



Australian Seed Federation

Submission to the

Options paper released by the

Advisory Council on Intellectual Property

For

The review of enforcement of plant breeder's rights

AUGUST 2008

Table of Contents

Cover Page	Page 1
Table of Contents	Page 2
Executive Summary	Page 3
Background, Introduction and Options 1 and 2	Page 4
Options 3 and 4	Page 5
Options 5 and 6	Page 6
Options 7, 8, 9, 10a, 10b and 11	Page 7
Options 12, 13, 14, 15, 16, 17 and 18	Page 8
Options 19a,19b,19c, 20, 21, 22, 23 and 24	Page 9
Options 25, 26, 27, 28	Page 10
Options 29, 30, 31, 32, 33, 34 and 35	Page 11
Options 36, 37, 38 and 39	Page 12
Options 40, 41, 42, 43, 44, 45, 46 and Question 1	Page 13
Questions 2, 3 and 4	Page 14
Questions 5, 6 and 7	Page 15

Executive Summary

The key points in this submission for the Advisory Council on Intellectual Property (ACIP) to consider include:

- The ASF's priority is to recommend changes which will clarify the responsibilities of industry and if required, ultimately stop those who are willing to "take on" the *PBR Act* and actively engage in activities which achieve their goal, to the detriment of the plant breeding industry,
- The ASF's priority is to also recommend changes which will promote a profitable and competitive plant breeding industry in Australia,
- Evidence collection and the need to reverse the burden of proof are practical gains from a revision of provisions in the *PBR Act*,
- Inability to collect evidence is a major problem, and is probably the "bottleneck" in not being able to pursue PBR breaches in Australia,
- PBR users have claimed in general terms, that the degree of onus on the plaintiff and the cost of failure are so high, that their legal advisors have counselled them against proceeding,
- The ASF recommends that an expert panel is established to assist with changes to the *PBR Act*, its enforcement and clarification of not only the terms, but its intent so that the *PBR Act* becomes enforceable and understood,
- ASF recommends an amendment to the *PBR Act* that reverses the burden of proof from the PBR owner once a "reasonable amount of evidence" is presented by the PBR owner. At the very least this should trigger a requirement for both parties to submit evidence before an "independent tribunal".
- The ASF is in favour of introducing measures that can enhance the grantee's options for gaining evidence. These could include: :
 - provisions in the *PBR Act* to allow entry onto private property to gain evidence,
 - provisions in the *PBR Act* to require the parties in dispute to participate in an alternative dispute resolution processes,
 - to have the presumption of guilt provisions or procedures (reverse the onus of proof) included in the *PBR Act*, and
 - introduction of an evidence gathering procedure similar to that which exists in the European Union i.e. "saisie-contrefaçon" which provides an official way of collecting evidence.

In order for the Act to be effective it must be possible to protect or enforce those rights. However, enforcement of plant breeder's rights continues to be a problem, not only in the pasture seeds industry but throughout the horticulture and grain industries as well.¹

¹ RIRDC Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 14

Background

The ASF is the peak national body representing the interests of Australia's sowing seed industry at the state, national and international level. Members of the ASF have an estimated annual turnover in sowing seed sales of approximately A\$1.2 billion.

The membership of the ASF can be found at <http://www.asf.asn.au/>. The membership comprises stakeholders from all sectors of the total seed supply chain including plant breeders, seed growers, seed processors, and covers a diversity of geography, climate, crops, and cultivars.

Introduction

The ASF is seeking substantial changes to be made to the *Plant Breeders Rights Act 1994 (PBR Act)* to ensure there are appropriate mechanisms in place for members to achieve protection and enforcement that is cost effective, timely and enforceable.

This will assist in providing greater certainty to the industry by ensuring that investment can occur with the knowledge that intellectual property rights will be upheld.

The ASF is also seeking changes to the *PBR Act* because it is dated, is often described as “dysfunctional”, and it creates unnecessary confusion for all involved.

We would suggest that plant breeder's rights have more in common with patents than any other form of intellectual property and that broader standing provisions could prove helpful in enforcement proceedings.²

It is vitally important for PBR owners to have in place an accessible and effective PBR enforcement system to ensure their investments can be protected through an appropriate and recognised legal channel.

