



Australian Government
IP Australia

Consultation Paper: Review of the Plant Breeder's Rights Advisory Committee

September 2014



Robust intellectual property rights delivered efficiently

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Review of the Plant Breeder's Rights Advisory Committee

Introduction

This paper discusses the Plant Breeder's Rights Advisory Committee (the Committee) and possible alternative mechanisms to provide advice on plant breeder's rights.

IP Australia invites interested parties to make written submissions by **Friday, 31 October 2014** and in particular seeks responses to the questions posed in this paper.

If you would like to receive any updates about this consultation, please include your contact details (preferably including your email address) with your submission.

Written submissions should be sent to consultation@ipaaustralia.gov.au.

For accessibility reasons, please submit responses by email in Word, RTF or PDF format.

We would also be happy to receive responses by telephone.

The contact officer is Andrew Wilkinson, (02) 6225 6199.

Please note that, unless requested otherwise, written comments submitted to IP Australia may be made publicly available on our website and may be disclosed to other Commonwealth agencies, including, but not limited to, the Department of Industry.

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- how you may seek access to and correction of the personal information we hold;
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- IP Australia's Privacy Contact Officer details.

A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

Submissions should be received no later than Friday, 31 October 2014.

Background

The Committee is established under the *Plant Breeder's Rights Act 1994* (PBR Act) and its functions are to advise the government on matters related to the PBR Act.¹

The National Commission of Audit recently examined the scope and efficiency of the Commonwealth Government. In March 2014, the Commission released recommendations for rationalising agencies, boards and committees as part of streamlining the structure and operation of the Australian Public Service.²

Amongst the recommendations made for actions to be taken regarding 482 non-principal Commonwealth bodies, the Commission recommended that the functions of the Plant Breeder's Rights Advisory Committee be considered for consolidation into the portfolio department. The Commission also recommended a review of the ongoing need for the Advisory Council on Intellectual Property, which will be considered separately by the government.

Following the Commission's recommendations, in May 2014 the Minister for Finance released a paper titled *Smaller and More Rational Government 2014-15*.³ This paper detailed the key commitments of the Abbott Government to reduce the size of government, and to ensure that government services are as efficient and well-targeted as possible.

It is important that the government continues to have access to technical advice on plant breeder's rights, but there is no requirement to legislate the form in which this advice is provided. Arguably, the prescriptive statutory basis of the current Committee limits its flexibility, and consequently its ability to maintain its efficiency and effectiveness over time. It is proposed that all references to the Committee are removed from the PBR Act. Instead of the Committee, a non-statutory mechanism is proposed to provide specialised advice on plant breeder's rights matters. This approach seeks to reduce complexity and the formalities and costs associated with the current overly-regulated structure and process.

The government is seeking public comment on proposed non-statutory mechanisms to provide advice on plant breeder's rights matters. This paper proposes three alternative options to the current Committee and discusses relevant sections of the PBR Act.

Plant Breeder's Rights

Australia has operated a plant breeder's rights system since 1987 to encourage the development of new varieties of plants for Australia's domestic industries and for export.⁴ These rights are intended to create a balance between providing plant breeders with an opportunity to obtain a reward for producing a new plant variety, and providing benefits to growers and society through access to new and improved plant varieties.⁵

Australia's PBR Act provides protection for new 'plant varieties'. This includes plants, fungi and algae but does not include bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages.⁶ A plant breeder's right provides the right to exclude others from using the registered variety for a range of commercial activities and from misusing the variety name. To be a registrable plant variety, a variety must:⁷

¹ Explanatory Memorandum to the Plant Breeder's Rights Bill 1994.

² National Commission of Audit, *Towards Responsible Government - The Report of the National Commission of Audit - Phase Two*, March 2014.

³ Available at <http://www.financeminister.gov.au/publications/docs/smaller-and-more-rational-government.pdf>

⁴ Advisory Council on Intellectual Property, *Review of Enforcement of Plant Breeder's Rights*, p26.

⁵ Ibid.

⁶ Section 3 of the *Plant Breeder's Rights Act 1994*.

⁷ Section 43 of the *Plant Breeder's Rights Act 1994*.

- have a breeder;
- be distinct, uniform and stable; and,
- not have, or have only recently, been exploited.

The Plant Breeder's Rights Advisory Committee

The Committee is currently a statutory body established and administered under Part 7 (sections 63-67) of the PBR Act.

The Committee has operated under both of the *Plant Variety Rights Act 1987* and the PBR Act, as the Plant Variety Rights Advisory Committee and the Plant Breeder's Rights Advisory Committee respectively. The Committee's usefulness resides in its specialised and technical knowledge of plant breeding and utilization, which is available to the government on request.

