



## **Submission to the Australian Advisory Council on Intellectual Property**

### **~ Review of Enforcement of Plant Breeder's Rights Options Paper ~**

**August 2008**

**NSW Farmers' Association  
Level 25, 66 Goulburn Street  
Sydney NSW 2000**

Ph: (02) 8251 1700  
Fax: (02) 8251 1750

#### **NSW Farmers' Association Background**

The NSW Farmer's Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, meat, wool and grain producers, to more specialised producers in the dairy, horticulture, egg, poultry meat, pork, oyster and goat industries.

## **Introduction**

The NSW Farmers' Association (the 'Association') welcomes the opportunity to provide a submission to the Advisory Council on Intellectual Property ('ACIP') options paper regarding their review of enforcement of Plant Breeder's Rights ('PBRs'). Plant breeding programs are essential in ensuring the continued productivity and prosperity of agriculture because these activities enable the development of new varieties which have enhanced yields, quality attributes and disease resistance therefore adding value and meeting various market demands and environmental challenges.

The Association recognises that with a complex issue such as PBRs as well as the diverse needs of the different agricultural sectors, it is difficult to apply one uniform approach to PBRs. The ACIP options paper appears to be focused on the most complex component of the whole issue as opposed to the serious problems inherent within the system itself, that need to be satisfactorily resolved before outcomes can be delivered for the benefit of both Government and industry.

The concept of grain end point royalties being collected by grain traders or first end users offers some advantages and the Association believes this should be made easier to implement. Through this process, there is more potential to pass these costs to the end consumer. Currently the costs are being absorbed by the grain producer, but this is becoming increasingly unsustainable therefore further reinforcing the need for all grain royalties to be collected through end point royalties. The Association has been seeking a review of the funding arrangements for PBRs and accordingly the Association was disappointed that the ACIP review did not extend to include this issue.

The Association has carefully considered the options paper which the ACIP has prepared as part of their review of enforcement of plant breeder's rights. The comments which the Association would like to make in response to the options paper are structured as a direct to the option which is contained in the paper.

## **Response to Options Paper**

### ***Option 1: No change to the rights of PBR owners***

*This option assumes that the current suite of rights is sufficient to enable PBR owners to generate a fair return on their investment. ACIP seeks any reasons why the current rights of the PBR owner under s.11 should not be changed, including any unintended consequences of a change.*

#### **Response:**

The Association believes that there needs to be a change to the rights of PBR owners.

### ***Option 2: Provide PBR owners with an additional right over 'use' of the material***

*This option is to introduce into s.11 a new right for "use of the material". The aim of this would be to provide PBR owners with the clear right to obtain royalties from end users such as feedlotters, millers, ethanol producers and juice manufacturers and therefore provide a more effective and efficient collection process.*

*This option may increase royalty payment compliance, reduce complexities in the system and minimise compliance auditing costs. However, such a significant change may impact on the public good objective of the system and may be unnecessary if robust commercialisation and contractual arrangements were established at point of first sale. It may also enable PBR owners to 'double dip' by requiring royalties from both sellers and buyers.*

#### **Response:**

The Association agrees with this option, on the basis that a trader and/or accumulator have not already paid the royalties.

**Option 3: Provide PBR owners with an additional right over 'purchase' of the material**

*This option is to introduce into s.11 a new right for "purchase of the material". The aim of this would be to provide PBR owners with the choice of what point in the value chain to collect a royalty. For example, accumulators who are acting as agents for buyers would by law be considered to be purchasing the material and would therefore require a licence from the PBR owner.*

*Again, such a change may assist PBR owners to obtain royalties, particularly for grain varieties, but may have other impacts on the PBR system. This option may require significant changes to s.23 regarding exhaustion of rights in order to be effective. At present, a new purchase right would be limited to sales done without the consent of the PBR owner. This option may enable PBR owners to 'double dip' by requiring royalties from both sellers and buyers, although this is not necessarily a bad thing.*

**Response:**

The Association believes this option would not provide the desired outcome as it is too complicated and it would introduce significant regulatory burden.

**Option 4: No change**

*This option is to accept that the including the meaning of 'reasonable seeks any reasons why s.14 and consequences of a change.*

**Response:**

The Association agrees with this option.