Such a system will help create greater certainty, and will encourage the ASF membership to continue to invest in the areas of science, innovation and technology, and will enable Australian plant industries to access the latest international technologies and germplasm.

The ASF also encourages ACIP to consider the importance of encouraging this continued investment in assisting Australian agriculture to meet the challenge of climate change.

“investment in plant and animal genetics may be able to diminish the loss of productivity associated with higher temperatures and changing rainfall patterns”.³

ACIP OPTIONS

The ASF is pleased to provide the following comments in relation to the options put forward by ACIP.

Option 1 - No change to the rights of PBR owners

The ASF's view is that the *PBR Act*, in its current form, is not sufficient to enable PBR owners to achieve adequate protection, and enforcement in a manner which is cost effective, timely and most importantly enforceable. Changes are supported by the ASF because it can confirm from its own experiences that there are a number of deficiencies the *PBR Act*. These were highlighted to ACIP in the ASF's original submission.

Option 2 - Provide PBR owners with an additional right over 'use' of the material

The ASF supports the inclusion of a new right for “use of the material” to be introduced into s.11.

² RIRDC – Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 15

³ Garnaut Climate Change Review draft - page 34

Members of the ASF are substantial investors in Australian agriculture. It is a technical and expensive process. ACIP has itself identified in the options paper that the “breeding of a new variety typically takes about 12 to 14 years”.⁴

Along the way breeding lines will be discarded from the process due to under-performance in one or more characteristics. The long period between initial investment in breeding and the commercialisation of varieties, together with the high level of investment that is necessary to develop varieties to commercial release, makes plant breeding a high-risk investment for commercial companies which is compounded by the *PBR Act*, in its current form.

The ASF believes it is imperative to introduce mechanisms such as right over “use” for pursuing alleged PBR breaches. The inclusion of “use of the material” into s.11 will ensure that PBR owners have in place an accessible and effective PBR enforcement system to rely upon if other avenues of engagement, such as contractual arrangements, have been exhausted. It will also ensure that the *PBR Act* is flexible enough to move with the ongoing changes within in the various industries.

Such use however should not extend to the use of protected material for breeding purposes.

Option 3 - Provide PBR owners with an additional right over ‘purchase’ of the material

The ASF supports the inclusion into s.11 of a new right for “purchase of the material”. The ASF will continue to work constructively with “industry” to look at the best possible options along the value chain to collect PBR.

This could also have the potential of moving the burden away grain producers. It must however be in the commercial interests of the plant breeder and must not diminish their ability to enforce PBR if it is required to do so.

The complexities involved for the collection of end point royalties (EPR), following the changes to Australia’s wheat marketing arrangements, which has moved to a deregulated environment, is an example of the issues that need to be addressed.

The magnitude of this change is highlighted in the ACIP options paper, which identified almost three years ago that the “percentage of wheat crop received by AWB which attracts EPRs increased from 35% in 2004-05 to 49% in 2005-2006”.⁵ These figures would now be on the low side, and combined with a large increase in the number of exporters entering the market as a result of the changes to the wheat marketing arrangements, the collection process is now an even greater issue for ASF members.

In relation to PBR varieties, another factor is the increasing use of on-farm storage by growers. This is because the speed of harvest continues to increase, and they are seeking greater flexibility to market their grain over longer periods.

This grain however rarely finds its way back into the bulk storage system, nor does it usually move along the tradition “grain paths”. More often than not it will be delivered directly from grower to the end user or via a marketing agent and not into the central accumulation system. This area needs to be addressed, as the traditional collection points are changing, and the *PBR Act* in its current form, is outdated.

Such use however should not extend to the use of protected material for breeding purposes.

Option 4 - No change

The ASF does not accept that the courts currently have an accurate view which can also be accurately used by industry, on the application of s.14 and s.15, including the meaning of “reasonable opportunity”.

⁴ ACIP options paper June 2007 – page 3

⁵ GRDC, March - 2008

PBR users have claimed, that in general terms that the degree of onus on alleged infringers for example, should also have to prove that they have not engaged in a breach of the *PBR Act*.

