

Submission to the Wheat Export Marketing Arrangements Inquiry Draft Inquiry Report

Introduction

The Australian Seed Federation (ASF) welcomes the opportunity to provide the following submission in response to the release of the Draft Inquiry Report (the Report) from the Productivity Commission inquiry into the Wheat Marketing Arrangements.

The ASF is the peak national body representing the interests of the Australian sowing seed industry at the state, national and international levels.

The membership of the ASF can be located at www.asf.asn.au and comprises stakeholders from all sectors of the total seed supply chain including plant breeders, seed growers, seed processors, and covers a diversity of geography, climate, crops, and cultivars.

The ASF's Submission to the Report is in response to the Productivity Commission outlining that *"Compliance with the End Point Royalty Collection system is a concern for plant breeders. The Commission request comment on this issue"*.¹

Plant Breeder's Rights (PBR)

The ASF supports Plant Breeder's Rights (PBR) which are exclusive commercial rights to a registered variety.

PBR are a form of intellectual property, like patents and copyright and recognised under the [Plant Breeder's Rights Act 1994 \(the PBR Act\)](#) and in Australia, are managed by [IP Australia](#).

Plant breeding, or the development of new plant varieties, are a risk management tool for agriculture and the route to enhancing Australia's international competitiveness, while fulfilling our ongoing thirst to adapt to climate variability, agricultural productivity, and world food security.

"...investment in plant and animal genetics may be able to diminish the loss of productivity associated with higher temperatures and changing rainfall patterns".²

It is the ASF's view that plant breeding and the delivery on new varieties also continues to deliver diversity to Australian agriculture, which is a vital ingredient in assisting with:

- The performance of Australian farm exports, during the worst drought period recorded, earning the *"country \$27.5 billion in 2007/08"*³;
- *"Continual innovation in farm machinery, sophisticated plant and animal programs and intelligent transport solutions underpin the ability of Australian agribusinesses to bring world-class commodities to market"*⁴;
- Australia exporting *"62% of total agricultural production"*⁵; and
- Australian farmers producing *"93% of Australia's domestic food supplies"*⁶.

¹ http://www.pc.gov.au/data/assets/pdf_file/0008/95831/11-chapter8.pdf

² Garnaut Climate Change Review draft - page 34

³ ABARE Australian Commodity Statistics 2008

⁴ Austrade - Australia your competitive edge 5 August 2008

⁵ ABARE Australian Commodity Statistics 2008

⁶ Australian Government Department of Agriculture, Fisheries and Forestry Food Statistics 2007

The Australian Government Review of Enforcement of Plant Breeder's Rights

The ASF would like to alert the Productivity Commission's attention to the Australian Government recently releasing the [Review of Enforcement of Plant Breeder's Rights](#) (the ACIP Review), undertaken by the [Advisory Council on Intellectual Property](#) (ACIP).⁷

During the ACIP Review process, the ASF provided two (2) submissions ([May 2007](#), [August 2008](#)).

The ASF notes that ACIP has advised that the Australian Government will respond to the release of the ACIP Review and understands "*the Government may decide to accept, accept in part, or reject specific recommendations*".

It is the ASF's view that the *PBR Act* is "still currently under review" and the ASF notes that the Chair of ACIP, Mr Leon Allen, has identified in the release of the report "*that PBR owners face significant obstacles to the effective enforcement of their rights and that this is discouraging the development of new plant varieties*".⁸

Clearly ACIP have identified that the PBR current collection system, including End Point Royalties (EPR), is not achieving its full potential.

The Chair of ACIP has also identified that "*ACIP recommends that a number of legislative and procedural changes be made*".⁹

Clearly ACIP have also identified that structural and legislative changes are required to ensure the current PBR and EPR collection system reaches their full potential.

The ASF **recommends** that the Productivity Commission should consider the Chair of ACIP's comments in the context of its own report into the Wheat Export Marketing Arrangements especially when the reality is that the majority of the investment in breeding is now undertaken by private entities, and not the public sector.

