and it's crucial, we say, against the background of what one sees in the reasons, as Mr Marsh presenting – from 2008, someone very anxious about the introduction of GM canola into the district, and the effect that it would have on his farm.

And having engaged – even before it had been legalised – and then once it actually comes to it and it's about to happen on the boundary, this is the response that he has to it, which simply re-enforces all that is made plain by the DAFWA note, which is the issue here is a risk of genetic contamination.
Can I say that's also re-enforced by Mr Baxter's own evidence under cross-examination at page 1 of the appeal book – volume 1, page 708 and 767. Transcript pages 750 and 818. Volume 2, I apologise. So that evidence, if you see it, 708, at (a) to (b) - - -

NEWNES JA: Is that 708 of the transcript, or the green appeal book?

CAHILL, MS: Of the green appeal book, and 759 of the transcript. I apologise. I should be referring to the transcript pages, I think. But at (a) to (b) Mr Baxter was cross-examined about these standards:

> And you knew that one of the rules, according to Mr Marsh, was that you weren't allowed to have GMO – genetically modified material – on an organic farm. You knew that?---That's right.

> And you knew that if you did have a genetically modified organism on an organic farm, that could jeopardise the certification?---I knew it could.

And then when we go to 818 – and this is relevant also to the reasonable foreseeability of the movement of the swaths, but if we focus first on this risk of decertification. From (b) he's asked about what he thought might happen in relation to the blowing of the swaths from one farm to the other.

And he's talking about the five-metre buffer that Monsanto required, and then the road and the trees – the tree line that was between them. And then we get down to (d), and your Honours will see just before (e):

> And you didn't think, having read this document, that you should consider any other management strategies?

He says:

> Well, Mr Marsh wasn't growing canola.
>
> And so the answer to my question is no?---Well, I thought we'd taken all the precautions that we needed to take.

Now, that's entirely consistent, we say, with what was being articulated through the DAFWA publication, and is consistent with Marsh's own actions at the time.

So we come to the letter of October 2010, post-planting, pre-swathing, and that's at page 1401 of volume 3. And the really pertinent point – the significant point about this notice of intention to take legal action is that it can be – that the language of it is really quite materially different from that very broad language of 2008, which was basically, if something gets on to my property I could – it could affect my certification. My certification could be lost.

Something quite different here. There's a repeated use of the word "contamination" throughout, and it's the risk of contamination that is the focus – the focal point of this letter. Practically every paragraph bar – I think it is 11 and 12 uses contamination or contaminated to describe the concern or the risk that's associated with this notice of intention to take legal action.

Now, what do we say is intended to be conveyed by this? Section 3.2 of the NASAA standard was found at trial

judge reasons for decision at paragraph 100 to have been provided with this document. So we've got section 3.2 of the NASAA standard accompanying this, and its repeated reference to contamination. Well, his attention is not drawn specifically to 3.2.9 and the kind of argument that the appellants now put about – well, this means accidental contamination of land or system.

Read section 3.2. What's it all about? Read the first paragraphs:

> Deliberate use or negligent introduction by the operator –

Obviously:

> ...of GMOs.

So the only possible decertification risk, reading that section, that Mr Baxter could have discerned, was at 3.2.11 and 3.2.12, which is contamination of the product. Well, Mr Marsh didn't grow canola. So there wasn't much chance of that happening. Any seed could be cleaned. The wheat crop was too far away to do any damage. It had been moved.

So reasonable foreseeability, against the background of the novelty that the trial judge found about this first time growing of canola, and the swathing, we say clearly his Honour was right to conclude that the risk of decertification for the mere presence, blown or carried, carried a risk of decertification, was just simply – quite clearly the correct decision. It wasn't reasonably foreseeable.

Now, as to the risk of the GM material blowing into Eagle Rest as a result of the swathing, the short point about this is it was simply not proved to the requisite standard and to the requisite extent that Mr Baxter had reasonable foreseeability of that risk. The reason is this: there was insufficient – indeed, no, evidence adduced about seasonal wind conditions; more pertinently, how far swaths move on winds of particular strength. The trial judge correctly focused at 685 of his reasons on the reasonable foreseeability of movement by swathing, and I don't think there's any argument from our opponents about that now.

But what was missing from the evidentiary case that the appellants ran at trial was any evidence to indicate reasonable foreseeability by Mr Baxter of sufficiently

strong winds in Kojonup at that time of year to move swaths from Mr Baxter's paddocks – the Two Range and – sorry, Two Dams and Range paddocks – to move across the five metre buffer, across the road, and then through the trees to the other paddocks in Eagle Rest. There was evidence from the experts about the fact that strong winds can move swaths, but there was never any condescension in the evidentiary case of the appellants about the extent of that movement, whether – how strong the winds needed to be and how far the swaths would blow if a sufficiently strong wind existed.

So, this evidentiary deficiency, we say, again, is fatal to the appellants. We weren't talking in this case about adjacent paddocks without a roadway in between and just a single wire fence. It was something qualitatively different. There was a road with trees on the side of the road, and the five metre buffer that Monsanto required as part of its licence conditions for the growing of the GM canola. The deficiency of the evidence is surprising, given that the evidence in the witness statements of both Mr Robinson and Mr Stretch was to the effect that swathing was a very common and the most common practice in the Kojonup area for harvesting canola.

So the question becomes why – and I put this rhetorically – why did the appellants not adduce evidence of experience in the locality with the movement of swaths over distances from one place to another. That deficiency, we say, was fatal in terms of seeking to attribute to Mr Baxter reasonable foreseeability of the risk of movement. It was made clearer that evidentiary deficiency at paragraph 752 of the trial judge's reasons for decision, where mention was made of what had been put to him at interlocutory stage, that there was going to be from the appellants an expert report from a Dr Snow, which would have gone to the question of safe distances and suitable buffer zones as between distinct cropping or grazing operations.

Now, that expert report was never forthcoming and, had it been, it may have elucidated the point about whether the movement of swaths through that landscape with which we are particularly concerned here – the five metre buffer, the road, the trees – at that time of year, in the prevailing environmental conditions was something that was reasonably foreseeable. We say that against that background and the failure of the appellants to prove their case, that the trial judge was plainly right to conclude that the risk of – sorry, that the risk of decertification because of the movement of swaths from Mr Baxter's farm to Mr Marsh's was

reasonable foreseeable. It just simply wasn't proved. Can I come to ground 4, which is the issue of vulnerability.

McLURE P: Perhaps I should just – for the record, nothing else – I thought Mr Baxter's evidence-in-chief on a couple of occasions accepted, in effect, that there was strong winds and that it was capable of spreading weeds and other things. But, in any event, just to put you on note, really, I don't know that you should waste your time on going to those. I just put you on notice that there's – the material that I've read in the evidence of your client, that would suggest that there's an evidentiary foundation, but, in any event, there's probably - - -

CAHILL, MS: Yes.

McLURE P: - - - not your best point, I think, Ms Cahill.

CAHILL, MS: I will just touch on it briefly at T829, transcript 829. The point there is that nowhere is it explored with him the distance over which he understood the – that the swaths could travel. And the passage that I took your Honours to a moment ago talked about how he presumed, because of all those protections, he assumed – presumed nothing would get over, was the language that he actually used. Now, in relation to ground 4, which deals with vulnerability, as we understand the essential complaint in this ground of appeal, it's to say that the trial judge concluded that the exposure to a contractual sanction, exposure of the plaintiff to a contractual sanction, can never amount to relevant vulnerability for the purposes of imposing a duty of care.

We don't see the reasons as going that far. What they do is they focus on two types of vulnerability: one is vulnerability from the misapplication of 3.2.9, if his Honour's construction was right, and I don't address that one in the interests of time, today, for the reasons we've already touched upon, but, secondly, if one looks at his Honour's reasoning at 321 and 741, there's no relevant vulnerability in relation to a contractual term of that type.

McLURE P: Well, what does he mean by the – in effect, that the appellants – the damage suffered by the appellants or their vulnerability was self-inflicted and self-initiated?

CAHILL, MS: Yes.

McLURE P: Is this their conduct, what, in informing NASAA of what had – I mean, I just don't understand quite what he's talking about.

CAHILL, MS: We think we understand what he means - - -

McLURE P: Perhaps you can help, then.

CAHILL, MS: - - - and that's – it's to do with the fact that the NASAA contract was a consensual arrangement into which they entered and contained this term, this – I'm sorry, I put that badly – this standard, 3.2.9, which permitted, if the appellants' construction is right - - -

McLURE P: So, it's sort of linked with the unreasonableness case, is it?

CAHILL, MS: Not directly. It has got a different jurisprudential foundation because what it does is identify some limits to vulnerability in a variation on the way in which contractual relationships – that were described in Woolcock, for example – limit a plaintiff's vulnerability. If I can be – if I can just develop that point as quickly as possible. The trial judge's reasons, we say, don't purport to establish a general proposition that any exposure to any contractual sanction can never, in any circumstances, amount to a relevant vulnerability for the purposes of the assessment of duty of care for pure economic loss, and we certainly don't contend that.

Before developing that point, though, can I make some important submissions to place the particular contractual term in context. To understand the reach of standard 3.2.9, at paragraphs 170657, I won't dwell on it but the trial judge found that GM canola is both safe and legal. It's also food. It happened to be accidentally present on the – on Eagle Rest for reasons outside Mr Marsh's control. It was found that there was no risk of it interfering with the genetic makeup of any of his crops. The national standard did not permit decertification in those circumstances.

Against that background, the reach of standard 3.2.9 is a risk of decertification for the presence of a safe, legal food on Mr Marsh's farm for reasons outside his control where it's not required – where that's not a prohibition or a reason for decertification under the national standard. Now, the short point is this: it's open to the appellants and to NASAA to submit themselves to that regime, and we make no judgment about the rights or wrongs of that, and we don't ask the court to do so, but

there's a separate question about whether a third party, such as Mr Baxter, can be held liable for the operation of such a term that has such a context and such a reach.