The ASF can confirm that the burden of proof on the plaintiff is such that a successful prosecution is very difficult to achieve.

The cost of taking a civil action can be prohibitive.⁶

PBR users have claimed, in general terms, that the degree of onus on the plaintiff and the cost of failure are so high, that their legal advisors have counselled them against proceeding. The burden of proof required from close communities is also a major issue as reports of seed trading usually arrive from third parties who do not wish to become involved.

The ASF believes that the burden of proof from the PBR owner, once a reasonable amount of evidence, is presented by the PBR owner, should at the least ensure, or trigger, a requirement of both parties to submit evidence before an independent tribunal to an investigate if an infringement has or has not occurred.

Option 5 - Clarify the meaning of ‘reasonable opportunity’

The ASF believes the next step is to establish an expert panel to assist with changes to the *PBR Act*, its enforcement and clarification, and its intent. This includes the issue of “reasonable opportunity”. The ASF also believes the expert panel could be recognised by industry as the first step to be taken before moving towards the Court system.

The ASF is open to the suggestions, as outlined in the options paper, that the members of the expert panel could come from independent experts in plant breeding, the PBR office and ACIP.

The ASF recommends that it is represented on the expert panel, and is consulted during the formation of the expert panel, because it represents all sectors of the seed supply chain including plant breeders, seed growers, seed processors and seed marketers.

Option 6 - Reverse the onus of proof

The reasons they gave for this were that PBR was too slow, too unpredictable and too difficult to enforce.⁷

The ASF recommends an amendment to the *PBR Act* that reverses the burden of proof from the PBR owner, once the PBR owner has presented a reasonable amount of evidence. Once this evidence has been presented by the PBR owner, it should trigger a requirement for both parties to submit evidence before an independent tribunal to be investigated, to find out if an infringement has or has not occurred.

The ASF can confirm that the burden of proof on the plaintiff is currently such that a successful prosecution is very difficult to achieve.

Although we do not have comparable figures for PBR, the Australian Federation of Intellectual Property Attorneys (FICPI) has estimated that a simple patent infringement matter in 2003 in Australia would cost not less than \$200,000.⁸

The burden of proof required from close communities is also a major issue, as reports of seed trading usually arrive via third parties who do not wish to become involved. PBR users have also claimed that in general terms that the degree of onus on alleged infringers for example, should require them to prove that they have not engaged in a willing attempt to breach the *PBR Act*.

⁶ RIRDC, Plant Breeder’s Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 15

⁷ RIRDC – Plant Breeder’s Rights and Contract Growing in the pasture seed industry, 2007 – page 19

⁸ See FICPI’s submission to ACIP Enquiry, *Consideration of extending the jurisdiction of the Federal Magistrates Service to patent, trademarks and designs matters* 2003

It has sometimes been suggested at an industry level that one of the reasons there have been so few infringement proceedings under the PBR Act is that people in rural areas do not want to give evidence against their neighbours or potential customers and clients.⁹

Option 7 - Delete references to ‘reasonable opportunity’ in s.14 and 15

The ASF believes that an expert panel (ASF response to Option 5) would be the best way to progress this option to the next stage.

Option 8 - Clarify the application of s.11, 14 and 15 to grains

The ASF believes that an expert panel (ASF response to Option 5) would be the best way forward to assist in clarifying whether royalties on harvested material, which is also propagating material, can be appropriately sought under s.11, 14 and/or 15.

Option 9 - No change to the farm saved seed exemption

The ASF recommends that the farm saved seed provision of the *PBR Act* requires change as it provides the potential for breaches of the *PBR Act* to occur by allowing the opportunity for willing participants to illegally produce, condition and market seed without any authorisation from the PBR owner.

The ASF currently supports the view that the cost of auditing a particular variety for illegal activity under the current *PBR Act* far outweighs the potential benefit.

Option 10A - Modify the farm saved seed exemption to be explicitly limited

The ASF supports moves to modify this option.

Option 10B - Modify the farm saved seed exemption to be similar to that in Europe

The ASF encourages ACIP to make a judgement as to whether or not the *PBR Act* is in compliance with the 1991 UPOV Convention in terms of protecting the breeder’s rights with the current inclusion of farmer saved seed provisions, and provide this feedback to the ASF.

