

Marsh v Baxter, Kojonup to Canberra: Foresight, Hindsight and Insight



Dr John Paull
School of Land & Food
University of Tasmania
j.paull@utas.edu.au

1

This is a case study from Australia about 2 neighbouring farmers in conflict.

It is between Michael Baxter who planted GM canola and his organic neighbours, Steve & Sue Marsh.

This conflict is a proxy contest between organic & GMO agriculture.

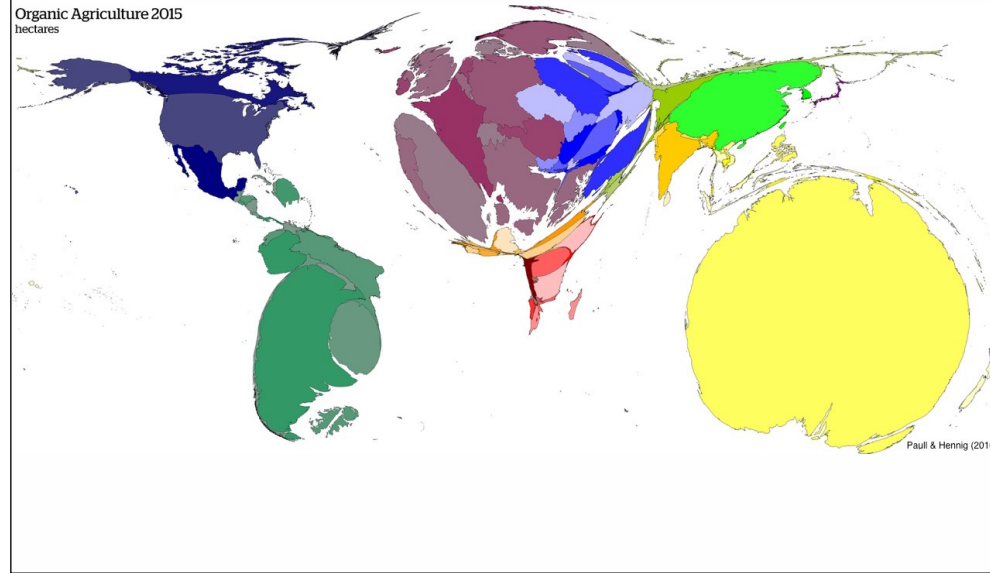
Are these two agricultural technologies destined for co-existence or conflict?

I will give some of the context of organic & GMO agriculture.

Then we will look at the progress of this dispute.

Then we see how, after the expenditure \$2m on legal fees, the essence was reduced to a single question - a single sentence about foresight - and that question went to the High Court.

The World of Organic Agriculture



2

This is a map of global organic agriculture. It is a density equalising map, so equal areas of organic agriculture are represented by equal areas on this map. As you see, Australia is a giant in the organics sector - with more certified organic agriculture hectares than any other country.

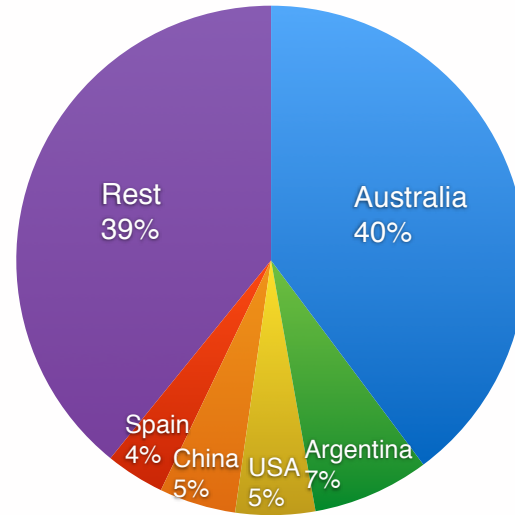
Organic Agriculture **excludes**...

- synthetic fertilisers
- synthetic pesticides
- **GMOs**
- engineered nanoparticles
- irradiation

3

Organic agriculture is a farming technology that excludes:
synthetic fertilisers, synthetic pesticides, GMOs, engineered nanoparticles & irradiation.
The Marsh v Baxter case is about the GMO exclusion.

Organic (ha) - Big 5



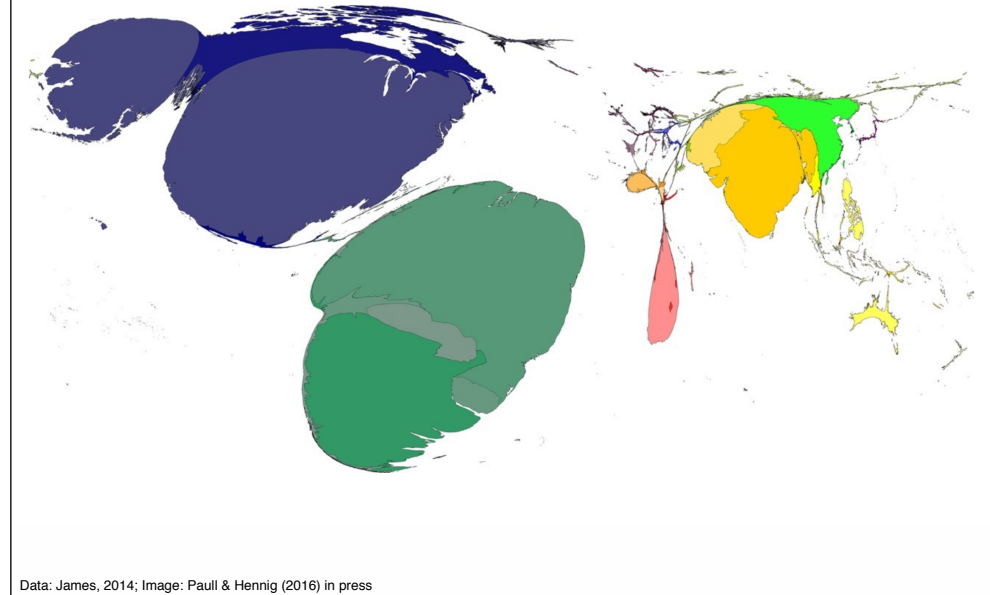
World total = 43.1 m ha

data: Willer & Lernoud, 2015

4

Australia accounts for 40% of the world's certified organic agriculture. It is followed by Argentina, USA, China & Spain - with 165 countries accounting for the residual 39%

