

Submission to:

Inquiry into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material

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Terms of Reference

Inquire into and report on mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material, including approaches taken in Western Australia and by other jurisdictions and any other relevant matter.

Synopsis

Consumers around the world avoid GM food and seek organic food. Australia is a global pygmy in the world of genetically modified organisms (GMOs) and a giant in the global world of organics. Western Australia (WA) has a GMO moratorium in place with certain exemptions. GM produce sells at a discount compared to non-GM produce and organic produce. GM crops put non-GM growers and organic growers at risk of contamination and this can lead to economic losses. Non-GM produce contaminated with GM is discounted in the market place as GM produce. Such contamination causes economic harm to non-GM farmers and particularly to organic farmers. In the case of Marsh v Baxter, a WA farmer harmed by GM contamination (to the extent of \$85,000) went through the courts (with combined legal costs of approximately \$2 million) and the law failed to provide any remedy to the harmed party (Marsh). The simplest fix is to revert to the WA GM moratorium without exemptions. In the absence of that, a compulsory third party (CTP) GMO incident insurance is proposed. CTP works successfully in other areas of potential harm (e.g. motor accidents). CTP is an insurance and hence it deals with risk. CTP decouples the premium-payer (the potential source of harm) of the CTP from the claimant (the potential victim of harm) with an independent arbiter. No fault CTP is recommended.

1 Context

1.1 Global Consumers Avoid GM

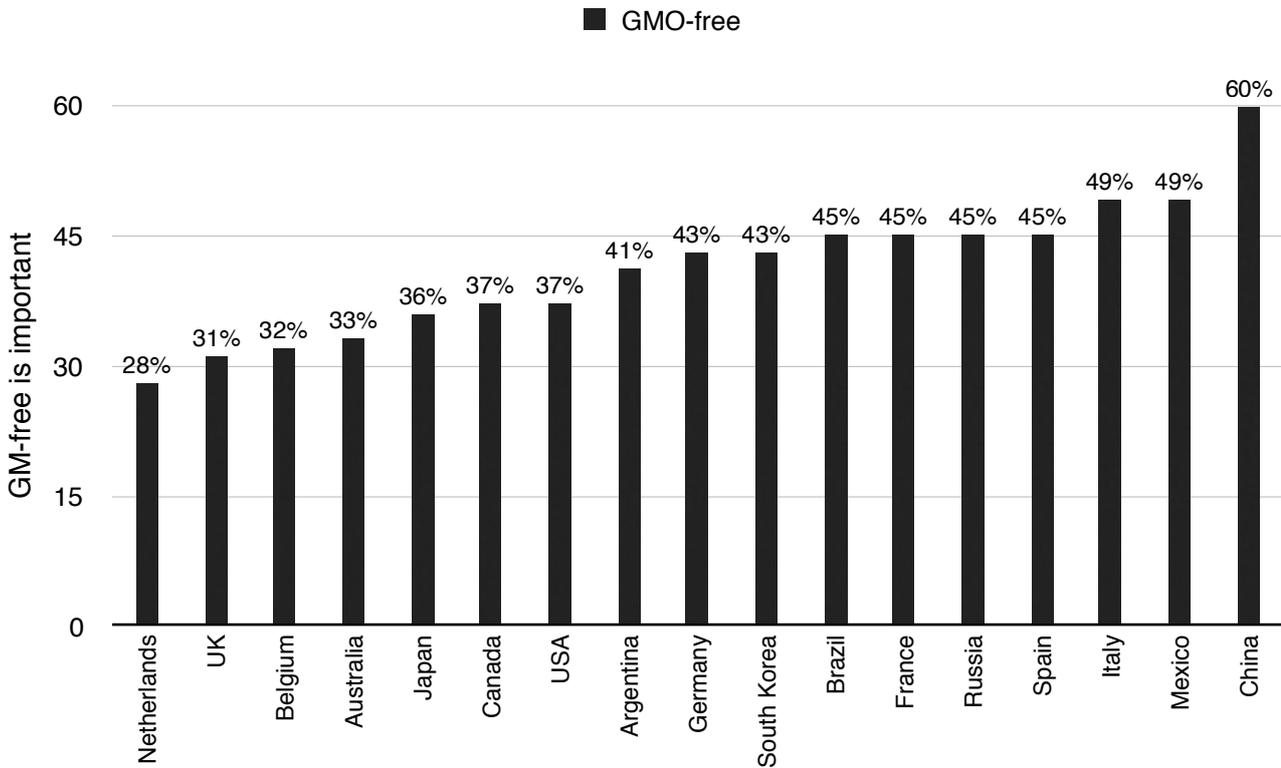


Figure 1. The percentage of consumers who rate avoiding GM food as important or very important (GfK, 2017).