Option 11 - Remove the farm saved seed provision

It is important for the ASF to clarify that it does not accuse all of the participants in the seed supply chain of seeking to actively engage in activities which are in breach of the *PBR Act*.

The ASF’s priority is however very focussed on recommending changes which will clarify the responsibilities of industry and, if required, ultimately stop those who are willing to “take on” the *PBR Act* and actively engage in activities which achieve their goal to the detriment of the plant breeding industry.

The ASF is also seeking to be extremely active in working with the industry to ensure that all avenues are exhausted, if there is a breach.

The ASF is of the view that the current “farm saved seed” provisions of the *PBR Act* provide the opportunity for those willing to test the current system and breach the *PBR Act*, to do so.

Section 17 of the *PBR Act* which incorporates the farm saved seed provision, is a reason why there is an ever increasing “black market” in protected varieties, by those who are willing to test the current system, after the first point of seed sale of a PBR protected variety.

⁹ RIRDC - Plant Breeder’s Rights and Contract Growing in the Pasture Seed Industry 2007, page 32

Removal of the farm saved seed provision should be actively considered further to achieve this goal and it is vitally important for an “apolitical figurehead” such as IP Australia explain the situation to industry, to take the “agripolitics” out of the debate on farmer saved seed.

With this in mind, the removal of Section 17 from the *PBR Act* should be considered further as an option moving forward, as provided for under the 1991 UPOV Convention.

The farm saved seed provisions of the 1991 UPOV Convention (article 15(2)) are optional and require that if adopted by member countries, national legislation should include strict limits so that the PBR holder’s interests are safeguarded and farmers who use PBR protected propagating material can only do so on their own holdings and for their own use.

Option 12 - No change.

Option 13 - Change the title of s.17 to ‘Conditioning and use of user produced propagated material does not infringe PBR’.

Option 14 - Change s.17 to be restricted to ‘sexually propagated taxa’

In response to options 12, 13 and 14, the ASF believes the logical next step is to seek clarification from an expert panel for plant breeders and industry.

The ASF is open to the suggestion, as outlined by ACIP, that the members of the expert panel could come from representatives from the plant breeding industry, combined with independent experts in plant breeding, the PBR office and ACIP. The ASF should also be represented on the expert panel.

The ASF recommends that it is also consulted during the formation of the expert panel as the ASF represents stakeholders from all sectors of the seed supply chain including plant breeders, seed growers, seed processors and seed marketers.

Option 15 - No change to the EDV provisions of the PBR Act.

The ASF supports change to the EDV provisions of the *PBR Act*. The ASF does not believe the essentially derived varieties (EDV) provision provides breeders with a sufficiently defensible remedy to protect their breeding investment. The current position is absent of any enforcement provisions as is the case with PBR breaches in general. PBR owners should be in a position to protect their substantial investment if all other avenues have been exhausted.

Option 16 - Enable EDV declarations to be in respect of any variety

The ASF supports EDV declarations to be in respect of any variety and notes that this was recommended by the expert panel on breeding and accepted by the Government. The ASF also notes that despite this acceptance it has not yet been implemented.

Option 17 - Enable applications for EDV declarations to be made prior to grant of the original variety

The ASF does not regard enabling applications for the EDV declarations to be made prior to the grant of the original variety as the best possible option moving forward. The ASF would however support the introduction of an EDV alternative dispute resolution system for parties in dispute. This will also ensure the respective parties can utilise this process in the first instance before taking the next step towards legal action.

Option 18 - Remove the test for ‘important features’ in s.4(c)

The ASF supports strong consideration for the removal of the test for “important features’ from s.4(C) of the *PBR Act* as it has the potential to create greater protection for the variety owner. This could be further investigated by the expert panel.

Option 19A - Remove the words “as distinct from cosmetic” from s.4(c)

Option 19B - Replace “cosmetic” with “of no commercial value”

Option 19C - Remove the words “as distinct from cosmetic” and define “important features” in s.3.

The ASF believes the next step is to seek clarification from an expert panel.