That invites, because of the consensual nature of it, a consideration of the factor of vulnerability as it has been considered in the context of cases such as Woolcock. We recognise that there's some care that needs to be taken in applying those cases by way of analogy because, in those building cases, contractual vulnerability has usually been considered in the context of the allocation of contractual risk between plaintiff and defendant where there's a contract between them. Now, if I can – just pull up Woolcock for me.

Woolcock is number 14 on our list of authorities. At paragraph 23, we've got this point about – and this is Gleeson CJ, Gummow, Hayne and Heydon JJ here – this reference to the important requirement of vulnerability that has emerged since Caltex Oil, and this oft quoted passage about what vulnerability is, and it's the plaintiff's inability to protect itself from the consequences of the defendant's want of reasonable care. That's usually understood to be in advance of the conduct.

And what we see at 31 is a very important point about where, typically – this is page 533 – the onus lies, so that where we're sitting in a contractual context and talking about the ability of a plaintiff to protect themselves contractually or, conversely, the corollary is expose themselves to risk, the important thing is to understand that the onus lies upon the plaintiff to demonstrate that they had no alternative in that contractual setting other than to assume the burden of the risks that they did or expose themselves to those risks.

Now, we have nothing like that here from the plaintiff. The appellants took no steps at trial to demonstrate that there was no alternative to entering into the NASAA standard and submitting themselves to the full scope and force of standard 3.2.9 as it sought to be – as it was applied by NASAA and sought to be upheld by the appellants here. McHugh J, at paragraph 80 - - -

NEWNES JA: Is your point that they gain no commercial advantage - - -

CAHILL, MS: Most certainly - - -

NEWNES JA: - - - over - - -

CAHILL, MS: Yes.

NEWNES JA: - - - some other means of certification which would have enabled them to sell the product?

CAHILL, MS: Well, they got a price premium over conventional products by entering into this contract.

NEWNES JA: But there were other means of doing that without subjecting themselves to 3.2.9.

CAHILL, MS: Well, that's our contention, your Honour, but the important point we make about paragraph 31, of course, is that it was incumbent upon – this was the plaintiff's case to prove, and they had to prove a duty, and by reference to the salient factors including vulnerability. And on the authority of Woolcock at 31, that required them to demonstrate to the trial judge that there was no alternative but to submit to the regime of 3.2.9 in order to sell their product as certified organic. That's the point we make, and there was nothing like that here.

Now, McHugh J, at paragraph 80, page 548, talks about vulnerability being a key issue, and describes what the vulnerability – what vulnerability means in that context. Now, at 85, we draw the court's attention there to what is said, again, in the context of a building case, but the importance is that what his Honour does there is identify the way in which the contractual vulnerability could have been addressed not just through a contractual relationship and the allocation of risk between plaintiff and defendant, but also by the plaintiff entering into a contract with the vendor of the property, because this was one of these – I'm saying facetiously – dodgy building cases, but where the building was deficient.

And the point his Honour is making here is, well, there was two things he could have done contractual, this plaintiff: protected himself by getting a warranty from the vendor, or getting an assignment of the rights that the vendor had from the ultimate defendant. So, there's a real analogy there – here, to that case, where Mr Marsh – Mr and Mrs Marsh have not demonstrated what they could have done to protect themselves contractually other than by entering into 3.2.9.

So, the consensual nature of the relationship, this NASAA contract, that Mr and Mrs Marsh entered into is highly relevant, we say. And at this point, I turn to address a point that, I think, your Honour, President McLure, raised with me yesterday, which, if I understood it

correctly, was to identify the way in which the AQIS administrative arrangements worked under the legislation that provided for the certification of NASAA and therefore provided something that – and these are my words, not your Honour's – went beyond a conventional contractual arrangement between the two and gave it the imprimatur of something that was more – again, my words – more akin to a legislative arrangement.

Can I address that by making four points. The first is this: the administrative arrangements don't have any legislative status. That's the first thing. So, they're not as if they are subordinate legislation. The second thing is that even when one goes to those orders and look at them, the purpose and object is readily discernible. Without dwelling on it in the interests of time, there are two clauses in particular that I draw the court's attention to: clause 1.4 and 19.1.1 at green appeal books 1703 and 1723 respectively.

Both of those clauses indicate that the fundamental, indeed the only, purpose of the objective – purpose of the audit of NASAA by AQIS and its accreditation is to ensure compliance with the national standard. So, it says nothing about the virtues, proprietary, legitimacy of the standards otherwise. It's not a sanction - - -

McLURE P: I'm not sure that's right. As I understand it, you've got the export – perhaps I will just get the – you've got the Commonwealth Export Control Act, you've got the regulations made under the Commonwealth Export Control Act which entitle you to make orders, you've got the Export Control (Organic Produce Certification) Orders. Under those Orders, AQIS can approve an association such as NASAA, and, in order to approve that association which then gives, in effect, delegated authority to NASAA to give government approval to export using certified organic, but you have to establish a quality management regime and the NASAA standards are part of the quality management scheme submitted by NASAA.

So, the approval of the association NASAA by or under the orders by AQIS is an approval of their standards inter alia, which is the proposition I was putting.

CAHILL, MS: And, your Honour, we simply say, with respect, yes, but approval as to what? And the answer is, when one looks at the administrative orders, approval that they comply with the national standard. It doesn't approve anything about them to the extent that they go beyond what the national standard says.

McLURE P: Well, that's not how I read it, but I understand the proposition that you put.

CAHILL, MS: So, we have those two features. The third point is this: that the NASAA standard itself does not intend to have the character of regulation. I can make that point quickly by reference to two pages: 1733 and 1744. And I just mention them – the parts of the text that I'm referring to specifically here: final paragraph on 1733, first sentence:

> It's NASAA standard is not case in stone, but is an organic, living and dynamic document.

McLURE P: As is the national standard. It says the same thing.

CAHILL, MS:

> A thorough review of this standard is anticipated with a new edition expected to be released in August.

Over the page, just above (c):

> The standard is subject to continuous upgrading and amendment.

Finally, the fourth point, and this is a really key one, is, of course, the application of this standard to the appellants and their farming operation is assumed, not imposed, through a contractual arrangement between themselves and NASAA NCO, and that's a really key point. We ask the question rhetorically – I was going to do it at a later time but I will do it now – how differently the case in Perre v Apand would have been – the facts in Perre v Apand might have been assessed were it not a government regulation that precluded import into Western Australia, but, rather if those growers in that 25 kilometre radial area had together, for reasons to improve the image and garner a premium to the value of their product, entered into a memorandum of understanding between all of them that was to the effect that if potato blight broke out on one of their properties, they all agreed that none of them would sell their product.

We submit that that would have raised very different issues in terms of vulnerability and the assessment of the vulnerability factor in terms of the imposition of a duty of care in Perre v Apand. So, coming to your Honour, Justice Newnes', point, we identify what we say is the essentially consensual nature of this relationship of where

the appellants have submitted themselves to the operation of 3.2.9, and we make this point: none of us know anything about the motivations of the appellants in entering into a contract that exposed them to the operation of that standard.

It might have been for commercial reasons. Perhaps they did their sums and decided, after having done those sums, that the price premium that they earned on the sale of products outweighed the contractual risks of a decertification for accidental presence of canola on their land. It might be that it had nothing to do with commercial imperatives for them. Maybe it was something personal to their desire to submit to a regime over and above that provided for by the national standard, that they agreed with the additional rigour that 3.2.9 imposed. Maybe there was another reason that I can't think of, but - - -

McLURE P: What's the relevance of motive, though?

CAHILL, MS: Well, because, whatever was the reason for assuming the application of 3.2.9 to their farming operation, it has to be inferred, because of the consensual nature of the relationship, that the appellants understood and accepted that that had benefit to them. It was something that they wanted to do because it had benefit, otherwise they wouldn't have entered into it, which brings us to paragraph 110 of Perre v Apand where McHugh J in the context of a discussion about vulnerability – no, sorry. I might just have to - - -

McLURE P: Perhaps if you give it after lunch.

CAHILL, MS: Yes.

McLURE P: That's fine.

MURPHY JA: It is 118?

CAHILL, MS: Yes. Sorry. It's a transcription error, I think, your Honour. No, it's not. It's that passage about walking away - - -

McLURE P: We know the one.

CAHILL, MS: Yes.

McLURE P: Making a choice, knowing the risks, choosing to go one way instead of just walking away from the contract.

CAHILL, MS: Yes.

McLURE P: Yes, we know.

CAHILL, MS: And that has that application here. I'm not sure if your Honours wish me to keep going for another five minutes or - - -

McLURE P: Might as well, because I think it's going – well, it's up to you.

CAHILL, MS: Yes.

McLURE P: You've got – I don't know – are you nearly finished?

CAHILL, MS: I've got – I think – it might be best if I just – I'm not saying – I can keep going for another five minutes but, over the lunch break, I will pull it all together.

McLURE P: Are you able to give an indication - - -

CAHILL, MS: Commit to a timeframe?

McLURE P: Are you likely to finish shortly after the adjournment?

CAHILL, MS: I will endeavour to finish – if I said that I would endeavour to finish within the hour, would that assist?

McLURE P: Yes. I'm just trying to see whether we can program - - -

CAHILL, MS: Yes.

McLURE P: - - - the costs appeal. That's what this is about.

CAHILL, MS: Yes.

McLURE P: So, quarter past 2. Perhaps quarter past 3.

