

Submission to the Review of Enforcement of Plant Breeder's Rights

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Summary

- In establishing the scope of the inquiry, the Advisory Council should take into account the aims, objectives and purposes of the *Plant Breeder's Rights Act 1994* (Cth).
- In conducting the inquiry the Advisory Council should apply a method and methodology that is consistent with the *Competition Principles Agreement* (CPA). In effect, the Advisory Council must require those seeking to impose any, further, or more onerous, regulation to demonstrate both that (a) the most beneficial regulation is directed to clearly stated objectives, and (b) the form and content of regulation is the best means of achieving the objective(s).
- The overarching intention is that the quality and performance of the *Plant Breeder's Rights Act 1994* (Cth) is identified, assessed and that the recommendations are directed to best means of efficiency and effectiveness for the *Plant Breeder's Rights Act 1994* (Cth).

The overarching intention in reviewing any regulation is that the quality and performance of the regulation is assessed and that the most efficient and effective means of regulation are achieved. This is important because (see generally Organisation for Economic Co-operation and Development, *Taking Stock of Regulatory Reform: A Multidisciplinary Synthesis*, Special Group on Regulatory Policy (2004)):

Regulations are an essential component of modern society. When regulations work well, they enhance governance and promote stability, progress and prosperity. By contrast, ill conceived or poor quality regulations can create barriers to trade and commerce, impede innovation and increase business costs and consumer prices (Productivity Commission, *Regulation and Its Review 2004-2005*, Annual Report Series (2005) p 1).

In reviewing the *Plant Breeder's Rights Act 1994* (Cth) the Advisory Council should take guidance from the method and methodology of the *Competition Principles Agreement* (CPA) as it might be applied to reviewing existing regulations (Parts 1 and 2). This includes, as a first step, identifying the aims, objectives and purposes of the *Plant Breeder's Rights Act 1994* (Cth) (Part 3) and then applying the appropriate methodology to assess (a) whether the benefits of the restriction to the community as a whole outweigh the costs; and (b) whether the objectives of the regulation can only be achieved by restricting competition (Part 2). In conclusion, the Advisory Council's recommendations will only be a valuable contribution to promoting beneficial regulation that is of high quality and performance if the inquiry is conducted according to the method and methodology of the CPA (Part 4).

1. Existing Regulations

A significant part of the CPA was that governments around Australia review the anti-competitive effects on their existing regulation (CPA, cl 5(3)). The approach to conducting, and the content of, these regulation reviews under the CPA is primarily addressed in the Terms of Reference, although there may be additional considerations, mandatory procedures and guidance from other sources. Essentially, the objectives in conducting the regulation reviews are to assess whether the arrangements restrict competition; whether the benefits to the community as a whole outweigh the costs

(including the broader assessment of the ‘public interest’) and that it can clearly be demonstrated that the benefits exceed the costs; and whether the same objects could be achieved by other better (more pro-competitive) means (see Centre for International Economics, *Guidelines for NCP Legislation Reviews* (1999), p 7). Unfortunately, and despite 12 years of operation, the *Plant Breeder’s Rights Act 1994* (Cth) has not been subjected to a regulation review. Notably the *Plant Breeder’s Rights Act 1994* (Cth) was not included in the Intellectual Property and Competition Review Committee (see Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000)).

Perhaps importantly, the *Plant Breeder’s Rights Act 1994* (Cth) was initiated and adopted without an ‘adequate’ competition analysis according to the CPA because the legislation pre-dated the CPA obligations. A regulation review might therefore be expected, including the current Advisory Council inquiry in respect of the content within its Terms of Reference, so as to properly assess its costs and benefits and whether it truly is an appropriate form of regulation. Following the recent 2005 review of *National Competition Policy* reforms (including the CPA), there appears to be renewed concern about both the quality of the review process and a need to initiate further reviews targeted ‘to areas where reform of anti-competitive legislation is likely to be of significant net benefit to the community’ (Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005) pp 249-255). The *Plant Breeder’s Rights Act 1994* (Cth) has not, however, featured in any specific proposals to review existing regulations even though biotechnology has been identified as one of the Australian Government’s strategic policy priorities (See, for example, Commonwealth Biotechnology Ministerial Council, *National Biotechnology Strategy* (2000) p 7).

2. An appropriate method and methodology

An appropriate method and methodology that should be adopted by the Advisory Council is that detailed in the CPA. The CPA cl 5(1) provides:

... that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.

There remains some doubt, however, about the term ‘demonstrated’ in setting the standard to be achieved in applying the ‘guiding principle’ in CPA cl 5(1). This is because the CPA cl 5(5) expressly requires ‘evidence’ that proposed regulation restricting competition is consistent with the ‘guiding principle’. While the term ‘demonstrated’ might be construed as a lower standard for reviewing existing regulation, the preferable construction is most probably *evidence demonstrating* that the ‘guiding principle’ has been satisfied (see Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005), pp 134-140). That is, ‘legislation that restricts competition must be accompanied by evidence that the benefits of the restriction to the community as a whole outweigh the costs, and that the objectives can only be achieved by restricting competition’ (Productivity Commission, *Regulation and Its Review 2002-2003*, Annual Report Series (2003), p 7).

