

21 August 2008

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SUBMISSION TO A.C.I.P. REVIEW OF ENFORCEMENT OF PLANT BREEDERS' RIGHTS OPTIONS PAPER

Australian Forest Growers appreciates the opportunity to make a submission to the ACIP Review PBR Options Paper. This submission provides comment on issues raised in the Options Paper that are of interest to tree growers in Australia, many of whom are engaged in tree breeding as a key facet of their forestry business.

Australian Forest Growers (AFG) is the national association representing the private forest growing sector of the wood and paper industry.

AFG's members include farm plantation growers, private native forest managers and private commercial plantation companies. Since 1969, AFG has been advocating responsible establishment and management of plantations on agricultural land, which provide the multiple outcomes that the community increasingly demands. The growing of commercial plantations and active management of private native forests by our members has been delivering improved landscape health outcomes for decades, as well as complementing existing productive agricultural land use practices.

The development of a framework for adhering to intellectual property laws in plant breeding is significant to forest growers. Unlike other cropping industries, forestry is yet to widely adopt clonal varieties, however, tree breeding work towards that goal is underway. AFG urges ACIP to consider the need to ensure the revised framework supports investment in tree breeding for clonal forestry, and protects the rights of tree breeders in a practical and enforceable manner.

CONCERNS WITH CURRENT LAW

Given the long life cycle of forest trees, end-point royalties which are payable on harvesting the crop, are not apparently relevant to tree breeders. Point of sale royalties are likely to be more widely used, and are adequately covered by the existing provisions of Section 11 (per Option 1).

However, the long life cycle of trees means that purchasers of tree stock may be reticent to use improved genetic material (and hence pay royalties) when it is unclear that improved material will deliver an advantage, something which may take many years to be quantitatively verifiable. For this reason, a split royalty payment – part at point of sale and part on achieving satisfactory growth (e.g. 5 years), or for short rotation trees (e.g. 10 years) upon harvest, may be an appropriate structure that facilitates future investment in forest tree breeding.

Strengthening of the legislation to introduce a right over “use “ of the material along the lines proposed by Option 2 would increase the flexibility of the system for breeders of long life-cycle crops such as trees. It would also improve the ability of breeders to enforce their rights prior to having obtained evidence of the acts referred to in section 11.

EXTENDED RIGHTS AND ‘REASONABLE OPPORTUNITY’

At issue here is how well Sections 14 and 15 of the PBR Act reflect Articles 14(2) and (3) of the UPOV Convention. Greater alignment of UPOV and the PBR Act may reduce the uncertainty inherent in the current PBR Provisions.

On the matter of “reasonable opportunity”, the notion of reasonableness is well known to the court system, and it would appear to be out of sync with other legislation to attempt to provide a definition here for a specific situation. Accordingly, it appears that Options 5, 6 and 7 are not necessary if commonly accepted legal notion of “reasonableness” is maintained.

FARMER’S PRIVILEGE AND BALANCE OF RIGHTS - ALL TAXA

This complex provision of the PBR Act has little relevance to forest tree species.

The presence of this provision provides both grounds for confusion and uncertainty, as well a free benefit to farmers on the efforts of plant breeders.

The Act would be simplified and better meet its objective of supporting plant breeding by removing the Farmer Saved Seed provision.

It is contended in the Options Paper that removal of this provision would contravene Australia’s rights under UPOV and Article 9 of the International Treaty on Plant Genetic Resources in Food and Agriculture. However, this provision includes a provision that makes it subject to the National laws of member countries as follows:

“9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.”

FARMER’S PRIVILEGE AND ASEXUALLY PROPAGATED TAXA

This clause is important for asexually propagate species such as clonal tree varieties.

Current wording of the Act is confusing, with the heading to Section 17 failing to reflect the intent.

Unlike the historical provision for Farmer Saved Seed, there is no practical reason for a similar provision to apply to asexually propagated species. This provides room for confusion, in addition to a negative incentive for tree breeding.

If the aim of the present review is to provide greater certainty to breeders and reduce the likelihood of litigation, and reduce the cost of enforcement, then sexually propagated material should be removed from the Farm Saved Seed provision.

Accordingly, it is strongly suggested that Option 12 be rejected, that Option 14 be adopted. This would make the change proposed by Option 13 redundant.

ESSENTIALLY DERIVED VARIETIES

Options 16 and 17

Issues relating to Essentially Derived Varieties are unlikely to influence breeders of forest Tree Species.

Notwithstanding, it is apparent that the EDV provisions of the PBR Act (a) are confusing with respect to EDV and (b) give disproportionate reward to the discover of and EDV relative to the original breeder.

With respect to the proposed options, Option 16 and 17 both appear unworkable. Under Options 16, the simple administrative issue of recognising PBR rights on an EDV for a variety which is itself not a registered variety appears to undermine the system. Similarly, under Option 17, enabling applications for EDV prior to grant on the original variety appears to undermine the system. On this basis, neither Option can be supported.

Option 18.

The example provided under Option 18 is poor, as the level of active breeding involved in backcrossing a disease resistance gene into a registered variety is far different to simply identifying a sport of the original variety. Backcrossing a disease resistance gene into a registered variety is fundamentally the breeding of a new variety through substantial effort. Identifying a sport of the original variety is simply observation and recognition of a chance event that occurred naturally.

The arguments offered also do not recognise the possibility that an apparent sport may revert to the original variety.