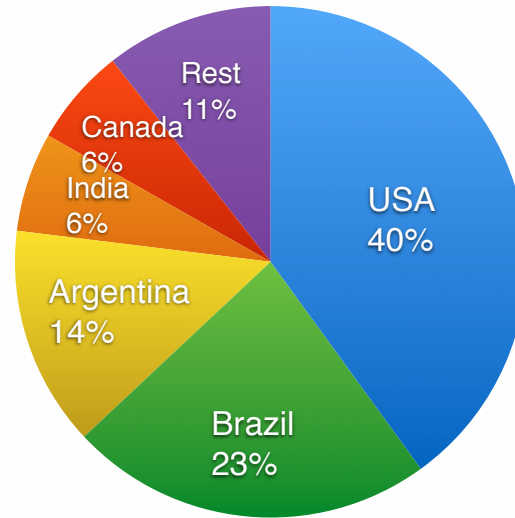
The World of GMOs



5

This is a map of global GMO agriculture.
As you see, Australia is a minnow in the GMO sector -
just a skeletal presence.
You see that the giants of GMO agriculture are North & South America.

GMOs (ha) - Big 5



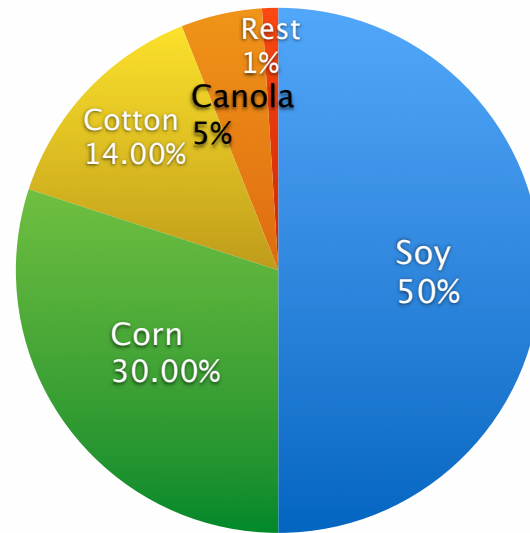
World total = 175.2 m ha

data: James, 2014

6

Worldwide, the uptake of GMO agriculture has been very limited.
5 countries account for 90% of GMO plantings.
And North & South America together account for 85% of the world's GMO plantings.

GMOs: 4 crops



data: CBAN, 2015

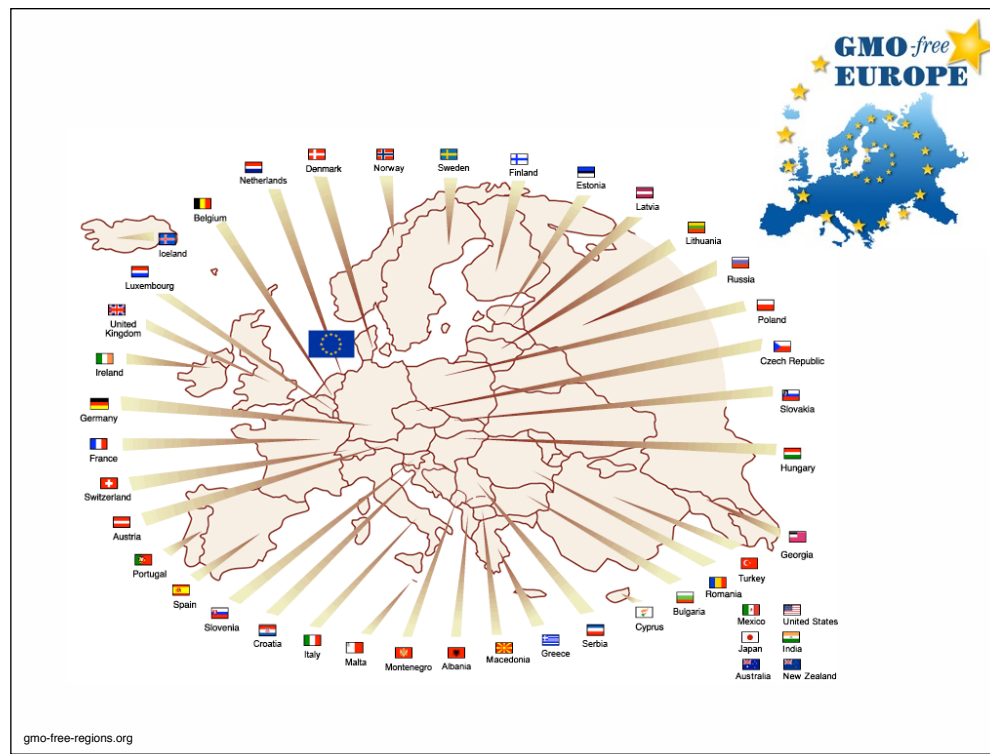
7

Just 4 crops account for 99% of GMO agriculture:
soy, corn, cotton & canola.
The Marsh v Baxter case is about GM canola.