Australian farmers and agriculture rely heavily on the delivery of this investment because "*82 per cent of Australian grain growers have adopted a new variety in the past five years*".¹⁰

The delivery of these new varieties requires heavy investment and has long lead times. ACIP has identified that the "*breeding of a new variety typically takes about 12 to 14 years*".¹¹

Furthermore the ASF believes that the cost of evaluation of plant materials is high, as a large proportion, in some cases, >99.95% of breeding lines will be discarded from the process due to under-performance in one or more characteristics, before a viable commercial product is released

This long period between initial investment in breeding and the commercialisation of varieties, together with the high level of ongoing investment across the total seed supply chain is necessary to develop varieties to commercial release and makes plant breeding and the introduction of new technologies a high-risk investment for commercial companies.

The plant breeding industry therefore requires improvements to its operating environment through substantial changes being made to the *PBR Act*, and the collection of EPR.

⁷ http://www.acip.gov.au/library/ACIP_PBR_Enforcement_Final_Report.pdf

⁸ http://www.acip.gov.au/library/ACIP_PBR_Enforcement_Final_Report.pdf

⁹ http://www.acip.gov.au/library/ACIP_PBR_Enforcement_Final_Report.pdf

¹⁰ Seed Business Magazine – March 2009

¹¹ ACIP options paper June 2007 – page 3

It is the ASF's view that the *PBR Act*, in its current form, is not sufficient to enable PBR owners to achieve adequate protection, and enforcement in a manner which is cost effective, timely and most importantly enforceable.

The complexities involved for the collection of PBR and EPR, following the changes to Australia's wheat marketing arrangements, which has moved to an "accreditation environment" for exporters, is an issue that needs to be considered by the Productivity Commission moving forward in this inquiry.

The magnitude of change is also highlighted in the ACIP options paper, which identified over three years ago that the *"percentage of wheat crop received by AWB which attracts EPRs increased from 35% in 2004-05 to 49% in 2005-2006"*.¹²

The ASF believes these figures would now be on the low side, and combined with a large increase in the number of exporters entering the market as a result of the changes to the wheat marketing arrangements, the collection process is now an even greater issue for ASF members.

In relation to PBR/EPR varieties, another factor is the increasing use of on-farm storage by growers and the impact of the domestic market, particularly on the east coast of Australia.

This is because the speed of harvest continues to increase, and growers are seeking greater flexibility to market their grain over longer periods, and the movement of grain into the domestic market increases the amount of delivery points for royalties to be identified and collected.

This area needs to be addressed, as the traditional collection points are changing, and the *PBR Act* in its current form, is outdated.

It is therefore vitally important for ASF members who are also PBR, and or EPR owners, to have in place an accessible and effective collection system, under the *PBR Act*, to ensure their investments can be protected through appropriate and recognised structural and legal channels.

Such a system will help create greater certainty, and will encourage the ASF membership to continue to invest in the areas of science, innovation and technology, and will enable Australian plant industries to access the latest international technologies and germplasm, increasing Australia's competitiveness.

The ASF would also like to draw to the Productivity Commission's attention the ACIP Review which has recently made **23 Recommendations** for the Australian Government's consideration, including possible structural and legislative changes.

The ASF's strongly **recommends** that the Productivity Commission takes these recommendations into consideration and ensures that any consideration to changing the Wheat Marketing Arrangements at this stage does not jeopardise the "ACIP process", and the ability of the Australian Government to respond to the report, or the ability of industry to respond to the Australian Government.

The ASF also **recommends** that the Productivity Commission does not force any potential negative impacts on the plant breeding industry, and its ability to collect a fair and commercial return on its investment, through the collection of royalties under PBR, and EPR, otherwise the ASF's concerns is that the delivery and investment in new plant varieties could be hindered at a critical time, especially when peak industry bodies such as the National Farmers Federation (NFF) have identified that:

¹² GRDC, March - 2008

“productivity based R&D has been vital for Australian farmers in developing new higher yielding and drought-resistant crop varieties, achieving water-use efficiencies and adopting conservation, tillage techniques to protect soil structure and maximise water retention”¹³

Advisory Council on Intellectual Property Recommendations A Review of enforcement of Plant Breeder’s Rights ¹⁴

To assist the Productivity Commission, the ASF has provided below the actual recommendations contained in the ACIP Review to ensure that the Productivity Commission is aware of some of the substantial legislative and structural changes currently being considered by the Australian Government, and industry

The ASF is also currently reviewing the following ACIP recommendations.

