

Submission on the Plant Breeder's Rights Review 2007 4 May 2007

Introduction

Thank you for the opportunity to register a submission concerning the Australian Government Advisory Council on Intellectual Property's issue paper: *A review of enforcement of Plant Breeder's Rights*. Please note that Greenpeace would like to participate in the proposed consultation process. Greenpeace's primary objections to the suggestions made in the Issues Paper include its assertion that public funds should be used to enforce a private right under Plant Breeder's Rights (PBR) and that the burden of proof regarding alleged infringements be shifted from the litigator to the defendant. Greenpeace suggests a broad, evidence-based, review of the impacts of PBR as an appropriate way forward.

Discussion

Greenpeace feels that this Issues Paper, overall, implies that stronger protection for breeders under PBR is required, without reference to any opinions to the contrary. No data or evidence is provided to support the assertion that greater or more stringent regulatory enforcement is needed. The one sided nature of the discussion paper is in itself a problem - any review of legislation should be prepared to look at the entire legislation and all of the criticisms associated with it. In this case it is also a problem because the paper fails to establish any regulatory need. Its reliance on the unsubstantiated complaints of an unknown number of PBR holders with unknown financial stakes in their licenses cannot be used to justify more stringent (and sometimes draconian) proposals.

Greenpeace is concerned that this discussion paper has not been the result of any broad consultation and that it does not canvas the full range of opinions and criticisms relating to PBRs. Greenpeace believes that the scope of the review should be much broader and cover issues relating to biopiracy; loss of innovation as a result of intellectual property rights being granted over plants and other living things; and loss of agricultural diversity and the extent to which intellectual property (IP) rights have contributed to that loss. These issues are matters that have been raised a number of times in relation to PBR and are well within the ambit of the Act's objectives. Greenpeace understands that substantial accusations of biopiracy have been made against Australian plant breeders and believes that these deserve further analysis. Also worthy of analysis is the extent of compliance of the current and proposed PBR with the United Nations Convention on Biological Diversity and the Commonwealth-State Working Group on Access to Biological Resources (CSWG) Principles.

Greenpeace strongly opposes any changes to the current criminal provisions in the Act. There is no evidence provided that the lack of prosecutions by the Director of Public Prosecutions is anything but a refusal to act because of a lack of evidence justifying criminal investigation. Any enforcement problems perceived by industry do not necessitate grounds for review of the legislation in isolation, especially at taxpayer's expense (see Sect. 1.2 of Issues Paper). As stated in Sect. 3.2.2 of the Issues Paper, "It is the responsibility of the rights holders to protect their rights against infringers...PBRs are private rights and, as such, enforcement is primarily the responsibility of the grantee." Greenpeace opposes the allocation of any additional public funds to enforce PBR.

Within the Issues Paper, Section 3.1 is correct in pointing 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 have increased the importance of intellectual property rights and their enforcement is unfounded and unsubstantiated. The stated Aims and Objectives of Plant Breeder's Rights (see Sect. 2.1 of the Issues Paper) is to encourage plant breeders to produce new plant varieties; to benefit

society with access to new and improved plant varieties; and to protect the food supply. It appears that the current trend towards increased use of patents and decreased public investment is actually decreasing the diversity of food crop varieties and hence jeopardising food security. Greenpeace believes that, rather than increasing the emphasis on intellectual property rights, the way to protect food supplies is to provide more public funding to aid the development of new plant varieties and protect the diversity of food crops.

Also of concern are Sects. 4.2.2 –4.2.3 of the Issues Paper. This section notes that mechanisms to obtain evidence, such as the Anton Piller order, are too onerous. However, no evidence is presented to substantiate these claims. Furthermore, no evidence is presented to suggest that the PBR Act is even being violated. Anton Piller orders are legitimate and necessary protections to citizens presumed innocent of an infringement of law. Impeding on the rights and protections afforded to citizens is an unreasonable and a dangerous invasion of privacy rights for citizens and the presumption of innocence. Because grantees are having a difficult time creating evidence and obtaining a legitimate search order (Anton Piller order) from a judge does not indicate that the legislation needs to be changed, especially when such changes would impinge on citizens' rights to privacy.

The National Privacy Principles from the Privacy Amendment of 2000, subsection 1.2 state that “An organisation must collect personal information *only by lawful and fair means and not in an unreasonably intrusive way.*” [emphasis added]. The objects of the Privacy Amendment of 2000 “recognises individuals' interests in protecting their privacy” and “recognises important human rights and social interests...including...the right of business to achieve its objectives efficiently.” To remove important legal safeguards that protect individuals' privacy would contradict existing privacy laws. There are already means of obtaining information and ensuring that business can achieve its objectives efficiently via Anton Piller orders. For these reasons, no change should be made in regards to evidence collection, nor should the PBR Act allow entry onto private property to gain evidence.

The presumption of guilt and/or reversing the onus of proof is incredibly dangerous, as it allows for predatory practice and unfair burdens placed on the defendant. It is the grantees' responsibility to prove guilt; the defendant should be assumed innocent until proven otherwise.

Section 4.2.7 of the Issues Paper suggests Alternative Dispute Resolution (ADR) is an important and potentially cost-effective alternative to costly litigation or other court costs. Greenpeace would agree, so long as a breach has been established prior to dispute resolution and the parties mutually agree to use ADR. ADR must not be used to establish responsibility – and certainly not in cases where a party fails to participate in ADR.. If a party has admitted to breaching the PBR, then ADR may be a “constructive, neutral way of resolving breaches, with a structure that demands both parties provide information in order to correct the problem.”

Conclusion

Greenpeace again thanks the ACIP for the opportunity to register a submission. It should be noted that this submission is not comprehensive. However, it serves as a preliminary outline of some of the dangers and flaws of the Issues Paper as addressed above. Greenpeace suggests a broad, evidence-based review, of the impacts of PBR as an appropriate way forward. As previously mentioned, Greenpeace would like to be a participant in the proposed consultation process.