

**Submission by**

**Gene Ethics**

**60 Leicester St, Carlton 3053 Australia**

**Tel: 1300 133 868 or 03 9347 4500 {Int Code +613}**

**Fax: 03 9340 5102**

**Email: [info@geneethics.org](mailto:info@geneethics.org)**

**WWW: <http://www.geneethics.org>**

**on a review of**

**Enforcement of Plant Breeder's Rights  
issues paper March 2007**

**2007**

Mr Cameron Stack  
ACIP Secretariat  
PO Box 200  
WODEN ACT 2606  
Telephone: (02) 62832804  
Email: cameron.stack@ipaaustralia.gov.au

Dear Mr Stack,

We make this submission on the following matters:

- *issues relating to the enforcement of plant breeder's rights in Australia;*
- *possible strategies to assist Australian plant breeder's rights holders to effectively enforce valid rights;*
- *whether any practices and procedures relating to the enforcement of Plant Breeder's Rights (PBR) are appropriate to be referred to the Federal Magistrates Court; and*
- *difficulties in enforcement of the PBR Act being experienced by users of the Act and to recommend solutions to these difficulties where appropriate.*

Gene Ethics seeks the opportunity to further participate in the consultation process.

### **Introduction**

Thank you for this opportunity to make a submission on the issues paper that proposes amendments to the PBR Act. Gene Ethics argues that:

1. public resources should not be used to enforce private rights (though we also question the validity of those rights);
2. the criminal law should not be used to enforce private rights;
3. the burden of proof for alleged infringements must not be moved from the complainant onto the respondent; and
4. a thorough public review of all aspects of the PBR Act and its social impacts would be timely.

### **Introduction:**

**Gene Ethics rejects patents on life and PBR. These mechanisms facilitate the enclosure and privatisation of the global biological commons. This is inherently unjust and against the public interest. The agricultural commons were created and nurtured by countless generations of breeders and seed-savers without commercial reward, and were bequeathed to us at no cost. Our inheritance is being pirated.**

**The PBR law is inherently unfair since 'inventiveness' is not a criterion for registering a plant variety under PBR. This also limits its capacity to achieve its alleged main purpose – producing new varieties – rather than primarily generating monopoly revenues for grantees. Invention is rightly a core criterion for a patent, which most GM companies use in preference to PBR to protect their varieties.**

**Without an inventive step being required for PBR, biodiversity can be privatised by a seed or agribusiness company, with no innovation, which amounts to privatising the biological commons. This is biopiracy and we oppose it.**

**We question the assumptions implicit in the Issues Paper - that increased PBR enforcement is needed or justified.**

**There may be better ways for the Act to reward plant breeders and to achieve its goals – the development of new plant varieties to meet the challenges of increasingly tough environmental conditions and to ensure food security.**

**We object to scarce public resources being mobilised to enforce an inherently unfair system, that seeks to enforce private property rights under the criminal law, at public expense. The resources of the Director of Public Prosecutions, the federal Magistrates Court and Commonwealth Police should not be spent to defend or enhance private commercial interests.**

**Plant breeders have the option of suing to enforce their rights if they regard them as infringed and Gene Ethics sees this as sufficient remedy.**

**Australian governments have consistently rejected our arguments that strict liability should apply to gene contamination, especially where the pollen or seed of patented or PBR varieties transfer their genes into the genomes of conventional or organic crops.**

**Allowing only civil actions for PBR infringement is consistent with government decisions not to allow strict liability where farmers' crops are contaminated by patented GM or PBR varieties. Protection should cut both ways. Plant breeders should have no greater rights than people whose crops are contaminated by protected varieties. Government must not allow draconian enforcement of private PBR and patent claims at public expense without allowing similar enforcement where GM contamination occurs.**

**If criminal liability (with penalties of jail and fines) were to apply to alleged infringements of patents and PBR, they should also apply to the inevitable contamination that would ensue from the commercial release of (especially open-pollinated) GM and PBR plant varieties.**

### **Commentary**

Issues Paper, Section 3.1 correctly points out that there is an increasing use of patents to protect plant intellectual property, and a decrease in public investment in plant breeding. However, the assumption that these factors create a need for increased intellectual property rights protection enforcement is unfounded.

The Aims and Objectives of Plant Breeder's Rights Laws (Section 2.1 of the Issues Paper) is to encourage plant breeders to produce new plant varieties, and to benefit society with access to new and improved plant varieties and assured food security. But increased use of patents and PBR, and decreased public investment in plant breeding are reducing, not increasing, food and crop diversity.

- **Question 1:** Is the farm saved seed exemption of the PBR Act causing your business difficulties in achieving the desired level of compliance in royalty payment and/or any other difficulty?