Option 19

Once again, on the principle of giving greater certainty to plant breeders, Option 19 appears to best support the rights of the original PBR owner.

Options 20 and 21

Given the low numbers of EDV applications, Both Options 20 and 21 appear to have no practical value or meaning. Option 20 of having first recourse through the Court System appears to be counter-productive to the aim of reducing system costs and complexity. For this reason, Option 21 is preferred.

Option 22. Develop benefit sharing arrangements

The proposed Option appears to be a logical approach to dealing with the problem, and allows each application to be dealt with on its respective characteristics rather than on a one-size-fits-all basis. For example, where an EDV increases the marketability of the original variety the resolution may be quite different to a situation where the converse occurs. This Option is also appropriate given the low numbers of EDV applications.

Option 23 and 24. Clarify the meaning of s.23

Clearly the current wording of this section is confusing, and the Act would benefit from clarification of the wording as proposed by Option 24.

LACK OF CLARITY

Given the small volume of jurisprudence on the Act, the desire to clarify the Act to improve its utility, and the obvious confusion expressed by legal practitioners re interpretation of the Act, the proposal of Option 26 to clarify the meaning of terms in the Act is supported.

PRE-GRANT ENFORCEMENT

To AFG's knowledge, there is no Australian IP Legislation which allows an action to be commenced. Allowing such pre-grant rights would set a dangerous precedent that might damage the credibility of the PBR Act. Accordingly, Option 27 is supported and Option 28 is rejected.

FEDERAL MAGISTRATES COURT AND PBR

Given that the most significant part of infringement proceedings is generally likely to involve the costs of discovery, expert witnesses etc, potential cost advantages of utilising the FMC are likely to be marginal. Combined with the fact the FMC lacks IP specialists, Option 29 – no change to the jurisdiction of the FMC – is supported.

Option 31 is also supported on the basis that the objective of this review should be to simplify enforcement procedures and reduce cost. Development of a standardised approach to DNA analysis can help achieve this objective by removing argument over methodology from Court, and prevent an obstructive litigant from using this as a means to stall proceedings. Contrary to the statements in the Options paper, a well designed approach to DNA analysis can cover a wide arrange of situations, and accommodate developments in technology.

ALTERNATE DISPUTE RESOLUTION (ADR) AND PBR

As a matter of principle, the concept of employing ADR processes as a first point of call, particularly pre-trial and pre-discovery, where this can lead to simplification of dispute resolution, is supported. To this end, the proposal underpinning Option 33 is supported.

As noted in the Options paper, ADR procedures are unlikely to be appropriate or productive in cases where there is deliberate bad-faith PBR infringement, where an urgent interim injunction is required, etc, and court procedures must remain the ultimate option in such cases.

CRIMINAL SANCTIONS AND PBR

Clearly, the low number of cases that have proceeded to court give the AFP reason to rate PBR as a low priority.

It is suggested that the industry needs to institute a process of reporting infringements, particularly where these do not proceed to court, in order to build a pattern of behaviour that will give cause for attention (or otherwise). Until this is done over an extended period, it would appear there is no basis other than to support Option 34.

ACQUISITION OF EVIDENCE

It is evident from previous submission to the Issues paper that the obtaining of evidence is a key limitation in enforcement of PBR rights. Difficulty with enforcing PBR rights must undermine the utility of the PBR system, and its objective of stimulating investment and innovation in plant breeding. It is likely that most cases where the infringing party is uncooperative will be situations of deliberate bad-

faith PBR infringement. In these instances, stronger measures to allow PBR holders to obtain evidence are warranted. On this basis, a combination of Options 38 and 39 is supported, provided they are combined with adequate safeguards to prevent abuse of these enhanced provisions to obtain evidence. These provisions may also contribute as a deterrent to infringement, which would also be a desirable outcome.

Options 38 and 39 should be combined as described above. AFG would be seeking assurance that appropriate codes of conduct in relation to PBR owners discovery be developed in consultation with industry.

CUSTOMS PROVISIONS FOR PBR

The failure of the PBR system to provide customs seizure provisions is unlikely to have significant impact on protected forest tree species, but is another example of the Act providing a right that is difficult to enforce, undermining confidence in the overall utility of the legislation.

A simple option not mentioned in the Options Paper would be to require that the variety name of protected plant varieties be declared on the quarantine/customs import forms. This would place an obligation to not falsify documents. Combined with a notice system as used for trademarks as suggested by Option 41, would substantially improve the capacity to enforce PBR rights, and reduce the likelihood of infringement.

A system based on notice as proposed by Option 41 would appear to be more appropriate than a blanket system, as it is targeted at specific, suspected infringements and therefore makes efficient use of limited Customs resources.

EXEMPLARY DAMAGES

It is appropriate that PBR be brought into line with other IP rights with the introduction of exemplary damages. Moreover, only where it is proven in Court that there is flagrant and wilful infringement, can exemplary damages be justified as part compensation for the disruption to a PBR holder of having to enforce their right.

The current difficulty with enforcement of PBR rights, and the lack of severe penalties for infringement encourage disregard for the provisions of the act, and undermine the system. For these reasons, the introduction of exemplary damages as proposed under Option 44 is supported.

Please do not hesitate to contact either myself on (02) 6162 9000 or Glenn Dale on (07) 3366 8972 should you wish to discuss any of the issues raised in this submission.

Yours sincerely



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