**Option 5: Clarify the meaning of 'reasonable opportunity'**

*Some options for doing this are:*

- *test the meaning of s.14 and 15 in court. This would provide a high degree of certainty but would be a difficult and expensive exercise.*
- *seek an opinion from the Australian Government Solicitor. This may not provide the degree of certainty necessary desired.*
- *seek the opinion of an expert panel, similar to the Expert Panel on Breeding F29, set up to provide guidance on how a range of PBR issues are intended to operate. Such a group may include representatives from industry, independent experts in plant breeding, the PBR Office and ACIPA and be a more appropriate way to address industry concerns than waiting for court decisions to eventuate. A model for this may be the US system of 'restatements of law', although with more emphasis on an agreed understanding and less on case law F30. To ACIP's knowledge, such restatements are rare in Australia.*
- *amend the Act in some way, such as by adding a definition of 'reasonable opportunity' in s.3.*

**Response:**

The Association does not believe that this is the most appropriate way to progress the issue as it does not appear fair that a grower should endure litigation in order to test the system.

**Option 6: Reverse the onus of proof**

*This option involves reversing the onus of proof so that the alleged infringer has to demonstrate that the PBR owner did have a reasonable opportunity to exercise its rights. This would not provide a guarantee that PBR owners could use s.14 and 15 with impunity, but could act as a deterrent to infringement. However, this option may not follow the Australian legal standard of a presumption of innocence.*

**Response:**

The Association is strongly opposed to the reversing of the onus to prove there was a reasonable opportunity.

**Option 7: Delete references to 'reasonable opportunity' in s.14 and 15**

*Removing the condition that the PBR owner must not have had a reasonable opportunity to exercise its rights would remove uncertainty over the interpretation of the term. However, this may not be consistent with UPOV Article 14(2) and 14(3). Such a change may also have the detriment of allowing PBR owners to wait until well after use of the protected material has commenced and business decisions made before demanding recompense from end users.*

**Response:**

The Association does not agree because it offers two undefined alternatives and the Association believes there should be one clearly defined alternative.

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

*This option involves clarifying whether royalties on harvested material which is also propagating material can be appropriately sought under s.11, 14 and/or 15. Some alternatives for doing this are:*

- *bring a test case to court. This would provide a high degree of certainty but would be a difficult and expensive exercise.*
- *seek an opinion from the Australian Government Solicitor. This may not provide the degree of certainty necessary desired.*
- *seek the opinion of an expert panel as described in Option 5 above.*

**Response:**

The Association disagrees with this option and therefore feels that; Farm saved seed would be considered practical in Australia because.

1. It is easy as it is naturally stored a low moisture content, making it suitable for seed.
2. There is existing infrastructure which would enable this to occur. Most farms have silos and there is a whole industry based on seed grading plants.
3. There is a history of farmers retaining their own seed.
4. Royalties are not the issue.

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During the past drought years over 70% of NSW Farmers' would be exempt.

**Option 9: No change to the farm saved seed exemption**

*This option is appropriate if the exemption is believed to be working satisfactorily and providing the correct balance between the rights of PBR owners and growers. Section 17(2) can still be used to have the exemption not apply to particular taxa declared in the Regulations. This may prevent the saving of propagating material in sectors where an equitable return on the investment in breeding cannot be achieved. However, as no taxes have been declared in this way, the practicalities of this are uncertain. ACIP is interested in why no applications to have taxes declared in this way have been submitted.*

*ACIP seeks any reasons why s.17 should not be changed in regards to the balance between the rights of PBR owners and growers, including any unintended consequences of a change.*

**Response:**

It is vital that the farm saved seed exemption is continued, and the Association is not surprised the International Treaty on Plant Genetic Resources for Food and Agriculture enshrines farmers' rights in their legislation.

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

*This option could involve making the exemption only available where it is "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" (from UPOV Article 15(2)). This would clarify that the exemption is limited and PBR owners would have a basis to bring infringement actions in circumstances where the practice of saving seed is preventing them from securing a reasonable return. However, this option may create uncertainty for all parties, particularly growers, over when the exemption applies, and may result in more litigation.*

**Response:**

The Association believes that making the farm saved seed exemption 'explicitly limited' may result, for all practical purposes, in preventing farmers from saving their seed at all.