CAHILL, MS: So, that will give me the day, because I think I started at 3 yesterday so - - -

McLURE P: Yes. Yes. Because it might be convenient – I assume you're appearing on the costs appeal.

CAHILL, MS: Ms Vernon will be appearing on the costs appeal.

McLURE P: Okay. It might be convenient if we can do it all today, if we can - - -

CAHILL, MS: Yes.

McLURE P: - - - finish it.

CAHILL, MS: Mr Colvin is appearing for the appellants - - -

McLURE P: Yes, I know, but - - -

CAHILL, MS: - - - so I think he will need – yes.

McLURE P: - - - we've given him a not before time.

CAHILL, MS: Excellent.

McLURE P: That's – so, you will be around about an hour.

CAHILL, MS: Yes.

McLURE P: Mr McCusker, how long will it take to reply, do you think?

McCUSKER, MR: Well, I would try to do it within the hour, your Honour.

McLURE P: So, it will take an hour to reply.

McCUSKER, MR: I would say so, yes. I think it would be – with respect, it would be more prudent to simply tell Mr Colvin - - -

McLURE P: Not to come today.

McCUSKER, MR: - - - not to come.

McLURE P: All right.

McCUSKER, MR: Yes.

McLURE P: Okay. Well, in that case, we will adjourn till 2.15.

(LUNCHEON ADJOURNMENT)

McLURE P: Ms Cahill.

CAHILL, MS: Just before I turn back to vulnerability, can I just mention – this flows on from a point raised by his Honour, Justice Murphy, with me about the contractual provisions. Just to mention in green appeal book 3 at page 1379, clause 8. In particular, clause 8.1, is another clause which very much indicates a lack of contractual entitlement to decertify in the circumstances of the incursion. Returning to ground 4, where I was before lunch, I had identified the features of standard 3.2.9, its character as a contractual provision, and the issue about contractual vulnerability as a principle as expressed in the cases.

And where that leads to, then, is this conclusion as a submission to the court on behalf of the respondent, that this assumption of the risk of decertification for the reasons set out in 3.2.9, as relied upon in terms of the construction by the applicants, was a risk assumed by Mr Marsh, not imposed upon him, not for the purposes of being able to farm organically, because he was always at liberty to do that and that wasn't affected by this, but rather to earn a price premium for his product.

And we say that with all of those factors and considerations put together, this was not a relevant vulnerability for the purposes of attracting a duty of care, and that's the effect of the learned trial judge's reasoning at 741. That's what he's really saying. Can I mention – just because it's expedient to do so here – the corollary of vulnerability, which is this salient factor of control of risk, and just make these points. Of course, it was the appellants who had control of whether or not they entered into a contract with NASAA or not.

The respondent, Mr Baxter, had no control over that at all, whether they attempted to obtain certification with a competitor or didn't obtain certification at all. Obviously, the respondent is not in any position to influence NASAA's exercise of its discretion under standard 3.2.9. Mr Baxter is not in a position to appeal the exercise of the discretion, and he can't mitigate its effects in terms of the presence of the swaths on their land and how they're responded to in a way in which the appellant can, or the appellants can.

So, to be clear, the appellant had contractual remedies that were built into the contract and also into the standards in terms of their right to appeal or seek a reconsideration of the decision. And, secondly, the appellants also had control over what they were going to do with the land in response to the incursion, and the

evidence was, really, that they did quite a deal. They were very diligent in removing volunteers and so forth. But the point here, though, in the context of the control of risk, is it was they who had the control over the consequences of the incursion in terms of decertification rather than the respondent.

McLURE P: Vulnerability usually directs attention to what the injured party can do to protect himself or herself from the conduct of the tortfeasor. Your submissions have an entirely different focus, and one might have thought quite a novel focus, but – I mean, I understand the propositions. It's just that it's not quite consistent with vulnerability as it's usually understood in tort law, is it?

CAHILL, MS: Well, it is to this extent, your Honour, because all that we can control in terms of the concepts that we're dealing with here is the incursion by - - -

McLURE P: But it's usually a question of the person who suffered damage, what they can do, how vulnerable they are.

CAHILL, MS: Yes. Yes. And the relevant - - -

McLURE P: To what you do.

CAHILL, MS: Yes, but the - - -

McLURE P: The tortfeasor does.

CAHILL, MS: The novelty here arises not so much in our application of the law but in the novelty of the facts, because it is the appellants themselves - - -

McLURE P: Anyway, look, I understand. I'm only, really, just putting it to you to put the proposition that it's a departure from what is within the ordinary scope of vulnerability for the purposes of the recovery of pure economic loss in tort law. I mean, it's just – but I - - -

CAHILL, MS: Well, we respectfully disagree, and the reason why we do is because the novelty emerges from the facts where the harm arises from a risk that the appellants themselves have created.

McLURE P: Anyway - - -

CAHILL, MS: That's – that's the factual novelty in the case. We've created the risk of economic harm from something that our acts absent that contract would not have that consequence.

McLURE P: Well, anyway.

CAHILL, MS: So, that's the relevant vulnerability.

McLURE P: It's an unusual argument. Just put it that way.

CAHILL, MS: We say it's not an unusual argument, with respect. We say they're unusual facts that try to pin a duty where the economic risk – sorry, the economic loss or risk of economic loss has been created by the appellants. When we come to ground 2, as I foreshadowed before lunch, the appellants rely heavily on the reasoning in Perre v Apand, and we don't – we think it's appropriate, with respect, to look at Perre v Apand because of this method of analogical reasoning which the High Court supports.

But the difference between the two sides here is that, when we look at Perre v Apand, all we see are the very material differences on the facts. We start with the interest, relevantly, that was affected by the release of this seed. The interest, relevantly, that the Perres had in Perre v Apand, and the effect on the interest, was that the land was quarantined and simply effectively prevented them from exporting into their primary market. Well, we don't have that position here.

There's nothing to prevent the Marshes from farming organically. There's nothing to prevent them from selling their product. But what they do lose here is a price premium, something that they get more than other growers – conventional growers aren't entitled to by reason of their certification, and that's a qualitatively different interest with which we're concerned. I've already touched upon vulnerability and noted the relevant difference here. In Perre v Apand, there was a government regulation imposed, and made a submission about how differently Perre v Apand might be viewed if there had been the economic risk imposed by a memorandum of understanding amongst the growers to the effect of the government regulation.

Similarly, in relation to the control of risk in advance of the incursion, there was nothing that the Perres could do to prevent the operation of the government regulation. Here, however, with the Marshes and their contractual protections, they actually had the opportunity to move their crops away from the boundary, and that made the risk of decertification – or should have made the risk of decertification much less, we say. Autonomy and legitimacy of conduct, of course, is really a very key

difference and very critical to the assessment of whether or not a duty of care exists here.

Of course, in Perre in Apand, you had this uncertified seed that was being sold and supplied into this potato growing region to the Sparnons. And, of course, this doctrine of autonomy is terribly important in the way in which it's articulated between paragraphs 115 and 117 of the reasons of McHugh J in Perre v Apand, because that point is made that our law does not extend to rendering people liable for pure economic loss for legitimate activities, even where they know that they might cause loss.

As I addressed your Honour, Justice McLure, yesterday, whatever may be the boundaries and the limits of what constitutes a legitimate activity, there can be no suggestion other than that what Mr Baxter did here was legitimate. His swathing was a common practice, carried out professionally on the advice of an agronomist, and there was nothing to suggest that there was anything unusual about that particular method or the way in which the method of swathing was carried out on that day. So, here we have, within the doctrine of autonomy, a complete answer to this claim in negligence, the existence of a duty.

Even where risk of pure economic loss is foreseeable, there is no restraint on that legitimate activity that the law imposes. Now, the only exception is the one that McHugh J identified in 117 which has no application here but had application in Perre v Apand – was that Apand was already under a corresponding duty not to infect the Sparnons with the potato blight and supply the seed. So, they were already under – there was no imposition on their right to autonomy by imposing a duty on the Perres because that restraint already existed. We have nothing like that here.

There is no suggestion that there was any restraint on the swathing of canola. There was no restraint to ensure that it blew over into anybody's property. All the Mr Baxter had to do was comply with his licence. That he did, and there's a clear finding about that. And that's the additional reason why the doctrine of autonomy continues to have application here and precludes the finding of a duty of care. There's also a very relevant difference on the facts in terms of the knowledge of risk and its magnitude, because it was quite clear in Perre v Apand at paragraphs 132, 141, that there was very precise knowledge on the part of the Apands about the extent of the risk to these other

growers who wouldn't be able to then export their produce to this state.

There's nothing like that here. We say that the appellants don't get over the threshold even of reasonable foreseeability. And whilst President McLure clearly doesn't accept that proposition, certainly - - -

McLURE P: No, no. I'm mindful of the degree of particularity or generality that the foreseeability requirement at the duty level involves. That's the point I was trying to make.

CAHILL, MS: The point we make, though, here in relation to the knowledge of magnitude of risk is that, clearly, there can have been no knowledge – there's certainly no evidence of knowledge of the magnitude of the risk on the part of Mr Baxter here. He was provided with a copy of section 3.2 and then these broad statements about, "I could lose my – lose my certification". We ask rhetorically, looking at section 3.2 of the NASAA standard, how could he have possibly understood the magnitude of the risk on a normal reading of that provision, especially in light of those matters, those factual matters to which I referred previously in relation to the issue of reasonable foreseeability.

Physical propinquity is the one factor which this case shares with Perre v Apand. That's recognised; Mr Marsh was in physical propinquity to Mr Baxter, but that, of course, is never going to be enough, and it doesn't fully address the issue of indeterminacy of liability against the background of the apparent reach and scope of section 3.9.2 and its – 3.2.9, I beg your pardon – and its discretionary foundation. We rest on our – so, for those reasons, we say that there can be no duty of care found in this case, and his Honour was clearly right – the trial judge – to so conclude.