Recommendation 1.

A new “purchase” right be added to s.11. This new right would only apply to those taxa that are specifically declared in the regulations. Industry sectors such as wheat breeders would apply to the PBR Office to have particular taxa so declared.

Recommendation 2.

The PBR Act be amended to clarify that harvested material that is also propagating material is to be considered as propagating material for the purposes of s.11, even if it is not being used for that purpose.

Recommendation 3.

No changes be made to extended rights under s.14 and 15.

Recommendation 4.

There be no change to the operation of farmer’s privilege under s.17. However, s.17 should be amended to state in easily understood terms that s.17 does not provide the farmer with the right to perform the acts listed in s.11(a) to (g). For example, the farmer will still require the PBR owner’s authorisation to sell the reproduced propagating material, the harvested material or the product of the harvested material.

Recommendation 5.

As part of IP Australia’s education and awareness programs, raise industry awareness of the opportunity under s.17(2) to have specific taxa excluded from the farmer’s privilege exemption.

Recommendation 6.

Encourage PBR owners to make clear to growers the conditions of sale of propagating material and their obligations in relation to future generations of it. This includes making clear that growers require the authorisation of the PBR owner to sell crops grown from farm-saved seed.

Recommendation 7.

No changes be made to s.17 in relation to asexual propagation at this time.

¹³ NFF Federal Budget Submission 2009 – Feeding a hungrier world

¹⁴ http://www.acip.gov.au/library/ACIP_PBR_Enforcement_Final_Report.pdf

Recommendation 8.

Enable EDV declarations to be made in respect of any variety.

Recommendation 9.

Amend s.4(c) by replacing the test for important features with a test for essential characteristics.

Recommendation 10.

Retain responsibility for EDV declarations with the PBRO and ensure the PBRO has the ability to assess such applications. This may involve the PBRO seeking advice from an external body or expert. If, in the future, a Patent Tribunal is established and proves successful, consideration should be given to expanding its remit to include declarations of EDV.

Recommendation 11

In relation to s.23 and exhaustion:

No changes be made to s.23 as it applies to the current acts referred to in s.11.

Section 23 be amended to provide that PBR does not extend to an act of purchase of the material referred to in s.11 that takes place after the propagating material has been sold by the PBR owner unless that act involves *any* production or reproduction of the propagating material. This includes growing the first generation crop comprising propagating material that is grown from purchased propagating material.

Clarify in the PBR Act that the mere sale of propagating material G0 for purposes of growing and selling G1 does not necessarily imply a licence to purchase crop G1.

Recommendation 12.

An on-going Expert Panel be established to provide guidance and opinions on general issues or specific cases concerning the PBR Act and related law. The Panel should comprise appropriate people with expertise in relevant areas who provide their services as required.

Upon request from any person and for a moderate fee, the Panel may provide detailed guidance and opinions on general issues or specific cases concerning the PBR Act and related law. The Panel should focus on the enforcement of granted rights and not provide advice on the registrability of individual applications for PBR. The Panel's opinions should be made publicly available in a manner that respects commercially sensitive material. The Panel may refer matters to the Government or ACIP as it sees fit.

Recommendation 13.

No changes be made to the pre-grant enforcement provisions.

Recommendation 14.

The jurisdiction of the second tier of the Federal Court of Australia to include PBR matters.

Appropriately qualified magistrates must be made available and there should be appropriate measures taken to ensure the processes of the second tier are faster and cheaper than in the first tier. Examples include simplifying and standardising procedures for expert evidence and DNA testing through the issuing practice notes, use of alternate dispute resolution where appropriate, and curtailing of the discovery phase.

Recommendation 15.

IP Australia facilitates ADR for parties in dispute by establishing, maintaining and making publicly available basic information on the ADR options available to PBR owners and a register of ADR service providers with PBR and plant breeding experience.