Option 20 - Transfer the administrative EDV declaration system to the courts or other body

Option 21 - Improve the PBRO’s ability to make determinations on EDV

The ASF does not believe the current EDV provision provides breeders with a sufficiently defensible remedy to protect their breeding investment. The current state of play lacks any enforcement provisions as is the case with PBR breaches in general.

The ASF supports the reversal of the burden of proof if the owner of the initial variety can supply a case for reasonable evidence of essential derivation. This reasonable evidence would be *prima facie* and could include strong phenotypic similarity, only a small difference in some simply inherited characteristics, and strong genetic similarity.

Therefore if the owner of the initial variety has fulfilled one of the above requirements, then the second breeder would have to prove that there is no predominant derivation, or that they had not used the initial variety or a variety essentially derived from that initial variety.

The ASF would support the introduction of an EDV alternative dispute resolution system for parties in dispute as initially the best way forward before having to resort to legal action. The ASF notes that this option was “recommended by the Expert Panel on Breeding and accepted by the Government”. The ASF also notes it has “never been implemented”.

The ASF also recommends that ACIP further explore the ability of the Plant Breeder’s Rights Office (PBRO) to enhance its operations by making sure has the resources and expertise to make an informed decision on this matter, and then the PBRO should take the necessary steps to ensure it is in a position to make determinations on EDV, if it is required.

Ultimately the option should be left open for PBR owners to also move to the Courts, if it is required.

Option 22 - Develop benefit sharing arrangements

The ASF recommends this option is further considered and as highlighted by ACIP, the ASF alternative dispute resolution process could provide an appropriate forum or model.

Option 23 - No change to the provisions on exhaustion of PBR.

Option 24 - Clarify the meaning of s.23

In relation to options 23 and 24, the ASF believes the very fact that ACIP has stated on page 35 that “this provision appears to mean that PBR rights are exhausted in relation to any acts.....” confirms there is uncertainty with the current *PBR Act* and changes are therefore required.

The ASF is of the view that the Courts do not currently have the expertise in relation to this matter.

The ASF also believes the option put forward is fraught because it relies on the application of this section further developing “as more cases come to court”. The *PBR Act* in its current form limits the possibilities of cases even reaching court because of the high costs.

What we do know, however, is that there have been very few court cases relating to the infringement of plant breeder's rights in Australia.....¹⁰

The next step to deal with options 23 and 24, is to seek clarification by a expert panel for plant breeders and industry. The ASF recommends that it is consulted during the formation of the expert panel, and is represented on the expert panel, as the ASF represents stakeholders from all sectors of the seed supply chain including plant breeders, seed growers, seed processors and seed marketers.

Option 25 - No changes to the meaning of terms and sections of the Act

Option 26 - Clarify the meaning of particular terms in the Act

A better solution would be for the legislature to amend the Act to clarify how it applies to seed and grain.¹¹

In response to options 25 and 26, the ASF seeks changes to the meaning and terms of the *PBR Act* because there is a lack of compliance and a lack of understanding.

The current *PBR Act* has been described by some as “dysfunctional”. There is evidence of confusion and a lack of understanding. The *PBR Act* allows willing participants to try and breach it, without any punishment.

There is a lack of legal precedent in its twenty year history, several words and sections remain ambiguous and open to individual interpretation. The *PBR Act* has never been truly tested.

The *PBR Act* is silent as to who may prosecute an offence.¹²

Greater clarification is urgently required especially as the meaning of a number phrases are not sufficiently understandable, and are not easily clarified unless a process through the Court is engaged. The ASF would welcome ACIP consulting with legal experts to form a view of the *PBR Act* including a more detailed understanding as what can only be described as “grey areas”. The results of this consultation should be reported back to the ASF for further consideration.

This information could also be presented before an independent panel, or an expert panel, for consideration and the Australian Government Solicitor could also be consulted to assist the panel/s if required.

This layered approach would have the added benefit of assisting to define areas of need, putting in place a process and definitions understood by participants on the panel and therefore industry, and finally an avenue to consult again with another layer of independent advice.

Several words and sections of the *PBR Act* for example, remain ambiguous an open to individual interpretation.

- Section 12 relating to essential derivation,
- Section 17 relating to farm saved seed; and
- Section 57 relating to innocent infringement.

