

4 December 2017

Mr Brett Massey
Assistant Director – Domestic Policy
IP Australia
PO Box 200
Woden ACT 2606

By email: consultation@ipaaustralia.gov.au

Dear Mr Massey

RE: Draft Legislation Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill and Regulations 2017 - PBR Act Reform

The Australian Seed Federation (ASF) welcomes the opportunity to provide comments to IP Australia on the proposed Plant Breeder's Rights Act reform. The ASF is the peak national body representing the interests of Australia's sowing seed industry. The membership of ASF comprises stakeholders from all sectors of the seed supply chain including; plant breeders, seed growers, seed processors and seed marketers.

The ASF was a key player responsible for the introduction of Plant Breeders Rights legislation into Australia in 1987 and has since continued to represent the interests of plant breeders.

1. Essentially Derived Varieties

Currently, if a plant variety is bred from an earlier PBR-protected variety with only minor changes, the owner of the earlier variety can apply to have the later variety declared an essentially derived variety (EDV). If the application is successful, both owners have a stake in the second variety. The change seeks to close a loophole where an EDV cannot be declared if no PBR application has been made for the later variety.

The ASF supports this proposal as it brings the Australian PBR law more in line with the UPOV 1991 convention. UPOV does not specify that the EDV needs to be protected or not. This proposal closes a loophole that exists where an EDV cannot be declared if no PBR application has been made for the later variety. It is likely that the EDV is very similar to the earlier variety and in most cases protection is not filed for.

2. Unjustified threats of infringement

An unjustified threat of infringement would be where a PBR owner threatens to sue someone without justification. The change seeks to deter these threats by making the PBR owner able to be sued for an unjustified threat. Also, if the threat is particularly bad (blatant or flagrant), the victim of the threat can be awarded extra compensation (additional damages).

The ASF in principle supports this proposal where a PBR owner threatens to sue an alleged infringer without justification, the court can award damages to the threatened party. However, the ASF is concerned about how a threat can be determined to be unjustified, bad or flagrant and what criteria are used to prove this.

3. Further powers to award damages under the PBR Act

The change seeks to deter infringement by allowing a PBR owner to be awarded extra compensation (additional damages) where the infringement is considered particularly bad (blatant or flagrant). This is already the case for patents, designs and trademarks.

The ASF in principle supports this proposal. This proposal strengthens the position of the PBR owner and should deter potential infringers. However, as with determining what is an unjustified, bad or flagrant threat (2. above), there are concerns about what would constitute a blatant or flagrant infringement. The ASF assumes this has been established for patents, designs and trademarks.

4. Exclusive licensees in the PBR Act

A PBR owner may wish to license all of their rights in the PBR to another person (eg a distributor), known as an exclusive licensee. Despite the exclusive licensee having sole rights to commercialise the variety, the exclusive licensee currently cannot sue infringers themselves. Currently the PBR owner needs to sue the infringer, which can add delay and expense for the exclusive licensee. The change seeks to remove this potential delay and expense by allowing the exclusive licensee to sue infringers themselves. This is already the case for patents and trademarks.

The ASF supports the proposal to provide the exclusive licensee with the opportunity to sue infringers. The ASF believes this should not be a right but a negotiated opportunity developed by the PBR owner and the licensee in the license agreement.

Conclusion

The ASF supports the proposed reforms to the PBR Act as it clarifies EDV and strengthens the position of the PBR owner/exclusive licensee and should act as an increased deterrence of potential infringers.

However, the ASF does not believe this goes far enough. The ASF believes that the PBR Act has failed the small grain industry and farmers are breaching PBR. Thousands of farmers are knowingly growing and selling protected varieties with the knowledge that it is unlikely that they will be prosecuted. The consequence of this action is that very little breeding is taking place in major species of forage crops and feed grains such as Oats, Peas, Triticale and many other non-hybrid species.

In its final report released in January 2010, ACIP agreed that there were many barriers to the effective enforcement of plant breeder's rights (PBR) and that these discouraged the development of new plant varieties. ACIP recommended a number of legislative and procedural changes.

One of the most significant recommendations was the introduction of an Information Notice System that enables PBR owners to obtain information from alleged infringers on the source of plant material. The introduction of a UK-style Information Notice System would mean PBR owners may be able to require a notice from growers suspected of infringing PBR which states the source of specific plant material and products. A failure to comply within a set time could be counted against the grower in any subsequent court action.

In the Australian Government response to ACIP Final Report released in June 2010, it accepted this recommendation pending a feasibility study. Such an Information Notice System would address many of the key issues raised by the ASF in its submissions. The ASF requests IP Australia to prioritise its introduction.

The Australian Seed Federation is also pleased to confirm that it is interested in receiving any updates about this consultation.

All correspondence regarding this submission and the consultation process can be addressed to:

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If you have any questions do not hesitate to contact me.

Yours sincerely

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