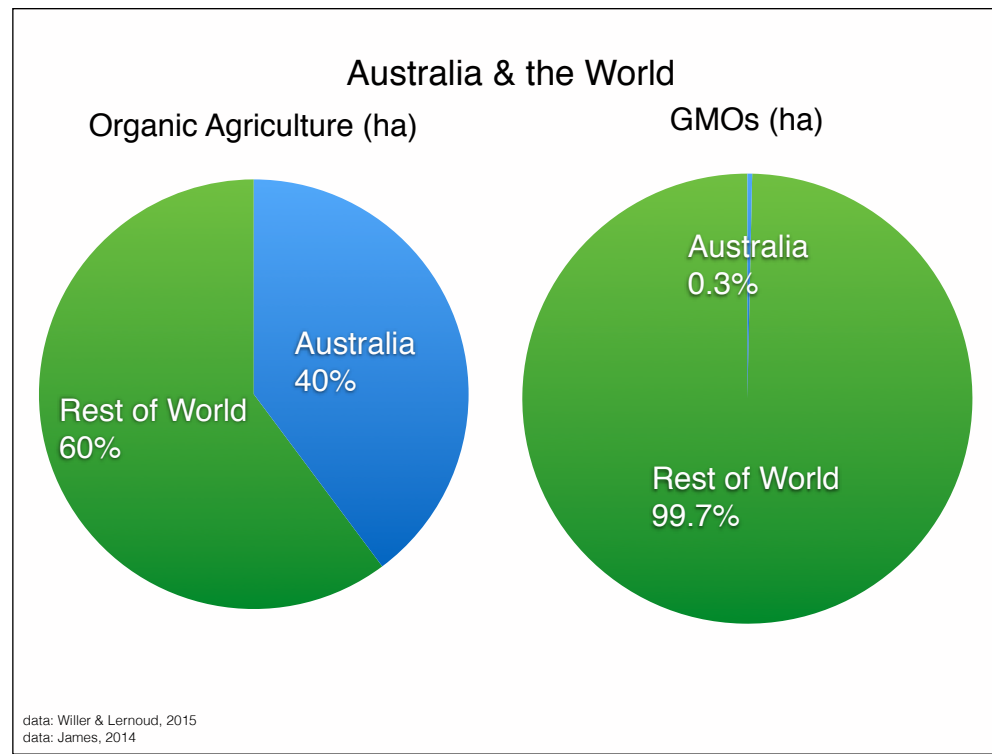
8

In Australia, the Gene Technology Regulator approves GMOs. It is a federal agency that has approved GM cotton & GM canola. Nevertheless, each state has taken its own position on these approvals. Some states, including Tasmania & South Australia, have strong moratoria in place. Other states have a compromised moratorium or no moratorium.



9

In Europe, there has been steady resistance to GMOs throughout the continent - with many moratoria in place.



10

For Australia, when we compare Organic and GMO hectares, we see that Australia is the world leader in organics & a very minor player in GMOs. Australia has 40% of the world's certified organic agriculture (17m ha & growing) & just 0.3% of the world's GMO agriculture (0.5 m ha & shrinking).

GMOs - a contested technology



11

The case of Marsh v Baxter is a battleground of a bigger worldwide conflict.
GMO technology is a contested technology.
The contest is essentially a conflict of corporates versus consumers.
A handful of big corporate pesticide companies are pushing for the uptake of GMOs
& a multitude of consumers are pushing back against GMOs.

GMOs - a contested technology

- ✗ patents
- ✗ control
- ✗ “substantially equivalent”
- ✗ labelling
- ✗ health
- ✗ ecology
- ✗ environment - canetoad

12

There are at least 7 areas of contestation against GMOs.

Should we allow patents over living organisms?

Is it OK for pesticide companies to control our food supply? For corporate profit?

There is the dubious doctrine of ‘substantial equivalence’ - wanting to have it both ways - claiming a patent for difference & an exemption from scrutiny on the basis of sameness.

There is the fight to have GM products labelled.

The impacts of GMOs on health, ecology & environment are uncertain & will remain so for generations.

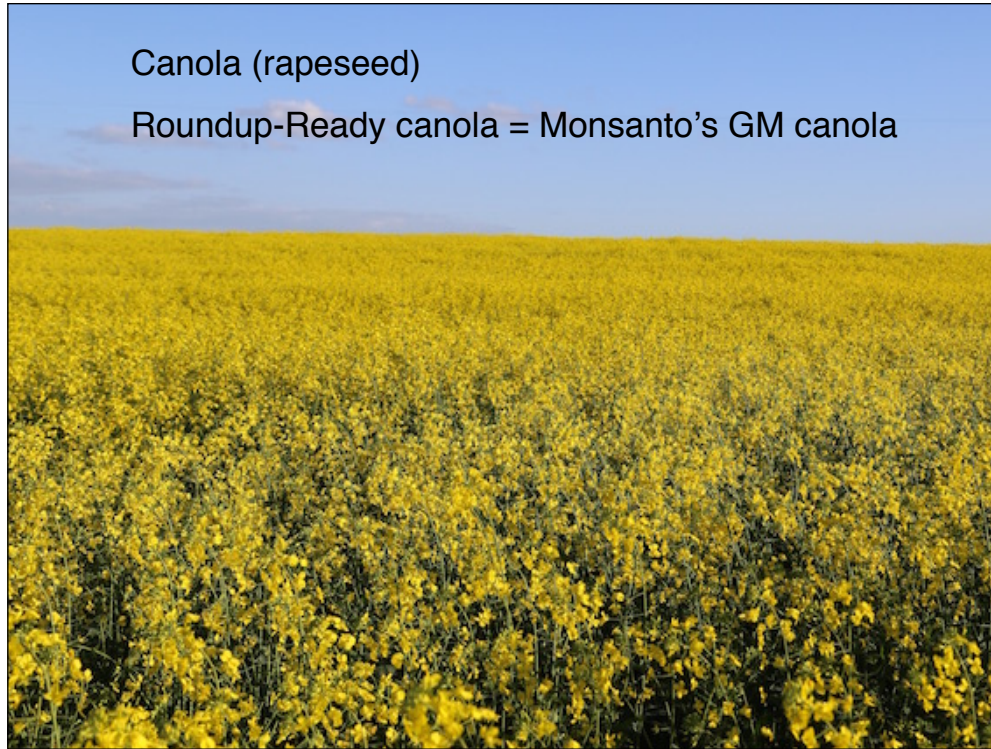
Are GMOs the new canetoads of Australia & the world?