1.2 Global Consumers Seek out Organics

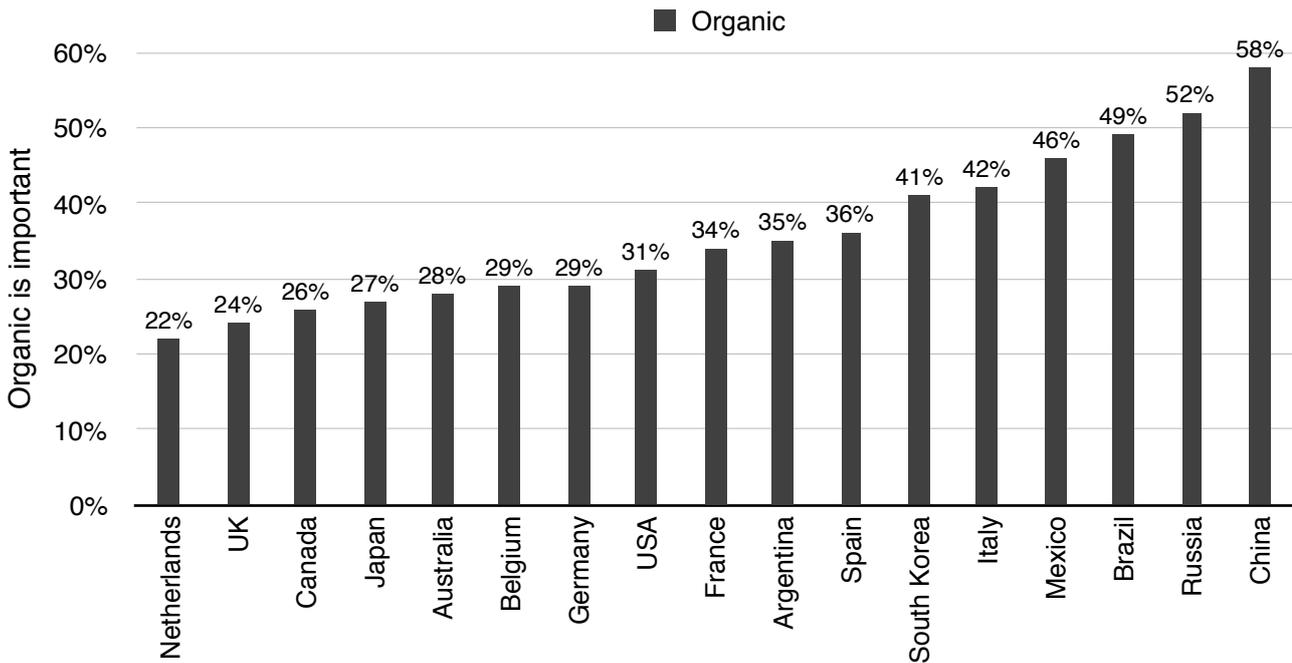


Figure 2. The percentage of consumers who rate choosing organic food as important or very important (GfK, 2017).

1.3 Australia is a Pygmy in the GM World & a Giant in the Organics World

GMOs (ha)

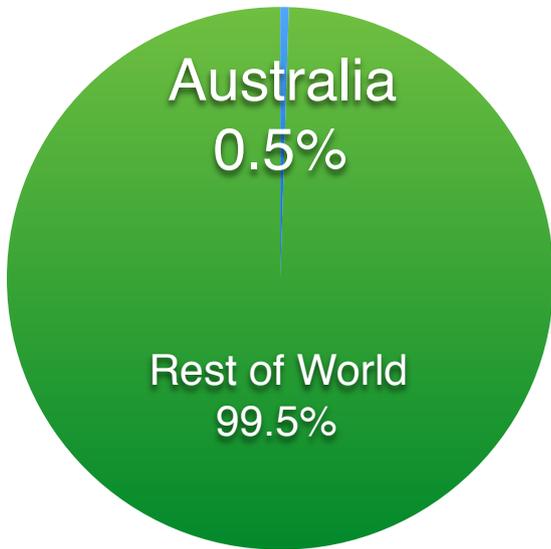


Figure 3. Australia's share of global GMO hectares is just one half of one percent (ISAAA, 2017).

