

Submission:

In Relation to:

***ACIP REVIEW OF ENFORCEMENT OF PLANT
BREEDER'S RIGHTS***

By Pacific Seeds Pty Ltd(April 2007)

Contact Officer:

*Graeme Smith
Technical Manager
Pacific Seeds Pty Ltd
TOOWOOMBA QLD 4350*

*Tel: (07) 46 902666
E-mail: graeme.smith@pacseeds.com.au*

TO:

Mr. Cameron Stack
ACIP Secretariat
PO Box 200
WODEN ACT 2606

Telephone: (02) 62832804 Email: cameron.stack@ipaustralia.gov.au

Background:

Pacific Seeds Pty Ltd, a member of Advanta, is a field crop breeding, production & marketing company. We conduct breeding and R & D programs involving sunflower, sorghum, corn, pennisetum, oats , wheat, barley and canola. Introduction of overseas germplasm for the breeding program is through a company owned quarantine glasshouse.

Production of PBR protected open pollinated and hybrid seed is conducted both by contracted farmers and on company owned and operated farms under the control of company agronomists.

Production is done in Tasmania, New South Wales, Queensland and Western Australia.

Processing, seed treatment and quality assurance is performed "in-house" at company facilities based in Toowoomba.

Submission:General Comments.

A crucial way of improving agricultural production is by introducing new plant varieties. Breeding new varieties requires substantial investment in terms of technology, skill, labour, physical resources and time, all of which cost money. Investors will only commit funds if there is a good chance that they will benefit in the long run . Breeders must therefore have a mechanism to establish exclusive rights to new varieties. Plant Breeders Rights provide this provided they can effectively prevent others from multiplying and selling their varieties on a commercial scale. Without effective enforcement, the exclusive rights of plant breeders as granted by the PBR Act have limited value.

Unfortunately, evidence from the Australian seed industry would suggest that the PBR Act 1994, and it's predecessor PVR Act 1987 is not as effective as it could be .

Response to Specific Questions:

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.

Response:

Although the losses from seed royalties when farmers save seed for re-sowing on their own property in the next season are significant, the biggest losses occur when large quantities of farmer saved seed is marketed “over the fence”. For many farmers, the costs and activities needed to retain, grade, chemically treat and warehouse in insect free storage, relatively small quantities of saved seed for sowing on their own farms in the subsequent season are a disincentive to retaining their own seed. In many cases it is easier to purchase sowing seed at sowing time. However if by “over the fence trading” the quantity to be “turned into sowing seed” becomes more worthwhile then the practice becomes more profitable. Removing farmers rights to retain their own seed for sowing would help remove the problem of over the fence trading but to the detriment of the honest farmer.

The biggest losses will obviously come from failure to pay End Point Royalties, which in turn rely heavily on an effective enforceable PBR system to provide the initial surety of variety ownership For the Australian Wheat industry a leakage of 3% loss in EPR declarations amounts to losses of well over \$1 million annually,(Based on 21m tonnes of grain at EPR of \$2/t and 3% loss is \$1.26 million).Farmer Saved Seed opens an opportunity for growers to “muddy the waters” even further regarding what is eligible for payment of royalties (EPR).

Question 2: Has the *Cultivaust* judgment 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.

Response:

Pacific Seeds main concern with the PBR Act 1994 is the difficulty in adequately enforcing the grantees right with respect to the prohibiting of the over the fence trading of farmer saved seed. Our understanding of the *Cultivaust* case is that it was primarily concerned with the rights to impose an EPR following the granting of PBR status.

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.

Response:

Plant Breeders Rights, and it’s predecessor Plant Variety Rights have been law since 1987. There have been numerous education campaigns, leaflets, brochures, rural press articles etc to educate the users of protected varieties. We believe that the relevant industry segments know what PBR means but are also aware that it is very unlikely that they would be prosecuted for breaching the Act regardless of the amount of publicity given to the Act. The penalties if actually convicted are also not a significant deterrent.

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.

Response:

The requirement that a second variety needs to be either PBR protected or the subject of an application for PBR before the original breeder can claim EDR provision is an obvious loophole that needs to be closed. If the issue of genetic distance is to be addressed, the homology standards to be established need to be realistic, changing a variety with the addition of one or two genes can be a significant benefit to the longevity and utility of that variety and this needs to be acknowledged. However, the original breeder in most case's had done the hard work and this needs consideration from a commercial perspective. If a derived variety is released and the EDV status subsequently challenged, clear guidelines on the molecular fingerprint of the variety needs to be defined as do the options available to the original breeder and the breeder of the potentially infringing variety. Molecular markers are the only realistic tool available to evaluate the homology or dissimilarity index of conflicting varieties PBR status. The marker type and genome coverage needs to be clear and defensible. It has been suggested in some markets that homology levels >80% are the trigger for initial discussion between the concerned parties and for levels >85% the option of commercial negotiation and potential sharing of royalty income is available to the original PBR owner.

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

Response:

Where the compensation from a successful court case is limited simply to reimbursement of lost seed royalty, a seed company would be well out of pocket, especially if the risk of failure due to a minor legal technicality is taken into account.

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?

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

Response

No Comment

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

Response:

How do you collect evidence legally? Despite requests by industry to the PBRO for some guidance in this area, to date there has been no positive outcome. Is it possible to just enter a farmers property and start stabbing bags, collecting seed from silos, taking photos etc? How can the chain of custody of such evidence be maintained. Does it need to be a qualified 3rd party? Although it is a federal Act I doubt if the Federal Police would want to be involved in gathering evidence.

