

**STANDING COMMITTEE ON
ENVIRONMENT AND PUBLIC AFFAIRS**

**INQUIRY INTO MECHANISMS FOR ECONOMIC LOSS TO FARMERS IN
WESTERN AUSTRALIA CAUSED BY CONTAMINATION BY
GENETICALLY MODIFIED MATERIAL**

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
TUESDAY, 24 APRIL 2018**

SESSION ONE

Members

**Hon Matthew Swinbourn (Chair)
Hon Colin Holt (Deputy Chair)
Hon Tim Clifford
Hon Samantha Rowe
Hon Dr Steve Thomas**

Hearing commenced at 9.30 am**Dr JOHN PAULL****Research Scientist, sworn and examined:**

The CHAIRMAN: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or the affirmation.

[Witness took the affirmation.]

The CHAIRMAN: Thank you. You would have signed a document titled “Information for Witnesses”. Have you read and understood that document?

Dr PAULL: I have read and understood it.

The CHAIRMAN: Thank you. These proceedings are being recorded by Hansard and broadcast on the internet. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones, particularly since you are appearing via Skype. Try to make sure that you speak into them and that you do not make any unnecessary noises around them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Dr Paull, would you like to make an opening statement?

Dr PAULL: Yes. I would like to make four points.

The first point is that the simplest solution is to reinstate the GM moratorium in WA. The second point is that in the Marsh v Baxter case, most of the facts were agreed to, so the case was not about facts. There was \$85 000 of real economic loss that was agreed between the parties. There was incursion of GM material across most of the Marsh farm; that was agreed between the parties. Then there were years of litigation and \$2 million approximately spent in legal fees. Most of that legal argument was about nuisance or negligence—was this nuisance or negligence in the definition of the common law? The result was 2–1 against in the appeal. So, it was a marginal decision in any event, but the result was that Marsh spent a lot of time, put his livelihood at risk, and there was no satisfaction. I think that really the underlying purpose of why we are here is that that was an unsatisfactory result. The third point is that Marsh v Baxter has had a chilling effect on anyone else harmed, for the simple reason that you do not want to be vilified; you do not want to go through the expense; and you do not want to get no result. The result, you can say, is a culture of “Don’t ask; don’t tell”, and that is unfortunate.

The fourth point is if there are funds and we can develop a process for collecting the premiums—there are funds coming in and there are funds going out—there is a simple procedure for getting those into balance, because they will be of necessity unbalanced. The way to do that is to put a CTP—compulsory third party—operator in the middle and then they collect the income as

premiums, which you can do in WA, and they underwrite the risk that there are claims, and then they pay the claims. The CTP operator has the procedures for doing all that. ICWA is your operator in WA, who does a very respected and competent job in CTP. CTP is a proven method. It works in WA and it works around the world, so we do not need to reinvent the wheel. That is my statement. Thank you.

Hon COLIN HOLT: Good morning, or good afternoon—it might still be morning for you.

Dr PAULL: Good morning; it is morning.

Hon COLIN HOLT: I am interested in the CTP idea. You say that we are well versed in collecting the premiums. When we established no-fault insurance in Western Australia for motor vehicles, it was based on a well-known catastrophic injury rate, so you could set the premium at a known history of what it potentially cost the community. We probably do not have that in this instance. Have you got any suggestions or can you comment on that?

Dr PAULL: I agree we do not have the history, and we are suppressing the history right now, so we are not likely to get the history on the trajectory we are currently on. I think the appropriate thing is to give it to, for example, a set of actuaries at ICWA, or anywhere else, and let them work through the identified risks, and they can scan the world for that, and then put probabilities against them—that is what an actuary does—and on that basis work out a premium. Premiums in CTP are modest amounts, despite the fact, as you said, that there are catastrophic events and catastrophic harms in, for example, motor accidents. Nevertheless, the CTP charges for individuals, because it is spread over a population of vehicle users, is a modest amount. It is a manageable amount, and it is the cost of being in charge of a vehicle, which is a potentially harm-precipitating object.

Hon COLIN HOLT: Is there any history of it happening anywhere else in the world or in any other jurisdictions that you are aware of?

Dr PAULL: CTP has a long history everywhere around the world, but CTP for GM contaminations, no. GM contamination is a new issue. The simplest way to avoid GM contamination is to just ban GM, and lots of places have done that. Eighteen countries in Europe have done that; Russia has done that; provinces in China have done that; states in India have done that; and states in Australia have done that as well, banning GM. That solves the problem of the potential harm. Failing that, a CTP scheme is a mechanism that we know the infrastructure of, we know the mechanisms of, and yes, we could work out the premiums.