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

*This may involve restricting the exemption to certain prescribed taxa (ie. the opposite of current Australian law under s.17(2)), and/or requiring large scale growers to pay equitable remuneration to the PBR owner - for saved seed and to keep necessary records.*

*This option may limit the extent of the exemption, enable PBR owners to generate a reasonable return from growers who are more able to afford it and ensure Australian law complies with UPOV in regards to the legitimate interests of PBR owners. However, it may cause further confusion as to the circumstances in which the exemption applies, may not solve issues such as 'under reporting' by growers, and requires an entire new system to be established. This would involve setting appropriate remuneration rates and determining what size growers are exempt.*

**Response: 10(b)**

The Association disagrees with the suggested solution as it would add even further complexity to the system, without really addressing any of the practical problems. If the exemption is limited to prescribed varieties, this would probably result in the need to change legislation regularly. The seed industry has recently asked for a minor change which has taken over two years to draft. It would be interesting to see exactly what is meant by the suggestion 'to implement an equitable remuneration system for breeders where farmers save seed,' and whether this would avoid the alleged problems of the current scheme e.g. farmers mis-declaring varieties at the silo.

**Option 11: Remove the farm saved seed provision**

*This option would completely remove the rights of growers to retain seed for personal use. Growers would be required to seek authorisation to use harvested seed for all further crops. If enforceable, and growers continue to use PBR protected varieties, this option would increase returns to PBR owners. It would also help to clarify that growers do not have the right to trade or barter PBR protected seed. However, this option would significantly increase costs for growers, may result in a lower rate of uptake of new varieties and would require new seed production infrastructure. If not enforceable, this option may merely result in increased non compliance and dissatisfaction with the PBR scheme. Also, it would need to be determined whether removing the farm saved seed provision would contravene Australia's "farmers' rights" obligations under Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture.*

**Response:**

The Association is totally opposed to this option. If the right for farmers to save seed for their next year's crop is removed, this will be a great hindrance to the new varieties being taken up by farmers. Seed companies would have a difficult task indeed to forecast how much seed will be required for the next crop, as it is difficult to forecast demand. Also, sufficient seed producers would need to be growing the new varieties under contract to the seed companies. Finally, no farmer wants to seek permission to grow the variety of his choice for the next year's crop. It is culturally unacceptable that seed companies should have this power over farmers and the community who might otherwise benefit by an improved product. It is also unethical that farmers, who have frequently funded the development of new varieties through their R&D levy, might be refused the opportunity to grow those varieties.

**Option 12: No change.**

*This option is appropriate if the farm saved seed exemption should encompass all*

forms of propagation. Section 17(2) can still be used to have the exemption not apply to particular taxa declared in the Regulations. This would prevent the saving of propagating material in sectors where it does not traditionally occur and is not considered appropriate. However, as no taxa have been declared in this way, the practicalities of this are uncertain. It also may not address inherent misunderstanding about the exemption and the inherent costs for litigation and compliance audits. ACIP seeks any reasons why s.17 should not be changed in regards to asexually propagated varieties, including any unintended consequences of a change.

**Response:**

No comment

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

If it is appropriate that s.17 encompass all forms of propagation, then this option would help to clarify this for users. However, the provision is known nationally and internationally as ‘farm saved seed’, and so may take some time to have a practical effect.

**Response:**

No comment

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

This option would involve replacing the term ‘propagating material’ in s.17 with ‘seed’ or ‘sexually propagated material’. This would be appropriate if the widespread practice of saving propagating material would mean the owners of PBR for asexually reproducing species would be unable to generate a fair return, and so such species should not be subject to s.17. Any such change would be prospective. This option would be compliant with UPOV and also provide a great deal of certainty for users, however it would not have the flexibility to accommodate any changes deemed necessary in the future and may not alleviate the high enforcement costs being experienced in some sectors of the horticultural industry.

**Response:**

No comment

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

Changes to the EDV provisions may not be warranted as the low number of applications for an EDV declaration may indicate that there is limited need for the provisions. However, this may instead indicate that the provisions are too impractical to be useful. Also, the uptake of GM technology may increase concerns in the future. ACIP seeks any reasons why the EDV provisions should not be changed, including any unintended consequences of a change.

**Response:**

The Association does not agree with this option. The GM example in this option is inaccurate because if a new variety is similar to an old variety except that it has a genetically modified chemical resistance it is surly distinct.