In applying the CPA’s ‘guiding principle’ (including in reviewing existing regulation: CPA, cl 5(3)), the CPA itself provides some insight into the ‘public interest’ that may be relevant in determining the threshold or standard necessary for the benefit to outweigh the costs (see CPA, cl 5(9)). The CPA cl 1(3) provides:

Without limiting the matters that may be taken into account, where this Agreement calls:

- (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
 - (b) for the merits or appropriateness of a particular policy or course of actions to be determined;
- or
- (c) for an assessment of the most effective means of achieving a policy objective;
- the following matters shall, where relevant, be taken into account:
- (d) government legislation and policies relating to ecologically sustainable development;
 - (e) social welfare and equity considerations, including community service obligations;
 - (f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
 - (g) economic and regional development, including employment and investment growth;
 - (h) the interests of consumers generally or of a class of consumers;
 - (i) the competitiveness of Australian businesses; and

- (j) the efficient allocation of resources.

Despite this guidance, the Australian Government, States and Territories hold very different views about the level of the threshold (see, for examples, House of Representatives Standing Committee on Financial Institutions and Public Administration, *Inquiry into Aspects of the National Competition Policy Reform Package* (2002); Senate Select Committee on Socio-economic Consequences of the National Competition Policy, *Riding the Waves of Change* (2000); Senate Select Committee on Socio-economic Consequences of the National Competition Policy, *Competition Policy: Friend or Foe?* (1999) and the submissions to these inquiries), and about how the ‘public interest’ should be considered (see, for example, Senate Select Committee on Socio-economic Consequences of the National Competition Policy, *Riding the Waves of Change* (2000), p 101). As a consequence, a definitive statement of the ‘public interest’ test remains elusive, although the framing of the ‘public interest’ test appears to have changed in its recent articulations, which favours process over substance (see Council of Australian Governments, *Communiqué: 10 February 2006* (2006) attachment B (decision 1.2(a))):

While greater specification and guidance on matters to be considered in applying the test may be helpful, there is only so much that can be achieved via this route. This in turn puts a premium on ensuring that mechanisms are in place to promote the quality of the review process ... Processes which systematically review the rationales for regulatory and other restrictions on competition, and the merits of different options for better meeting underlying objectives, are critical to informed decision making by governments. They can also play a useful role in promoting public awareness of the issues and trade-offs associated with different policy approaches (Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005), p 140).

The *Plant Breeder's Rights Act 1994* (Cth) imposes significant costs on business, principally through regulatory compliance costs (including allocating some of the scarce funding available for research and development), and imposes a barrier to entry through the regulatory hurdles faced by those seeking to develop and commercialise new or competing plant varieties. Further, as the *Plant Breeder's Rights Act 1994* (Cth) is a form of regulation of an area characterised by rapid growth based on new technology there is significant potential for inappropriate regulation to be particularly harmful (see Productivity Commission, *Regulation and Its Review 1999-2000*, Annual

Report Series (2000), p 42). Importantly, the Australian Government has also identified these kinds of issues as central to its considerations under a Regulatory Impact Statement:

Regulation affects business when it imposes a cost or confers a benefit on business. The terms 'cost' and 'benefit' should be interpreted broadly, covering items which can be immediately quantified in monetary terms (eg service charges, subsidies, compliance costs), as well as items which cannot be immediately quantified in monetary terms (eg restrictions on competition, environmental damage etc) (Office of Regulation Review, *A Guide to Regulation* (1998), p A3).

This is significant because embedded in the CPA's analytical approach that all regulations comply with the 'guiding principle' (for an overview of current arrangements see Argy S and Johnson M, *Mechanisms for Improving the Quality of Regulations: Australia in an International Context*, Productivity Commission Staff Working Paper (2003), pp 21-41) there is a method and methodology for assessing both the desirability of a particular regulatory measure (regulatory quality) and the outcomes of a chosen regulatory measure (regulatory performance). In the sense used here 'method' means the techniques or procedures used to gather and assess information about the regulation and its operation, and 'methodology' means the strategy, process or design underpinning the choice and use of a particular method, and the way that method is linked to the desired outcomes. Put another way, the appropriate method and methodology according to the CPA might be characterised as the gathering and evidence-based assessment of information according to the rubric of the CPA in favour of competition (although, importantly, non-economic factors may be relevant and taken into account with the effect of introducing or maintaining anti-competitive regulations and activities: see Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Report No 8 (1999), pp 322-324; Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005), pp 134-137) that addresses each of the following questions about the regulation and its component parts:

1. Is it clearly stated ... what is the fundamental problem being addressed? Is a case made for why government action is needed?
2. Is there a clear articulation of the objectives, outcomes, goals or targets sought by government action?