The CHAIRMAN: Just to let you know, Dr Paull, Hon Colin Holt will have to leave in about half an hour. So, please do not take it as a personal slight. It is a pre-existing commitment that he has to attend to. We will still proceed with the hearing without him. We provided you with a list of questions to give you some notice of the material that we are going to cover today, so what I propose to do is work my way through those questions and get your responses. It may give opportunities for other lines of inquiry, and members of the committee may jump in with any issues that they wish to raise with you. The first is that you state on page 1 of your submission —

GM crops put non-GM growers and organic growers at risk of contamination and this can lead to economic losses.

You state on page 4 —

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.

Are you aware of any instances in Australia, and particularly in Western Australia, of farmers suffering economic loss due to GM contamination, including as a result of product recalls? We can

take it as given that we are aware of the Marsh v Baxter case. That is the most obvious one. We are after anything outside of that that you might be aware of.

[9.40 am]

Dr PAULL: There is an Ian James case of a WA wheat farmer, and that was in the press. Documentation on that, as far as I know, was not presented by Ian James, but it was reported in the press. Another case was wheat hay from WA that was rejected. It was exported to Japan, and it was rejected on the basis that it was contaminated with GM canola material. Other than that, as I pointed out, a reasonable strategy for a farmer that is contaminated is to just wear it and be smart. The fact is we do not have a lot of data on this.

The CHAIRMAN: Are you aware of any other examples outside of Western Australia in other jurisdictions?

Dr PAULL: Lots of jurisdictions have just banned it to solve this problem —

The CHAIRMAN: I mean the other states of Australia, rather than international jurisdictions?

Dr PAULL: No.

The CHAIRMAN: Thank you. You state on page 1 of your submission that “the law failed to provide any remedy to the harmed party” in Marsh v Baxter, and on page 5 that “common law remedies are not effective to remedy harms caused by GM contamination”. The committee has received evidence from some submitters that the common law is adequate—or certainly they have put forward that proposition—and the other proposition is that a single case is not sufficient to draw a conclusion that common law remedies are inadequate to compensate GM farmers. Can you envision there being possible factual scenarios that might have led to a different outcome in Marsh v Baxter?

Dr PAULL: I will put some counterfactuals. A counterfactual might have been that the case was settled out of court. A counterfactual might have been that Baxter did not swath cut and drop his crop, and that would have avoided some of this angst. The original case could have been presented better and the barrister for the appeal could have been more on his game. They are some counterfactuals. The fact is, however, as pointed out by one of your members here—thank you—CTP for motor insurance was precipitated by some catastrophic injury that could have been addressed in common law; it could have been resolved. The reality is that it is very difficult and challenging to take every motor accident case through the common law. But the procedures are still there and the options are still there. The CTP is put in place for the simple reason that it is a much simpler, much more straightforward and much fairer system.

The CHAIRMAN: Some submitters have stated that there have been no shipments of grain rejected by export markets due to the unintended presence of GM canola since its introduction in Western Australia and that any compensation scheme is nothing but a solution looking for a problem. What is your response to that?

Dr PAULL: I think my response is that CBH are doing a very good job of testing all of their grain before it leaves the state. When it is contaminated, they are downgrading it to GM. A normal agricultural practice for shipping grain is to downgrade until you get down to a grade that it would be accepted by the purchaser. So the cost of segregation and then contamination and then downgrades is borne by the whole WA agricultural community. But we need to give credit to CBH that, yes, their grains have not been rejected, and that is for the simple reason that they have been tested before they have been sent and they have been tested when they have arrived and there is nothing there.

The CHAIRMAN: You state at page 6 of your submission, in your commentary on the option of a levy being imposed on the GM, sector that —

If there are demands that exceed the levy pool, then the scheme fails the harmed parties, in that a speedy resolution is unachievable.

I note the principles for farmer protection legislation advocated by a number of organisations state that if compensation claims exceed the value of the fund, an administrator of the fund would request the minister that the levy be raised to cover the shortfall. What is your response to this?