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

This option was recommended by the Expert Panel on Breeding and accepted by the Government, however it is yet to be implemented. This option would allow the owner of PBR on an original variety to have any derived variety declared an EDV, not just those which are the subject of a PBR application or grant. This would better enable the owner of PBR on the original variety to generate a greater return on his or her investment. However, the current remedy for a derived variety being found to be an EDV is for the rights on the original variety to extend to the derived variety. Enabling varieties which are not subject to a PBR application or grant to be declared an EDV raises the question of whether a body other than the PBRO is needed to decide the matter, as the

PBRO would have no obvious jurisdiction over non-PBR varieties. Another question is whether the appropriate remedy would continue to be to extend the rights on the original variety to the derived variety.

**Response:**

The Association does not agree with this option because we believe that EDVs are not the problem.

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

*This may speed up the process, but if the original variety is subsequently not granted, the breeder of the derived variety would have unnecessarily incurred the cost of disputing the EDV application and lost revenue from the derived variety. The unsuccessful applicant for the original variety may be liable for these costs.*

**Response:**

The Association does not agree with this option as it is not viewed as an issue.

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

*This would increase the scope for the PBR owner of the original variety to exercise their right. The majority of submissions made to ACIP requested greater protection for the original variety, and this may go towards meeting their needs. It would also better enable the PBRO to determine EDV declarations. However, it may mean that a derived variety could be declared to be essentially derived despite contributing substantially to the public good. An example would be the insertion of a gene for disease resistance into a disease-susceptible original variety through backcrossing.*

**Response:**

The Association does not agree with this option.

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

*This would remove the possibility of a cosmetic feature being considered an unimportant difference, despite it being of significant commercial value to that variety. However, it may provide less guidance on the meaning of ‘important’.*

**Response: 19(a).**

It may be worth considering this option, please refer to the response 19b.

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

*This would involve changing s.4(c) to read “it does not exhibit any important features (as distinct from features of no commercial value) that differentiate it from that other variety”. This would remove the possibility of a cosmetic feature of commercial value being considered an unimportant difference and continue to provide some guidance on the meaning of ‘important’. This option may change the meaning of ‘important’ to be ‘of commercial value’.*

**Response: 19(b).**

It would be unlikely that breeding would occur if it was of no commercial value.

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

*This would enable a fuller explanation of “important features” to be provided which better addresses issues such as cosmetic and commercial.*

**Response: 19(c).**

Please refer to the response 19(b).

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

*This option was recommended by the Expert Panel on Breeding and accepted by the Government, however it is yet to be implemented. Moving the responsibility for*

*deciding whether a derived variety is an EDV from the PBRO to the courts may have the benefits of greater expertise in this area and discourage any frivolous actions from being taken in the future. It may also compel disputing parties to use ADR. However, many respondents emphasised that legal recourse to settling PBR disputes is beyond the financial resources of many breeders due to the relatively small profit margins from many plant breeding investments. Moving responsibility for EDV declarations to the courts may make such determinations too slow and expensive for many in the industry, and be counter to a general shift towards alternative dispute resolution mechanisms. Moving this responsibility to another body, such as a Tribunal, may provide a balance between the rigour, high costs and resolution times of the court system and the high accessibility and low costs of the PBRO. It may require the development of alternate dispute resolution systems such as mediation and arbitration. However, advice provided by the Australian Government Solicitor to ACIP suggests that where a Tribunal is determining a dispute between private parties, it would still be subject to review by a court. This would potentially create another layer in the system.*

**Response:**

The Association believes this proposal would not work.

**Option 21: Improve the PBRO's ability to make determinations on EDV**

*This may involve further training for PBRO staff, creating access to expert witnesses and adjusting the financial arrangements so that the full or a majority of costs are borne by the parties involved. Such an option may provide a quicker, less expensive process than could be provided through the courts or some other body. However, this may not be a cost-effective solution given the very low number of applications for EDV declarations.*

**Response:**

Please refer to the response 20.