Organics (ha)

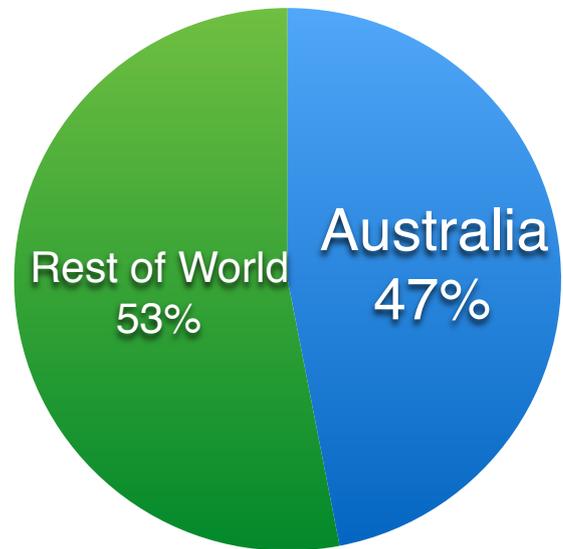


Figure 4. Australia's share of global certified organic hectares is almost half of the world total (Willer & Lernoud 2018).

1.4 Australia leads the world in Organic Agriculture

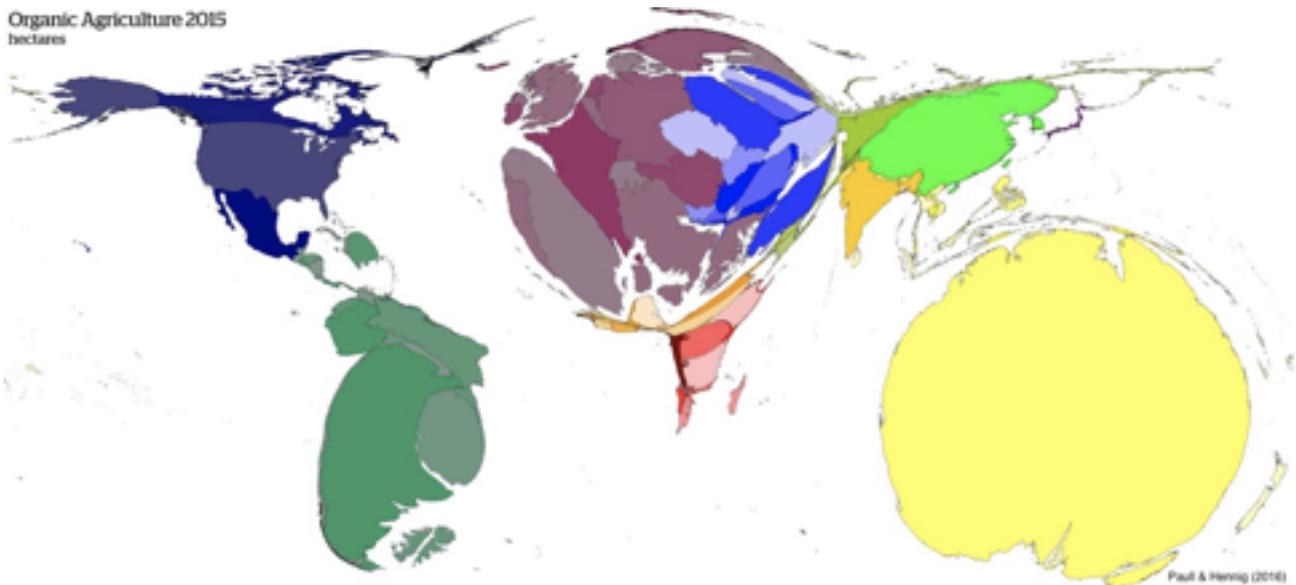


Figure 5. The Atlas of Organic Agriculture shows Australia as the world leader in certified organic agriculture hectares in this density equalising world map (Paull & Hennig, 2016).

1.5 WA GM Moratorium

In 2003, WA passed the Genetically Modified Crops Free Areas Act 2003. In 2008, WA exempted GM cotton in the Ord River Irrigation Area (ORIA) from the moratorium. In January 2010, WA exempted GM canola from the moratorium. This was despite being aware that “since the advent of GM canola in Canada farmers can no longer grow organic canola in Western Canada” (WADAF, 2010). It was claimed that “common law allows for effective remedies for persons incurring damage from GM crops” (WADAF, 2010, p.3).

The dividend of the exemption of GM canola is that non-GM farmers are harmed when their farms and crops are contaminated by GM canola.

Non-GM canola sells in WA at a premium of 10% over GM canola (Figure 6). This means that when a non-GM harvest is contaminated by GM canola the value of the crop is downgraded by about 10%. This is irrespective of where the contamination occurred - in the field, at harvest, in transport, or at a storage facility.