We rest on our written submissions in relation to grounds 5 and 6, and turn to ground 7 which deals with breach. Can I make the point here that we do emphasise that the case on breach was limited on the pleadings at trial to the essential complaint that we had not – we swathed when we could have harvested. There was no question of reasonableness that was addressed in the pleading. It was simply there was an alternative and the fact that you didn't follow the alternative meant that you were in breach. We were, in effect, obliged to adopt an alternative that mitigated the risk.

McLURE P: I read the pleading as saying reasonable care required that you direct harvest, not swath. That's what breach is usually about; it's identifying the particular aspect of the failure to exercise reasonable care. That's how I read the pleading.

CAHILL, MS: The point was this, though: the heart of the pleading was not that we shouldn't have swathed, but that we couldn't.

McLURE P: Well, that's a very - - -

CAHILL, MS: And that was the objection that we took at trial, and we maintain that objection before this court.

McLURE P: Anyway.

CAHILL, MS: Nevertheless, we – in terms of the analysis of breach by the trial judge, this obviously rested on the conclusion that standard 3.2.9 did not permit decertification, and I won't address that in the interests of time for the reasons advanced this morning. When we look at the alternative position, assuming that decertification was permitted, the question under section 5B(1)(c) is, in substance – and I think, your Honour, President McLure put this to me yesterday – is, in substance and in broad sense, an assessment of the reasonableness of the swathing rather than the direct harvesting.

Now, in our submission, that falls to be assessed against the significant concession that was made by the appellants yesterday. I mean, up until yesterday, it hadn't been challenged – well, it wasn't challenged that there are legitimate agricultural reasons for swathing generally, and that that's the preferred method of harvesting canola. But, now, there's no challenge that Mr Baxter had a legitimate reason himself to swath because of the weed control that he could gain in those herbicide resistant rye grass paddocks, and that's that finding - - -

McLURE P: I didn't quite understand the – I mean, I had trouble understanding the concession, but, as I ended up, I thought he was – I thought Mr McCusker was saying that, in the abstract, in a theoretical perspective, swathing is a method, a legitimate method, but, in the circumstances of this case, it was unreasonable. Now, that's, I thought, where it ended up. If I'm wrong, I'm wrong, but - - -

CAHILL, MS: Well - - -

McLURE P: - - - you obviously have a different view.

CAHILL, MS: Well - - -

McCUSKER, MR: If it would be helpful, your Honour, you're right.

McLURE P: Sorry?

McCUSKER, MR: I say if it would be helpful, you are right in what I conceded or what I said. You're correct.

McLURE P: What did you say?

McCUSKER, MR: I said that swathing is a well-accepted practice, but that in the particular circumstances of this case, it was - - -

McLURE P: It was unreasonable.

McCUSKER, MR: - - - it was unreasonable.

McLURE P: Yes. That's what I understood in the end.

CAHILL, MS: Yes. Well - - -

McLURE P: Just so that you don't - - -

CAHILL, MS: No.

McLURE P: - - - narrow your submissions unduly as a result, Ms Cahill.

CAHILL, MS: Well, there might be an important point for MrCusker ultimately to clarify because, as I understood his submission – and this is an important point in terms of the factual findings that the court is required here to review or not, as the case may be – but there was this finding at 713, 713, to the effect that Mr Baxter himself had a legitimate reason for weed control purposes to swath those two paddocks. Now, I understood Mr McCusker to say yesterday – and, of course, he can clarify or change his position in reply – that that was accepted that that was a reason, but it wouldn't, in all of the circumstances, albeit that fact was accepted, militate against the conclusion that it was nevertheless unreasonable to direct harvest – sorry, to swath. So, there may be some - - -

McLURE P: Anyway, you've - - -

MURPHY JA: I think if you put it in terms of weight - - -

CAHILL, MS: That's how I understood it.

MURPHY JA: - - - I think he accepted 713 but said - - -

CAHILL, MS: That's how I understood it.

MURPHY JA: - - - you weigh that against other things.

CAHILL, MS: Yes. And, as - - -

McLURE P: Well, I'm not sure, so, at the end of the day, we've got the written submissions. We know, at least, where they are in the written submissions, and then we will have to go back and try and identify what's left.

CAHILL, MS: Yes. So, my understanding was as your Honour, Justice Murphy, just put it, and can I make these submissions about if that be Mr McCusker's position, what we say the consequences of it are. Now, it's important to understand that if 713 is accepted, that what that meant was that to direct head would deny Mr Baxter a further opportunity to control his weeds in those paddocks where the RR canola was growing.

And that's important, and it can be tested against the evidence that's cited at paragraph 484, because there was this criticism, if you like, of Mr Baxter for direct heading the Mailbox paddock on that boundary which had conventional canola in it that year, and he was cross-examined about that and, at 484 of the trial judge's reasons for decision, the answer in re-examination as to why he did that was because he could desiccate that paddock and, at the same time, allow for a weed spray to be applied at the time of harvest, and that was something that he couldn't do with his RR canola because he had already applied Roundup Ready – yes, Roundup Ready herbicide during the growing phase.

So, what this culminates in, then, is a proposition that, albeit that it assists him to swath, to control weeds in those paddocks, he may not do so, and he may not do so because there's a risk of swaths blowing next door, and that that's just – that's the evaluation that the court should make. Now, what this does is not only militate against any opportunity

Mr Baxter has to engage in additional weed control, but it also ignores the fact that this was a new crop, as the learned trial judge found, had not been grown before, and it's said that – and, basically, the conclusion is that Mr Baxter was not permitted to use the preferred method of cropping, albeit that he had not experienced any seed

shattering or uneven crop ripening with his conventional crops, he was not allowed to deploy the preferred method of swathing that would militate against those eventualities on his new crop that he hadn't tried before.

Why? Because there was this increased risk of swaths blowing over. So, to simply say that without coming back to section 5B ignores the specific balancing act that 5B(2)(a) to (d) and those factors require, which looks at the evidence of the probability of harm. Well, here, the evidence was woefully deficient, both in relation to the extent of the movement that could be probably expected, and also in relation to the risk of decertification. The type of harm was of a very particular character; no one was going to be injured, no physical property was going to be damaged as a result of this swathing.

Even if one gets over the probabilities of it moving on to the adjacent farm, it's just going to rest there. That's all that's going to happen and, at the very worst, there will be a loss of price premium in the sale of these goods as conventional rather than certified. And the other balancing measure is to – without repeating the submissions, to note this very individualistic objective that underlies 3.2.9, and I won't repeat the submissions that I made before lunch about those.

Relevantly, here, we draw the court's attention to Dovuro v Wilkins, which is which number on our – at page 329 and number 5 on our list. McHugh J, yet again, talking about common practice, and it's relevant, here, to have regard to these remarks because of swathing being accepted to be a common, if not preferred, practice of harvesting in the Kojonup region. His Honour talks about:

> If negligence law is to serve any useful purpose –

it has got to:

> …reflect the foresight, reactions and conduct of ordinary members of the community

etcetera:

> To hold defendants to standards of conduct that don't reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute. It's not to say that a defendant will always escape liability by proving that his or her conduct was in accord with common practice. From time to time, cases will arise

> where, despite common practice in a field of endeavour, a reasonable person in the defendant's position would have foreseen and taken steps to eliminate or reduce the risk that caused harm to the plaintiff.

Now, that's the case of the appellants here. But this caution is important:

> But before holding a defendant negligent even though that person has complied with common practice, the tribunal of fact had better first make certain that it has not used hindsight to find negligence. Compliance with common practice is powerful, for not decisive, evidence that the defendant did not act negligently. And the evidentiary presumption that arises from complying with common practice should only be displaced where there is a persuasive reason for concluding that the common practice of the field of activity fell short of what reasonable care required.

Well, we say that those observation are very applicable here. So, whilst it might be easy to say once this has all happened and looking back that, well, you could have done it somehow differently and this would never have happened, but that's not the process of reasoning that is appropriate in terms of the section 5B exercise. We say for those reasons that the learned trial judge was clearly correct in concluding that there was no breach of duty of care, even if a duty was held to have existed.

Can I deal very quickly with an aspect of legal causation in this way, by bringing together contentions – aspects of contentions 1 and 4 with ground 8, section 5C. And, essentially, our points are put in short form in this way: contention 1 is all about the national standard. Now, we obviously acknowledge that the national standard represents the minimum standards that are applicable for certification. That's what the regulatory environment describes.

But, nevertheless, the point that we make in our submissions and we provide the references – the trial references for it – is that the NASAA officers who gave evidence were quite clear, that they consider themselves bound to apply the national standard and, specifically, there should be – this was Ms Denham who heads NASAA, or did at the time of the trial – there should be no circumstance in which you can be decertified under the NASAA standard but not decertified under the national standard. So, this was a self-imposed approach, in

particular, to the decertification of operators; the approach that NASAA had to the application of its own standards.

From that position, there could not have been a decertification of Mr and Mrs Marsh because, clearly, the national standard did not permit it. There are three essential features of the national standard that I will briefly refer your Honours' to. First of all, standard 3.1.9(b) on page 1853 of green book 4. Now, 3.1.9(b) is the only provision in the national standard that deals with the adventitious contamination of product GMOs, and, obviously, what it requires is contamination of product. So that's important. It says nothing about decertification; just, they need to be excluded from the sale.

In the genetic modification provisions that commence at 1855, section 3.3, those general principles are very important. The national standard makes clear earlier that the general principles tell you what the standards are designed to achieve, and these two general principles make it quite clear that it's products being free from GMO contamination which is the intended objective of these provisions.