**Option 22: Develop benefit sharing arrangements**

*A process that allows the breeders of the original and the derived varieties to find common ground on sharing the benefits of the derived varieties may be appropriate. The PBR Act could provide a framework for agreement to be reached among the contesting breeders. Such a process could be tiered, beginning with negotiation but with the option to seek recourse through alternative dispute resolution (ADR) procedures and ultimately the courts.*

*The ADR process offered by the Australian Seed Federation to its members may provide an appropriate forum or model F64. Compulsion to participate in such a process could be provided by having a judicial option that would determine benefit sharing arrangements. The PBRO may have a role in not granting PBR on an affected variety until an agreement on benefit sharing has been reached.*

*Such an option may enable the benefits of original and essentially derived varieties to be shared equitably at low cost and in a non-combative manner. However, such a process may encourage frivolous and/or vexatious claims of EDV in order to obtain some of the benefits of a derived variety.*

**Response:**

If benefits from sharing arrangements can be determined, it should then be possible to determine EDV.

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

*This option may be appropriate if it is accepted that the courts will have a view on the application of this section and will further develop it as more cases come to court. ACIP seeks any reasons why the exhaustion provisions should not be changed, including any unintended consequences of a change.*

**Response:**

No comment

**Option 24: Clarify the meaning of s.23**

*The courts' current interpretation of s.23 appears to restrict PBR owners' ability to seek royalties on material derived from propagating material that has been legally obtained from the grantee without further production or reproduction. This may or may not be appropriate. Some possible options for clarifying the meaning of s.23 are:*

- *amending s.23 in some way. ACIP is open to suggestions on how this may be achieved.*
- *seeking the opinion of the Australian Government Solicitor.*
- *seeking the opinion of an expert panel, such as that outlined in Option 5.*

**Response:**

The definitions need to be clarified now.

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

*This option is appropriate if the meaning of current provisions is sufficiently understandable and/or court decisions provide a sufficient process for clarifying them. ACIP seeks any reasons why no changes should be made, including any unintended consequences of a change.*

**Response:**

Agree, no change until the EDV is clarified.

**Option 26: Clarify the meaning of particular terms in the Act**

*Some options for this are:*

- *defining particular terms in Part 3 of the Act, or amending current definitions*
- *seeking the opinion of the Australian Government Solicitor*
- *seeking the opinion of an expert panel, such as that outlined in Option 5.*
- *using guidance from organisations such as CIOFORA.*
- *using guidance from Europe on equivalent provisions. ACIP welcomes any suggestions on which provisions may be of use.*

**Response:**

The Association does not agree with this option and believes this should be undertaken in Australia.

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

*This option is appropriate if it is considered that current provisions are sufficient and there would be little benefit in providing PBR applicants with the right to begin infringement actions before grant. ACIP seeks any reasons why no changes should be made, including any unintended consequences of a change.*

**Response:**

Agree that there should be no change, until this has been clarified.

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

*This option may enable breeders to better defend their (subsequently granted) PBR rights. It may be appropriate to restrict it to a particular sector such as horticulture. However, there are considerable risks involved in providing infringement provisions to an applicant of a new variety that has yet to establish its registrability through the granting process. For example, taking an alleged infringer to court based on a right that has not been granted may require from the plaintiff a substantial compensation or indemnity bond to cover the defendant's damages costs in a case where the PBR application proved to be invalid.*

**Response:**

The logistics of providing PBR applicants with the right to begin infringement action before they have reserve their grant, this may creates a legal night mare as it allows applicants to prosecute innocent competitors without completing their own grant applications.

**Option 29: No change to jurisdiction of the Federal Magistrates Court::**

*This option is appropriate if the FMC is not considered to provide any significant advantage over the FCA. One reason may be that the most significant costs are incurred during the pre-trial phase of litigation and the FMC will not address this. However, leaving the FCA as the only option will not encourage further court decisions and therefore more clarity on a range of issues. ACIP seeks any reasons why no changes should be made to the jurisdiction to the FMC, including any unintended consequences of a change.*

**Response:**

The Association agrees that there should be no change to jurisdiction of the Federal Magistrates Court on this issue.

**Option 30: Extend the jurisdiction of the Federal Magistrates Court to PBR**

*This option would provide an alternate, more accessible venue to those who would possibly not have pursued their dispute through the Federal Court. This option is contingent on the results of the current Government review of the federal court system.*

*The FMC may be suitable for PBR matters because, unlike patent cases, PBR cases may be less vulnerable to time intensive claims and stalling tactics challenging the validity of the registered right<sup>F88</sup>. Common claims against the validity of a patent often take up a large percentage of court time during patent infringement proceedings. ACIP is only aware of one PBR case commenced under the PVR or PBR Acts in which the validity of PBR was an issue<sup>F89</sup>.*

*It may be argued that PBR cases are similar in complexity to patent cases and therefore not suited to the FMC. Magistrates may have difficulty establishing and maintaining expertise in PBR due to the low number of cases. ACIP notes that both the FCA and FMC can seek the advice of independent technical experts to assist them. Another issue may be that, unless the discovery phase is limited or optional, costs will not be reduced.*

**Response:**

No comment.