Canetoads seemed like a good idea at the time. Backed by science.

But when things go awry there may be no recall.

Canola (rapeseed)

Roundup-Ready canola = Monsanto's GM canola



13

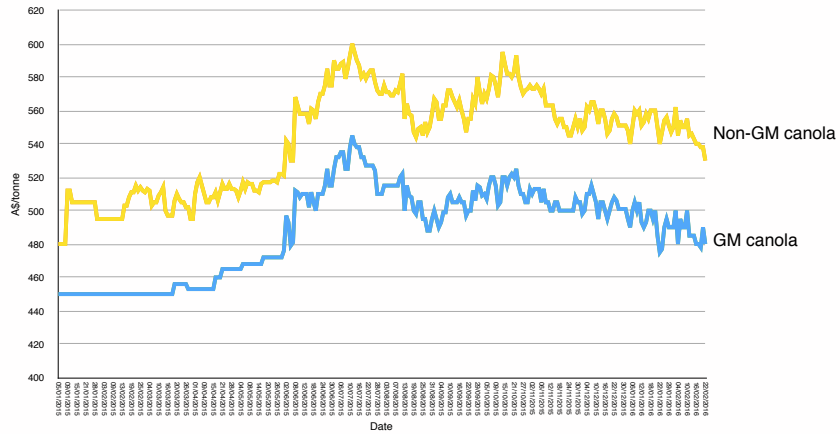
Canola is a rebranded rapeseed - it was in need of a rebrand.
The GM canola of this case is Monsanto's GM canola which they call Roundup Ready canola.
The GM canola is resistant to the herbicide glyphosate.



Image: John Paull, 2015

Canola is used for cooking oil.
78% of Australia's canola crop is non-GMO.
GMO labelling on food is mandated in Australia.
This brand proudly proclaims itself as "Non GMO".

Price premium of 10% for non-GM canola (WA, 2015)



Data provided by Kahliia Wintle (2016), CBH Group Daily Contract Prices

In Australia, non GM canola sells at a premium of 10% compared to GM canola.



16

The events in the case of Marsh v Baxter occur at Kojonup -
in the south west of Western Australia.



Image: John Paul, 2014

17

Kojonup is in the wheat belt of Western Australia,

It is about 260 km from Perth.

The land is flat & dry.

The rainfall is adequate for cereals (530mm).

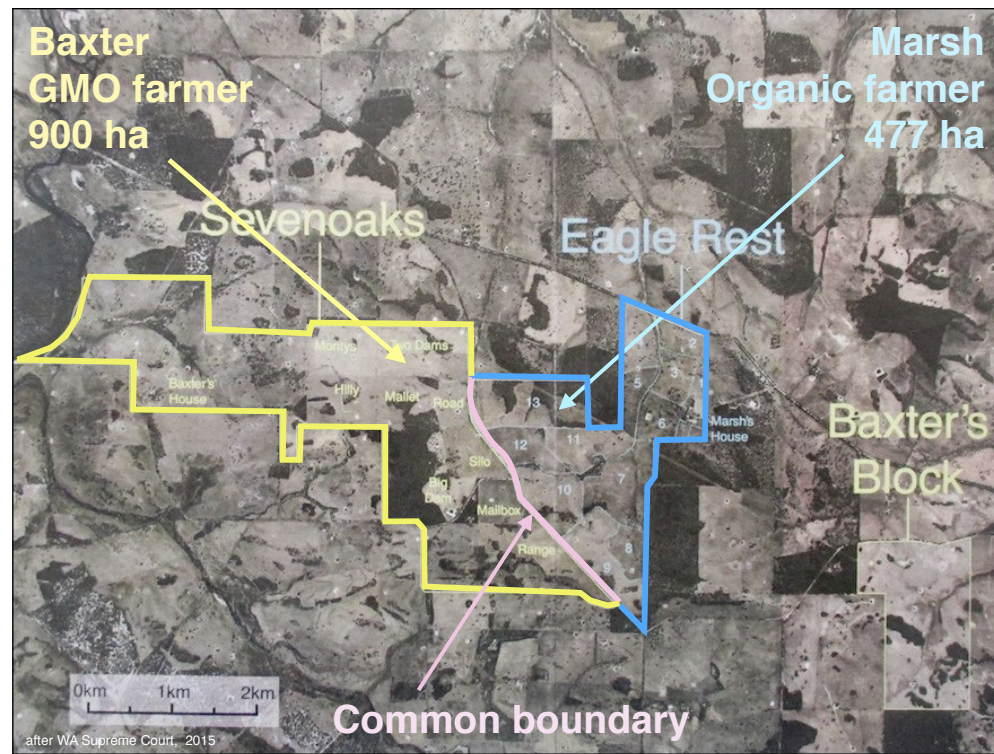
The winter is reliably wet for growing & the summer is reliably dry for harvesting.

Wheat yields are in line with the low rainfall & lower than international averages (eg 1.6 t/ha).



18

The region is renowned for wheat and sheep.
It is a land of big blue skies.