McLURE P: Well, because of the lateness of the house, I think we will just hear from you on these matters, rather than get your submissions on all of the relevant parts of the national standard.

CAHILL, MS: I wasn't – sorry, I'm not understanding your Honour.

McLURE P: Well, I'm just, really, saying that you've got, what, 10 minutes left so - - -

CAHILL, MS: I understand.

McLURE P: - - - I'm going to let you go.

CAHILL, MS: Yes. Yes.

McLURE P: Whatever submissions – whatever matters you wish to - - -

CAHILL, MS: Yes.

McLURE P: - - - our attention in the national standard.

CAHILL, MS: Yes, and that's all that I'm seeking to do right now, is just highlight - - -

McLURE P: Well, I'm just saying without any engagement from the bench.

CAHILL, MS: I see. I understand. And – yes. Now, 3.3.2 was the other one that I needed to draw your attention to. 3.3.2 is important at the bottom of 1855 because the avoidance of the accidental introduction of genetically modified organisms to the organic farm is language that is used in contradistinction to contamination. We have the former, not the latter, in the facts of this case. Now, apart from the – those are the only provisions, and I'm – there's more that we put in our written submissions, but we rest on those.

In terms of contention 4, there was really only a couple of points that I wanted to raise orally with your Honours. First of all, to address that point that your Honour raised with me yesterday – President McLure – about the very high threshold that might be needed to prove unreasonableness in this sense. We, with respect, don't see it that way. It's a question of legal causation about which this will bear upon, so one looks at the conduct against 3.2.9 of NASAA and how it has been performed, and then looks at it in a much more common sense way, if you like, about what is the true cause of the decertification in these circumstances.

Interestingly, however, if one was to apply the test of reasonableness, as it has been developed in Lee with the illogicality or irrationality, there's interesting – there's some interesting findings of his Honour, I think, between 608 and 611 of the reasons for decision about the illogicality of the decertification for three years. Just in terms of the factual matters, we just headline these points in relation to the position at 2010, when the decertification occurred.

Your Honours will see – where's that – at volume 4 of the green appeal book, page 2014, the swaths – these are the GPS location of the swaths in April, so this is where the 245 were situated.

McLURE P: I'm sorry, what volume?

CAHILL, MS: 2014. Now, with Mr McCusker's permission, and if the court wishes, I will hand up a better copy of the map at 2013 that better delineates the paddock boundaries for Eagle Rest. And it's just easier to

interpret 2014 if one can actually see more clearly where the paddocks begin and end.

McLURE P: Yes.

CAHILL, MS: So, the short point here is that there were no swaths found in paddocks 8 or 9, and one can see that from 2014. In paddock 7, you had these ones stuck in the trees on the boundary between 9 and 7, and then a handful, one can see there. At 11, you can see those three swaths in the southern part of the paddock, and handful at the edge of paddock 13, up the top. The short point is the concentration of swaths was, clearly, in 10 and 12, and those were two paddocks that, for separate reasons, were not – didn't contain any certified – they were both decertified at the time.

McLURE P: And I take the documents JAB215 to 2021 to be the GPS positioning points of where the swaths were found on the various - - -

CAHILL, MS: Yes.

McLURE P: - - - paddocks - - -

CAHILL, MS: So, they correspond.

McLURE P: - - - in Eagle Rest. Yes.

CAHILL, MS: So, one can calculate the number - - -

McLURE P: Which is then shown on the map at 2014.

CAHILL, MS: Exactly.

McLURE P: Right.

CAHILL, MS: Yes. And, so, here we had paddocks 8 and 9 decertified for no reason. I made a submission about paddock 11 yesterday – this morning, I beg your pardon – where you had the three swaths in the buffer zone, and that paddock and its crop were decertified. I won't rehearse the submissions that appear in the written submissions about all the other features that rendered it illogical for the certification to happen to the extent it occurred or at all. In 2011, of course, a year later, you've got eight swaths that have – eight – I beg your pardon, eight volunteers that have germinated from all of these swaths. Eight volunteers in two paddocks and yet - - -

McLURE P: This is after the swaths had been collected.

CAHILL, MS: Yes, so, in April, the swaths were collected, in April 2011, and, then, by the end of 2011, eight RR canola volunteers had germinated. Yes. Three of which were found in January of 2011 after some summer storms. So, eight swaths in two paddocks and yet the decertification of all of these paddocks continues until – for three years.

McLURE P: But wasn't the evidence that although there were that many swaths, there were also seeds spread through, so it was the widespread of the seeds. I've got the exhibit that's a swath – I think it's exhibit 15 – which has really quite a clear indication of what actually a swath is and the number of little seeds. It looked like chia seeds, really, perhaps a bit bigger.

CAHILL, MS: Poppy – sort of like poppy seeds.

McLURE P: Yes. Yes. So, very small and spread throughout – spread around whatever the evidence of the inspectors was.

CAHILL, MS: Well, yes, but this tells you where the concentration was – is our point.

McLURE P: Well, that shows you where the swaths were.

CAHILL, MS: Yes.

McLURE P: And you've got these little poppy seeds that have burst out of their pods, and they may not necessarily correspond with the location of the swath.

CAHILL, MS: And eight - - -

McLURE P: Eight - - -

CAHILL, MS: - - - germinate in the first year, and there's never any more. And at the end of that first year, what could and should have happened, as the learned trial judge found, was that the certification should have been restored and any volunteers simply pulled out as they emerged.

McLURE P: We've got no information as to what comprises the 85,000, do we? I mean, it's a bit of a disadvantage, really, not knowing what categories of damages have been agreed but - - -

CAHILL, MS: We're damned if we do and damned if we don't, your Honour. We're damned if we agree these damages and take them away from the - - -

McLURE P: No, no, no, but there's no reason why – because causation is so linked with breach, it's really interesting to then identify the precise categories. I assume it's, you know, future domestic production, future export income with the premiums. I mean - - -

CAHILL, MS: It's just a loss of – well, he's a farmer, so he sells to wholesalers but - - -

McLURE P: Yes, but there are different categories of loss: domestic – I mean, I don't know what the categories are because we don't – we haven't been told. Is there anywhere that we would find out, in the appeal books?

CAHILL, MS: I wonder, in the agreed facts, would there be anything? We will check. So, that's the issue in relation to causation and contentions 1 and 4 insofar as it bears upon this question of reasonableness and how that, then, in turn, bears upon section 5C and the evaluation of legal causation.

MURPHY JA: Were all the swaths there by late November 2010, early December?

CAHILL, MS: I beg your pardon?

MURPHY JA: Were all the swaths there by - - -

CAHILL, MS: Yes - - -

MURPHY JA: - - - late November, early December?

CAHILL, MS: There was only that one event of incursion, so it's not as if more swaths came after. So, what one would have been seeing in terms of the swaths as they were situated in the map that your Honours have is what has happened to the swaths after they have been lying there in the open environment for four months – three to four months.

MURPHY JA: So, they weren't collected straight away.

CAHILL, MS: No, and his Honour said something about that; the fact that they should have been – could have been. And, of course, because we're dealing with seeds – just to address your Honour's point about the poppy seeds, your Honour, President McLure – because we're dealing with poppy

seeds, they're not those sorts of seeds that have their own little parachutes that fly like – I'm trying to think of some sort of weeds. These poppy seeds have no capacity to disperse through the air other than via the seed pod. So, once they're in the ground, they're in the ground.

McLURE P: And sheep, of course.

CAHILL, MS: Well, yes. If a sheep eats a seed pod.

McLURE P: They look very – you know, they're very small, very light, it looks like.

CAHILL, MS: So, that's a relevant consideration in terms of the dispersal and the reasonableness of the response to the existence of seeds on the land.

McLURE P: My reading of the evidence from the NASAA people, though, was that the seeds were spread differently than the swaths, that there was no – they were – I mean, the reports say the seeds are spread all over the property. I mean - - -

CAHILL, MS: Yes, well – well, I don't think they ever said that - - -

McLURE P: In any event - - -

CAHILL, MS: - - - but - - -

McLURE P: - - - it doesn't matter.

CAHILL, MS: - - - and I'm not sure how they could - - -

McLURE P: Well, it might, but - - -

CAHILL, MS: And I don't think it was a finding either because, of course, these little black seeds against the soil, it would be hard to – and, in fact, I think it was Ms Goldfinch who said, "Well, how would you ever tell what seeds were – what sort of seeds were in the soil unless you did these sort of ridiculously large number of soil tests in a paddock, because of the size of them and the colour". So, can I just deal very quickly with an aspect of ground 11 which deals with nuisance claim, and coming to 19 on the appellants' list of authorities, Victoria Park Racing v Taylor.

So, this picks up on the discussion that your Honour, Justice McLure, had with Mr McCusker yesterday, and how this case might fit within the two generally recognised

categories. Well, we've not found any case that could, and we're looking at authorities that tell us what to do about this. Victoria Park Racing is relevant – one of those first year torts type cases – and the facts of which are, presumably, well known to the bench about this broadcasting tower next to the racecourse, and this claim in nuisance that was brought because people stayed home and listened to the broadcast rather than coming to the ground.

The relevant passage is at page 493 of the reasons of Latham CJ, and the point here that is being made is that the effect of the action, this broadcasting of the races from next door, was to make the business carried on by the plaintiff on the land less profitable, and that's what we have here. There's no claim for nuisance in the sense that I've had to go and pick up these swaths and it has been a problem and a waste of time and, for some reason, you know, I like to have picnics on those paddocks and I don't like to sit amongst scratchy swaths. Nothing like that.

This is a loss of profitability owing to the application of standard 3.2.9 without which there would be no relevant interference with the land for the purposes of the land of nuisance, and that's very key. Absent that, we're in the realm of Victoria Park Racing, and, as his Honour says there:

> The facts are that the racecourse is as suitable as it ever was for use as a racecourse.

