



**Office of the Director-General**

Department of  
**Primary Industries**

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**1 8 SEP 2002**

Mr J Roberts  
Secretary  
Advisory Council on Intellectual Property  
PO Box 200  
**WODEN ACT 2606**

Dear Mr Roberts

**Innovation Patent – Exclusion of Plant and Animal Subject Matter**

I refer to the letter of 2 July 2002 from your Chairman, Mr Owen Malone seeking views on the exclusion of plant and animal subject matter from the recently introduced innovation patent. I apologise for the delay in responding, but understand that a late reply would be acceptable.

Because the Department of Primary Industries (DPI) has considerable infrastructure investment in agricultural research and development, it has a vested interest in both plant breeders' rights (PBR) and innovation patents. DPI believes that it is important to have access to both mechanisms in order to provide a degree of flexibility in protecting its intellectual property (IP), and therefore is concerned about the recent decision to exclude plant and animal subject matter from the innovation patent system.

The letter and accompanying Discussion Paper do not explain the source of concern that led to the Commonwealth Government's decision to exclude plant and animal subject matter from the recently introduced innovation patent. I would like to place on record DPI's preference for their inclusion in the innovation patent system and that DPI has a keen interest to participate in any consultation process that the Advisory Council on Intellectual Property may initiate as a result of comments received on your Discussion Paper.

I offer the following comments on the four questions in your Discussion Paper.

*Question 1. Is the current 'gap' in IP protection for inventions with a lower threshold, that involve plant and animal subject matter, seen as an existing or potential problem?*

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DPI responds in the affirmative. As indicated above, DPI would prefer to have access to both PBR and innovation patent systems in order to provide a degree of flexibility in protecting its IP. As technological advances in the plant and animal sciences become more complex, it will be increasingly necessary for research and development agencies to appropriately protect their IP.

*Question 2. Given the existence of the standard patent system and the PBR system, is there a need for those involved with plant and animal subject matter R&D in Australia to be able to protect their research with the innovation patent?*

DPI would respond in the affirmative. Expanding on the response to Question 1, different IP outcomes require different degrees of protection and DPI needs to know that it has access to all three mechanisms as required. Current protection options are either extremely expensive to implement (for example, DUS trials for PBR) or excessively onerous to obtain (for example, costs and difficulties of proving patentability of plant material). In addition, current protection offered by PBR does not provide adequate coverage to the substantial investments made to achieve new plant variety outcomes, particularly when any new plant characteristic can be taken up by a 'rival' breeder as soon as new varieties are released commercially.

*Question 3. What, if any, are the national benefits of excluding plant and animal subject matter from the innovation patent?*

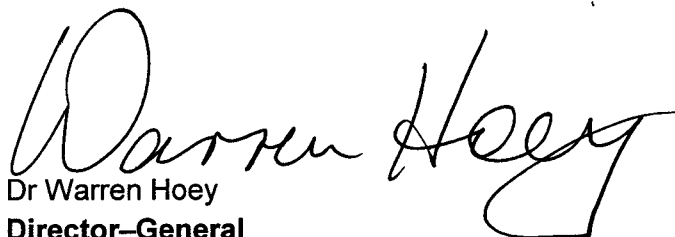
DPI cannot see any national benefits from exclusion of plant and animal subject matter from the innovation patent system. Indeed, we believe that there is real 'dis-benefit' from the exclusion as it lessens the commercial value of the unique characteristics of new varieties or breeds that are likely to be protected through innovation patent.

*Question 4. What impact would the innovation patent have on non IP right holders were it to include plant and animal subject matter?*

DPI believes that research and development agencies and their partners have a right to protect their IP by either patent or PBR. This is consistent with the 'user pays' principle whereby benefits should not flow to 'freeloaders' who do not invest in research and development. The issue of non IP right holders being beneficiaries of technology paid for by others deserves further consideration. Innovation patents provide a sound alternative for protection of unique characteristics for a reasonable cost. It also adds commercial value to the characteristics protected in new varieties or breeds, with the additional security offered likely to result in greater levels of commercial investment in development of new varieties or breeds.

The contact officer for further information is Mr Chris Adriaansen, Business Manager,  
Queensland Horticulture Institute, DPI on telephone 07 3896 9401.

Yours sincerely



Dr Warren Hoey  
**Director-General**

*Department of Primary Industries*  
*celebrating 2002 Year of the Outback*