The PBR Act sets out the Committee's function, membership, remuneration and allowances, disclosure of interests, and meetings. The Committee's membership includes representatives for breeders, users, consumers, conservation interests, and indigenous interests.

Role of the Plant Breeder's Rights Advisory Committee

The PBR Act established the Committee primarily to provide specialised technical advice to the government on plant breeder's rights matters when considering changes to PBR legislation.⁸ The Registrar may also refer matters to the Committee for advice on technical aspects of the administration of the PBR Act.⁹

Recent work of the Committee has included:

- a review on seed availability during the drought of late 2006;
- input to the Advisory Council on Intellectual Property review of enforcement of plant breeder's rights (2007-2010);
- producing an assessment framework for assessing applications to extend the duration of plant breeder's rights for a specified taxon under the PBR Act¹⁰ (July 2008);
- providing advice to the Minister in relation to an unsuccessful application made under said extension assessment framework; and,
- input to IP Australia's plant breeder's rights fee reviews.

Proposed options for providing advice on Plant Breeder's Rights

The National Commission of Audit acknowledged the value of the views of stakeholders and advice from experts outside of government, but emphasised that this advice and guidance should be obtained effectively and efficiently. The Commission saw the harnessing of views and external advice as core business for departments which does not necessitate dedicated statutory bodies.

It is proposed that all references to the Committee are removed from the PBR Act and the Committee is replaced with a non-statutory mechanism to provide specialised advice on plant breeder's rights matters.

⁸ Section 63 of the *Plant Breeder's Rights Act 1994*.

⁹ Section 63(2)(b) of the *Plant Breeder's Rights Act 1994*.

¹⁰ Section 22(3) of the *Plant Breeder's Rights Act 1994* provides the regulation-making power to extend the duration of plant breeder's right for a specified taxon.

Below are three alternative non-statutory proposals for obtaining specialised technical advice on plant breeder's rights that are currently being considered by the government. Such non-statutory approaches aim to provide a more effective and efficient way to seek this advice, and provide for increased flexibility to respond to changing needs.

The anticipated cost borne by stakeholders to directly participate varies depending on the option chosen. However, it is anticipated that the cost of engagement by the wider business community and other interested stakeholders will be largely the same regardless of the option.

Option 1: A consultative group supported by IP Australia

The Committee would be replaced with a non-statutory consultative group supported by IP Australia. While the existing requirements for membership of the Committee would be considered, this group may comprise wider representation from stakeholders in academia, industry and government, creating the potential for wider stakeholder engagement. Meetings would be held at regular intervals, and it would be expected that members make themselves available to attend these sessions. Though the consultative group would meet regularly, it would not operate as a formalised committee.

This option provides flexibility to obtain specialised technical advice in response to changing priorities, particularly as the membership of the group could be readily adjusted without the restrictions imposed by the existing legislation. This option also has the benefit of actively involving stakeholders on a regular basis.

This approach would be analogous to the other non-statutory consultative groups for patents, trade marks and designs.

Option 2: A technical cross-government advisory committee coordinated by IP Australia

The Committee would be replaced with a non-statutory, technical, cross-government advisory committee coordinated by IP Australia. The committee would consult with stakeholders and/or engage experts as required. This option provides the ability to respond to changing government priorities and readily adjust the membership.

Membership would include government agencies with an interest in plant breeder rights or related matters, for example, the Department of Industry, the Department of Agriculture, Fisheries and Forestry, the Department of Environment and the Commonwealth Scientific and Industrial Research Organisation (CSIRO).

IP Australia has experience with similar cross-government committees that are convened to deal with specific issues. Input from non-government stakeholders would, in effect, be mediated by the cross-government committee.

Option 3: Experts are engaged on a case-by-case basis with IP Australia as Secretariat

The Committee would be replaced with the ad-hoc and non-statutory engagement of specialist technical advice on plant breeder's rights. An expert panel comprising appropriate specialists would be formed as required to consider and provide advice on identified plant breeder's rights issues. The expert panel would consult stakeholders as necessary.

The ad-hoc nature of this option and the ability to select experts appropriate to the issue under consideration would enable this option to provide timely expert advice on specific issues. A similar approach was taken in 2002, when an expert panel was formed to report on 'Clarification of Plant Breeding Issues under the PBR Act'.¹¹ This option would provide a simplified and flexible approach to consultation, whilst still providing specific and targeted advice.