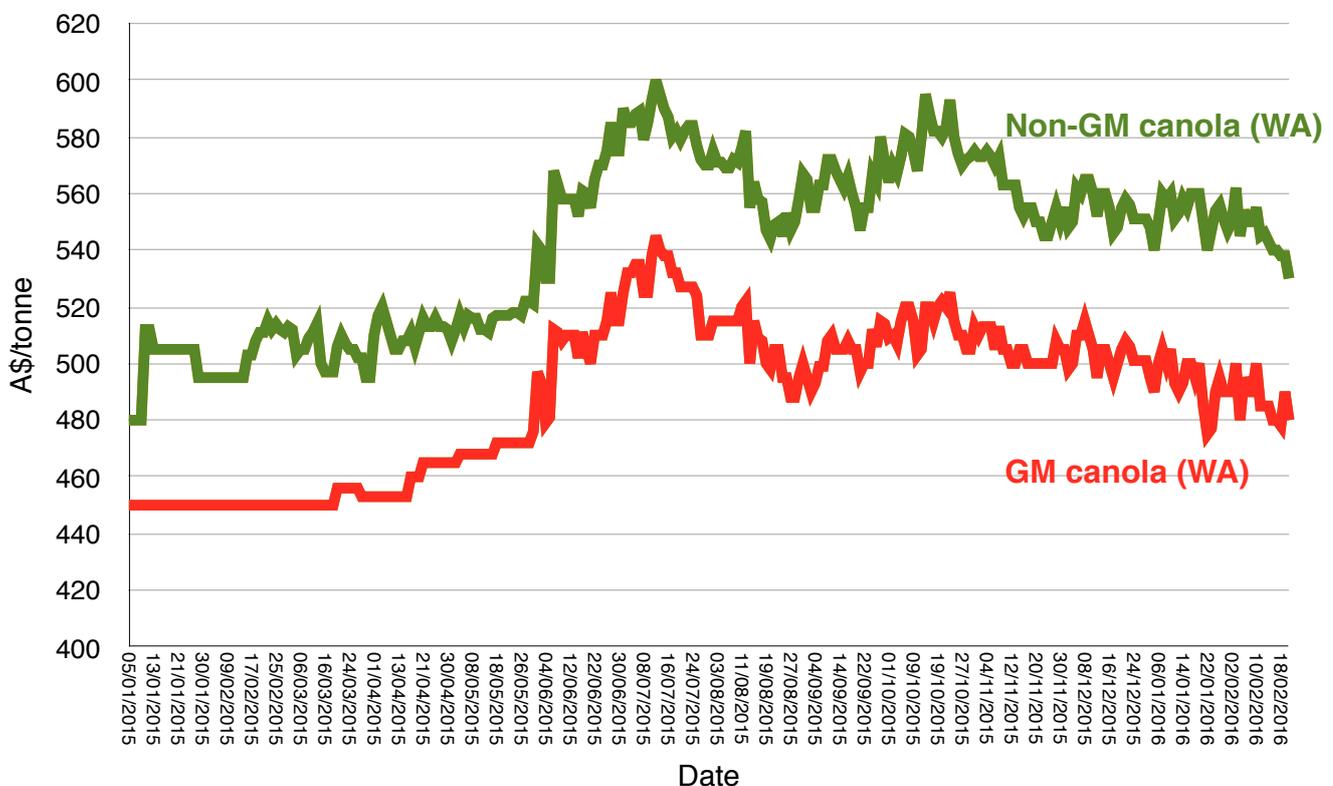


Figure 6. In WA, Non-GM canola consistently sells at a premium of 10% above GM canola (CBH Group Daily Contract Prices) (Paull, 2016).

1.6 A Case Study of GM Harm in WA

In the case of *Marsh v Baxter*, the organic farmer (Marsh) lost his organic certification (in December 2010) along with the premiums associated with being certified organic. Baxter had planted GM canola in May 2010. It was agreed between the parties that GM plant material had blown from Baxter's farm to Marsh's farm. The damages were agreed between the parties at \$85,000. Liability was denied by Baxter (Paull, 2015a, 2015b).

The case was heard in the Supreme Court of WA (2014) and subsequently in the WA Court of Appeal (2015). The facts of the case were generally agreed between the parties and were not in dispute. However the Court did not agree that there was any nuisance or negligence and did not impose any injunction on the future planting of GM canola. Leave to appeal was sought before the High Court of Australia in 2016 and was denied. This exhausted legal options to remedy the harm (Paull, 2015a, 2015b).

For a disputed \$85,000, approximately \$2,000,000 was expended on legal fees. Despite this disproportionate cost, the harmed farmer was not recompensed for the economic harm inflicted. The harm was not denied and the source of the harm was not denied. The harm was not remedied (Paull, 2015a, 2015b).