Dr PAULL: My response is that the minister might have better things to do than to be balancing these two funds. As was pointed out and as is precipitated in the question, these two funds, incoming and outgoing, are necessarily out of sync. So, the way to put them into sync is to put an intermediary, and that is a risk taker in the middle, which is, for example, a CTP provider. That would then put them back into sync, because the CTP provider is collecting all of the premiums and underwriting all of the outgoings, and the minister can sit back and do his or her ministerial duties.

The CHAIRMAN: Are you proposing this CTP as a no-fault type system or would there still need to be a proof of —

Dr PAULL: That would be the simplest CTP scheme. There are various nuances in a CTP scheme, but no fault is the sensible approach in my opinion.

The CHAIRMAN: Do you have a view on whether a levy would potentially be categorised as an excise levy, which can be only imposed by the commonwealth government?

Dr PAULL: Yes. I would not be calling it a levy, because CTPs are not levies. They are insurance premiums, and insurance premiums can be imposed and collected by the WA government, is my understanding.

The CHAIRMAN: If we are talking about a levy for a compensation mechanism rather than CTP, have you drawn any views as to whether or not that might be in breach of the constitution in terms of it being an excise tax rather than something that is within the state's powers?

Dr PAULL: I think you are right—it could be contested. I think I would get an opinion from the Attorney General for a start.

The CHAIRMAN: You also state on page 6 of your submission that —

There is no certainty that non-GM growers could obtain a MCPI policy covering contamination and harms by GMOs.

Are you aware of any instances where multi-peril crop insurance covering GMO contamination has been offered in Australia?

Dr PAULL: I do not think it is available in Australia. That is my conclusion.

The CHAIRMAN: That is your understanding?

Dr PAULL: Correct.

Hon COLIN HOLT: Anywhere else? What about any other jurisdictions?

Dr PAULL: Everybody is very loathe to take this on and I am not aware of any, no.

The CHAIRMAN: On pages 7 and 8 of your submission, you recommend as a model a CTP GMO incident scheme. Do you have any suggestions about how much the proposed premiums might be? I take into account your earlier statements about the Insurance Commission of WA actuaries working out the risk. Would that be your suggestion, that they do that, rather than putting forward an amount at this stage?

Dr PAULL: Yes. I do not think it is appropriate to put forward an amount, no. It would be a minor amount. In the scheme of things, it would be a trivial amount.

The CHAIRMAN: How would you suggest the premium be collected?

Dr PAULL: The premium for a CTP motor vehicle is collected at the time you get your licence, so it could be collected at the same time. You need a licence for growing GM, so it could be collected at the licence point. In any event, it should be collected not as a separate transaction, but bundled with something else. So at the point of getting the GM licence, that would be the appropriate place, in my opinion.

The CHAIRMAN: In your submission, you state that a CTP scheme can recover costs from the harming parties. Do you mean costs over and above the premiums that are being paid, and are you suggesting circumstances perhaps where a party can be shown to have acted with deliberate actions where there is some obvious negligence? Is that the situation where you are saying there could be a recovery against a wrongdoer, so to speak?

Dr PAULL: What we have learned from Marsh v Baxter is that negligence is a very fraught area in arguing, perhaps especially in WA. So, the short answer to that is no. However, the CTP provider could be expected to have the option of suing a fraudulent or a criminal act and then recovering costs. In WA with Bell Group, for example—I am not saying it is fraudulent; I am not saying it is criminal—ICWA, as I understand it, are chasing a lot of money from Bell Group because they did not pay premiums. So, yes, a CTP provider can expect to have some time in court to collect things other than premiums. However, most of the income from the ICWA is from premiums, and I would expect it to be the case as I am proposing for CTP GM as well.

The CHAIRMAN: Okay. Some submitters regard GM contamination as inevitable, and that as insurance deals with risk, not inevitable consequences, it is not appropriate or applicable to GM contamination. What is your view on this?

[9.50 am]

Dr PAULL: My view is that this is a complete misunderstanding of risk, because you have populations and individuals and you need to understand the difference. So, the probability, for example, that somebody's house in WA will burn down is highly probable, but the probability for the individual—you—is that your house will not burn down. So, yes, there is inevitability, or near inevitability, at the population level, but we are talking about at the individual level, and that is where the CTP comes in.

The CHAIRMAN: In terms of the CTP, you have stated —

... remedies can be implemented promptly, at little or no cost to the harmed party, and without acrimony

Can you provide to the committee some information on how you see the claims process operating in the event of GM contamination—that is, from the moment of contamination, how would the CTP process work, in your view?

