

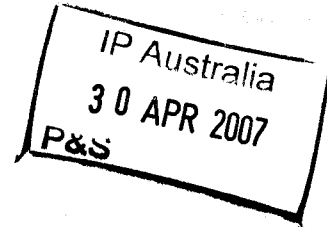


Reference: 07/05927

Department of  
Primary Industries and Fisheries

27 APR 2007

Mr Cameron Stack  
ACIP Secretariat  
PO Box 200  
WODEN ACT 2606



Dear Mr Stack

**Advisory Council on Intellectual Property – A Review of Enforcement of Plant Breeder's Rights**

The Queensland Department of Primary Industries and Fisheries (DPI&F) welcomes the opportunity to provide input into the Advisory Council on Intellectual Property (ACIP) review of enforcement of Plant Breeder's Rights (PBRs). Please find enclosed an initial submission to ACIP's review that outlines some of the issues that DPI&F feels can add to this discussion on the enforcement of PBRs.

The management of intellectual property (IP) is seen by DPI&F as a crucial element of the department's role in fostering profitable primary industries in Queensland and has a number of processes and dedicated resources to ensure that its IP assets are appropriately managed.

Plant Breeder's Rights represent a significant portion of DPI&F's IP portfolio and currently has a number of PBRs granted in Australia. The department has made a considerable investment in a range of plant breeding programs of which commercially released varieties are an important output. Equally important are the commercial relationships used to deliver these new crop varieties to market and the way these relationships are managed are critical to the success of a new commercial variety. The appropriate management of PBRs is also essential in these commercial arrangements.

The DPI&F formally requests that this initial contribution to ACIP is not publicly released for two reasons: firstly this submission does not necessarily represent Queensland Government policy and secondly some of DPI&F's commercial partners may identify with some of the examples and issues provided in the submission even though individuals or organisations have not been cited. Enclosure could adversely impact on our on-going relationships with our commercial partners.

DPI&F has provided its submission to allow ACIP to engage in further consultation and expand on areas of significance. DPI&F's initial contribution is not intended to be a complete and comprehensive position statement.

If you require any further information regarding this matter, please do not hesitate to contact David Ham on telephone 07 3238 3407 or email [david.ham@dpi.qld.gov.au](mailto:david.ham@dpi.qld.gov.au).

Yours sincerely

A handwritten signature in black ink that reads "David Ham". The signature is written in a cursive style with a large initial 'D'.

David Ham  
**Senior Principal Policy Analyst**  
**Innovation & Biosecurity Investment**  
**Strategic Partnerships**

Enc

# Queensland Department of Primary Industries and Fisheries Submission

## In response to the Advisory Council on Intellectual Property's Issue Paper –

### *A review of enforcement of Plant Breeder's Rights*

#### *Introduction*

This submission to the Australian Government Advisory Council on Intellectual Property (ACIP) by Queensland Department of Primary Industries and Fisheries (DPI&F) represents an initial response to the issues paper – *A review of enforcement of Plant Breeder's Rights*. It has been designed to stimulate further consultation and engagement between the two organisations.

**The Department of Primary Industries and Fisheries formally requests that this initial contribution to ACIP is not publicly released for the reasons outlined in the accompanying letter.**

#### *General Comments*

The issues raised in Section 4 of the PBR Issues Paper have relevance and have bearing on DPI&F's ability to enforce its rights under the PBR Act. There have been numerous alleged examples of infringement of DPI&F's PBR rights including over the fence trading of seed by farmers, farmers mis-declaring seed of varieties at the point of sale/delivery, and failure to pay royalties on subsequent generations of crops grown from farm saved seed.

The PBR system has been little tested in the courts and as such the legislation is open to interpretation. This can lead to uncertainty as to the outcome of any enforcement proceedings. The cost of bringing enforcement proceedings (when compared with the relatively low return from royalties and limited life of most commercial varieties), the difficulty in gathering evidence of infringement, the unwillingness of licensees to take action against their customers, the wide farm saved seed exemption all act as a bar to DPI&F taking action against infringement.

The Issues Paper raises suggestions that would assist with these difficulties. In particular, the education of growers, seed merchants, seed receival centres, seed companies etc on the rights and obligations under the PBR Act; clarification of definitions under the Act; mechanisms to aid evidence gathering such as entry onto private property and presumptions of guilt; providing stronger penalties and deterrents to infringement such as exemplary damages; use of the Federal Magistrates Court and regulated mediation or other alternative dispute resolution options; varietal identification; and a central information and collective peak body for raising awareness and overseeing enforcement actions.

