



Australian Government

Plant Breeder's Rights Advisory Committee

**ASSESSMENT FRAMEWORK
FOR REQUESTS TO EXTEND
THE DURATION OF PBR PROTECTION**

July 2008

Requests for extensions to the duration of PBR protection should be sent to:

The Registrar of Plant Breeder's Rights
IP Australia
PO Box 200
WODEN ACT 2606

Enquiries regarding the Framework should be directed to:

Secretariat
Plant Breeder's Rights Advisory Committee
PO Box 200
WODEN ACT 2606
Email: PBRAC.Secretariat@ipaustralia.gov.au
Telephone: 1300 651 010
Facsimile: (02) 6283 7999

© Commonwealth of Australia 2008

This work is copyright. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the Copyright Act 1968, all other rights are reserved. Requests and inquiries concerning reproduction and rights should be addressed to Commonwealth Copyright Administration, Attorney General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <http://www.ag.gov.au/cca>

Contents

- Introduction 3**
 - Legislative provisions 3*
 - Consultation..... 3*
 - Objectives 3*
- Procedural matters..... 3**
 - Who can apply 3*
 - Information to be included in a request 3*
 - Assessment process..... 5*
 - Outline of the Process 5*
 - Detailed process..... 6*
- Assessment of requests..... 7**
 - Where extension may not be considered 8*
 - Where extension will be considered..... 8*
 - Where extension may be considered..... 9*
- Impact analysis 9**
- Possible outcomes 9**

Introduction

Legislative provisions

Subsections 22(2) and (3) of the *Plant Breeder's Rights Act 1994* provide that:

“The regulations may provide that PBR in a plant variety included within a specified taxon lasts for a longer period than... [20/25 years]”.

Subsection 63(2)(a)(ii) of the *Plant Breeder's Rights Act 1994* provides that:

“The functions of the Advisory Committee are: at the request of the Minister, to advise the Minister on the desirability of declaring: in regulations made for the purpose of subsection 22(3)—that the duration of PBR in a particular taxon will be longer than provided in subsection 22(2)”

The effect of these provisions is that extension to duration of protection, if granted, will be applied to all PBR of plant varieties within a specific taxon, and not to an individual PBR. All further discussions will be based on extension protection for an entire taxa.

Consultation

This assessment framework was developed after extensive public consultation. Its purpose is to provide a considered and consistent basis on which to assess requests for extensions to the duration of PBR protection for a specified taxon under section 22(3). The framework will be publicly available on the IP Australia website.

Objectives

This paper:

- Provides a framework against which applications for extension of duration of protection on a taxon may be objectively and consistently assessed; and
- Outlines the assessment process for extension of duration of protection of a taxon.

Procedural matters

Who can apply

Requests may come from anyone, including:

- Breeders;
- Organisations representing breeders;
- Organisations representing farmers.

Information to be included in a request

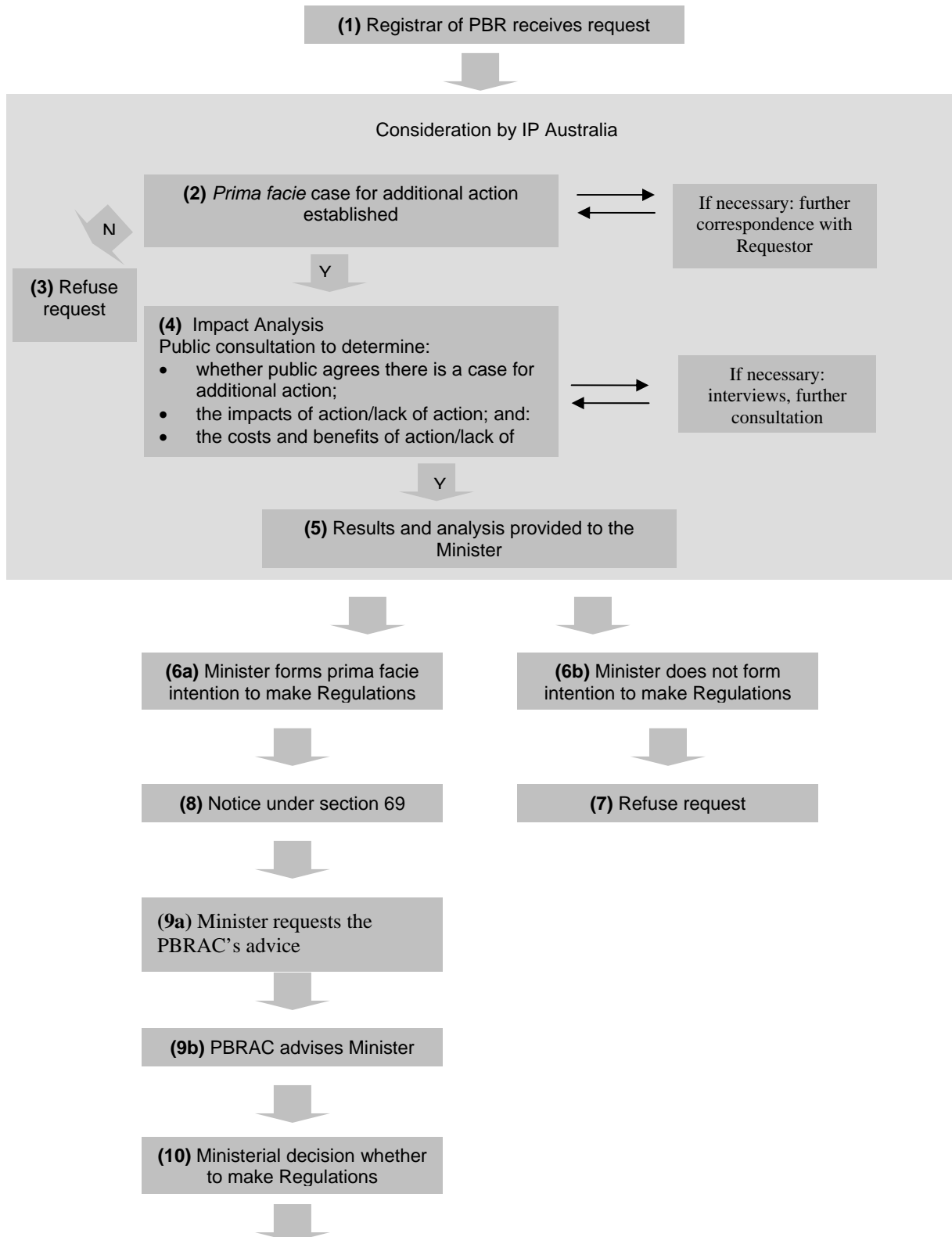
A request for an extension to the duration of PBR protection for a taxon should include the following information:

