

Response to the Review of the enforcement of Plant Breeders Rights

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NSW Farmers' Association Background

NSW Farmers' Association (the Association) is an apolitical voluntary industry body representative of the whole farming community in NSW. Through its commercial, policy and lobbying activities it provides a powerful and positive link between farmers and the public.

1. Background

Agriculture is a vital sector of the NSW economy. In 2001/02 – the last financial year not dramatically impacted by drought – agriculture contributed \$10.2 billion to the NSW economy and employed over 122 000 people. This represented 26% of the total value of Australian agricultural production. The value of exports of agricultural commodities from NSW (ie/ sourced from agricultural industries), amounted to \$1.5 billion in 2004-2005. The drought has had a significant impact on the gross value of agricultural production in NSW, slipping to \$8.6 billion in 2004/05, or 24% of the total gross value of agricultural production¹. In ‘normal’ production seasons, NSW farmers typically have the highest value of agricultural production of any State.

The cropping industry in NSW is a significant contributor to the economy. However in recent years drought has curtailed its contribution. The gross value of crops in NSW fell by 4% to \$4.4b in 2004-05 as a result of decreased production of principal crops combined with lower prices. Decreases in gross value were recorded for most of the major cereal crops including wheat (down 8% to \$1.4b), barley (down 22% to \$252m), canola (down 15% to \$143m) and oats (down 40% to \$59.5m). Cotton was the only significant crop to show an increase in gross value (up 30% to \$526m). Grapes decreased by 7% to \$300m, while the gross value of rice decreased by 44% to \$99.6m. The gross value of oranges increased by 34% to \$111m.

PRINCIPAL CROPS, NSW, 2004-05

	Production '000 t	Area '000 ha	Yield t/ha
Barley for grain	1,760.7	1,023.1	1.7
Grain sorghum for grain	846.8	211.4	4.0
Sugar cane cut for crushing	2,133.2	19.9	107.5
Wheat for grain	7,537.4	4,256.3	1.8

Plant breeding and related programs are a vital component to ensure the on-going productivity and prosperity of the cropping industry. Such breeding ensures new varieties have enhanced yields, quality attributes and disease resistance to add value and meet various market demands.

The reduction in State Government funding and resources towards plant breeding programs has seen their rationalization in recent years. This has provided an opportunity for private breeding companies to fill this void.

However, while the introduction of the *Plant Breeding Rights Act in 1994* has provided a commercial incentive (through End Point Royalties (EPR's)) for private companies to invest in plant breeding, farmers in NSW have mixed feelings about the PBR/ EPR process and whether PBR protected varieties represent good value for money.

For instance a significant proportion of farmers feel that the majority of PBR protected varieties are not performing and this they contend is the main reason why plant breeding companies are struggling financially. Unfortunately it is also acknowledged that whilst ever plant breeding companies are not able to operate profitably their ability to breed superior performing plant varieties will be hampered.

¹ Australian Bureau of Statistics (2004/05) *Value of Agricultural Commodities Produced* (cat. No. 7503.0)

NSW Farmers' Association policy in general is supportive of Plant Breeders Rights and End Point Royalties in the grain and pasture seed industries provided that royalties are set at reasonable levels and represent fair value for the product on offer.

NSW Farmers' Association encourages ACIP to liaise with growers regarding further developments on this issue so that enforcement of PBR's is fair and reasonable and the desired outcome is achieved.

2. Comments in relation to the issues paper

The NSW Farmers' Association appreciates the opportunity to provide feedback on this increasingly important issue.

We have a number of specific comments in relation to the 'Review of enforcement of Plant Breeders Rights issues paper' which are outlined as follows.

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? If yes, please supply details including estimates of loss if possible.

Farm saved seed was a fundamental condition of the original legislation and NSW Farmers' Association believes that the exemption should be retained. We believe that the critical issue is not that farmers save their seed but that the collection of the EPR is fragmented and expensive.

Grain growers have raised concerns about the system, worried that EPRs are not getting back to breeders, or that EPRs represent a form of 'doubledipping' because they are paying for the seed and then a royalty when the grain is delivered - on top of statutory research levies.

Growers are also particularly frustrated when EPR's are imposed and the variety is underperforming. The general sentiment among growers is that there are few grain varieties that have performed since PBR legislation was introduced.

Question 2: Has the *Cultivaust* judgement provided sufficient clarification on the operation of the farm saved seed exemption particularly as it relates to "reasonable opportunity" to generate a return on farm saved seed? If not, please outline your concerns for the inquiry.

NSW Farmers' Association cannot comment with any authority on this issue.

Question 3: Is there a need for more education and awareness for users of protected varieties? Please identify the industry sectors requiring more information and how this may be achieved.

Yes increased education and awareness would be encouraged for grains and horticulture producers along with breeders so that there is a reduction in EPR collection methods, different contracts used, which is confusing. Accordingly it is important that the industry as a whole looks for ways to improve the way EPRs are managed and to this end we are supportive of a nationally coordinated and regulated EPR collection system involving all parties in the supply chain.

Question 4: Does the provision of EDV provide breeders with a sufficiently defensible remedy to protect the scope of their investment in breeding? If not, please outline your specific concerns addressing the EDV provision/process and, if possible, how they may be improved within the context of this enforcement review.

This question is best answered by other parties.

Question 5: Is the cost of legal (including judicial) redress too onerous for you to undertake action against non compliers? Please document the nature of these concerns including where cost would cause the cessation of continuing legal redress.

NSW Farmers' Association does not condone any actions by growers which prevents the collection of EPR's. To this end we support an EPR collection system which provides breeding companies sufficient income to remain financially viable.