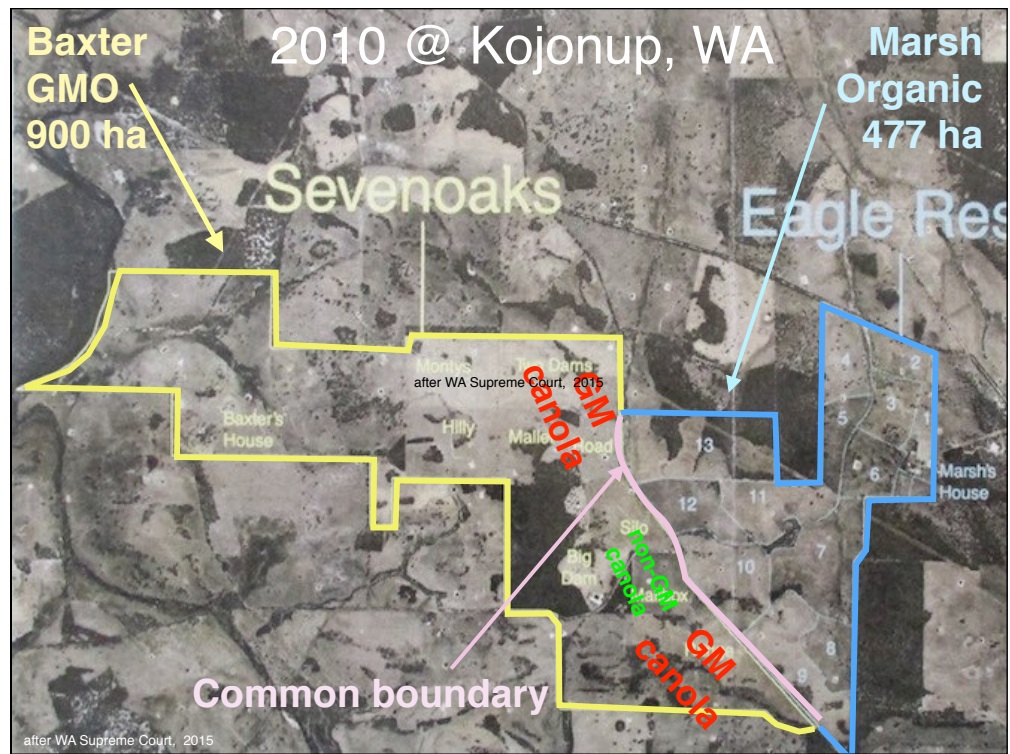
19

The farms of Marsh & Baxter share a common boundary of about 3.6 km - shown here in pink.
The GMO farm is on the left in yellow.
The organic farm is on the right in blue.
The GM farm is 900 ha & the organic farm is 477 ha.



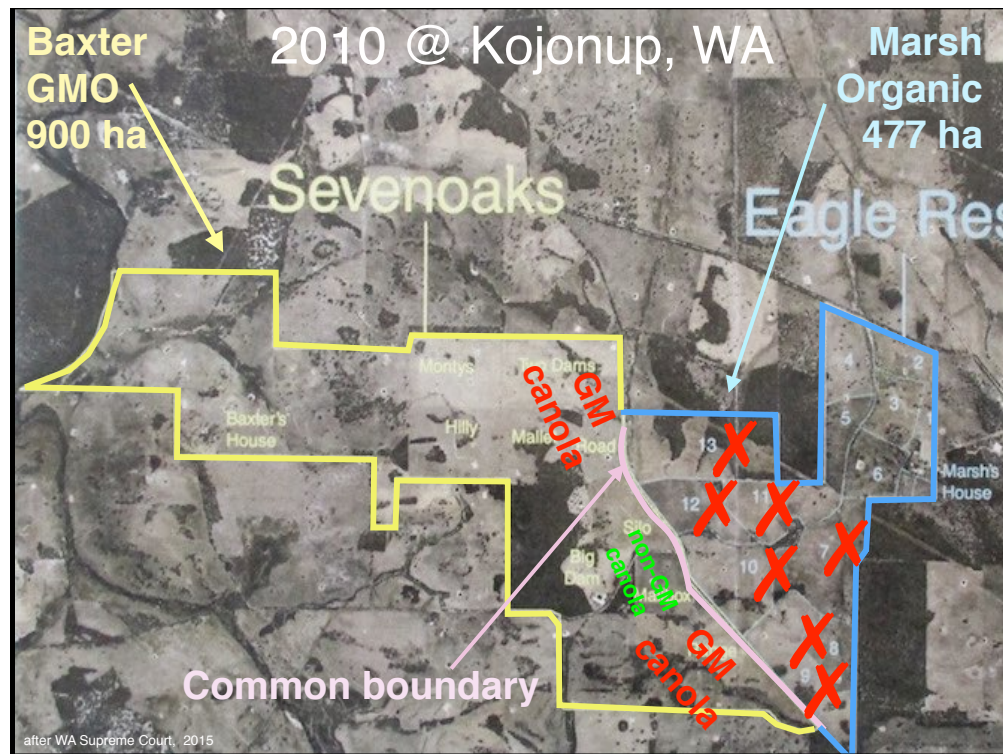
20

The Marsh farm has been a certified organic farm since 2006. Signs on the boundary clearly identify the farm as organic.



21

In 2010 Baxter planted GM canola in 2 of his boundary paddocks
 He planted non-GM canola in a middle paddock.
 Baxter says he ran out of GM seed.



22

The result was that GM canola blew across the organic farm.
Swathes & seeds of GM canola were identified on the organic farm.
The paddocks (7-13) marked with a red cross were decertified due to GM contamination.
This was 70% of the Marsh farm decertified in 2010.

GM canola on the boundary?

- malicious ?
- foolhardy ?
- reckless ?
- provocative ?
- threatening ?
- stupid ?
- sound farming practice?

image: WA Supreme Court, 2015

23

There is an unresolved question as to just why Baxter planted GM canola on the boundary of an organic farm. He had been warned prior that such an action could jeopardise Marsh's organic certification. He went and did it anyway.

Was it malicious, foolhardy, reckless, provocative, threatening, stupid, or sound business practice? or some combination?



24

The case went to the Supreme Court in Perth.
As you see, there was some popular support for Marsh.



Image: Australian Story, ABC TV, 2015

25

The ABC ran the story.
The big picture is of Monsanto versus the World.
The close-in picture is that of an organic farmer who could lose his farm -
and be bankrupted due to the award of costs.