As part of its review of post-grant patent enforcement strategies, ACIP is currently considering the establishment of an IP dispute resolution centre. The centre envisaged by ACIP would provide mediation, appraisal, and validity and infringement opinion services, delivered by experts drawn from a panel on a case-by-case basis. If such an IP dispute resolution centre is established for patents and proves successful, consideration should be given to extending its services to PBR matters.

The IP dispute resolution centre envisaged by ACIP would also provide non-binding determinative service through a Patent Tribunal. If a Patent Tribunal is established and proves successful, consideration should be given to extending its jurisdiction to PBR matters.

Recommendation 16.

IP Australia to liaise with the AFP and CDPP with a view to increasing the number of investigations and prosecutions of PBR cases due to the special circumstances (including the marginal profitability of some sectors and an apparent widespread lack of compliance) that exist in the plant breeding industry.

Recommendation 17.

Introduce an Information Notice system into the PBR Act based on the UK Information Notice system.

This would enable PBR owners to obtain information from suspected infringers on the source of plant material. Where this is not supplied within a reasonable time, legal proceedings may be commenced in which the presumption is made that the plant material was obtained through unauthorised use of propagating material and that the PBR owner did not have a reasonable opportunity to exercise its rights in relation to the material.

Recommendation 18.

Introduce into the PBR Act PBR seizure powers for Customs which incorporates features of the Australian notice system for trademarks and the European system. The system should minimise the resources and skills required of Customs, enable the PBR owner to identify the imported material and allow cases where there has been infringement to be resolved quickly and without legal action.

Recommendation 19.

Introduce exemplary damages provisions for PBR based on s.122 of the Patent Act.

Recommendation 20.

The Government take no action in establishing an industry peak body or collecting agency at this time. The Government should reconsider this approach should sectors of the plant breeding industry come to an agreement on the structure and function of a central body and seek the Government's assistance.

Recommendation 21.

IP Australia focus its PBR educational and awareness efforts on the tertiary sector. This should involve increasing its involvement in facilitating PBR education curricula and other information fora. IP Australia should investigate facilitating the inclusion of PBR curricula in university science and science-related courses and at agricultural colleges.

Recommendation 22.

The Government take no action in relation to the development of standard contracts and licence agreements at this time.

Recommendation 23.

It is not clear whether sections 52 and 53 of the *Trade Practices Act 1974* and various State and Territory Fair Trading Acts provide sufficient protection against mendacious variety declaration. If existing legislation does not make it illegal for a corporation or person to knowingly and falsely represent a PBR protected variety, the PBR Act should be amended to make such an act an infringement of PBR.

Conclusion

"In order for the Act to be effective it must be possible to protect or enforce those rights. However, enforcement of plant breeder's rights continues to be a problem, not only in the pasture seeds industry but throughout the horticulture and grain industries as well".¹⁵

It is the ASF's view that PBR and EPR breaches are no different to the piracy of movies, music, designer clothes, electronics and pharmaceutical goods.

Therefore before recommending changes to the Wheat Marketing Arrangements, the ASF **recommends** the Productivity Commission considers and ensures that:

- The Productivity Commission investigates the recommendations from the ACIP Review of Enforcement of Plant Breeder's Rights to ensure that any changes to the Wheat Marketing Arrangements does not overlap, hinder or malign the current process being undertaken by the Australian Government and the Australian seed industry;
- The grains industry is in a position to ensure improvements in requirements for variety specification protocols are adequate, which in turn will deliver improvements in compliance of the collection, and or deduction of PBR and EPR, providing a benefit to the industry as whole; and
- The plant breeding industry is protected by ensuring the industry can obtain a fair and commercial return on its investment in plant breeding, and therefore provide incentive for the delivery of plant varieties to Australian grain producers, and subsequently the grain supply chain through to those engaging in the export market.

The ASF would welcome the opportunity to provide further information to the Productivity Commission.

Should your office require further information, the ASF can be contacted on 02 6282 6822.

ASF Submission Ends

¹⁵ RIRDC Plant Breeder's Rights and Contract Growing in the Pasture Seed Industry, 2007 – page 14