- The *length* of the requested extension to the duration of PBR protection and reasons why this length is sought (longer or shorter periods of protection may be considered by the PBR Registrar);
- Whether the application for extension is *permanent* or is for defined period;

- The *taxon* for which the extension to the duration of PBR protection is sought and reasons why this taxon was chosen;
- The *reasons* why an extension to the duration of PBR protection is being requested including:
 - a description of the problem the extension is intended to address or overcome, and evidence to support that there is a problem; and
 - what other steps the requestor has taken to overcome or address the problem.
- An explanation of *why*, in the opinion of the requestor, Government action to extend the duration of PBR protection for that taxon is justified;
- An explanation of *how*, in the opinion of the requestor, extending the duration of PBR protection for that taxon will address the problem.

Assessment process

Outline of the Process



Detailed process

1. The Registrar of Plant Breeder's Rights (the Registrar) in IP Australia receives a request for an extension of duration of PBR protection for a taxon.
2. IP Australia considers the request to determine whether there is a case for action.
 - The request is considered against the EDOP Assessment Framework.
 - The requestor will be told of deficiencies in their request and given an opportunity to provide additional information.
3. If a case for action has not been made, then the Minister will notify the requestor that their request has not been successful.
4. If a case for action has been made, then the Minister will authorise public consultation. This consultation will follow the Government's established principles relating to good regulatory process, including:
 - Governments should not act to address 'problems' until a case for action has been clearly established;
 - A range of feasible policy options need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework;
 - Generally, only options that generate the greatest net benefit for the community, taking into account all the impacts, should be adopted.
5. The Minister will release a paper for public discussion. This will:
 - Set out the case for action;
 - Ask interested parties whether or not they agree there is a case for action;
 - Ask interested parties for their assessment of the impacts on them of:
 - extending the duration of PBR protection; and
 - not extending the duration of PBR protection.
 - Ask interested parties for their assessment of the costs and benefits on them of:
 - extending the duration of PBR protection; and
 - not extending the duration of PBR protection.
6. The paper will be advertised by:
 - Placing public notices:
 - in a range of newspapers including rural newspapers; and
 - on the IP Australia, PBRAC and Australian Government business consultation websites;
 - Writing to relevant PBR owners, industry groups and consumer groups;
 - Consulting with relevant Australian Government departments
7. After submissions close, face-to-face meetings and further consultation with stakeholders may be conducted if they are considered necessary.
8. IP Australia will conduct an analysis of the impacts of action/lack of action and provide a report to the Minister.

9. The Minister makes a decision to either proceed toward making regulations or to dismiss the application
10. If on the basis of this analysis, the Minister *does not* intend to make regulations under subsection 22(3), the request is refused and the requestor is advised accordingly.
11. If on the basis of this analysis, the Minister *does* intend to make regulations under subsection 22(3) then the process under section 69 of the PBR Act must be followed.
Section 69 requires the Minister to:
 - publish, in the *Plant Varieties Journal*, a notice of his or her intention to make a regulation under subsection 22(3);
 - request submissions be provided within 30 days of the notice; and
 - have regard to the submissions in making his or her decision.
12. The Minister may seek advice from the PBRAC (section 69) on the desirability of making regulations extending the duration of PBR protection for a specified taxon. If the Minister seeks the PBRAC's advice then the Minister may provide the PBRAC with a copy of the submissions and request, and the PBRAC must have regard to those submissions in preparing its advice. It is anticipated that the Minister will seek the PBRAC's advice.
13. The Minister will make a final decision whether regulations will be made under subsection 22(3) having regard to the PBRAC's advice.
14. If the Minister decides that regulations will be made, then regulations will be made. There is no need for further consultation.
15. The regulations will be reviewed in the normal course of events as may be required by the specific terms of the amended regulations for example at the end of the specified term, or as part of normal Government business.