That's the same position we have here. The only difference is the operation of 3.2.9, but that's not something due to the presence of the swaths in and of themselves or a feature of the land. It's a consequence of the application of that standard, and that's why the law of nuisance is a very uncomfortable fit for a complaint of the character that the appellants have here, and why I made the observation yesterday that it is unlikely to be an accident that Perre v Apand did not involve a claim of nuisance. That wasn't even sought to be prosecuted.

The reason probably was because a consideration of these sorts of facts discloses no interference with the enjoyment of the land in the way in which the traditional law of nuisance requires. Just – I have a moment, please, your Honour. I have nothing further, your Honour.

McLURE P: Yes. Thank you, Ms Cahill. Mr McCusker.

McCUSKER, MR: Thank you, your Honours. First, your Honour, the President referred to the question of is there

any detail about the damages and how they have been calculated. There is evidence, and it starts at – obtained in green appeal book at page 1106 and following, but that's evidence that was given by Mr Marsh in a written statement, and he sets out what the effect of loss - - -

McLURE P: Just the categories.

McCUSKER, MR: The various categories of loss: crop rotation, organic seed propagation, feeding certified stock using - - -

McLURE P: Sorry, what page?

McCUSKER, MR: Sorry, your Honour. 1106.

McLURE P: Yes. So, are you saying that they are, indeed, the categories of loss - - -

McCUSKER, MR: They are the categories of - - -

McLURE P: - - - that were agreed?

McCUSKER, MR: Yes. That was the effect. There's an important aspect to that, that when certified is lost, it's clear that a lot of consequences ensued, and he has set out there all of the consequences resulting from, in effect – well, not just the decertification but the decertification that sprang from the canola seeds. And that goes right through to page 1111, where he – there's quite a lot of detail about what the problem was during that period. And then, again, at page 1116 to 1117.

So, it wasn't just the loss of certification that prevented him from selling his goods or his produce as organic. It wasn't just that that was a problem. It was also other things such as the seed propagation – which he has mentioned – the crop rotation. All of these things have an impact on his farming business. I certainly won't take your Honours through to read that, but I thought you should have the reference. Your Honour, Justice Murphy, raised a question about – which I apprehended you might raise with me again but I'm not sure now – about the contract.

MURPHY JA: Well, yes. If you would like to say what you understand the plaintiff's case was and what provision they were relying on.

McCUSKER, MR: Yes, certainly. The power to suspend is found in the contract, clause 8.1, at appeal book 1377.

There's an obligation – I've taken your Honours to this before. There's an obligation under the contract to comply with the NASAA standards. Now, it's – sorry, 1379. I said 1377. And, so, effectively, to cut it short, your Honour, we say there was a power to suspend in the contract but there's also an obligation to comply with the terms of the NASAA standards. It would be strange on – it's a proper construction of this contract to say, well, we will set aside 3.2.9 because that's in the standards which we're supposed to comply with but you can't really comply with that.

I think, read harmoniously, you've got to give some proper effect to what the intention is behind the contract, and the intention is that 3.2.9 forms part of the contract. There's an obligation to accept the decertification if it's - - -

McLURE P: Well, you don't, because there are appeal rights.

McCUSKER, MR: Well, subject to that.

McLURE P: It has – it has a sort of hybrid private-public aspect, these - - -

McCUSKER, MR: It does, and I stand corrected, your Honour. There are appeal rights, but it's within that context that there's a contractual obligation, subject to the right of appeal.

MURPHY JA: But 8.1 is an interim measure, isn't it, that is suspending, really, to allow – you suspend, you inspect, you test - - -

McCUSKER, MR: Yes.

MURPHY JA: - - - and, then, don't you move to the sanctions part?

McCUSKER, MR: Yes. Yes. But you also move in – in all of that, because the – as I think the learned trial judge found, these standards are incorporated by reference in the contract. They become part of the contract, effectively.

MURPHY JA: Where is the provision for that, though, apart from 6.1, which is where you have to comply with them.

McCUSKER, MR: That's the one, yes. That's it. So, what's the point of 6.1, saying you have to comply with a standard, and you go to the standard and it says that if –

or contains 3.2.9, so, unless you are going to take a red pen through it, 3.2.9 says it goes nowhere. The proper way of constructing the contract – construing the contract, in my submission, is to simply say what the parties clearly meant was that was forming part of the contract, an obligation to comply with it, and the compliance means that that standard can be enforced against you, subject to your right of appeal.

I can't take it any further, your Honour, anyway, so. Now, dealing with the proper construction of the standard, 3.2.9, as I understand what is being said is that – well, one of the things being said about 3.2.9 at page 1752 is that if you look at all of the preceding and subsequent sub-standards, sub-clauses, then they seem to be directed towards the operators. So, you've got 3.2.2 as one example:

Operators using input materials

and so forth. And it's suggested that therefore 3.2.9 must be referable to what the operators have done. Now, the answer to that is that where there's an express provision in some of these clauses relating to what the operator must do or must not do, but you've got a clause here, 3.2.9, where it doesn't say anything about the operators, just an unacceptable risk of contamination. But, then, I'm not sure that one can apply the expressio unius principle, but, really, on a proper construction of that 3.2.9, it is of general application. It's broad. It's not limited to what the operator may or may not have done.

And, furthermore, the – if that's what it meant, then it would mean that the possible contamination by GMO, by a third party, would not affect the certification. And that, in turn, would mean that the product could be sold, even though there had been a GMO contamination because it was caused not by the operator; by a third party. So it can't be read, in our submission, sensibly, as meaning contamination caused by the deliberate or negligent conduct of the operator.

My learned friend referred to the general overarching purpose of – identified by my learned friend, but that's an abstract. What it does clearly do is to aim at the consumer protection. That's the goal of the NASAA standards. So if the goal is consumer protection, then, clearly, that goal is missed if you exempt anything which causes contamination, unless it's caused by the operator. So parts 3.1 and 3.2, in our submission, should be

construed harmoniously. And they can be construed harmoniously, although they relate to different – completely different kinds of contamination. The important thing is that 3.2 is a special provision dealing with GMOs.

Dealing with the effect of contamination, if I can just briefly refer to that, it's referred to in paragraph 77 of our submissions at the WAB31 to 2. And, in particular, it refers – there's a list there, which we've footnoted, of the NCOs assessment of the position on inspection. And it's important to realise this wasn't just a case of – of these swaths coming on the property and that's the end of it, and someone can come and pick them up. The report was that GM canola seeds from Seven Oaks entered the seed bank on Eagle Rest in an indeterminate number.

That was the evidence of Preston and the evidence of Powles, which we referred to in the submissions. The seed pods deposited were shattered. In many cases have been eaten by sheep. The seed dispersal within the seed bank would probably not be uniform. Winds were blowing swaths around Eagle Rest. So the fact that they were plotted in April of 2011, the places shown in that plan, that photograph, doesn't mean that that's where they were originally because they were being blown about.

So seeds were being scattered all over the place and livestock were moving around where Eagle Rest – around Eagle Rest where swaths were found, and, clearly, eating some of the seeds. So NASAAs assessment at that time when the inspection was made, in our submission was soundly based that there was an unacceptable risk of contamination, unless your Honours accept the proposition that contamination can only mean genetic transfer.

McLURE P: Or the honey - - -

McCUSKER, MR: Or the honey.

McLURE P: - - - analogy.

McCUSKER, MR: Yes, that's right. And in our submission – and I've gone through this before, so I won't belabour the point, but in our submission, it goes much wider than that because the whole system is being dealt with, and that includes the land itself. The fact that only a few of the seeds had germinated in the following season doesn't mean that at the time of the assessment there wasn't a real risk in the view of NCO that there might be a much greater result, a much more deleterious result because the seeds in

the seed bank could germinate in one year or two years and they just had to wait and see.

I think my learned friend was really putting this proposition, in practical terms: saying, "Well, it would be open for Mr Marsh to run around the farm every day to see if he could pick up any GM canola plants", but, really, that's putting to one side entirely the question – the real question, which was whether it was – whether there was anything unreasonable at all, in the Wednesbury sense, about the NASAA taking the view that there was an unacceptable risk of contamination as at the time of the inspection, not down the track.

So what my learned friend said about later discoveries of swaths of canola is not to the point; it's what the inspectors saw at the time of inspection which led them to think there was an unacceptable risk. Because the GMCs, if they were incorporated in the soil, could become part of the pasture. And you've seen – I've taken your Honours to the evidence of Mr Marsh as to the problems that he had to face to deal with this issue, the question of seeds being incorporated into the pasture, and, therefore, it would be ill-advised for him to graze the sheep, his stock, on that pasture.

So – and if – well, putting it shortly, the farmer couldn't be expected to check the pasture every day. And NASAA standards 3.1.12 and 3.25 to be found at GAB1751 could be engaged because the Marshes then would have knowingly or recklessly cultivated and harvested their crops where GMOs had been incorporated into the soil. NASAA standard 3.1.12 provides:

> Operators must not knowingly –

Sorry:

> Where prohibited substance had been applied directly or intentionally to certified products, it was a demonstrable failure to take reasonable precautions against contamination. Decertification will follow.

Under standard 3.2.5:

> Operators must not knowingly permit exposure, or fail to take action against the application of or exposure to GMOs.

So what I would submit to your Honours is the position as at the inspection in December is the position that must

be considered. Seeds spread everywhere; no certainty as to when it might germinate; how long it might take to germinate; the possibility that it will be in the pasture. Is there an unacceptable risk? Yes. Is that something which no reasonable person – a view that no reasonable person would hold? Our submission is no.