Option 27 - No change to the pre-grant enforcement provisions

Option 28 - Provide PBR applicants with the right to begin infringement action pre grant.

The ASF seeks further clarification on this issue through the formation of an expert panel for plant breeders and industry. The ASF notes the New Zealand PVR Office “believes it is widely understood that there is no

¹⁰ RIRDC – Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 14

¹¹ RIRDC – Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 38

¹² RIRDC – Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 16

meaningful difference between the rights provided by provisional protection and those provided by the grant”.¹³

This needs to be clarified for the plant breeding industry, as the New Zealand PVR Office also considers “that the lack of court action may indicate that this provision is an effective deterrent to using a variety while it is still under test..”.¹⁴

Option 29 - No change to jurisdiction of the Federal Magistrates Court

Option 30 - Extend the jurisdiction of the Federal Magistrates Court to PBR

Option 31 -Simplify expert evidence procedures in the FCA and/or the FMC

Taking action in the Federal Magistrates Court rather than the Federal Court may have an effect on costs because the initiating fees are lower, there are no daily hearing fees and the waiting list is shorter. ¹⁵
--

The ASF supports the use of the Federal Magistrates Service (FMS) because it provides the real possibility of allowing an injection into to the current system by providing a much faster, more economical and could lower the workload of the Family and Federal Court.

This approach would almost certainly fall within the obligations of the TRIP’s agreement, particularly if it is structured to be as streamlined and as user-friendly as possible, reducing delay and cost to litigants. The current system of legal enforcement, i.e. through the Federal Court of Australia, has stymied the course of legal action because the process is lengthy, extremely high cost, lacking clarity of timelines and possible conclusion of a legal case, and intimidating for some.

Option 32 - No change to ADR processes

Option 33 - Register of mediators with PBR and plant breeding expertise

There needs to be changes to the ADR process to ensure that PBR enforcement is undertaken in an expedient and cost effective manner. The enforcement process needs to be accessible, effective and understood.

The ASF supports the establishment of a register of PBR and plant breeding experts who could assist in the ADR process, either within or outside of the Court system. The register will provide a recognised “one-stop-shop” for parties to seek guidance and would be best administered by IP Australia.

The ASF also recommends that PBR owners should be able to pursue the Court option if it is their preference in relation to a specific case. This should remain a matter of choice as in some cases the preference may be for an ADR process to be used, another case may see the preference for the issue to go directly to court because, for example, there has been a history to consider.

Option 34 - No change to the criminal sanctions of the PBR Act.

The ASF does not have a firm view at this stage as to whether criminal versus civil sanctions would be more beneficial in protecting and enforcing the rights of PBR owners.

Option 35 - Request the AFP and DPP to give PBR cases a higher priority

The ASF supports the AFP and DPP giving PBR breaches a higher priority.

¹³ ACIP Options Paper – June 2008, pages 40- 41

¹⁴ ACIP Options Paper – June 2008, pages 40-41

¹⁵ RIRDC – Plant Breeder’s Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 15.

For Federal Magistrate’s Court fees see *Federal Magistrates Act* (Cth) 1999 s 120(3) and Federal Magistrates Regulations (Cth) 2000

However, many growers and other stakeholders expressed confusion over who was meant to prosecute offences under the Act. Many people to whom we spoke in the industry assumed it was the role of the Plant Breeder's Rights Registrar or IP Australia to prosecute an offence. Others assumed it was the role of the Australian Federal Police (AFP) to prosecute the offences.¹⁶

It is the ASF's view that PBR breaches are no different to the piracy of movies, music, designer clothes, electronics and pharmaceutical goods.

“two men have been charged over a \$5 million counterfeit clothing racket”¹⁷.

PBR breaches are estimated to cost the seed industry approximately A\$300 million per annum.

Whilst it requires a nearly impossible act of imagination to think of the publishing or music industries without copyright or a pharmaceutical industry without patent...¹⁸

Option 36 - Extend the jurisdiction of PBR matters to the State police and DPPs

The ASF believes a federal approach to the enforcement of PBR breaches better reflects the dynamics of plant breeding in Australia.

There is merit however, in an expert panel further considering a state based approach to PBR breaches. This would allow a quick and local response to an alleged breach.