Image: Australian Story, ABC TV, 2015

This is the GM farmer, Michael Baxter.
Baxter grows cereal crops, sheep, and canola.
Here he standing in a canola field.
Since that program, the case has gone on to the WA Court of Appeal
and then to the highest court in the land, the High Court in Canberra.

Harvest - swathing

- 8-10 Nov 2010 Baxter's crop is swathed
- heads cut off & herbicided & windrowed
- wind > swathes, seed pods into organic farm
- 2-4 Dec 2010 swathes collected by Marsh
- Judge: novelty is a defence

Martin (2014)

27

A lot of court time was spent on the method of harvesting of the GM canola. Baxter had grown non-GM canola for a decade. Previously he had always direct headed the crop - so, for all previous crops, the harvester went thru & the seeds were gone from the paddock. For the GM canola, Baxter changed his practices, he swathed the crop - cut the stalks, herbicided, windrowed the cut stalks, and left them for 3½ weeks before collecting the cut material from the fields.

Contamination?

- 245 GM canola swathes > organic farm
- 1.2 km into the organic farm
- Marsh: “contamination”
- Certifier: “contamination”
- Agreed: “no genetic contamination”
- Judge: “incursion”

Martin (2014)

28

The judge determined that 245 GM canola swathes were blown onto the organic farm. And that they had intruded 1.2 km into the farm. To the organic farmer, and to the certifier, this GM material was “contamination”. But to the judge, it was an “intrusion” rather than contamination.

i. Nuisance?

- to prove - interference
- to prove - loss of enjoyment & use
- Judge: no physical damage
- Judge: Marsh can sue the certifier

Martin (2014)

29

There were 4 elements of the case.

For nuisance, the burden of proof is low.

It is to prove that Marsh has lost some use & enjoyment of his land.

The judge found that there was no physical damage to the Marsh farm.

He suggested that Marsh take up the decertification with his certifier rather than Baxter.

ii. Negligence?

- To prove: nuisance + carelessness
- Judge: novel harvesting method (swathing)
- Judge: novelty is a defence

Martin (2014)

30

For negligence, the burden of proof is higher.

It had to be proven that Baxter was careless & acting in disregard of his neighbour.

If nuisance cannot be established, then the case for negligence will also most likely fail.

The Judge stated that Baxter had not used swathing as a harvest method before, & so

because of the novelty of the harvesting method, Baxter could not have foreseen the wind blowing the GMO material onto the organic farm.

iii. Injunction?

- a court order to stop a future action
- ask: 2 km buffer
- ask: 1.5 km buffer
- ask: 1.1 buffer
- ask: no swathing
- no empirical evidence presented

31

Marsh sought to permanently restrain Baxter from some future course of action.
An application for a permanent injunction uplifts a case to the Supreme Court.
The initial request was for a 2km buffer zone between a future GM crop and the organic farm.
Then followed a cascading retreat of demands - down to 1.5 km, then down to 1.1 km, then to zero.
The buffer zone idea was finally relinquished &
replaced with the request for a ban on swathing as a harvest method.

Agreed facts

2 views...

Marsh

“contamination”

negligence

nuisance

injunction

\$85,000 damages

“sue Baxter”

Judge

“incursion”

no negligence

no nuisance

no injunction

\$804,000 costs

“sue the certifier”

Martin, 2014

32

Most facts in the case were agreed between the parties.

However, there was a big difference in the interpretation of the facts.

For Marsh it was “contamination”. For the Judge it was “incursion”.

For Marsh it was negligence. The Judge declared no negligence.

For Marsh it was nuisance. The Judge declared no nuisance.

For Marsh an injunction was called for. The Judge declared no injunction.

For Marsh it was \$85,000 of damages. The Judge declared \$804,000 of costs against Marsh.

For Marsh it was sue Baxter. The Judge declared sue the certifier.



Image: John Paull, 2015

The judgement and the award of costs were appealed by Marsh.
This escalated the case to the WA Court of Appeal.
Once again, popular support was demonstrated for the Marshes.



34

The appeal was lost
and the case was escalated to the High Court in Canberra.

Marsh v Baxter

- Supreme Court of WA 2014 (12 days)
- Court of Appeal (WA) 2015 (3 days)
- High Court (Canberra) 2016 (1 day)

Martin (2014);
McLure, C. J., Newes, D. W., & Murphy, G. H. (2015);
French, R. S., Kiefel, S. M., & Gordon, M. (2016).

35

The case has traversed these 3 tiers of the judicial process.
Each time narrowing the issues, and the time allocated - 12 days - 3 days - 1 day.

Marsh v Baxter Timeline

Dec 2003	GM canola approved for Australia
2004	GMO moratorium in WA (Labor)
Sept 2008	Liberal WA government elected
Nov 2008	Marsh warns Baxter
Jan 2010	Exemption for GM canola under WA moratorium
May 2010	Baxter plants GM canola
Dec 2010	Baxter swathes GM canola
Dec 2010	Marsh finds GM seeds, pods, swathes
Dec 2010	Marsh loses organic certification
April 2012	Marsh sues Baxter
Feb 2014	Supreme Court WA (12 days) - lost
Mar 2015	Appeals Court WA (2 appeals) (3 days) - lost
Feb 2016	High Court, Canberra (1 hour) - refused

36

The timeline of the case has been:

Dec 2003	GM canola approved for Australia
2004	GMO moratorium in WA (Labor)
Sept 2008	Liberal WA government elected
Nov 2008	Marsh warns Baxter
Jan 2010	Exemption for GM canola under WA moratorium
May 2010	Baxter plants GM canola
Dec 2010	Baxter swathes GM canola
Dec 2010	Marsh finds GM seeds, pods, swathes
Dec 2010	Marsh loses organic certification
April 2012	Marsh sues Baxter
Feb 2014	Supreme Court WA (12 days) - lost
Mar 2015	Appeals Court WA (2 appeals) (3 days) - lost
Feb 2016	High Court, Canberra (1 hour) - refused

Foresight...

