SUBMISSION TO THE REVIEW ON THE INNOVATION PATENT ADDRESSING THE ISSUE OF THE CURRENT EXCLUSION OF PLANT MATERIAL

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Innovation Patent - exclusion of plant and animal subject matter

Introduction

The Seed Industry Association of Australia welcomes the opportunity to provide the following comments to the Advisory Council on Intellectual Property (ACIP) regarding the review of the innovation patent (IP).

The SIAA is the peak national body representing the interests of the sowing seed sector whose membership covers plant breeders, seed growers, seed processors and marketing firms.

The SIAA vision is to increase prosperity to Australian agriculture through leadership and management of issues critical to the successful progress of the Australian seed industry.

SIAA estimates the total value of the sowing seed sector in Australia at approximately $1.2 billion annually. Please note that this is an estimate only as government or industry gathers no formal figures. The SIAA membership represents about 80% of total sales in sowing seed and covers all forms including horticulture, forage, pasture, grain and ornamentals.

Executive Summary

The innovation patent system as understood by SIAA is unique to Australia and therefore provides plant breeders both here and abroad with an added incentive to invest in Australian plant breeding programs as the innovation patent "provides a quicker, broader and cheaper form of patent right for inventions" when compared to PBR and the standard patent.

As Australian plant breeders are largely classified into small to medium sized business enterprises, the IP is well suited in Australia and would be more affordable to the majority of plant breeders when compared to the standard patent.

The SIAA notes "ACIP recommended that the innovation patent cover the same subject matter as a standard patent. The government response to the ACIP report agreed with this recommendation and noted:

> *The Government agrees that the same subject matter protectable under a standard patent should be protectable under the innovation patent".*

Accordingly, the SIAA supports the view that as plant material is protectable under the standard patent it should also be protectable under the innovation patent.

The SIAA was disappointed with the intervention immediately prior to the innovation patent bill going before parliament that resulted in the exclusion. This intervention was done without industry consultation. The Parliamentary Secretary to the Minister for Industry, Tourism and Resources is to be commended for his action in providing industry with an opportunity to comment on this exclusion.

Patent coverage for plant and animal subject matter

The SIAA has always maintained a broad view on the range of subject matter that should qualify for an IP. Australia is seen as an attractive proposition for potential investors located here and abroad as its intellectual property regime is consistent with the World Trade Organisation's Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

Access to an innovation patent by plant breeders will only strengthen the incentive to inject capital into Australian plant breeding programs remembering that the majority of plant material granted PBR each year is from overseas. (Source: PBR Office).

Plant Breeder's Rights versus Patent

Plant breeder's rights (PBR) are used to protect new varieties of plants by giving exclusive commercial rights to market a new variety or its reproductive material. A PBR provides an owner with the right to direct the production, sale and distribution of the new variety, receive royalties from the sale of plants or to sell their rights.

A PBR differs from a patent in that it does not require the plant or method of producing it to be novel, inventive or fulfil the criteria of patentability.

It could be argued therefore that IP provides a greater threshold level than PBR.

Issues

A gap in protection

The review of the petty patent identified a "gap" in the system, where protection was not available for innovations with a lower inventive threshold. The review also noted that this level of innovation might not qualify for protection under other intellectual property legislation. Part of the reason behind the introduction of the innovation patent was to address this "gap" in protection.

While the innovation patent addresses the gap for most industries, the exclusion means that this "gap" remains for industries where R&D associated with plant and animals is carried out.

The SIAA therefore recommends that the 'gap' must be addressed, as the common denominator between industries is the 'inventive' step. The current exclusion discriminates against the plant industries with no scientific justification.

Types of IP rights available for plant subject matter.

The SIAA believes the patent system and the PBR system are complimentary and will continue to be with the inclusion of plant material in the IP.

The SIAA also believes the innovation patent will offer added benefits over PBR by protecting the processes and the extremely important issue of 'essential derivation' i.e. IP will provide greater protection to the 'original breeder' because the scope of coverage under IP is broader than PBR.

National Benefit

Farm saved seeds

Whilst it is true that a notable difference between patents and PBRs is the 'farm saved seed exemption', IP can address this issue by incorporating FSS provisions under the auspices of the UPOV Convention.

Research and development implications

There is considerable R&D activity in industry sectors associated with plant and animal subject matter in Australia, and particularly in the agricultural industry.

While the restriction may prevent some inventions from proceeding under the innovation patent system, there does not seem to be any benefit to industry by having such a restriction.

The SIAA believes that the exclusion provides a net cost to Australian agriculture and plant breeding as breeders requiring a patent under the current system can only go down the 'standard patent' route.

The costs of the exclusion therefore include:

- missed opportunity for protection;
- foregone R&D opportunity in Australian agriculture;
- higher cost of gaining protection;
- reducing Australia's ability to compete internationally if investors release their technology to our competitors, and
- an irreconcilable system for addressing essential derivation.

Conclusion

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

   Yes. Potentially, the gap may serve as a disincentive for current and potential investors to invest in Australia due to the 'discriminatory' nature of the exclusion when compared to other types of inventions e.g. industrial.

   The gap means that investors can only go down the standards patent route, which in itself provides a disincentive due to its high cost and lengthy process.

   The gap will negate the possibility of IP addressing the issue of essential derivation and once again act as a disincentive for investors to channel funds into Australian plant breeding programs.

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?**

   Yes. The IP offers complimentary benefits to PBR and the standard Patent that on their own may not provide enough incentive for R&D in Australia. For example, as

mentioned previously IP addresses essential derivation whereas UPOV require disputes over ED to be resolved in the courts.

IP also covers 'processes' whereas PBR does not.

IP offers Australia a 'competitive advantage' due to the fact that we are the only nation with IP i.e. lower cost form of protection.

IP may increase the 'asset base' of Australian agriculture if it leads to greater R&D.

IP may offer greater opportunity for technology transfer and provide a more rigid system for commercialising partners to negotiate under common law.

IP is seen as more 'enforceable' when compared to PBR.

On a comparative basis, the scope of coverage under IP is broader compared to PBR.

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

SIAA believes the benefits of inclusion outweigh the costs associated with exclusion.

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

SIAA believes that non-IP right holders are not the central parameter in determining whether to include plant material. The only area that should be addressed is with respect to farmer saved seed and this could be managed by incorporating a section in the Act that conforms to the UPOV Convention.

CONCLUSION

The SIAA strongly recommends the inclusion of plant material in the innovation patent.