2 Fix

2.1 A Fix is Required

The *Marsh v Baxter* case proved that the assurances of the then WA government that "common law allows for effective remedies for persons incurring damage from GM crops" (WADAF, 2010, p.3) were false. The case established, at a cost of \$2 million, that common law remedies are not effective to remedy harms caused by GM contamination (Paull, 2015a, 2015b).

For non-GM producers harmed by GM farming in WA, the pragmatic approach is to just "cop it" since the pursuit of common law remedies:

- can be disproportionately expensive;
- can be massively time consuming;
- can be acrimonious; and
- offers no surety of success.

2.2 Models considered and rejected

2.2.1. Levy on GMO sector.

A levy could be collected from the GMO sector (there are multiple options for selecting the point of collection: patent holder, seed retailer, GM grower, et alia). The disadvantage of such a scheme is that a levy is not a mechanism for managing risk.

A levy is a scheme for collecting and potentially distributing funds but in a risk management scenario (as in GM contaminations) there is no match between the funds scheduled for collection and the funds demanded for dispersement (if any).

The levy pool (of predictable size) is permanently out of sync with the (unpredictable) demands on the levy pool. If there are no demands then the levy pool is 'dead money'. If there are demands that exceed the levy pool, then the scheme fails the harmed parties, in that a speedy resolution is unachievable.

2.2.2. MCPI taken out by GM growers

This is a risk management strategy. MCPI (Multi Peril Crop Insurance) could be mandated for GM growers. Such MCPI would cover GM crops. Such insurance would provide some certainty and risk management for GM growers. However non-GM growers who are harmed would need to make a claim against the GM grower. This is problematic since the harmed party, the non-GM grower, is a third party and any claim would be contested. That would pit non-GM grower versus Big Insurance. Such an action would be expensive for the harmed party, time consuming, and with no surety of success.

2.2.3. MCPI taken out by non-GM growers

This is a risk management strategy. There is no certainty that non-GM growers could obtain a MCPI policy covering contamination and harms by GMOs. In any event, such a scheme is an unfair financial impost on non-GM growers, since it is not them creating the potential harms. In the event that there was a successful claim, then their premiums would increase in the following years. This is an unfair option since it moves the costs to the potential victims of harm (i.e. of contamination).

2.3 The Ultimate Fix

We should not lose sight of the 'ultimate fix' and that is to remove the risk. That is achieved by WA reinstating its GM moratorium without exemptions. With the risk of harms from GMOs removed from the landscape, then there is no risk to manage.

2.4 Model proposed

Compulsory Third Party (CTP) GMO Incident Scheme

- This is a risk management strategy.
- CTP has a long history of working successfully for all parties in other harm situations (e.g. motor accidents), including in WA.
- A CTP scheme collects premiums from the potentially harming party. Premiums are aggregated. CTP decouples the harming party from the harmed party and thereby remedies can be implemented promptly, at little or no cost to the harmed party, and without acrimony
- A CTP can operate on a no fault basis so that, at its core, it is not an adversarial mechanism. CTP for motor accidents is no fault in Victoria & Tasmania (MAIB, 2017).
- The advantages of no-fault CTP includes that legal fees are minimised and that claims can be settled quickly and amicably.
- A CTP scheme can be outsourced to existing insurance companies (as in NSW, Qld & ACT) or it can be assigned to a government business enterprise as in WA (The Insurance Commission of Western Australia) and Tasmania (Motor Accidents Insurance Board).
- A CTP scheme can recover costs from harming parties.
- A CTP scheme can (and often does) reinsure some of the risk that it is carrying (in CTP motor accident insurance, reinsurance may be taken against long term catastrophic injuries, such as paraplegia, that is, potentially large but infrequently made claims. A reinsurer may, for example, be a large overseas insurance company).
- In WA, a CTP GMO Incident Scheme could be managed, for example, by the Insurance Commission of Western Australia (ICWA). The ICWA already has

the expertise and track record of managing a CTP scheme. (A difference is that a no-fault CTP GMO Incident Scheme is recommended in the present submission).

- In a WA CTP GMO Incident Scheme, premiums can be collected on GM seed sales at the point of sale. (Other options are possible. What we learn from CTP motor accident insurance is that it is simplest to couple the insurance premium with some other payment that is necessary and regular, vehicle registration in that case).
- In WA, the ICWA is the state's expert on CTP schemes and is a suitable party to oversee the proposed WA Compulsory Third Party (CTP) GMO Incident Scheme.

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16 February 2018

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