



Victorian Farmers Federation

Grains Group

27 April 2007

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

Dear Mr. Stack

Plant Breeder's Rights Enforcement Review Issues Paper

Thank you for the opportunity to respond to the issues paper created by ACIP (Advisory Council for Intellectual Property). Plant Breeder's Rights (PBR) is a very important part of the grain growing industry and the VFF Grains Group is happy to be involved in its evolution.

It is the policy of the VFF Grains group to support PBRs as an effective means in providing an incentive in continued breeding research and keeping the available varieties in Australia on the forefront of the industry. We also see PBRs as an effective way to allow for cost recovery of the expensive process of variety development and to facilitate royalty collection.

The VFF will use this opportunity to address the questions raised in your issues paper which are of the most concern for the grains industry and outline our concerns with possible changes with the PBR legislation. Many of the questions posed in this paper are directed to users of PBRs, but as growers we are considerable stakeholders and the responses to questions will be of this point of view.

Farm Saved Seed Exemption

The VFF Grains Group is very supportive of the concept of a farm saved seed exemption. Using farm saved seed as propagating material is a practise that is commonly employed by grain growers in Victoria. Many growers rely on their farm saved seed as a way to control input costs. Removal of the exemption will be taking one more option away from growers. Victorian growers are very capable and flexible producers of grain, but removal of the exemption will affect their economic competitiveness.

Question One:

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 and other difficulty?

Difficulties associated with royalty collection attributed to farm saved seed are more likely to be a result of the royalty mechanism rather than the act of saving seed. An efficient and uniform code for end point royalties across the industry would facilitate royalty collection. Also, if all plant breeders only used EPRs there would not be incidents of 'double dipping', where farmers are forced to pay a royalty at time of purchase AND at the time of sale.

Question Two:

*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 industry.*

The result of the *Cultivaust* case has not provided clarity of 'reasonable opportunity' and the concept of reasonable opportunity has not been sufficiently explained to growers. There is considerable confusion surrounding the term 'reasonable opportunity' and how it relates to farmer saved seed. Most growers feel that once a seed has been paid for it can be saved for following years as propagating material. In general, growers are not aware that their responsibilities may continue beyond that, however nor is the legislation clear if it does.

To clarify the responsibilities of the grower there should be a more focused definition of reasonable opportunity. Breeders surely could not expect growers to fully understand and provide for 'reasonable opportunity' when there is no clear definition and is up for legal interpretation. For example it can be interpreted that since the seed was purchased in the previous year the breeder has reasonable opportunity in the current year. Seed breeders will have a list of customers of a particular seed and it would be up to the breeder to pursue any additional royalties they may be entitled to.

The difficulty and uncertainty surrounding royalty collection and 'reasonable opportunity' can be overcome. The Grains Group is in favour of the development of a uniform code for the collection of end point royalties (EPR). The use of EPRs transfers some of the growing risk to plant breeders and transfers cost from the beginning of the growing season to time of sale. Also, EPRs allow for the collection of the benefits of farm saved seed and avoids the confusion of the definition of farm saved seed and 'reasonable opportunity'.

Question Three:

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

The legislation surrounding the PBRs is clear when it comes to what farmer saved seed can be used for. The PBR Act states, and the VFF does its best to educate growers, that Farm Saved Seed can be used for propagating material only, not to sell, exchange, share, or barter. The VFF Grains Group is clearly in favour of an equitable royalty system.

However, there is room for education on the issues surrounding 'reasonable opportunity' and any other responsibilities growers may have after the purchase of seed. Growers wish to work within regulatory guidelines and abide by their obligations, however lack of understanding or more importantly lack of clarity can be an inhibitor.

Question Nine

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

The VFF is supportive of PBRs and therefore we are supportive of the principled enforcement of PBRs. However, some of the suggestions within the issues paper are disturbing. The issues paper listed the following measures to enhance gaining evidence against possible infringers of PBRs:

- Provisions requiring participation in dispute resolution such as mediation
- Provisions to allow entry onto private property to gain evidence
- Presumption of guilty provisions
- Exemplary damages

Under no possible circumstance should there be a presumption of guilt. Presumption of guilty is unfair, unethical, and contrary to every fibre of the judicial system. Also, provisions to allow entry on to private property will be giving to many rights to the breeders can easily lead to an abuse of power. There are many practical problems with presumption of guilt. For example, unfriendly neighbours could lay a charge and cause immeasurable expense and inconvenience. This could certainly lead to the invasion of private property which is unacceptable.

There are already avenues to obtain the ability to search private properties. If there is a sufficiently strong case against a suspected PBR infringer a search warrant will be issued and no abuse of power will occur.

The other option proposed in the issues paper is a mediation mechanism. The VFF does not have an official view on mediation as it relates to PBRs, but growers are already familiar with mediation as NACMA trade contracts are subject to NACMA arbitration.

NACMA provides four dispute resolution options; Mediation, Expert Opinion, Fast Track Arbitration, and Full Arbitration. As many growers are already aware of this arbitration service and it is done in an equitable manner it many serve ACIP to investigate their process further.

Question Twelve

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

As mentioned earlier the term 'reasonable opportunity' does not provide adequate information of the due diligence required by growers to adhere to PBRs with respect to farm saved seed. What are the rights and obligations of growers using farm saved seed? When a grower saves seed does that mean they can use it as propagating material indefinitely 'no questions asked' or does it mean there are addition obligations the grower must fulfil?

Question Fifteen

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.

The topic of mediation was discussed earlier, but I would like to comment on the quote from the submission from the Australian Seed Federation, referring to Alternative Dispute Resolutions (ADR):

This could be based on an arbitration model, but would need legislative support to ensure that failure to cooperate could be penalised to the extent that it is better to cooperate e.g. failure to cooperate is deemed as guilt, etc.

This viewpoint is completely unacceptable. We believe that should an arbitration model be established there should be incentive to cooperate, but instituting a 'guilty until proven innocent' method is not the way to do it.

NACMA does not employ an assumption of guilt principle. To encourage cooperation, once a dispute is forwarded to the arbitration system a party who is not cooperating is essentially forgoing their right to defend their case and is less likely to have the decision in their favour. The NACMA arbitration process has largely proven to be an equitable and cost effective way to resolve disputes.

Conclusion

In closing, the VFF Grains Group policy is fully supportive of equitable PBRs as long as the exemption for farmer saved seed remains. It is extremely important to growers to have the option to farm saved seed. We recognise the importance for return on investment, so a fully functioning End Point Royalty scheme will be the best way to provide means to recover the cost of breeding.

Adding to the confusion is the wide variety of ways of exercising PBR in the industry. There are some with a royalty payment at time of purchase and others have an EPR payment and even others which charge both. There should be an industry push to consolidate the mechanism for royalty collection into a centralized EPR system. The VFF will be happy to work with the broader industry on these issues.

I thank you for the opportunity to comment on the Issues Paper and look forward to being involved in this issue in the future. If you have any comments please contact myself or Darryl Harrison at (03) 9207 5536.

Kind Regards,

G. L. Nalder

Geoff Nalder
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