We are not a business and we think it inappropriate to focus exclusively on the needs of those with a commercial interest in the outcomes of this review.

This Issues Paper does not discuss the core issues in a balanced way as it assumes that more stringent rights and protections are needed under the PBR Act to encourage plant breeders, but does not present any other options. For instance, it could be proposed that breeders be contracted by the community through governments to undertake certain essential work previously carried out by public sector breeders.

We regard the ancient practice of farmers and gardeners saving seed from their harvest for planting next season as an inalienable right. Seed saving is essential to adapting plants to local conditions, especially where environmental degradation and global climate change processes occur. So seed must not become a product that can be dealt with through one size fits all approaches to breeding new varieties.

We oppose property rights that would prohibit or limit seed saving or make it prohibitively expensive as farmers and gardeners have always made more contributions to developing new varieties than the seed industry.

- **Question 7:** Please inform ACIP of any limitations you perceive in extending the jurisdiction of the Federal Magistrates Court to cover PBR matters.

**We agree with the following statement from Section 3.2.2 of the issues paper:**

“It is the responsibility of the right holders to protect their rights against infringers and ... PBR rights are private rights and, as such, enforcement is primarily the responsibility of the grantee.”

We see no case for the PBR Act to enable the criminal courts to make PBR enforcement a criminal matter. The use of public resources to recover alleged private losses is antithetical to the public interest.

It would be particularly inequitable to make alleged infringements of PBR into a criminal matter when Australian governments have so trenchantly resisted all requests to expand the avenues of redress for anyone suffering the consequences of contamination by patented genetically manipulated (GM) plant varieties. We consider that a strict liability regime for GM contamination is needed, so we see no case for the enforcement rights of those who own PBR or patents on plant varieties to be given any stronger entitlements than their right to sue.

We do not support (Section 74) which provides that, “Most PBR infringements in the private sphere will also be subject to public enforcement ... A criminal prosecution can be commenced, potentially even if a private action is current, possibly resulting in both damages (civil) and a court fine (criminal).”

We call for rescission of: “The criminal penalties for PBR infringements ... introduced in the 1994 Act in response to complaints concerning the ‘costs’ and ‘difficulties’ of enforcing rights under the 1987 PVR Act.”

It is entirely appropriate that: “The burden of proof in criminal actions requires proof ‘beyond

**reasonable doubt”** and that “a successful prosecution under criminal provisions needs to satisfy a higher burden of proof than is the case in civil actions, which could make a successful prosecution under the criminal provisions more difficult.”

We oppose any proposals to reverse the onus of proof of entrench a presumption of guilt. These would allow PBR owners to engage in predatory practices that would place an unfair burden on landholders who may for trivial reasons and on weak grounds be judged guilty in advance. The assumption of innocence until proven guilty and the onus of proof on the accuser must not be compromised.

We also agree that it is appropriate that: “The Plant Breeder’s Rights Office (PBRO) within IP Australia, has only a very limited role to play in respect of enforcement.” Monitoring and enforcement should remain the sole responsibility of the grantees themselves.

- **Question 10:** Is the burden of proof on plaintiffs too onerous in PBR matters to allow effective legal redress?

No. PBR is in many cases a way of privatising public resources. Enclosing the global biological commons should not be permitted. Other ways of rewarding genuine innovation should be found that do not include enclosure.

- **Question 11:** Please outline changes you consider may alleviate concerns over the burden of proof requirements on the plaintiff in PBR matters.

We have no concerns over the burden of proof requirements on plaintiffs. That’s where they should properly rest.

- **Question 13:** Would the introduction of ‘exemplary damages’ in the PBR Act enhance the incentives for grantees seeking judicial relief and facilitate more effective enforcement mechanisms?

If they are imposed, exemplary damages should apply to all PBR infringements. Where PBR is placed on a variety that has, for instance, become available through a foreign aid program where local breeders received the material for the purposes of assisting breeders or growers in other countries. Such biopiracy should not be rewarded and exemplary damages should apply.

We consider that PBR can achieve its legitimate goals without draconian enforcement provisions.

- **Question 14:** Please provide your views and/or experiences concerning the utility of criminal sanctions available to PBR rights owners to protect their rights.

We do not see any need at all for criminal sanctions as these should be strictly civil issues.

- **Question 15:** Would mediation be of net benefit in plant breeder’s rights disputes?

Mediation should be the first option tried in seeking to settle all disputes, including those over PBR. However, mediation should not be mandated and refusal to participate in mediation should in no way be taken as prima facie evidence of guilt.

- **Question 21:** Would you support the establishment of a central coordinating body for plant breeders to assist with enforcement?