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

*This option may simplify and/or standardise the process for proving infringement and avoid the need for parties to agree to methodologies, such as for DNA testing. However, such procedures may also remove the ability of the court to follow the most appropriate processes for a given situation and/or take advantage of developments in DNA testing and other technologies.*

**Response:**

The Association do not agree with this option as there needs to be a better understanding of the issue. There is a DNA testing research project being undertaken by Rural Industries Research Development cooperation (RIRDC).

**General Comment**

**Part 5 – Sector Generated Support**

**Response:**

The Association is supportive of an organization representing the interests of plant breeders and the roles of this organization should be carefully considered. The role of enforcing PBR, or providing assistance to this end, may make an education role difficult.

**Option 32: No change to ADR processes**

*Some ADR alternatives are currently available, so this option is appropriate if these are considered to be adequate or would be adequate if further promoted in the industry. ACIP seeks any reasons why no changes should be made to ADR processes, including any unintended consequences of a change.*

**Response:**

The Association suggests that the National Agricultural Commodities Marketing Association Limited be used on this issue.

**Option 33: Register of mediators with PBR and plant breeding expertise**

*This option would involve establishing a register of PBR and plant breeding experts who can assist in ADR processes, either within or outside of the court system. This may enable experts to be identified quickly and make ADR processes more effective, but would incur establishment and maintenance costs. ACIP seeks views on the usefulness of such a register and who would be best placed to administer it.*

**Response:**

It may be difficult to find independent mediators in this small industry. The National Agricultural Commodities Marketing Association Limited should be given some consideration.

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

*This option may be appropriate if criminal convictions are unlikely to be achieved due to the reluctance of PBR owners to harm business relationships, the difficulties of providing sufficient evidence to meet the higher burden of proof and the unwillingness of community members to become involved in a police investigation. ACIP seeks any reasons why no changes should be made to the criminal sanctions of the PBR Act, including any unintended consequences of a change.*

**Response:**

The Association believes that there are sufficient areas of doubt in the legislation that changing criminal sanctions in the act could create even larger problems.

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

*This option is to request that the AFP and DPP give PBR cases a higher priority, at least equal to other IP matters. This may increase the chance of investigations and prosecutions being conducted. Justification for a higher priority may include PBR being a special case because of the following issues:  
the difficult nature of suing one's customer rather than one's competitor.  
Compared with other fields, it may be more common in PBR cases that a rights owner alleges a breach of the law has been committed by one of its own customers, such as a grower who purchases PBR protected varieties, than by a competitor;  
marginal profitability in sectors of the plant breeding industry. This makes civil actions out of reach for many and increases the financial impact of offences; current apparent lack of compliance and need for deterrence; current untested status of the public infringement provisions of the PBR Act.*

**Response:**

The Association do not agree with this option.

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

*This option may increase the chance of investigations being undertaken, however the State police are likely to have similar resource limitations as the AFP. There may also be inefficiencies in prosecuting in each State where infringement is alleged to have taken place.*

**Response:**

The Association believes there may be other ways to progress this issue as the resources of various departments are limited; plant breeders are inhibited in bringing suits forward,

particularly with difficulty in obtaining evidence. A better path forward is clarification of the law, good communication and better education regarding the responsibilities of the various stakeholders.

**Option 37: No change**

*This option is appropriate if current Anton Piller orders and contractual arrangements are considered adequate in enabling PBR owners to obtain evidence of infringement. ACIP seeks any reasons why no changes should be made to current laws on the acquisition of evidence, including any unintended consequences of a change.*

**Response:**

See response to option 39.