Question 6: If the FMC had the jurisdiction to hear PBR matters, would this influence your decision on whether or not you pursued a PBR enforcement action?

This question is best answered by other parties.

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

This question is best answered by other parties. However we would also encourage the use of alternate dispute resolution mechanisms as we believe they offer a more effective remedial solution to PBR matters involving growers. Legal action should only be the last resort in such instances.

Question 8: Is evidence collection constraining your ability to undertake effective legal redress in PBR matters? Please document your concerns.

See our response to question 7. NSW Farmers' Association would not support a proposal to reverse the onus of proof within PBR legislation. This would create an adversarial environment between growers and seed traders in the industry and may lead to commercial retaliation and social disruption in small rural and regional communities.

Question 9: What changes would assist breeders (and their legal advisers) in obtaining sufficient evidence to successfully undertake appropriate enforcement measures? What other ideas may help alleviate the difficulties in obtaining evidence?

NSW Farmers' Association encourages ACIP to have active discussions with all sectors of the industry to determine a mutually satisfactory process to collect EPR's. One option for instance could be to set up a company which would collect EPR's, mediate, undertake public relation efforts and distribute EPR's to the Plant Breeding Companies (not the receivers of the grain).

Question 10: Is the burden of proof on plaintiffs too onerous in PBR matters to allow effective legal redress? Please document and quantify if possible.

This question is best answered by other parties. Also see our response to question 7 and 8.

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

This question is best answered by other parties. Also see our response to question 7 and 8.

Question 12: Are there terms used in the PBR Act causing difficulties for grantees and their legal advisers when undertaking, or considering undertaking enforcement action? What actions could be undertaken to improve the understanding of specific terms used in the PBR Act?

Yes. NSW Farmers' Association would support the simplification and clarification of terminology with the PBR Act.

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 yes, please provide your reasons and, if possible, suggest criteria for determining exemplary damages.

NSW Farmers' Association would not support the introduction of an exemplary damages clause within the PBR Act. As stated previously we are supportive of the use of alternate dispute resolution mechanisms as we believe they offer a more effective remedial solution to PBR matters involving growers. We believe that the focus should instead be on improving the current EPR collection system rather than tightening legislation. The proposed introduction of such clauses demonstrates that the current system is not working.

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

See our response to question 7,8 and 13.

Question 15: Would mediation be of net benefit in plant breeder's rights disputes? Please provide reasons for your views and, if possible, the mechanisms in which mediation could be introduced (mandated?) for PBR enforcement matters.

Yes for the reasons stated previously.

Question 16: Is the importation of PBR protected plant or parts of plants (flowers) infringing your PBR right to a significant extent? Please provide details of your concerns and, if possible, quantitative estimates of the losses you sustain.

This question is best answered by other parties.

Question 17: Please suggest options for addressing your concerns regarding the importation of PBR protected plants or plant parts

This question is best answered by other parties.

Question 18: Are difficulties in varietal identification constraining your ability to enforce your PBR right effectively? Please document your concerns and, if possible, provide quantitative estimates of losses.

NSW Farmers' Association acknowledges the lack of a rigorous and cost effective variatal identification mechanism at grain receival sites and the resulting problems associated with collection and attribution of EPR's. Accordingly we support the development of technology which will enable the rapid identification of wheat varieties upon receival.

Question 19: Would you suggest alternative variety identification options that may address your concerns?

It will be extremely difficult to identify individual varieties whilst ever we have an excess number of plant varieties available to growers. For instance Australian growers currently deliver around 250 wheat varieties and given that current testing can only determine what a variety is not, rather than what it is, then the probability that an unscrupulous grower can continue to avoid paying the levy will remain high.

Question 20: Do molecular technologies have significant utility for reducing low compliance rates in variety identification? Do these technologies require additional development to improve their utility? Please document your reasons.

This question is best answered by other parties.

Question 21: Would you support the establishment of a central coordinating body for plant breeders to assist with enforcement? Please provide reasons for your view and indicate which of the above functions should be undertaken by such an entity.

NSW Farmers' Association does not currently have policy regarding this issue and further detail would be required before our position could be determined. However in principle the idea seems to have merit.

Question 22: Please document any other activities that would be appropriate for such a body and the reasons for including these activities.

Again NSW Farmers' Association does not currently have policy regarding this issue. One option could be to set up a company which would collect EPR's, mediate, undertake infringement investigations, public relation efforts and distribute EPR's to the Plant Breeding Companies (not the receivers of the grain).

Question 23: What methods or mechanisms would assist PBR owners in obtaining evidence in small communities, where the holder of the evidence does not wish to be involved in infringement actions?

See our response to question 22.

Question 24: Would a peak/specialist body provide an effective means for deterring infringement and undertaking infringement cases while remaining sensitive to specific issues of small rural communities?

This option should be investigated further as it may provide a superior alternative to the current arrangements.

Question 25: Is there a need for additional education and awareness programs in particular sections of the plant breeding and/or variety user industries in Australia? If yes, please nominate the sector, the nature of the information program required and an appropriate delivery mechanism.

Yes. The thrust of this paper is ill directed. TRADGICALLY SO. You must bring the users with you. As such the IP industry probably needs a fair dose of awareness and education as this review just offers more of the same.

Question 26: Is there a need for a body to provide relevant information and procedures (e.g. an enforcement hot-line) for breeders wanting information on enforcement matters? Who should perform this role? Please provide reasons.

This question is best answered by other parties.

Question 27: Are you aware of any effective and efficient IP management strategies that may have utility to the Australian plant breeding industry? If so, would you supply the details and/or where the information may be obtained?

No.