

30 July 2014

The Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

RE: INQUIRY INTO GRAIN EXPORT NETWORKS, INCLUDING THE ON- AND OFF-FARM STORAGE, TRANSPORT, HANDLING AND EXPORT OF AUSTRALIAN GRAIN

CropLife Australia (CropLife) is the peak industry organisation representing the agricultural chemical and biotechnology (plant science) sector in Australia. CropLife represents the innovators, developers, manufacturers and formulators of chemical crop protection products and agricultural biotechnologies.

The plant science industry provides products to protect crops against pests, weeds and diseases, as well as developing crop biotechnologies that are key to the nation's agricultural productivity, sustainability and food security. The plant science industry is worth more than \$17.6 billion a year to the Australian economy and directly employs thousands of people across the country. CropLife Australia is a member of CropLife Asia and part of the CropLife International Federation of 91 national associations globally.

CropLife commends the Senate Standing Committee on Rural and Regional Affairs and Transport for this timely inquiry into the transport of Australian grain.

Section 92 of the Constitution of the Commonwealth of Australia ('the Constitution') prohibits the Commonwealth and the States from imposing burdens on interstate trade and commerce. In the pivotal case of *Cole v Whitfield*¹, the High Court of Australia unanimously held:

"The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries..."

Despite s92, and the case law laid down in *Cole*, as a result of a legislative drafting error, the South Australian Government maintains a total ban on the transport of genetically modified (GM) seed and grain through the state of South Australia. This total ban on the trade and commerce of GM seed and grain originally arose as an unintended outcome following the drafting of technical provisions in the *Genetically Modified Crops Management Act 2004* (South Australia) and subsequent definitional changes made to the Federal *Gene Technology Act 2000* (Cth).

While definitional issues within the Federal *Gene Technology Act 2000* (Cth) may have been a contributing factor to the South Australian GM seed and grain transport ban, it is in South Australia's own legislation where the conflict with Australian Constitutional Law arises and where corrective action is required.

¹ (1988) 165 CLR 360



Background

The *Genetically Modified Crops Management Act 2004* (SA) ('the Act') **s5 (1)(a)(ii)** permits the Governor of South Australia, by regulation to "designate an area of the State as an area in which no genetically modified food crops may be cultivated".

Section 4 of the *Genetically Modified Crops Management Regulations 2008* (SA) states, "Pursuant to s5(1)(a)(ii) of the Act, the whole of the State is designated as an area in which no genetically modified food crops may be cultivated."

Section 3(1) of the Act defines cultivate in relation to a genetically modified food crop to include at paragraph (b) "to spread, disseminate, deal with or dispose of any plant or plant material that has formed part of that crop."

Section 3(1) of the Act further defines deal with, "in relation to a crop, GMO or other material, has a meaning that corresponds to deal with a GMO under the *Gene Technology Act 2000* (Cth)".

Section 10 of the *Gene Technology Act 2000* defines deal with at paragraph (h) to include "transport the GMO".

Key Points

- Technical amendments arising from the *Gene Technology Amendment Act 2007* (Cth) resulted in "transport the GMO" becoming a specific dealing regulated under the *Gene Technology Act 2000* (Cth). Prior to these technical amendments, transport only "in the course of a dealing" was regulated under the Commonwealth Act.
- An **unintended consequence** of these subsequent amendments is that the transport of GMOs is prohibited in South Australia by virtue of being listed as a dealing under the Commonwealth Act.
- This unintended consequence has given rise to a potential Constitutional issue as it may be considered to amount to a burden on the freedom of interstate trade and commerce (refer to **s92** of the Constitution and the judgment in *Cole*).
- There is no indication in the Second Reading Speech of the *Genetically Modified Crops Management Bill 2004* (SA) that the Parliament of the day intended for the Act to ban transport of GM seed and grain through the state.
- There is further evidence from the Second Reading Speech that the Parliament of the day noted that the Act needed to be compliant with national competition principles and also consistent with Commonwealth law (noting that **s109** of the Constitution renders invalid and inoperative any state law to the extent that it is inconsistent with the Commonwealth Law).
- There exists significant overlap between the definition of cultivate in the South Australian Act and the definition of deal with in the Commonwealth *Gene Technology Act*.
- Relatively minor amendments to the South Australian *Genetically Modified Crops Management Act 2004* could resolve this issue.



CropLife suggests that the Senate Standing Committee on Rural and Regional Affairs and Transport recommend, through the COAG process, that the Government of South Australia makes the following amendments to the *Genetically Modified Crops Management Act 2004* (South Australia) that will prevent the Act from being in potential conflict with s92 of the Constitution and that will also allow for the unfettered transport of GM seed and grain through the State of South Australia.

1. Delete 'deal with' from paragraph (b) of the definition to cultivate.
2. Insert in the definition to cultivate:
 - Conduct experiments with the GMO
 - Make, develop, produce or manufacture the GMO
 - Use the GMO in the course of manufacture of a thing that is not the GMO
 - Import the GMO
 - Dispose of the GMO.

It is important that as part of the National Regulatory Scheme for Gene Technology, that all states have legislation that is consistent with that of the Federal *Gene Technology Act 2000* (Cth), in order that any future amendments to the Federal Act do not have unintended changes in the states as has occurred in South Australia.

Please do not hesitate to contact me or CropLife's Policy Manager for Crop Biotechnology, Mr Osman Mewett (osman.mewett@croplifeaustralia.org.au 02 6230 6399) should you require any additional information to enable you to give due consideration to this issue.

Yours sincerely

(SIGNED)

Matthew Cossey
Chief Executive Officer