¹¹ The 2002 report can be viewed via <http://www.anbg.gov.au/breeders/plant-breeders-rights-act-report.pdf>

While each option offers specific benefits, overall the preferred non-statutory advisory mechanism is considered to be Option 1. Please provide your views by responding to the questions below.

Questions

1. Which is your preferred option for providing advice on plant breeder's rights? Please provide reasons for your preference, including why the other options are not preferred.
2. Are there any other options for providing advice on plant breeder's rights that are not considered in this paper that may achieve the same result?

Advice on making regulations and imposing conditions

In addition to considering alternative advisory mechanisms to the current Committee as outlined above, the government is also reviewing the sections of the PBR Act that the Committee may currently be asked to provide advice on.

Regulations made under sub-sections 17(2) and 22(3)

Sub-sections 17(2) and 22(3) are intended to safeguard the interests of plant breeder's rights holders.

Under sub-section 17(2), plant breeder's rights holders who believe that the farm-saved seed provision prevents them from obtaining a fair return on their investment in breeding can apply to have regulations made to declare a taxon exempt from the provision.

Under sub-section 22(3), plant breeder's rights holders can apply to have regulations made to extend the duration of protection for a specific taxon when they believe there were factors that prevented them from obtaining a fair return on their investment.

No changes are proposed to these sub-sections.

Section 69 of the PBR Act provides that such regulations cannot be made under sub-sections 17(2) and 22(3) without prior public notice and consultation. This will not be changed (however note that it is proposed that all references to the Committee throughout the PBR Act, including in this provision, will be removed).

Regulations made under sub-section 42(1)

Section 42 provides regulation-making power to exclude application of the PBR Act to a specified taxon.

The *Plant Variety Rights Act 1987* conformed to the 1978 Convention of the International Union for the Protection of New Varieties of Plants (UPOV), and only applied to plant varieties declared by regulation. This Act was replaced by the PBR Act of 1994, which conforms to the 1991 Convention of UPOV and applies to all plant varieties (unless excluded by regulation under section 42).

Section 42 was included to serve as a bridging measure, covering the period between commencement of the PBR Act and commencement of Australia's obligations under the 1991 Convention of UPOV.¹²

The 1991 Convention of UPOV entered into force in Australia on 20 January 2000, meaning section 42 is no longer required. As such, it is proposed to remove section 42 of the PBR Act.

Exercising powers under section 49

Section 49 of the PBR Act gives the Minister the power to impose conditions, in the public interest, on a plant breeder's right. These conditions are applied at variety level (rather than at taxon level).

¹² In particular, see Article 3 of the 1991 *Convention of the International Union for the Protection of New Varieties of Plants*.

Unlike sections 17(2), 22(3) and 42(1) above, exercising this power does not require the making of regulations. Any such decision made by the Minister is reviewable by the Administrative Appeals Tribunal under Section 77 of the PBR Act. This power has never been exercised.

Section 49 was based on Section 34 of the *Plant Varieties Rights Act 1987* and is designed to help protect the public's interests. The PBR Act includes a number of other provisions that serve to protect the public interest. These powers are found under sections 16-19 and 23 of the PBR Act,¹³ with further detail on their roles found in the Explanatory Memorandum.¹⁴ Equivalent safeguards to sections 16-19 and 23 are common in plant breeder's rights systems around the world and/or comparable to the exemptions available for other industrial property rights.

Section 49 arguably adds a level of unnecessary uncertainty to the plant breeder's rights system in Australia, given that there are other public safeguard measures already in place. In addition, no power equivalent to the power under section 49 is found in the legislation for other industrial property rights (patents, trade marks and designs). For these reasons, and to minimise overly-regulated administrative processes, the government is considering whether section 49 is necessary at all. It may be appropriate to delete section 49 entirely, or to amend it so that the power to impose conditions under the section resides with the Secretary or Registrar, rather than the Minister.

Please provide your views on the above legislative proposals by responding to the questions below.

Questions

3. Are there any issues associated with removing section 42 from the *Plant Breeder's Rights Act 1994*?
4. Are there any issues associated with removing section 49 from the *Plant Breeder's Rights Act 1994*, or with providing the Secretary or Registrar the power to impose such conditions, rather than the Minister?

¹³ Section 16: Certain acts done for private, experimental or breeding purposes do not infringe PBR; Section 17: Conditioning and use of farm saved seed does not infringe PBR; Section 18: Restriction on grantee's rights in certain circumstances; Section 19: Reasonable public access to plant varieties covered by PBR; Section 23: Exhaustion of PBR.

¹⁴ Explanatory Memorandum to the Plant Breeder's Rights Bill 1994.

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