One similar example is a “stock squad” which the ASF understands has been supported by farmers in the past and has been utilised to investigate the theft of stock including sheep and cattle. If the theft of sheep and cattle can be investigated, why not the theft of PBR?

Option 37 - No change

Option 38 - Introduce a system based on the UK Information Notice

Option 39 - Introduce a system based on the French saisie order

The ASF reaffirms that there are inherent difficulties associated with the collection of evidence largely as a result of the information residing with individuals who live in small rural and regional communities which in turn places them and the PBR holder in a difficult situation.

The inability to collect evidence is a major problem and is probably the “bottleneck” in not being able to pursue PBR breaches by those willing to test the *PBR Act*. Plant breeders are also often reluctant to take infringement action when the infringer is also the customer of the breeder.

For these reasons the ASF would support an approach that allows for a “third party” other than the PBR holder to take the lead in managing infringement to protect the interest of the breeder/licensee. The ASF is in favour of introducing measures that can enhance the grantee's option for gaining evidence.

These could include provisions in the *PBR Act* to allow entry into private property to gain evidence and provisions to require parties in dispute to participate in an alternative dispute resolution process.

The *PBR Act* could also include the presumption of guilt provisions or procedures (reverse the onus of proof) and finally the introduction of an evidence gathering procedure similar to that which exists in the European Union, e.g. “saisie-contrefaçon”.

¹⁶ RIRDC – Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 15

¹⁷ Sydney Morning Herald of 6 July 2008

¹⁸ RIRDC – Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 4

Option 40 - No change

Option 41 - Introduce PBR seizure powers for Customs based on the notice system used for trade marks

Option 42 - Introduce PBR seizure and destruction powers for Customs based on the European system

The ASF believes the very fact that the Australian Customs Service (Customs) has the power to seize goods that allegedly infringe copyright and trade marks, but not patents or plant breeder's rights highlights there is a major weakness within the system. The ASF supports a change which will introduce seizure powers for Customs based on the trademarks systems, and to include the relevant features of the European system.

Option 43 - No change

Option 44 - Introduce exemplary damages provisions

The ASF supports the current trend of incorporating "exemplary damage" provisions into intellectual property rights and further supports the inclusion of exemplary damage provisions in the *PBR Act*. This would act as a deterrent to parties who may be willingly considering infringing PBR, and an encouragement for PBR grantees to undertake infringement proceedings.

The resources (staff & financial) required to investigate a PBR breach are often well beyond what most breeders can afford, especially when the benefits of the action are difficult to quantify and subject to uncertainty. The inclusion of exemplary damages in the *PBR Act* would almost certainly provide the necessary incentive for PBR owners to consider pursuing a claim against a willing offender.

Australia has a high degree of international investment in its plant breeding programs including from New Zealand, USA and the European Union. Given the ASF understands that exemplary damages are available under the New Zealand Plant Variety Rights (PVR) Act 1987, their inclusion would be consistent with international law and provide the necessary incentive for overseas plant breeders to continue their investment in Australia and defend their intellectual property rights.

Option 45 - No changes to infringements and offences under the PBR Act in regards to identification of protected varieties.

Option 46 - Amend the PBR Act so that mendacious variety name declaration is an infringement of PBR

The ASF supports an amendment to the *PBR Act* so that making a mendacious declaration is an infringement of PBR.

ACIP QUESTIONS

Question Q1

What role should Government play in this area? Should the Government facilitate the plant breeding industry in developing one or more models of collective/peak bodies?

The ASF supports the establishment of an expert panel funded by Government to assist plant breeders and the industry with the enforcement of PBR rights. The ASF should be represented on this expert panel.

It is also important that this expert panel educates all parts of the chain, including responsible policy authorities.

Question Q2

What would be the most effective ways of improving education and awareness of PBR for each industry or stakeholder group?

The ASF supports a more concerted education/awareness campaign to be driven by the Plant Breeders Rights Office with assistance from appropriately qualified legal, business and technical people to ensure a truly “apolitical campaign” and to provide much needed skills in the area of commercialisation of PBR rights to IP owners.