**Option 38: Introduce a system based on the UK Information Notice**

*This option has the benefit of speed, as it enables the PBR owner to serve a notice on the alleged infringer without first having to apply to a court, and of the burden of proof being placed on the alleged infringer. However, this system may enable PBR owners to unreasonably harass variety users. It is also only able to provide the PBR owner with information, not samples, and the PBR owner may not know whether the alleged infringer has provided correct information. For these reasons this option may be best when combined with Option 39 below.*

**Response:**

See response to option 39.

**Option 39: Introduce a system based on the French saisie order**

*This option has the benefits of enabling samples to be seized and of having a legal officer present when the order is served on the alleged infringer. However, this system may take longer than Option 38 and so it may be best to combine the most relevant features of both.*

**Response:**

No comment.

**Option 40: No change**

*This option is appropriate if it is considered unnecessary or impractical for the Australian Customs Service to identify and seize PBR protected material.*

**Response:**

No comment.

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

*This option could involve introducing new provisions in the PBR Act for Customs to administer. These provisions may enable a PBR owner to lodge with Customs a notice of objection which identifies the PBR protected material and a written undertaking, or paid security, to repay Customs' expenses.*

*However, plant material is perishable and has a limited life span, which poses problems with regard to its storage and handling. Also, Customs have limited resources and lack relevant expertise in plant identification. Possible ways of overcoming this are:*

- *obtaining appropriate expertise, such as by employing Qualified Persons, particularly during high risk periods such as Valentine's Day.*
- *using a DNA marker system if one were available, such as for roses, administered by an appropriate expert.*

**Response:**

The Association supports this option.

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

*This may involve many of the steps in Option 41, with the addition of enabling customs to destroy goods if a PBR owner has within 10 days (three for perishable goods) declared the goods to be infringing its right and has obtained the written agreement of the owner/receiver of the goods for the goods to be destroyed. This may have the advantage of speeding up the process and reducing costs in circumstances where there is clear infringement and a willingness on behalf of the importer to cooperate. However, such circumstances may be too rare to justify introduction of the system.*

**Response:**

No comment.

**Option 43: No change**

*This option is appropriate if it is considered that exemplary damages are unlikely to be effective due to the low risk of infringing behaviour being identified and brought to court and/or the degree of evidence required to prove that exemplary damages are warranted - flagrant infringement, conduct of the party etc.*

**Response:**

The Association strongly supports this option.

**Option 44: Introduce exemplary damages provisions**

*This option may be based on the system of exemplary damages recently introduced for patents. This may provide increased deterrence for potential infringers, fairer compensation for PBR owners, make pursuing infringements more attractive and encourage other forms of resolution, such as ADR. The New Zealand system may provide a model. However, the total number of successful court actions may remain relatively small, reducing the effect of such provisions. ACIP seeks your views on whether exemplary damages are necessary and how they should be determined.*

**Response:**

The Association strongly oppose this option as the exemplary damages may set a precedent and they could be unfair.

**Questions**

**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?*

**Response:**

Yes.

**Q2.**

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

**Response:**

The Association believes the legal aspect should be eliminated.

**Q3.**

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

**Response:**

The Association is concerned about the time and resources which this option would require.

**Q4.**

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

**Response:**

Improved access to the appropriate information.

**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?*

**Response:**

It is important that the levy payer is supportive the option.

**Q6.**

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

**Response:**

The Association is concerned that the ACIP has not properly considered the basic thrust on PBR at a farm level.

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

*This option is appropriate if it is considered that making mendacious declaration of a PBR protected variety an infringement or an offence under the Act would not significantly discourage such behaviour.*

**Response:**

The Association agrees with this option.

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

*This option may involve expanding s.53(1)(c) and/or s.75 to include as an infringement and/or an offence the act of deliberately not using the correct name of a PBR protected variety. Making mendacious declarations an infringement of PBR would enable PBR owners to instigate civil proceedings in such cases to recover damages and act as a deterrent. Making such behaviour a criminal offence may provide a significant deterrent, as it enables a court to impose fines and/or a prison sentence. However, it is unlikely that the Australia Federal Police and Commonwealth Department of Public Prosecutions will investigate such cases and bring them to court – see Chapter 6.*

*ACIP emphasises that the intent of this option is not to make inadvertent varietal Mis declaration an infringement or offence.*

**Response:**

The Association believes that the Act should be amended.

**Q7.**

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

**Response:**

The Association believes is concerned about the focus on litigation as this was not a feature of PBR when it was under the auspices of DAFF.