Wednesday, 15 November 2017

IPAustralia
PO Box 200
Woden ACT 2606


Dear Sir or Madam,

The Australian Nurserymen’s Fruit Improvement Company (ANFIC) Ltd is an Intellectual Property (IP) Management Company representing fruit breeders from more than 50 breeding programs and more than 20 countries. We have submitted many PBR applications on behalf of both Australian and International fruit breeders and believe we are well qualified and experienced to comment on the Draft Legislation.

Please find below a public submission is response to the Consultation Questions raised by IPAustralia.

**Consultation Question 3:** Part 12 of Schedule 2 provides for a PBR exclusive licensee to bring infringement proceedings. Should an exclusive licensee of the PBR grantee also be able to make an application for a declaration?

Yes it our opinion that the exclusive licensee of the PBR grantee should be able to have all rights equal to the PBR grantee and be able to make an application for a declaration. In commercial agreements with PBR grantees, there is a requirement to enforce all rights of the PBR grantee as if we were the PBR grantee, but the current legislation has precluded that requirement.

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**Consultation Question 4:** Is it appropriate for the second variety to meet all the ordinary criteria for registration in subsection 43(1)? If there are reasons why a particular criterion is not appropriate to include, please provide reasons. For example, is the requirement in s 43(1)(e) an unreasonable requirement to impose on the applicant for a declaration when they may not be aware of previous sales by the second breeder?
In our opinion it is entirely appropriate for a second variety to meet all ordinary criteria for registration.
While it entirely likely that not all applicants can know of previous sales by other applicants, we believe the declaration still needs to be provided even if previous sales are unknown.

**Consultation Question 5:** Does the commercial-in-confidence test strike the right balance between protecting the privacy of parties and ensuring that all information relevant to the decision is available to all interested parties?

Provided the commercial-in-confidence information is not related to the breeding, PBR requirements or EDV information, which would be required to be made available, then that would be appropriate.

**Consultation Question 6:** Is it appropriate for the applicant for a declaration to pay all costs associated with the test growing, or is another arrangement more appropriate? For example, should the second breeder instead pay those costs?

In our opinion, the second breeder knows full well what they have found as an EDV of the first variety. In many cases today, commercial non-propagation agreements supplied with the purchase of PBR, and even non-PBR varieties, may also state that any sports/mutations/EDV’s found from the first variety remain the property of the first breeder.
This has become a necessity, as second breeders are reaping the significant financial rewards of the first breeders work, through ‘finding’ cosmetically superior EDV’s and not applying for PBR to allow them to collect a financial return for having a keen eye when seeking sports/mutations in their orchards but not conducting any breeding work.
This is particularly evident in EDV’s of apple varieties, where increased skin colour over a first variety provides significant commercial benefit to growers and the second breeder without any breeding work done. The first breeder may have taken 25-30 years to cross-breed their first variety, while the second breeder may select an EDV within the first 3-5 years of planting the first variety in their orchard.

**Consultation Question 7:** Is the definition of exclusive licensee appropriate? Would it be interpreted as requiring an assignment or a transmission to the licensee?

In our opinion, the definition of an exclusive licensee, for PBR purposes, should include the full and complete IP rights management, but not ownership as this resides with the variety owner/breeder, so the exclusive licensee can enforce and protect the IP rights of PBR as the exclusive licensee and agent for the variety owner/breeder.
The exclusive licensee should have all rights as per the grantee for protection and enforcement of IP rights but without ownership.
This will not require an assignment or transmission to the licensee as current contractual arrangements will cover this.
Overall, ANFIC is very comfortable with the proposed changes to the Plant Breeder’s Rights in the draft Intellectual property Laws Amendment Bill and Regulations 2017, in particular:

- Essentially derived varieties
- Unjustified threats of infringement
- Further power to award damages under the PBR Act
- Exclusive licensees in the PBR Act

One area not currently being addressed in this Bill, is related to assisting enforcement of Plant Breeder’s Rights.

While there is never any question about a Plant Breeder’s Rights grant once a grantee, or now exclusive licensee, gets into court and can prove the infringement of their rights, it’s the pathway to get to court to have these Plant Breeder’s Rights enforced which is a significant challenge in Australia.

Gaining access to a grower’s property to conduct an audit inspection looking for infringing varieties is only available through an ‘Anton Piller’ order, which is extremely expensive to conduct.

This is cost prohibitive for amateur breeders and variety owners so if this is something that could be addressed in conjunction with these proposed PBR changes, which would provide a very strong and enforceable PBR package in Australia.

If you require anything further from us concerning this submission, please do not hesitate to contact us.

Yours sincerely,

Dr Gavin Porter
ANFIC CEO