No. Gene Ethics does not accept that living organisms should be the subject of monopoly ownership under the Patents or Plant Breeder's Rights Acts. Intellectual property rights should only be granted to encourage genuine inventions and should not apply to organisms originally found in nature. Plants are not inventions. PBR is doubly objectionable because, unlike patents, it does not apply the criteria of non-obviousness, inventiveness and replicability which must be met for the grant of a patent.

This enables global agricultural and natural biodiversity to be privatised through PBR without any changes being made to the registered organism. Thus, PBR is not even the spur to innovation that other intellectual property rights regimes are supposed to be.

The idea that public funds should be used to enforce a private right under PBR (Section 2.4.5) is unacceptable. The resources of the Director of Public Prosecutions, the Federal Magistrates Court and the Australian Federal Police should not be used to investigate, prosecute or try disputes over alleged infringements of PBR. Plant breeders with varieties registered under the PBR Act already have adequate remedies through civil proceedings. If breeders are experiencing problems of enforcement, they have other remedies than ad hoc changes to the law.

We strongly oppose any use of so-called Anton Piller orders or criminal investigations to enforce PBR 'rights'. Such blatant intrusions would mirror Monsanto's invasion of private lands in North America to collect crop samples without authorisation for the purpose of enforcing plant patents. This has proved a multi-faceted disaster for those farmers whom Monsanto targets, who have insufficient means to defend themselves and are forced to settle.

### **International Obligations**

Australia should seek ways to implement its commitments under international agreements in ways that also serve the national interest. Mere acquiescence to their apparent requirements will not serve us well.

The paper says: "Australia acceded to UPOV in 1989 and as a signatory it is obliged to provide enforcement for plant breeder's rights. The World Trade Organisation (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ... mandates that member states must establish minimum standards of intellectual property protection. TRIPS requires member states of WTO to ensure that effective enforcement procedures are available for intellectual property rights. ... require that parties to the TRIPS Agreement have decisions concerning enforcement made on the merits of the case, without undue delay, and that parties to the proceedings will have an opportunity for a review by a judicial authority of final administrative decisions."

With the nations food security at stake the interests of transnational agribusiness should not be enabled to impose its will without public participation or knowledge as appears to happen at present.

The so-called 'farmer's privilege' that allows farmers to harvest and legitimately use propagating material derived from the crop grown from the original and legitimately obtained propagating material

for subsequent cropping cycles on their own farm should be a right.

The issues paper notes: "The 'farm-saved seed exemption' allows farmers to harvest and legitimately use propagating material derived from the crop grown from the original and legitimately obtained propagating material for subsequent cropping cycles on their own farm (Section 17 of the PBR Act). The farm saved seed exemption does not, however, allow a farmer to **sell, exchange, share, or barter** the harvested material to another grower, without the further authorisation of the grantee. If this occurs, the grantee is entitled to exercise the PBR rights and require a royalty to be paid as specified in Sections 14 and 15."

But these are the very processes which maintain and improve local biodiversity and adaptation that will be crucial as global climate change arises.

#### **4.2.6 Criminal sanctions v civil sanctions**

It may be true that seeking judicial relief would be considerably diminished if the Federal Police were NOT??? to initiate a prosecution but police intervention is totally unacceptable as: "the State incurs much of the cost of the enforcement proceedings ... which will rarely be compensated for by any fines imposed." It is outrageous that the Act allows such prosecutions.

Society does not treat the infringement of a PBR so seriously that: "criminal sanctions, including imprisonment," are justified, even though they, "may be a greater deterrent against infringement than civil remedies, particularly if the infringer is unable to pay costs.

We consider it entirely appropriate that: "In the past, police forces such as the Australian Federal Police have rarely become involved in IP enforcement because it is generally given a lower priority compared to other crimes." And we believe that should continue.

We agree that:

- PBR is a private right and, as such, it is not appropriate for the Federal Police to prosecute;

We strongly consider it appropriate that:

- the burden of proof and quantum of evidence required for success is higher in criminal proceedings; and

We consider that in the vast majority of cases:

- not all infringements have significant national economic consequences.

#### **4.2.7 Alternative Dispute Resolution (ADR)**

Alternative dispute resolution (ADR) is an umbrella term used to describe various ways of resolving disputes other than through litigation. In other areas of intellectual property, alternative dispute resolution schemes have been implemented or are being considered for the resolution of disputes.

#### **Conclusion**

Don't make the PBR law any more draconian than it already is. Other ways to achieve the goal of producing more varieties should be sought. The PBR Act is a blunt instrument and the proposed changes would make it blunter. We need our farmers and gardeners to have their activities facilitated in the national interest, not stymied.

**We call for a general review, including examination of greater protections for farmers' rights to develop local varieties, protecting agricultural biodiversity and food security.**