The question of law to be determined by the High Court

“Does the giving of notice by a plaintiff to a defendant of a risk of harm that later materialises, that notice being soundly based in fact, provide the foundation for finding that the risk was reasonably foreseeable, or does the defendant also need to have had independent means of ascertaining whether the risk exists”

(Special leave to appeal application, 2016, High Court, Marsh & Anor v Baxter, (P44/2015))

37

Ultimately, the case was taken to the High Court.

And this was the question to be determined.

The question was about foresight:

“Does the giving of notice by a plaintiff to a defendant of a risk of harm that later materialises, that notice being soundly based in fact, provide the foundation for finding that the risk was reasonably foreseeable, or does the defendant also need to have had independent means of ascertaining whether the risk exists”.

Foresight...

The question of law to be determined by the High Court

“Does the giving of notice by a plaintiff to a defendant of a risk of harm that later materialises ... provide the foundation for finding that the risk was reasonably foreseeable...[by] the defendant”

(Special leave to appeal application, 2016, High Court, Marsh & Anor v Baxter, (P44/2015))

38

It amounts to this, IF I tell you that IF you knock down that pillar then the roof will fall down, and then you knock down the pillar, and the roof falls in, and then you say that you could not have foreseen that. In Marsh v Baxter, Marsh, foresaw the GMO risk to his farm, and he gave Baxter fair and timely notice (verbally & in writing) that a GMO crop on Baxter's land had the potential to contaminate Marsh's farm and that would put Marsh's organic certification in jeopardy.

High Court of Australia

Special leave to appeal - refused

The court of last resort



Image: John Paull, 2016

39

The High Court of Australia is the court of last resort.
Special leave to appeal was refused.
This result leaves the case as a train wreck.



Baxter's legal costs paid for by Monsanto
Baxters visit New Zealand with Monsanto \$

Image: Australian Story, ABC TV, 2015

40

The Baxter's had a trip to New Zealand paid for by Monsanto -
the provider of the GM canola.
Baxter paid none of his own costs.
They were paid by Monsanto.



Costs awarded against Marshes

Image: John Paull, 2015

41

Sue & Steve Marsh face massive cost orders.
Meanwhile, their organic certification has been reinstated.



Marsh v Baxter - an Australian precedent

A win for Monsanto

- Impunity to contaminate organic farms

A loss for organic sector

- No security of production
- No buffer zoning
- No reimbursement of economic loss
- Fair warning of harm carried no weight
- Costs disproportionate to damages

42

The Marsh v Baxter case has created an Australian precedent

The case is a win for Monsanto and appears to grant an impunity to contaminate organic farms

The case is a loss for the organic sector, offering:

No security of production;

No buffer zoning;

No reimbursement of economic loss;

No weight for fair warning of harm;

Costs disproportionate to damages.



Thank you.
I welcome your questions.

References

- CBAN. 2015. Where in the world are GM crops and foods? The reality of GM crops in the ground and on our plates. Ottawa, Canadian Biotechnology Action Network (CBAN).
- French, R. S., Kiefel, S. M., & Gordon, M. (2016). *Results of Special Leave Applications: Marsh & Anor v Baxter (P44/2015)*. 12 February. Canberra: High Court of Australia.
- James, C. (2014). Global Status of Commercialized Biotech/GM Crops: 2013. Brief 46. Manila, Philippines: International Service for the Acquisition of Agri-Biotech Applications (ISAAA).
- Martin, K. (2014). Judgment: MARSH -v- BAXTER [2014] - WASC 187BC201302729; CIV 1561/2012. Perth: Supreme Court of Western Australia.
- McLure, C. J., Newes, D. W., & Murphy, G. H. (2015). *Judgment: MARSH -v- BAXTER [2015] - WASCA 169; CACV 67 of 2014*. 3 September. Perth: Supreme Court of Western Australia.
- Paull, J. (2008). Beyond equal: from same but different to the doctrine of substantial equivalence. *M/C Journal of Media and Culture*, 11(26).
- Paull, J. (2014). Organic versus GMO farming: Contamination, what contamination? *Journal of Organic Systems*, 9(1), 2-4.
- Paull, J. (2015). GMOs and organic agriculture: Six lessons from Australia. *Agriculture & Forestry*, 61(1), 7-14.
- Paull, J. (2015). The threat of genetically modified organisms (GMOs) to organic agriculture: A case study update. *Agriculture & Food*, 3, 56-63.
- Paull, J., & Hennig, B. (2016). Atlas of Organics: Four maps of the world of organic agriculture. *Journal of Organics*, 3(1):25-32.
- Willer, H., & Lernoud, J. (Eds.). (2015). *The World of Organic Agriculture: Statistics and Emerging Trends 2015*: Frick, Switzerland: Research Institute of Organic Agriculture (FiBL) & Bonn: IFOAM-Organics International.

Geography & Spatial Sciences Conference
University of Tasmania, Hobart, Australia
7-8 June 2016