Assessment of requests

The question of whether a request for extension of duration should be granted needs to be decided on a case-by-case basis. Nevertheless, it is possible to set out some of the guiding principles that will be taken into account when deciding to grant an extension of term. These factors are non-exhaustive. In all cases, it is open for interested parties to argue that a factor is not relevant, or that a different course of action should be taken. Even if a strong case for action has been made, an extension may not be granted if there are sufficiently significant adverse impacts on others (*see below*). Conversely, an extension may be granted despite adverse impact on others.

When considering whether duration should be extended under subsection 22(3), a number of issues will be taken into account. These include:

- The cause of the factor limiting exploitation;
- Will extending duration effectively address the problems caused by the factors limiting exploitation?
- Are there alternative mechanisms in place to deal with the factors limiting exploitation?

- Is the breeder able to take effective steps to mitigate against the effects of the interfering factors? Have they done so?
- How many people are affected by the perceived problem?
- The perceived consequences if an extension to the duration of protection is not granted;
- The breadth of the taxonomic category for which the extension is sought;
- Crop rotation length;
- Typical (industry average) period to commercial adoption, for the taxon;
- Multiplication time;
- Time for a taxon to become biologically and commercially productive;
- Anticipated commercial life of that taxon.

Where extension may not be considered

There are a number of situations where it will be difficult to argue for an extension. These include:

- i. Where the delay is a direct result of the breeder's actions; that is, the restrictions are self-inflicted.
- ii. Normal limitations businesses would ordinarily be expected to deal with, for example, normal fluctuations in the market.
- iii. A result of the mode of commercialisation chosen by the owner. This may occur where the mode of commercialisation is ineffective or takes a long period of time to implement.
- iv. Attributed to the scope of the rights (they are not extensive enough), or the existence of a defence (the breeder's exemption or the right to save seed or other propagating material).
- v. A result of a low uptake by users. Examples include: consumer concerns about the plant variety; concerns regarding GM status or nutraceuticals; and consumers not liking the characteristics of the variety.
- vi. A result of the fact that the new plant variety does not meet the needs of users and/or consumers, or is not as effective as existing varieties. For example existing varieties may grow better in some climatic conditions, survive transport better, have a longer shelf life, have better taste, be more appealing visually, or have as good a combination of yield and disease resistance as existing varieties.
- vii. The only reason (without further justification) for seeking an extension is because another jurisdiction has granted one.

Where extension will be considered

There are a number of situations where it will be easier to argue for an extension. These include:

- i. External regulatory factors and other declarations limit the time in which the variety is able to be exploited (such as GM regulation (either State or Commonwealth)).
- ii. A state of emergency is declared/*force majeure*. To date there have been no examples of this in Australian history.
- iii. Where the extension would actively promote Australian plant breeding.

Where extension may be considered

There are a number of situations that appear to be neither easy nor difficult to argue. These include:

- i. “Acts of God” (such as drought, Flood/Storm) that restrict the time to exploit.
- ii. A particular taxon may be unusually difficult, costly or time consuming to multiply.
- iii. A particular taxon may take a long time to establish or become productive.
- iv. Agronomical, biological or commercial characteristics of the taxon that delay the time to earn a return from the variety.

Impact analysis

As part of the decision making process, IP Australia will undertake an analysis of the impacts of action that might be taken. An impact analysis will consider the impacts, costs, benefits and risks of taking action versus not taking action. Applicants may be asked to supply such information as is deemed necessary to undertake the impact analysis.

An impact analysis would normally consider issues such as:

- Who is affected by the factors limiting exploitation?
- What groups are likely to be affected by an extension to the duration of protection? For example: trade competitors, growers and wholesalers.
- What are the likely impacts for each of these categories of people? These consequences need to be identified and categorised as expected economic, social and environmental benefits and costs. Examples of possible questions to ask are:
 - What impact will extension have on growers, consumers and the community? (e.g. will growers and consumers face high costs?)
 - Will extending duration provide appropriate incentives to breeders?
 - What effect will extension have on investment in innovation in general and investment in plant breeding in particular?
 - Will it skew investment from one industry to another? What is acceptable?
 - What is a reasonable opportunity to seek a return from the market?
 - What is a reasonable risk adjusted rate of return on an investment?
 - What effect will not extending have on plant breeding investment?

Possible outcomes

In considering an application for extension, the Minister may adopt a number of different outcomes:

- Not to extend the duration of PBR protection for the nominated taxon;
- To adopt alternate Government action;
- To extend the duration of PBR protection as requested by the applicant
- To extend the duration of PBR for a period considered appropriate by the Minister
- To apply the extension to existing and/or future rights within the taxon.
- To apply the extension indefinite or only for a limited period of time
- To determine whether the extension is subject to a future review and, if so, when.