The changes to Australia’s wheat marketing provide the perfect impetus to embark on an education program across Australia’s plant breeding sector for the grains industry and its customers including farmers, bulk handlers, grain marketers, the domestic market and the export market as a whole.

This would also provide the impetus for the education program to be spread across the other industries such as horticulture as well. Australia’s agriculture industry is flush with avenues to get a message across to the wider industry and the ASF, as the peak body for the sowing seed industry, has a key role to play in this area.

There are also industry bodies covering all sectors from plant breeders, research and development corporations, grain marketers, farming organisations, domestic flour millers, feedlots, horticulture, turf and lawn seed and supermarkets just to name a few. Most of the peak bodies also have affiliates in each of the jurisdictions and are therefore able to get the message out far and wide and most importantly, locally.

The ASF would welcome the opportunity to be involved in working on an education/awareness program with the PBR office for example, to assist in facilitating a national campaign to assist the users of PBR to understand its value and the obligations that comes with it.

Question Q3

What role should Government play in this area? What particular educative programs or course curricula should the Government develop or facilitate? Should Government develop detailed PBR curricular for agricultural colleges and TAFE?

The ASF believes Government/s have a very important role to play in this area.

It is the ASF’s view that education is both a public and industry good and Government/s combined with the peak bodies should approach an education awareness program together to ensure the content is “on message” and targets all parts of the supply chain, including growers and the legal profession.

The ASF also supports the development of PBR curricula at both the senior secondary level and tertiary educational institutes. The ASF also supports policy makers receiving further education in this area.

Question Q4

What else needs to be done on this issue? What role should Government play?

The ASF believes Government should remain involved through an expert panel funded by Government for plant breeders to assist with enforcement of PBR. This panel needs to have the ability to provide the flexibility to assist with a number of issues relating to PBR. These have been identified in the ASF’s response to the ACIP options paper.

Question Q5

One of the problems with implementing an equitable EPR system is that harvested product is often a mix of material on which the growers' PBR obligations to the breeder have been met and material on which those obligations have not been met. Can this issue be dealt with through use of contracts? Are there other options for addressing this issue?

The announcement of 1 July 2008, by Wheat Exports Australia (WEA) that the Wheat Export Accreditation Scheme will include EPRs (Clause 4.4) as a "relevant matter" to be considered when determining if an applicant is "fit and proper" to be accredited to export bulk wheat under the Scheme is viewed, by ASF, as an important step forward for the industry as a whole.

ASF, in conjunction with other parties, is actively working with the grains industry to ensure that the collection of EPRs is conducted in an efficient and practical manner.

In relation to the issue of mixed material, growers continually need to be made aware of their responsibilities in relation to PBR and EPR. Some mistakes are made as the speed of harvest increases and people are under pressure, while others are made by those who are willing to testing the current system, because there is a perceived lack of enforcement.

The ASF believes industry requires continued education to reinforce the message, combined with the appropriate changes being made to the *PBR Act*. This will assist in helping industry understand its obligations and will target those who are willing to test the system, by ensuring the *PBR Act* can be enforced.

Question Q6

Do you have any major concerns, other than those listed above, about the implementation of an effective EPR system in your industry?

Industry requires an effective EPR system. If an effective EPR collection system is not put in place, then the plant breeding industry will be operating in an environment of uncertainty which degrades the incentive for plant breeding because of the large investment costs involved.

Question Q7

Establishing EPR systems is primarily the responsibility of industry. However, is it appropriate for the Government to facilitate this?

The ASF recognises that EPR systems are primarily a responsibility of the industry and the ASF is working constructively with industry to address this issue. It is however appropriate for Government to be actively involved as part of the facilitation process. The ASF holds this view because the Government does provide funding to the Grains Research and Development Corporation which also undertakes work in this area.

The Australian Government has also announced that it "will commit up to \$9.3 million over three years to assist with the transition, including for grower information sessions, publication for market data and technical market support grants".¹⁹ This transition period for the industry should include information being made available for growers on the issues of PBR and EPR so they understand their obligations especially as the market has now changed.

ASF Submission Ends

¹⁹ The Hon Tony Burke, Minister for Agriculture, Fisheries and Forestry – Media release, 23 June 2008