- CBAN. 2015. Where in the world are GM crops and foods? The reality of GM crops in the ground and on our plates. Ottawa, Canadian Biotechnology Action Network (CBAN).
- French, R. S., Kiefel, S. M., & Gordon, M. (2016). *Results of Special Leave Applications: Marsh & Anor v Baxter (P44/2015)*. 12 February. Canberra: High Court of Australia.
- James, C. (2014). Global Status of Commercialized Biotech/GM Crops: 2013. Brief 46. Manila, Philippines: International Service for the Acquisition of Agri-Biotech Applications (ISAAA).
- Martin, K. (2014). Judgment: MARSH -v- BAXTER [2014] - WASC 187BC201302729; CIV 1561/2012. Perth: Supreme Court of Western Australia.
- McLure, C. J., Newes, D. W., & Murphy, G. H. (2015). *Judgment: MARSH -v- BAXTER [2015] - WASCA 169; CACV 67 of 2014*. 3 September. Perth: Supreme Court of Western Australia.
- Paull, J. (2008). Beyond equal: from same but different to the doctrine of substantial equivalence. *M/C Journal of Media and Culture*, 11(26).
- Paull, J. (2014). Organic versus GMO farming: Contamination, what contamination? *Journal of Organic Systems*, 9(1), 2-4.
- Paull, J. (2015). GMOs and organic agriculture: Six lessons from Australia. *Agriculture & Forestry*, 61(1), 7-14.
- Paull, J. (2015). The threat of genetically modified organisms (GMOs) to organic agriculture: A case study update. *Agriculture & Food*, 3, 56-63.
- Paull, J., & Hennig, B. (2016). Atlas of Organics: Four maps of the world of organic agriculture. *Journal of Organics*, 3(1):25-32.
- Willer, H., & Lernoud, J. (Eds.). (2015). *The World of Organic Agriculture: Statistics and Emerging Trends 2015*: Frick, Switzerland: Research Institute of Organic Agriculture (FiBL) & Bonn: IFOAM-Organics International.

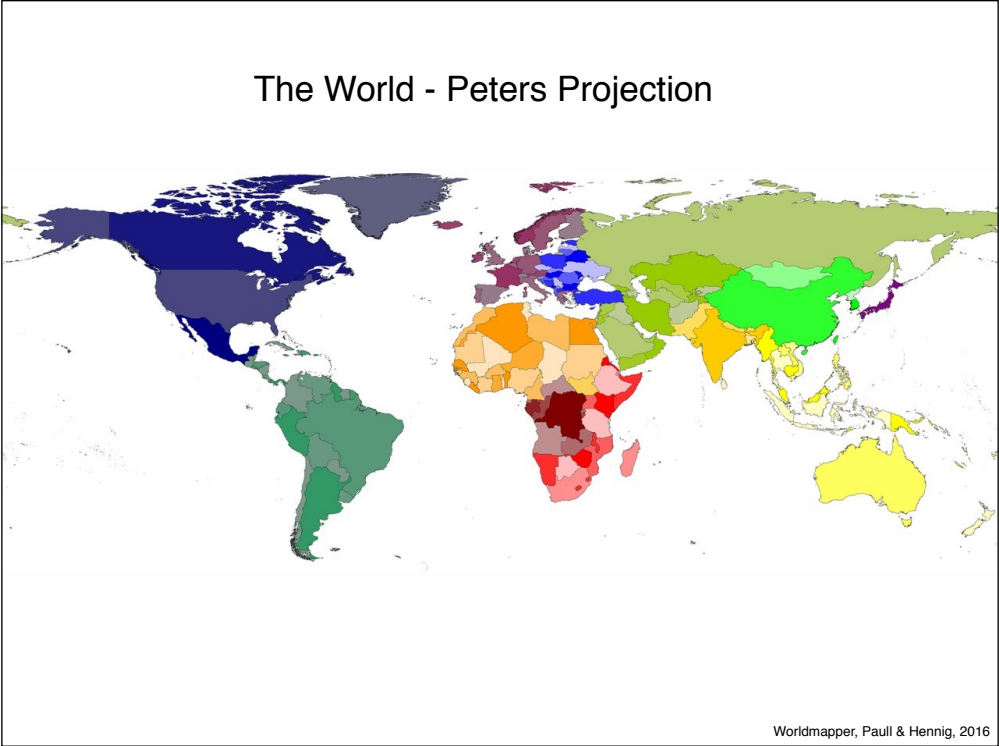
Abstract

Australia is a global leader in organic production and a minnow in global GMO production. Organic produce consistently sells at a premium, while genetically modified (GM) produce consistently sells at a discount. In the case of Marsh and Baxter, the facts were agreed but their interpretation was not and this proved fatal to the case. This was a dispute between two farmer neighbours at Kojonup, Western Australia. When the GMO moratorium was lifted in WA, Baxter promptly planted Monsanto GM canola along his border with his organic neighbour. Marsh had previously warned Baxter that the organic certification of the Marsh farm was at risk if it was contaminated by an incursion of GM canola. The foreseen incursion eventuated and the certifier (NASAA) withdrew the organic certification. Marsh sued Baxter. The parties agreed that the Marsh loss was \$85,000. The case (for nuisance and negligence) was lost in the Supreme Court of Western Australia, the WA Court of Appeals, and eventually the High Court of Australia. The cumulative costs of this litigation will exceed \$2 million. Monsanto indemnified the GM farmer, whereas the costs put the livelihood of the organic farmer at risk. The case offers no evidence that organic/GM co-existence is viable, and no confidence that current law provides any protection for organic farming from GM contamination or predatory planting.

45

Abstract

Australia is a global leader in organic production and a minnow in global GMO production. Organic produce consistently sells at a premium, while genetically modified (GM) produce consistently sells at a discount. In the case of Marsh and Baxter, the facts were agreed but their interpretation was not and this proved fatal to the case. This was a dispute between two farmer neighbours at Kojonup, Western Australia. When the GMO moratorium was lifted in WA, Baxter promptly planted Monsanto GM canola along his border with his organic neighbour. Marsh had previously warned Baxter that the organic certification of the Marsh farm was at risk if it was contaminated by an incursion of GM canola. The foreseen incursion eventuated and the certifier (NASAA) withdrew the organic certification. Marsh sued Baxter. The parties agreed that the Marsh loss was \$85,000. The case (for nuisance and negligence) was lost in the Supreme Court of Western Australia, the WA Court of Appeals, and eventually the High Court of Australia. The cumulative costs of this litigation will exceed \$2 million. Monsanto indemnified the GM farmer, whereas the costs put the livelihood of the organic farmer at risk. The case offers no evidence that organic/GM co-existence is viable, and no confidence that current law provides any protection for organic farming from GM contamination or predatory planting.



Reference map of the world.