Now, my learned friend mentioned what I had actually said about swathing. And, certainly, we accept that swathing is an accepted agricultural practice, but it's not the only one. Mr Baxter said the advantages said to be attached to swathing were more weed control, if there was a problem, but bear in mind there that the Roundup Ready Canola was sprayed by Roundup, and, therefore, it should have vastly reduced any weed problem.

He said he had never had a problem with pods shattering. And that appears at green appeal book 685. And said that, furthermore, at the time when he had been direct hitting, he's able to get an evenly ripened crop. He said GAB685 – pretty well, he put it. Now, importantly, neither Mr Baxter, nor Mr Robinson had said what weight, what importance was given to the weed control effect of swathing when it was decided to swath. There's no evidence before the court that swathing was an imperative because of the position of the weed; it's just a means whereby if there is a weed problem after Roundup Ready – Roundup is applied, it's a method by which the weeds can be further reduced.

But there's no evidence that that was a problem once the Roundup had been applied. And we say that that doesn't mean they shouldn't have swathed simply because of that, but they shouldn't have swathed because of the risk to the neighbour, the risk which was identified very clearly by the letter that Mr Marsh delivered to Mr Baxter in September, together with a copy – extraordinary – a copy of 3.2.9. Now, if that's not clear notice of a risk, it's hard to imagine what would be. But this is not just a question of a reasonable person in Mr Baxter's shoes appreciating that there was a risk; Mr Baxter himself must have appreciated the risk.

And then what my learned friend has said about that is simply, well, he thought that that would be covered by the distance, five metres from the fence – he went up to five metres from the fence – and the road and the trees. And that's as far as he went. So the question there is, looking at what appears to have been no more than a marginal benefit in swathing compared with direct harvesting, what was the risk that he was taking of the

neighbour suffering, indeed as the neighbour had said could suffer – the word was "catastrophic losses" because of the loss of the certification.

NEWNES JA: What do you mean by marginal benefit? If there was costs to be saved - - -

McCUSKER, MR: Yes, weed.

McLURE P: - - - in swathing in that particular way, Mr Baxter makes a decision to forgo saving those costs in order to allow his neighbour to make a higher price for his crops. Is that how it works?

McCUSKER, MR: Well, there was no – the point I'm making, your Honour, is there was simply no evidence of how important it was to Mr Baxter to swath. He didn't say after the Roundup was applied there was still a lot of weeds around. It seems to have been more of an experiment. He had never – he didn't swath any of the other (indistinct) as I mentioned before; he didn't swath again. Swathing is a more expensive operation. And the reason he didn't swath again, as I mentioned yesterday, was not that it had anything to do with his case, but his evidence was simply because that's what he had always done. So it seems to have been a kind of one-off occasion when he tried it out. But if that's all it was and there was no financial imperative to employ this more expensive method - - -

McLURE P: Well, he had to hire a contractor, which he didn't normally do, and he had to hire something to add to his harvester to pick it up.

McCUSKER, MR: That's right.

McLURE P: So the costs of harvesting had been increased by the decision to swath.

McCUSKER, MR: That's right, your Honour.

McLURE P: But there was no analysis, as far as I can see - - -

McCUSKER, MR: No.

McLURE P: - - - to the financial benefits as against the costs.

McCUSKER, MR: That's right. And so it can't be said this was some kind of imperative. He should have swathed. In

all the circumstances, it appears to have been a fairly marginal benefit to him.

MURPHY JA: When you say “marginal”, you mean - - -

McCUSKER, MR: If it was - - -

MURPHY JA: - - - marginal economic benefit?

McCUSKER, MR: Economic benefit.

MURPHY JA: Yes.

McCUSKER, MR: Yes. Yes. There is, of course, a real benefit in spraying the canola with Roundup, because not only does it kill the weeds in the crop – in the growing crop, but it also eliminates most of the weeds’ seed bed for the following year. So you’ve got a two-fold benefit. But that’s all to do with the spraying, which is what the GM canola allows you to do – or the RR canola. So – and I just mention too that in 2010 he did harvest Mailbox paddock, which was a conventional canola paddock, and that, he said, had a weed problem in it but he still just harvested it with a direct header.

Now, it’s been put by my learned friend – just going up to another point she has raised – that the NASAA standards are not – are idiosyncratic. I don’t know whether your Honours want me to develop that matter further. We say that the – they’re not idiosyncratic. They are important standards which have been – although it’s true that the monitoring of the quality of the operation is directed towards ensuring that the national standards are met, that doesn’t mean that the NASAA standards, which have this clause 3.2.9, and so on, are in some way idiosyncratic. Nor is there any evidence that no one but Mr Marsh was engaged in this kind of contract.

So it’s really put to one side. The question – it would be idiosyncratic, of course – or it could be said to be idiosyncratic if there was a provision that gave NASAA completely arbitrary power to decertify. You might say, “Well, you better look elsewhere for a contract.” But this, although it provided in 3.2.9 for decertification in the case of a conclusion that there was an unacceptable risk, as your Honour the President has already pointed out, that was subject to a right of appeal. Now, your Honour the President also raised, I think, the question of the European position.

McLURE P: Yes.

McCUSKER, MR: The European - - -

McLURE P: I understand there's a standard, but I understand – anyway, really, I need just to know where the evidence is.

McCUSKER, MR: Yes. It's at green appeal book 1995 to 1997. That's the recommendations.

McLURE P: These are the international IFOAM standards, are they?

McCUSKER, MR: No, these are the recommendations – the other - - -

McLURE P: Sorry, what page again?

McCUSKER, MR: 1995, your Honour.

McLURE P: Sorry. Yes, but we know that the European guidelines were not followed by a number of nation states in Europe. But that's not in evidence, I assume.

McCUSKER, MR: I'm not sure that that's so, your Honour. These are guidelines – they're not – they're not regulations, but they are guidelines for development of national coexistence measures to avoid the unintended presence of GMOs in conventional and organic crops. And in items 3, 4 and 5 in particular:

> It may be necessary for Member States' public authorities to define, in the areas where GMOs are cultivated, appropriate measures to allow consumers and producers a choice between conventional, organic and GM.
>
> The objective of co-existence measures is to avoid unintended presence of GMOs preventing the potential economic loss and impact of the admixture of GM and non-GM.

And:

> In some cases, depending on economic and natural conditions, it may be necessary to exclude GMO cultivation from large areas.

So there's clearly a concern. I think this is – in the European continent, concern about the growth of GM products and the separation, so there can be a proper coexistence. The UK Soil Standards too, I should mention, are to be

found at green appeal book 2000 and 2009. This was all put in evidence, your Honour. And 2009 deals with genetic engineering and nanotechnology.

> You must not use genetically modified organisms in organic farming or food processing. They do not fit within the principles of organic agriculture. Once released, they cannot be recalled. They also pose potential risk to the environment and human health.

And 3.62, 3.63 and 3.64, or relevant 364:

> You must make sure you prevent contamination during production, processing, storage and transport. If contamination occurs or risk of contamination, we may decide to withdraw certification from your land, crops, or products.

So that standard, "If there's a risk", they put it, "of contamination we may withdraw." And then there's the ACO standard, finally, which appears at page 2051. And, in particular, the GMO guidelines appear at 2057. 4.8.16:

> Residues or cross contamination of GMOs under certified crops is prohibited.

4.8.19:

> GMOs and their derivatives are prohibited in all aspects of organic production, including but not limited to vaccines.

4.8.20:

> Operators shall outline in their OMP noted risks from GMOs management strategies to contain such risks.

So the point is that there was, as your Honour has put to my learned friend, and remains, a real concern of controversy about the use of GM products. And for that reason, there have been various protocols or warnings issued to ensure that as far as possible, GM products are not mixed.

McLURE P: And at least, putting aside the safety to humans and the environment, the market recognises a distinction between the different types.

McCUSKER, MR: It does, your Honour. All of this may be, without any evidence whatever that GM products are harmful to human health or livestock, but that's not the - - -

McLURE P: Well, in Australia, a positive finding, I suppose, by the Office of Gene Regulator, that the risks of harm - - -

McCUSKER, MR: Yes. That's right.

McLURE P: - - - are not significant.

McCUSKER, MR: But, nevertheless, despite that finding there is clearly a substantial body of opinion in the public that there is some harm attached to GM products. It may not simply be harm in terms of consumption of the products. There may be a deeper rooted concern about the way in which they're produced and possible contamination of the environment losing biodiversity, and so forth. They are all – but whatever the reasons are, they exist – that is the concern exists.

And that's why in the case of organic products, those organic products can't be certified as organic unless there is a very rigid control. So it is not idiosyncratic. It is no more – one could say, perhaps, that the Monsanto contract was idiosyncratic since it was the first time it was produced, but it's an unhelpful term. The question is is there anything in this contract which is really so extraordinary that no one could possibly expect it to operate in this case. And I've taken the evidence – this wasn't a sudden, spur of the moment decision to decertify by NASAA; this was something which was the result of several inspections and careful survey and an assessment of what the risk was.

I turn now to the nuisance categories, your Honour, if I may. Your Honour the President asked a question of whether there's been any decided case considering a nuisance claim in which there is economic loss that doesn't occasion property damage, where there is no loss of amenity in a particular sense. We can't find any, your Honour. But that doesn't mean that, therefore, this is not a proper nuisance claim, because, as has been said many times, the categories of nuisance are not closed, and it involves a balancing act of a number of factors.

Your Honour observed that the cases recognise two categories of nuisance: nuisance involving damage to property; and nuisance involving lack or loss of amenity, and that this case didn't appear to fit quite into either of those categories. Certainly, it doesn't fit neatly, and one could say that the deposit of a large number of seeds, which were GM seeds, on the property of itself is a form of

damage to property. It depends how widely or narrowly you view that term.

