30 January, 2017

IP Australia
PO Box 200
Woden ACT 2606

RE: Public consultation on the draft Intellectual Property Laws Amendment Bill 2017, and the draft
Intellectual Property Laws Amendment Regulation 2017

Input Rijk Zwaan to the Exposure Draft of the Intellectual Property Laws Amendment Bill 2017

Page 6, Section 52, Revocation on surrender of PBR

We propose to delete this amendment and to retain the current section 52. The nature of an intellectual property
right requires that the breeder is free to decide whether he wants to maintain or abandon the right; just like the
breeder is free to decide whether he applies for PBR or not.

Concerning the reasoning for this amendment as described on page 18 and 19 of the draft explanatory
memorandum to the Amendment Bill we would like to comment as follows: It is not clear to us why a right could
not be revoked where there are relevant proceedings pending. Such proceedings, if still relevant, could be
continued and the outcome of the proceedings – if relevant - could apply retroactively. Further, in our opinion
the argument that revocation might be detrimental to the licence holder (which in this context is the compulsory
license holder) does not hold. A compulsory license is granted if this is necessary to ensure reasonable public
access to a plant variety. In case the right is revoked, the party who obtained the compulsory license may
reproduce and sell propagating material of the variety concerned without being bound by the compulsory
license so this would safeguard access to the plant variety concerned.

As a consequence we propose to delete corresponding amendments such as amendment 24 on page 7, as well.

Page 58, Section 76G, Consequences of extension

According to subsection (3) infringement proceedings cannot be brought in respect of an infringement
committed between the moment a PBR ceases or a PBR application is withdrawn and the moment the relevant
PBR (application) is restored as a consequence of an extension. However, it should be clear that from the
moment a PBR is granted, third parties may only exploit the plant variety with consent of the PBR holder. This
means that if a PBR has been temporarily ceased but has been restored thereafter as a consequence of an
extension, the PBR holder should remain able to initiate infringement proceedings against any infringement committed with respect to this PBR, regardless of the moment such infringement has taken place (also including acts committed between the moment the PBR was temporarily ceased and the moment the PBR was restored).

Page 58/59, Section 76H, Protection of third parties

We do not understand subsection (2)-(5). These subsections (partly) relate to the situation in which no valid PBR exists: during that period nobody has an exclusive right regarding exploitation of the plant variety concerned, so we do not see how a person that does not have the exclusive right to exploit, can dispose of the right to exploit the plant variety. Further, as mentioned above, it should be clear that from the moment a PBR is granted or restored, third parties may only exploit the plant variety with consent of the PBR holder.

For similar reasons we do not understand subsection (6) on page 59. Licenses can only be granted by the PBR holder, or by a party who obtains a license from the PBR holder to grant sublicenses therefore we do not understand the need for this subsection.

Regarding subsection (7) we refer to our remark above that as soon as a PBR is granted, third parties may only exploit the plant variety with consent of the PBR holder. In this respect we do not understand why on the basis of this subsection a “doing of a thing” does not infringe the PBR of a plant variety.

We are furthermore concerned that subsection (2)-(7) in conjunction with section 76G (3) could be misused by third parties to wrongfully obtain a “right” to exploit a PBR protected variety: A party might deliberately object to the grant of an extension in accordance with section 76D (2), groundless or not, just to “create” a period between the moment a PBR ceases or a PBR application is withdrawn and the moment the relevant PBR (application) is restored. If during this period the relevant party starts exploiting the relevant variety, the right holder could thereafter no longer enforce its PBR against this party to prevent him from further exploiting the relevant variety.

Page 22, Section 3H, Extensions of time, page 54, Section 76C

It is not clear to us whether it is necessary to apply for an extension of time for taking over DUS reports. It is very important that the term for taking over overseas reports can be more than 12 months, so that the applicant can wait until the overseas report is ready when filling in part 2 of the application. We propose to clarify this.

Page 138/139, Sections 57A-57D, Protection of third parties

In 57A reference is made to “a threat”. In subsection (2) it is explained that a threat may be by means of circulars, advertisements or otherwise. We assume from the examples that threats as meant in this section only refers to public statements. We propose to clarify this.

We propose to add in section 57D that the mere notification that all rights (to start legal actions) are reserved does not constitute a threat of proceedings. And as included in our submission of April 2, 2015 we would like to emphasize that it is important that starting legal action against an alleged infringer including requesting a court order for collecting evidence of a possible infringement, should not considered to be an unjustified or groundless threat of infringement. This is particularly important in relation to PBR of sexually propagated species as it is very difficult for breeders to gather evidence of an infringement of a PBR in practice. Seed is a product that does not show from the outside to which (protected) variety it belongs and is a living product that can change into a plant but can lose this ability over a limited period of time. Therefore further investigation is often required and it may
not be possible to get hold of the relevant material and information without a court order.

Further it is also important that in case a user files a claim based on unjustified threat of infringement, the right holder is not forced to start an infringement case in court just to show that the threat of infringement is not unjustified.

**Page 163/164, Amendment 586 and corresponding amendments, Removal of the PBRAC**

Concerning the removal of the PBRAC from the PBR Act we filed a submission in relation to the consultation on this issue in 2014. In this submission we expressed a preference for option 1, i.e. a consultative group supported by IP Australia. The Draft Explanatory Memorandum mentions that a more flexible, non-statutory mechanism will provide specialised advice on PBR matters. We propose that such a mechanism will be established as soon as the PBRAC is removed from the PBR Act and we would like to emphasise again the importance for breeder to be consulted on PBR legislation as they are directly affected by it and they are the ones who have required the necessary expertise.

**Miscellaneous - Section 26 (2) (ga) of the Act**

Although we realize that this section is not a subject of the current Public Consultation, we would like to use this opportunity to express our concerns with regard hereto. According to this section a PBR application should contain information on each variety that is used in the breeding program to develop the new variety. However, the names of the used varieties concern business-sensitive information. This information could therefore not be provided to the Secretary in an application. In addition, this information is also not required to examine the distinctness of a new variety. We would therefore propose to delete subsection 26 (2) (ga) of the Act.

Kind regards,

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