Dr PAULL: I think we would just take as the model the motor accident claim from ICWA and tweak it just the tiniest amount and let them manage the process.

The CHAIRMAN: Essentially, a person makes a complaint to the Insurance Commission of WA, they then pick up the complaint, and if they can establish the necessary facts of contamination, the compensation will flow from there. Would that be a good summary?

Dr PAULL: Yes, that would be a very fair account. This wheel has already been invented. We do not need one between us, or otherwise we will have to reinvent it.

The CHAIRMAN: Are you aware of organic export notice 2018-01, which was released earlier this year?

Dr PAULL: Yes, I am aware of that.

The CHAIRMAN: It recommends that where there has been an accidental introduction of a prohibited substance or materials, including GMOs, the appropriate sanction by the certification body should be the issuing of a corrective action request only, not a suspension or decertification of the relevant unit. What is your position on this?

Dr PAULL: First of all, we have to accept that this is an advisory note; it is not binding on anybody. I would need a lot of convincing that that advisory is correct or reasonable, for the very simple reason that if we have an assembly line and a fault develops in a product, the onus is on the operators to press the stop button, stop production, take the faulty items out of production and then reinstate the assembly line. I think the analogue of that in organic growing is that, yes, the notification that there is some contamination or whatever—a CAR—is made, but on top of that this process of certification should be suspended, the problem resolved, and then reinstated.

The CHAIRMAN: Do you believe there is a risk that if GM-free farmers make compensation claims under any statutory scheme or some other scheme, actions for unlicensed patent use may be made, potentially having a chilling effect on the making of such claims?

Dr PAULL: It is a very interesting question. Firstly, I would like to make two points. One is Monsanto tried this as, let us call it, a stunt in Canada. Percy Schmeiser was a very persistent guy, a farmer in Canada, and he took it through all of the legal steps, and he lost. We have to say he lost. Monsanto won the legal case, but Percy Schmeiser won the public relations war. The result was that Monsanto painted themselves into a corner as the evil corporation and they still have not painted themselves out of that corner, in my opinion. I would suggest that they have not been repeating that Percy Schmeiser strategy around the world and they would be quite loathe to do it. The second point is that we could put a clause in the CTP, or whatever scheme you propose, that says a contamination claim trumps a patent misuse claim, so that the patent misuse claim cannot ride over the top or run in parallel with a contamination claim. That would resolve the issue from the one point of view that history tells us that Monsanto might be very reluctant to do this; and, then, secondly, solve it with a clause.

The CHAIRMAN: I take it you are not a lawyer, so just take this question as best you can, but, as I understand it, patent law in Australia is commonwealth law, and the laws we are proposing here are state laws. Is there not an issue there in terms of whether or not the state could overcome a commonwealth law regarding ability to enforce patent rights?

Dr PAULL: It is a possibility. If you ask me, I would write the clause into it and see if the commonwealth challenges it. If the commonwealth does not challenge it, it stands.

The CHAIRMAN: Some submitters have asked that if a compensation scheme was introduced for GM contamination whether there would also be compensation for all sources of contamination, such as weed intrusion, which some people have submitted is a problem for organic farms due to a lack of weed control. What is your response to that?

Dr PAULL: My response is that weed incursion is normal and it has been happening for the last 10 000 years. It is a very, very normal event. GM incursion is not a normal event. We do not want it to be a normal event, and it needs to be compensated. We do not compensate normal, for example, but we do compensate abnormal contamination.

The CHAIRMAN: Are you aware of any evidence to support the proposition that organic or biodynamic farms have a greater problem with weed control than conventional farming methods, if we can use that term?

Dr PAULL: The definition of a weed is a plant that is in the wrong place. Monoculture farmers will have a different approach to weeds, where they may regard everything that is not their crop as a weed, whereas a biodynamic or organic farmer will regard that he or she is managing an ecosystem, and the fact is that on this planet we are managing an ecosystem, not a monoculture.

The CHAIRMAN: Some submitters have stated that the introduction of a compensation scheme would stifle agricultural innovation. Do you have a response for us on that claim?

Dr PAULL: I do. I think the opposite. I think it would foster innovation. That is what we know from CTP motor vehicle insurance. A car today is safer than a car last year, 10 years ago, 20 years ago or 30 years ago, and that is because CTP data has fostered innovation. Accidents cost money, so it puts the onus on motor companies to make safer cars, and that is what they have done. I think the opposite is the answer to your question, and that is that CTP will foster innovation in increased safety.