Here is also the problem with proving violators “intention to use propagating material”. Violator may purchase as “grain” but then use as “seed”.

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?

Response:

Developing guideline judgments in relation to PBR offences including advice as to appropriate levels and types of evidence would provide some confidence to grantees and perhaps indicate to people contemplating breaching the PBR Act what the likely consequences may be. Withdrawal of the privilege against self-incrimination in civil proceedings may also be worthwhile.

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.

As mentioned in our response to Question 8 and Question 11, knowing what constitutes sufficient and acceptable evidence and who / how to collect it is a major constraint.

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

Response:

Onus of proof should be placed on the defendant in relation to the knowledge requirements of civil actions. This addresses the difficulties in obtaining access to property to collect / assess evidence.

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?

No Comment

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.

Response:

Our understanding is that as the PBR law stands at present, a large scale grain grower may only need purchase one bag (25kg) of a PBR protected variety, bulk it up over 2-3 generations and then have commercial use of the resulting grain totaling thousands of tons (or in the case of forage, thousands of acres of production) for the following 20 years. In this example the only reward that the breeder of the variety has received is the seed royalty on the original one bag of sowing seed. This hardly seems like a fair and equitable remuneration to reward and promote the future breeding operations of the PBR grantee. Admittedly, imposing an EPR is an option for grain crops but this mechanism is difficult to impose for forage crops. Providing a system of statutory or exemplary damages for confirmed infringement of PBR would not only act as a deterrent to breaches but also would provide the grantee with some level of compensation.

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

Response:

The only real benefit of criminal sanction is their significant deterrent factor and the fact that investigation and prosecution is undertaken by the Federal Police. In the current climate of total lack of confidence in the Act by grantees in the agriculture sector, the prosecution and imposition of criminal sanctions in 1 or 2 high profile cases would be seen as a positive step to “get the message across”, regardless of the potential loss of monetary compensation. Violators are violating Commonwealth law. The Commonwealth should take some action to defend their law.

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.

Response:

Mediation as a means of settling disputes without the need to become involved in expensive court battles, with no certainty of a positive finding certainly has its merits. However for mediation to become an effective tool and means of deterring PBR infringements some precedents need to be set by the courts. Guideline judgments from confirmed infringements will not only set legal precedents but will act as a solid alternative and incentive for the arbitration and mediation process to work. As with all mediation and arbitration systems, there is still the final option of proceeding to court should mediation or arbitration be unsuccessful.

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.

Response:

No, not for our company

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

Response

No Comment

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.

With the trend toward EPR as a means of collecting adequate return on investment, we believe that the Act needs to be reviewed in a way that allows better enforcement of and provides incentive for growers to properly declare the identity of varieties that are delivered to bulk grain silos. This will require not only practical, cost and time effective variety identification and testing methods but also provision of penalties for non-compliance. Whilst the introduction of GM canola will perhaps provide some answers and contribute toward partially solving some of these issues for other crops, there will still always be a differential in the level of EPR that different breeders ask of growers and hence the incentive for growers to try and 'cheat' the system.

This issue can work for OP varieties, but under the existing guidelines the current system will not work for hybrids where parents also need protection. If a parent is used inappropriately a proper validation system needs to be put in place where the breeder of inbred parents can be protected without having to make these parents available to competitors. The lodgment with the PBR authority of a molecular fingerprint may be a means to address this situation. The use of molecular markers publicly available could be the standards for such a molecular fingerprint.

Even with good identification systems, deliveries of mixed varieties (deliberate or otherwise) will also present some difficulties.

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

Response:

For OP varieties – morphological descriptions supported by molecular markers for conflict resolution is a workable solution.

For hybrid parents – the use and lodgment of molecular fingerprints may be a solution to the potential risk of inappropriate use.

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.

Response:

For some species where there is still a degree of “population variability” in the commercialised varieties it should be recognized that molecular markers have limited application, e.g. lucerne. However, for crops such as canola, wheat, barley and the parents of hybrids the use of molecular markers is clearly a useful option. In corn , sorghum, sunflower and wheat we currently fingerprint our lines with SSR markers and have this information on hand to detect infringements. Unfortunately this technology is not available for all crops. To be of real practical value, especially regarding EPR’s the techniques need to be fast for use at receipt, accurate, not only at determining a samples identity but also in defining differences between varieties , robust and low cost.

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.

Response:

Yes very much so. The overseas organisations listed in the review paper (BSPB,CPTA and CIOPORA) all reportedly work very well in enforcement activities. Although the cost of such organisations can be significant, so are the losses due to breeches of the Act.

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

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?

Response:

Use of 3rd party investigators would help remove the PBR owner from community perceptions of big company verses small struggling farmer.

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?

Response:

Yes. A specialist body as opposed to a peak body would be preferred as they would be seen to be totally independent of commercial interests and influence.

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.

Response:

Plant Breeders Rights, and it's predecessor Plant variety Rights have been law since 1987. There have been numerous education campaigns, leaflets, brochures, rural press articles etc to educate the users of protected varieties. Widespread publication of prosecutions or breeches of the Act may be the most effective educational tool.

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.

Response:

Definitely. As the PBR Act is a Federal ACT it is logically a responsibility of the keeper of the ACT to firstly ensure that the Act is actually capable of achieving its initial intention, secondly to provide information , thirdly to provide education and finally to give advice on enforcement to ensure the successful adoption, operation and compliance with the legislation. Provision of such information was requested by the ASF from the PBRO over 2 years ago. Unfortunately to date any response has not included the appropriate level of detail to be of significant use.

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?

Response:

No.