3. Is a range of viable options assessed including, as appropriate, non-regulatory options?
4. Are the groups in the community likely to be affected identified, and the impacts on them specified? There must be explicit assessment of the impact on small businesses, where appropriate. Both costs and benefits for each viable option must be set out, making use of quantitative information where possible.
5. What was the form of consultation? Have the views of those consulted been articulated, including substantial disagreements? If no consultation was undertaken, why not?
6. Is there a clear statement as to which is the preferred option and why?
7. Is information provided on how the preferred option would be implemented, and on the review arrangements after it has been in place for some time? (Productivity Commission, *Regulation and Its Review 2003-2004*, Annual Report Series (2004), p 12; see also Office of Regulation Review, *A Guide to Regulation* (1998), pp D17-D18).

In considering each of these questions, ‘the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals’ (Productivity Commission, *Regulation and Its Review 2003-2004*, Annual Report Series (2004), p 12). The immediate benefit of such an approach is to impose a moment of openness and indeterminacy in the regulatory review process with the prospect of developing better quality and better performing regulations.

Perhaps the most important contribution of the CPA, however, has been to recognise that ‘[r]egulation that confers benefits on particular groups soon builds a constituency with an interest in resisting change and avoiding rigorous and independent re-evaluation of whether the restriction remains justified in the public interest’ (Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993), p 191; this has been endorsed by the Australian Government: see Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005), pp 134-137). To address this particular constituency problem, the CPA expressly places the onus of proving (or satisfying the threshold of evidence demonstrating) that the restriction on competition was, or is, justifiable on those advocating that the restriction on competition remain in place (or is imposed) (CPA, cl 5(1); see also Office of Regulation Review, *A Guide to Regulation* (1998), p D10; Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993), p 190). The core principle is a presumption in favour of competition and against regulations that restricts competition, where

competition is a means to an end rather than an end in itself (See Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005), p 134). This is significant as some regulation may be anti-competitive but socially desirable (See Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Report No 8 (1999), pp 322-324; Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (2005), pp 134-137).

3. Aims, objectives and purposes of the *Plant Breeder's Rights Act 1994* (Cth)

In applying an appropriate method and methodology the Advisory Council must first identify the aims, objectives and purposes of the *Plant Breeder's Rights Act 1994* (Cth). These were identified at the time the *Plant Breeder's Rights Act 1994* (Cth) was being assessed and adopted by the Parliament.

The Second Reading for the Plant Breeder's Rights Bill (24 March 1994, *Senate Hansard* pp 2305-2306) was intended to 'encourage increases investment in plant breeding and technology transfer', and be 'complementary to the government's policies geared to promote innovation in Australia's plant industries by encouraging research and development using production levies and tax concessions'. Further the Bill was claimed to be 'in harmony' with 'the United Nations Agenda 21, the International Convention for the Conservation of Biological Diversity, the FAO "undertaking on plant genetic resources" and GATT'.

Importantly, the Second Reading for the Plant Breeder's Rights Bill identified a broad range of possibly competing aims, objectives and purposes. For example, the conservation objectives of the United Nations *Convention on biological Diversity* (the 'International Convention for the Conservation of Biological Diversity') might conflict with the trade objectives set out in the World Trade Organisation's *Agreement on Trade Related Aspects of Intellectual Property* (part of the 'GATT'). The advisory Council needs to present some perspective on these some of these potentially competing perspectives so that the costs and benefits of recommendations about the *Plant Breeder's Rights Act 1994* (Cth) can be justified. Further, these perspectives are necessary in determining whether the recommendations for change (or no change) are necessarily the best regulatory approach in all the circumstances.

Further, the Advisory Council needs to determine whether the existing, and relevant to the Terms of Reference, *Plant Breeder's Rights Act 1994* (Cth) has 'encourage[d] increases investment in plant breeding and technology transfer'. The advisory Council also needs to identify what are the measures that are 'complementary to the government's policies geared to promote innovation in Australia's plant industries' and whether these measures, relevant to the Terms of Reference, have been successful. For example, 'production levies and tax concessions' might be a more successful means of promoting increased 'investment in plant breeding and technology transfer' that is being undermined by plant breeder's rights under the *Plant Breeder's Rights Act 1994* (Cth). This is particularly likely if the overwhelming majority of plant breeder's rights are held by those using 'production levies and tax concessions' (noting that production levies are generally taxes directed to the producers of particular plant crops) rather than private investments. Presumably the Advisory Council will collect the data and information and make the appropriate assessments according to the method and methodology suggested by the CPA.

4. Conclusions

The Advisory Council's recommendations will only be a valuable contribution to promoting beneficial regulation that is of high quality and performance if the inquiry is conducted according to the method and methodology of the CPA, after first identifying the aims, objectives and purposes of the *Plant Breeder's Rights Act 1994* (Cth). While this is undoubtedly a difficult task, it is a necessary and desirable approach to delivering high quality regulation that does not create barriers to trade and commerce, impede innovation and increase business costs and consumer prices.