The CHAIRMAN: Some submitters have also raised the prospect of a compensation scheme giving rise to false claims to access compensation. Do you have a response for us to that claim?

Dr PAULL: Every business and every organisation has to deal with the potential of fraud, so there are protocols to do that. I would just see ICWA and see what their protocols are. They have protocols and lots of experience of this. Fraud, in any event, is a tiny, tiny fraction of everybody's business.

The CHAIRMAN: The committee has received some submissions that agricultural crops are never 100 per cent pure and that coexistence means meeting agreed low-level thresholds of GM. What is your response to that statement, Dr Paull?

Dr PAULL: My response is that crops today are 100 per cent free of Monsanto's GM genes, and that is the way we want to keep it. We have data from all around the world that that is the way consumers from all around the world want to keep it. We do not want to make contamination normal. It is the view of Monsanto and other GM advocates that GM contamination is normal. It is not normal.

The CHAIRMAN: We have had a number of submissions to the inquiry that have made the claim that they have grown GM and non-GM canola side by side successfully without any issues with contamination. What is your perspective on this?

Dr PAULL: I think those people are delusional, for the very simple reason that pollen wants to party, and pollen from canola also wants to party, and these pollen boys want to go out and have sex. That is what they do. They travel up to 1.5 kilometres to do that. So it is not possible to grow it side by side and for there to be no pollen interchange. It is just biologically not possible.

The CHAIRMAN: A farmer who grows conventional canola and has neighbours who grow canola has submitted to the committee that the incursion of GM canola on his property has not resulted in any economic loss. He states that GM canola seed was eliminated along with weeds in the normal way when preparing for the next crop and that GM canola seedpods shatter, fall to the ground and are not recovered in the harvesting process. What is your response to that?

[10.00 am]

Dr PAULL: In a word, nonsense. In Tasmania, canola seed is very persistent in the soil. For example, we have good data on this in Tasmania. In the late 1990s, there were GM trials of canola and those sites are still monitored for rogue canola and the canola is still coming up on those sites—not all of them, but some of them. So 20 years later we still have rogue canola coming up on test sites. So what we know from that is that it is very persistent in Australian soil. It is very hard to get rid of. The

Tasmanian government, Monsanto even, would love to get rid of it. We do not have a method of getting rid of it. If your farmer has a method, that is wonderful, but it is not credible in my opinion.

The CHAIRMAN: So how persistent is canola in terms of the years? What is the lifespan of a seed?

Dr PAULL: The lifespan of a seed, like any seed, it is reducing. But what I am saying is 20 years later in Tasmania, we still have canola plants popping up on sites that were seeded 20 years ago. You need to talk about the probability of surviving a particular time, but here is data that says 20 years later it is still there, and Monsanto are not going to disagree with that result.

The CHAIRMAN: Has there been a report on this particular example that you are talking about now in Tasmania? Has some peer-reviewed research been done on that?

Dr PAULL: The government has published audits on semi-annual on a regular basis for the last 20 years, yes.

The CHAIRMAN: They are publicly available, are they?

Dr PAULL: They are publicly available, yes.

The CHAIRMAN: Now, harming parties cannot always be identified. Does that have any implications for a CTP scheme for GM? I note you state on page 7 that a CTP scheme can recover costs from harming parties. So is it necessary that there is always identification of a harming party?

Dr PAULL: No, it is not necessary at all. In Percy Schmeiser's case, he could not identify where the GM canola came from and Monsanto did not pretend to identify where it came from and there is no necessity in a CTP scheme to know where it came from.

The CHAIRMAN: I think that brings us to the end of our questioning, Dr Paull. Did you wish to make a closing statement for us today?

Dr PAULL: Again, I reiterate that the simplest solution is to have a GM moratorium reinstated in WA. You had a good record of doing that and you are not very far off that. You only have a few exemptions from your moratorium. It could be put as an appendix to say that this is something to consider. It would be easier than having harm created and then harm compensated.

The CHAIRMAN: Thank you for attending today and persevering through the technological issues. I think there was a bit of a delay on both ends so I think we have done quite well. A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. We have not put any questions on notice, but if you wish to provide any additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence. We thank you for your time this morning, Dr Paull.

Dr PAULL: Thank you.

Hearing concluded at 10.03 am