



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference: HA08101004/1

9 July 2008

Mr Sean Applegate
ACIP Secretariat
PO Box 200
Woden ACT 2606

Dear Mr Applegate

ACIP review of PBR enforcement

Thank you for your email dated 6 June 2008 inviting the Office of the Commonwealth Director of Public Prosecutions (CDPP) to comment on the ACIP Options Paper on the enforcement of Plant Breeder's Rights (PBR). The following comments are directed to Part III, Chapter 6 of the paper regarding criminal sanctions and PBR.

The CDPP is responsible for the prosecution of offences against the laws of the Commonwealth and for the confiscation of the proceeds of Commonwealth crime. Cases prosecuted by the CDPP include matters involving drug importation and money laundering, offences against corporate law, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), people smuggling, sexual servitude, terrorism and offences against Commonwealth intellectual property law such as the *Trade Marks Act*, the *Copyright Act* and the *Plant Breeders' Rights Act*. The CDPP has no investigative function. It can only prosecute or take confiscation action where there has been an investigation by the Australian Federal Police (AFP), the Australian Crime Commission (ACC) or some other investigative agency. However, the CDPP has a role to play in assisting investigative agencies by providing legal advice if requested during the investigation stage. Accordingly, the comments in this letter reflect the CDPP's role in the prosecution process.

Page 50 of the ACIP Options Paper refers to the 'low priority' for the CDPP of the prosecution of PBR cases. The CDPP does not have a priority system in relation to which briefs it will accept or assess. The CDPP assesses all briefs of evidence referred by the relevant investigation agencies, in accordance with the *Prosecution Policy of the Commonwealth*.

The investigation and prosecution of PBR matters is complex, particularly where matters involve commercial relationships and transactions. Before a prosecution can be commenced there must be sufficient evidence to meet the test in the *Prosecution Policy* that there be a prima facie case with reasonable prospects of conviction and that the prosecution is in the public interest. The CDPP notes that in two briefs referred there has been insufficient evidence available, leading to an assessment that charges under the relevant offence provisions are unavailable.

SC\SC\RESPONSE TO ACIP OPTIONS PAPER

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The availability of civil actions initiated by the PBR owner provides an alternative to criminal prosecutions. Whilst the standard of proof that is required for a criminal prosecution is 'beyond reasonable doubt' (s13.2(1) of the *Criminal Code Act 1995* (Cth)), civil action has the lower standard of proof of the 'balance of probabilities'. As the Options Paper notes, the remedies that the court may grant for infringement of PBR includes an injunction ordering the person to stop the infringement and either damages or an account of profits to financially compensate the PBR owner for loss caused by the infringement. A further enforcement option that your agency may want to consider is the use of civil penalty provisions.

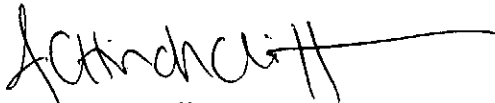
The challenges of successfully prosecuting offences under the *PBR Act* are similar to challenges faced in prosecuting numerous other Commonwealth offences. In this respect, the CDPP would welcome the opportunity to meet with the Plant Breeder's Rights Office to discuss prosecution action under the *PBR Act*.

The issue of the CDPP according sufficient attention and priority to PBR cases, raised in Option 35, has been addressed at the beginning of this letter.

Finally, I draw your attention to the incorrect use of the name of the CDPP in the Options Paper. Please note that the organisation is known as the Commonwealth *Director* of Public Prosecutions not the Commonwealth Department of Public Prosecutions.

Should you have any questions about the matters raised in this letter or should you require further information please feel welcome to contact Stephen Clark, Legal Officer by email at stephen.clark@cdpp.gov.au or by telephone on (02) 6206 5641.

Yours sincerely



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Policy