## *Specific Comments to Questions Raised in Section 4*

### **4.1.1 Farmed Saved seed and reasonable opportunity:**

#### Question 1:

The farm saved seed exemption does raise numerous legal issues for DPI&F. In the grain sector, where farm saved seed rates are considered high, there have been alleged examples of infringement of DPI&F PBR rights including over the fence trading of seed by farmers, farmers falsely declaring seed of varieties at the point of sale/delivery, and failure to pay royalties on subsequent generations of crops grown from farm saved seed. Gathering evidence and tracking harvested material of varieties can be difficult and very costly. Coupled with the relationship disparity between the Government / licensees and individual growers, there is a reluctance on the part of DPI&F or its commercial licensees to take enforcement action against infringers.

#### Question 2:

Despite the Full Federal Court decision in *Cultivaust*, the farm-saved seed exemption is problematic when trying to enforce PBR rights over subsequent generations of crops grown from farm saved seed. As before, the difficulty in establishing the infringement and the financial and political implications associated with legal proceedings, are a bar to enforcement.

#### Question 3:

Education of growers, seed merchants and seed receivals centres would be one cost effective way to address the issue.

### **4.1.2 Essentially Derived Varieties**

#### Question 4:

The issue of what is a "cosmetic" change has been debated when looking at potential EDV varieties. With no legal precedents for guidance there may be reluctance to recommend undertaking costly comparative trials with a view to legal action.

### **4.2.1 Federal Magistrates Court and PBR**

#### Question 5 - 7:

In light of the relatively low royalty returns and limited economic life of some varieties the cost of legal redress for infringement would be unwarranted in many situations. Simplification of legal proceedings using the Federal Magistrates Court is a welcomed suggestion. This would also go some way to addressing the disparity issue.

#### **4.2.2: Evidence collection:**

Question 8:

Evidence collection is a bar to enforcement. The difficulty in gathering evidence due to inability to track growth of crops and sale of harvested material, mis-declaration of varieties, unwillingness of persons to give evidence all compound the situation.

Question 9:

The suggestions made in the paper would all go some way to improve the situation and in particular the ability to enter private property for evidence gathering and changes to the legal presumptions to reverse the onus of proof similar to the UK model of declaration of origin.

#### **4.2.3 Onus of Proof.**

Question 10 and 11:

The burden of proof on the Plaintiff is another factor to take into account when determining whether to pursue legal action. By addressing some of the evidence gathering issues in 4.4.2 above, the burden of proof may not be as onerous.

#### **4.2.4 PBR Act Language**

Question 12:

The lack of case law in the PBR field leaves many terms open to wide interpretation. In light of this, definitions in the Act should be as clear as possible.

#### **4.2.5 Exemplary Damages**

Question 13:

Where there has been a flagrant or wilful infringement exemplary damages should be available under the PBR Act. An exemplary damages provision similar to that in the Copyright Act could be adopted.

#### **4.2.6 Criminal vs. Civil**

Question 14:

No specific response.

#### **4.2.7 ADR**

Question 15:

Mediation, whilst a useful tool in resolving disputes, can also be used to delay and compound the cost of litigation. As the Australian courts have mediation as part of the litigation process it is recommended that the procedure not be duplicated. If introduced, strict time limits should be placed on how and when mediation can be utilised.

#### **4.2.8 Customs/ importing goods**

Question 16 & 17:

No specific response.

#### **4.2.9 Varietal identification**

Question 18 & 19:

Issues relating to varietal identification have impacted on DPI&F's ability to enforce its PBR rights. Further information can be provided in follow-up consultation.

Question 20:

No specific response offered. Further information can be provided in follow-up consultation.

#### **4.2.10 Central information and collective peak body**

Question 21 & 22:

No specific response. Further information can be provided in follow-up consultation.

#### **4.2.11 Evidence collection and close communities**

Question 23 & 24:

No specific response.

#### **4.2.12 Increasing awareness**

Question 25:

Continuous improvement in the area of raising awareness of IP management across industry is welcomed. DPI&F has increased its own emphasis on educating staff including those involved in plant breeding. DPI&F is also aware of education programs sponsored by the Grains Research and Development Corporation and conducted by ACIPA - Australian Centre for Intellectual Property in Agriculture. These seminar-based training activities appeared to be well received with research providers and grain growers alike. This type of delivery mechanism is worthy of consideration in future education programs.

Question 26:

No specific response. Further information can be provided in follow-up consultation.

Question 27:

One example of an IP management strategy being developed in a plant breeding field can be found in the proposed IP management policy of the Australian Winter Cereal Pre-Breeding Alliance – the contact is Jeremy Burdon. Further information can be provided in follow-up consultation.