But if you take the Victoria Park Racing case, in that case the failure was not due to damage to property, really; it was the fact that there was found to be no right on the part of the racing company to prevent others overlooking their land and watching for themselves the race without paying. That was far removed, in our submission, from this case where the problem, the nuisance, is the deposit of seeds from next door property. If I could take, perhaps, a slightly fanciful analogy: if the defendant in the Victoria Park case had, instead of overlooking it, occasionally or habitually started throwing stones on the racetrack, small stones which impeded the operation of the race, that would be a different matter, and we - - -

McLURE P: Without hurting the horses.

McCUSKER, MR: Without hurting the horses, but perhaps deterring the horses from running. So – and we say that's much more of an analogy than simply the Victoria Park Racing facts as they're found. So we say that it doesn't matter that it can't be neatly categorised. By reference to ordinary principles, the court can decide that on the facts of this particular case, there was an unreasonable interference with the use and enjoyment of the land. This wasn't a case of simply overlooking; this was a case of letting product be blown over the other side.

And talking of the blowing, while I'm on that subject, my learned friend has said, "Well, there is no evidence – no evidence given of what the conditions were at the time that the canola seeds were blown across." And, of course, there wasn't, because no one is quite sure when they were blown. They were blown some time but they clearly – they weren't carried across, so they must have been blown.

And unless it was said by the defendant, "Look, I've got evidence that this was a highly unusual event", then you're left with the position that wind has blown these canola swaths across the road and it was able to do that because they were swathed. And that's the short point there. The fundamental issue in nuisance, of course, is whether there's an unreasonable interference with the use and enjoyment of the land, not the question of whether the facts can be put in a particular category.

The interference here was two-fold: the physical presence of the GM on the land made it no longer capable – or some of the paddocks no longer capable – 70 per cent, I

think, in all – of being certified, and it couldn't be used to grow or raise organic crops or graze livestock, and Mr Marsh had to use his land quite differently because of the GM incursion. That is, rotation of his crops had to be changed, which he did, and all of this constituted a nuisance. Now – and he's enumerated all the problems he had in the references I took you to. And what flowed from that interference was the economic loss that's been claimed. Now, we say it's not necessary for the court to go any further than that.

It would be open to the court to find on these facts that one aspect of the use of the land, interference of which constitutes a nuisance, is simply an interference with the owner's ability to economically exploit the land. And there is a reference to that in the Victoria Park Racing case, somewhat indirect by Latham CJ. Can I take you to the references there, and also to Rich and Evatt JJ refer to the question, and I appreciate, of course, that they were in the minority – it was a 3-2 decision by the High Court – but we refer to what they did say - - -

McLURE P: We don't have copies. That wasn't asterisked. But if you just make your submissions, we will - - -

McCUSKER, MR: Yes, your Honour.

McLURE P: - - - be able to follow it.

McCUSKER, MR: I know it was – I think it was asterisked in the respondent's list of authorities.

McLURE P: Anyway - - -

McCUSKER, MR: In that case, I will simply - - -

McLURE P: Just give us the references.

McCUSKER, MR: I will give you the references. It's Rich J at page 500, Evatt J at page 516 and 519. And could I also refer you to Lord Hoffmann, what he said in the Hunter v Canary Wharf case, where he explained the underlying concern of nuisance at page 705. Now, I appreciate that the Canary Wharf case is a massive case devoted mainly to the question of who has locus standi, but he did deal with the question of nuisance in the statement of principle and said:

But there has been some inclination to treat –

The decision in St Helen's Smelting Co v Tipping –

> ... as having divided nuisance into two torts, one ... "material injury to the property," such as flooding –

Etcetera.

> ... and the other of causing "sensible personal discomfort" ... In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance.

And that, we say, is exactly the situation here; the utility of this land has been diminished by the existence of the nuisance. He went on to say:

> It is for an unlawful threat to the utility of his land that the possessor ... is entitled to an injunction.

In that case.

> And it is for the diminution in such utility that he is entitled to compensation.

The interference – the nature of the interference, I've taken your Honour to the evidence of Mr Marsh, the rotation, the decertification, the quarantining of sheep and the modification or changing of the treatment of tillage. And because of that physical presence – that's at – I think I've given you the reference, your Honour. At green appeal book page 1435, anyway. Modified their treatment and utility of the soil in paddocks where GM canola had been found to encourage germination and volunteer plants. They wanted to get this cleaned up as quickly as possible. That was the best way to do it.

Now, my learned friend mentioned that his Honour said, well – the trial judge said, "Well, he didn't pick up the swathes." But these swathes, for the most part, had cracked open, and there were pods and seeds that – the mere fact that they were blown across meant that they – they must have dried out. And so picking up the swathes was not much use. They might have picked up some of the scattered seed or some of the seed that was left, but that can't be held against him. He left the swathes there so that he could identify what had occurred. And your Honour the President remarked in Southern Properties, at page 118 – paragraph 118, I think – yes:

> Nuisance protects a claimant's interest in the beneficial use of land ... not confined to the actual use ... extends to the pleasure, comfort and enjoyment ... Nuisance covers physical damage to property and non-physical damage.

We wouldn't – it's hard to say it's physical damage in one sense, but certainly things landing on the property constituted here a nuisance. So this case is not merely loss of – not an economic loss in the sense of Victoria Park Racing; this is a loss of the land's capacity, that's capacity to produce. In Victoria Park Racing, there was no question of a loss of capacity to race the horses.

Even if you had an audience of one, still able to do that. But in this case, the important aspect of this land, which had been certified organic and after a fairly torturous process, was gone. And so it really was a loss of capacity; not merely an economic loss. I referred your Honours to what Latham CJ said in Victoria Park Racing. He referred to the interference:

> If some new method of interfering with the comfort of persons in the use of land arises, the law may provide a remedy.

And, as your Honours well know, the category, as I have said, is not closed. The reference to comfort of persons in the use of land was construed very broadly by Gummow J in Perre and Apand at paragraph 196. His Honour there said that:

> In Victoria Park Racing, Latham CJ suggested the law might provide a remedy if there emerged some new method interfering with the use and enjoyment of land and the suitability of land for a particular commercial purpose.

Given the context there, his Honour clearly had in mind a development of the tort of nuisance. And the reference to suitability for a particular purpose can be gleaned from his reasons at 493 where – and his Honour is supported by the reasoning of Lord Hoffmann and Lord Hope I've mentioned. His Honour didn't accept the fact that there was – that any interference with the use of the land as a racecourse there, but he implicitly accepts there might have been such an interference on different facts which would have resulted in a finding of nuisance.

There is an ongoing debate, I think, your Honour, about whether or not nuisance requires an interference with

an existing or recognised legal right. In our submission, that is one that adheres in the ownership of property. But this is not, in our submission, the criterion. The question is whether there's been an interference and unreasonable interference with enjoyment of the – the use and enjoyment of the property.

Could I also address what my learned friend said on the question of whether this interference could possibly constitute an interference with use and enjoyment. Simply saying, well, clearly it did; not simply it could, but did. And the only question is was it reasonably foreseeable – that's not in nuisance; that's in negligence. Reasonable foreseeability doesn't matter at all in nuisance. May it please, your Honour, unless you would like me to address any further, they're our submissions.

McLURE P: Yes. Thank you, Mr McCusker. I'm going to make an order about the filing of schedules – yes, Ms Cahill.

CAHILL, MS: Yes. Just before your Honour does that, can I just record that we don't press ground 4(a)(1) of our notice of contention.

McLURE P: 4(a)(1). Just a moment.

CAHILL, MS: And that has a corresponding paragraph at 32(b), for Burt, in our written submissions in support of the contention.

McLURE P: I will just find the contentions first. Page?

CAHILL, MS: It's page 67 of the white appeal book, 4(a)(1).

McLURE P: Right. So 4(a)(1)?

CAHILL, MS: Yes. And 32(b) is the corresponding – at page 74. So those evidence references we won't rely on. We won't press that point. 32(b), for Burt.

McLURE P: 32(b)?

CAHILL, MS: Yes.

McLURE P: Yes. Thank you for that. Now, in relation to the schedules, I will read out a proposed order and then hear from the parties if they've got any concerns. In relation to each finding of fact made by the trial judge

that is challenged in the appeal or in the notice of contention, and for any new finding of fact sought by a party, within 14 days each party is to file and serve a schedule containing a summary, with transcript references, of all the evidence for and against the relevant finding.

Order 2 would be within seven days thereafter the parties to file and serve a further schedule identifying any additional evidence not relied upon in the schedule provided by the other party. So that gives the parties the opportunity to fill any gaps that have been left from the schedules the subject of the first order. Now, do you understand what's being sought?

CAHILL, MS: We understand what's being sought. Can we say we think that apart from the fact that the summary isn't there, you should have all the evidence references so far as we're concerned with the combination of the schedules that the parties have exchanged so far. So that leaves the notice of contention and the summaries.

McLURE P: Yes. Well, what I'm thinking of, ordinarily what we get is a summary of the evidence, "Joe Bloggs said that", and then the transcript references.

CAHILL, MS: Yes. I understand.

McLURE P: The bundling of the transcript references is a really difficult exercise when it comes to judgment writing.

CAHILL, MS: I understand.

McLURE P: So do you understand what's being sought?

McCUSKER, MR: Yes, your Honour.

McLURE P: Yes.

McCUSKER, MR: In explanation, but not an excuse, I'm instructed by my instructing solicitors that they did raise the question. They weren't quite clear what was required.

McLURE P: No, that's fine.

McCUSKER, MR: They raised it with the registrar.

McLURE P: And the 14 days for the schedules and a further seven days after service for the gap filling exercise. Otherwise, the court will reserve its decision on the appeal and adjourn.

AT 3.49 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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