



Mr Cameron Stack
ACIP Secretariat
PO Box 200
Woden ACT 2606

3 July 2007

Dear Cameron

Canola Breeders
Western Australia Pty Ltd
Unit 15, 219 Canning Hwy
South Perth Western Australia 6151
Locked Bag 883 Como WA 6952

Re: Review of enforcement of Plant Breeder's Rights

Please find below text referring to the operation of S23 of the PBR Act, which was raised at our meeting with the Review panel on 29 June 2007 and which illustrates the area of uncertainty discussed by us relating to extinguishment of PBR on sale of seed.

CBWA is aware that the interpretation of S23 outlined below is not held universally in the industry. However, if the interpretation is valid, we understand that it can impact on the validity of legal contracts (Licence and End Point Royalty Agreements) entered between breeders and growers in circumstances where seed has been wholesaled to a retailer for sale to a grower. In our view, it is fundamentally important for the future of end point royalty collection that the Act enables the breeder to enter a valid (and simple) legal contract with a grower who purchases seed of a PBR-registered variety from a retailer, and, secondly, that there is clarity in the Act on this issue.

Please note that the following text is provided for the purpose of information for the review panel; CBWA can provide no warranty as to the accuracy of the views expressed.

"The general nature of PBR's are set out in S11 which relevantly provides that:

"PBR in a plant variety is the exclusive right to do the following acts in relation to propagating material of the variety:

- (a) produce or reproduce the material;
- (b) condition the material for the purpose of propagation;
- (c) offer the material for sale;
- (d) sell the material;
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- (f) export the material.... etc"

The "material" referred to is very clearly "propagating material". This point is amplified and extended when the Note to that section appearing in the legislation acknowledges that:

"In certain circumstances, the right conferred by this section extends to harvested material (see section 14)."

This distinction is emphasised in S14 where the provision actually distinguishes between the actions of "producing or reproducing" propagating material and "material [being] harvested from the propagating material". These two stages/ activities are clearly distinct in the mind of the legislator as the purpose of S14 is to extend/link one to the other.

If one now turns to S23, it reads essentially as follows:

"PBR granted in a plant variety does not extend to any act referred to

in S11, ... in relation to propagating material of the variety ... that takes place after the propagating material has been sold ... unless that act involves further production or reproduction of the material ..
."

In my view "production or reproduction of the material" clearly refers to the further multiplication of the material for use as propagating material, such as farmer saved seed, and not to the cultivation of a harvested crop or "harvested material" as S14 so specifically provides. Therefore, if the seed that has been sold undergoes further production or reproduction (ie the next generation) then PBRs are re-established for the purpose of that propagating material, and therefore an EPR could be established upon the harvest from that "next generation" propagating material.

However in growing "harvested material" from the seed which has been sold, there is no "production or reproduction" of propagating material, unless part of that crop is saved for seed. In the case of the "saved seed" material S17 and S23(4) make clear that the PBR regime is re-established or "not infringed". In relation to material that is harvested from seed that has been "sold", however, there is no such provision to re-instate PBR. To take any other view of the section, and particularly paragraph (c), renders the whole section seemingly without any substantive meaning."

We hope that this text is useful in clarifying CBWA's concerns about difficulty in interpretation of this section of the PBR Act.

Yours sincerely



Jane Gibbs
Commercial Manager

Telephone: 08 9363 3407
Facsimile: 08 9363 3451