

Mr Andrew Wilkinson  
IP Australia  
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Via email: [consultation@ipaaustralia.gov.au](mailto:consultation@ipaaustralia.gov.au)

31 October 2014

Dear Mr Wilkinson,

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

The following submission is in response to IP Australia's Consultation Paper: Review of the Plant Breeders' Rights Advisory Committee.

The submission has been prepared by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia ('Committee').

#### **A. EXECUTIVE SUMMARY**

##### **Options for providing advice on PBR**

The Committee considers that none of the three options proposed in the Consultation Paper, on their own, is sufficient to provide the advice on the Plant Breeder's Rights (PBR) regime that the government will require in the event that the Plant Breeder's Rights Advisory Committee (PBRAC) is abolished. Accordingly, the Committee recommends the adoption of both Option 1 and Option 3.

##### **Advice on making regulations and imposing conditions**

The Committee considers that section 42 is redundant and may be removed from the PBR legislation without negative consequences. The Committee considers that section 49 should not, at this stage, be removed from the legislation, and notes that this issue is a matter on which the government should consider obtaining specialist technical advice. The Committee does not, at this stage, wish to express a view on the issue of on whom should rest the power to impose conditions under section 49.

#### **B. OPTIONS FOR PROVIDING ADVICE ON PBR**

The Committee recognises the significant value of formal mechanisms by which the Australian government obtains advice on intellectual property matters, including on PBR. While the Committee does not offer a view on whether PBRAC should be abolished, it strongly recommends that an alternative mechanism for provision of advice on the operation of PBR be adopted in the event that it is.

The Consultation Paper is seeking views on options for providing “specialist technical advice” to government on PBR. The Committee understands the reference to “specialist technical advice” to be to matters relating specifically to the science of plants and the technology of plant breeding. In particular, the Committee understands “specialist technical advice” to be distinct from general policy advice – that is, from advice about the content and operation of the legal aspects of the PBR regime.

In terms of general policy advice on PBR, the Committee believes that the Advisory Council on Intellectual Property (ACIP) continues to be the most appropriate body for providing such to government. The Committee recognises and applauds the work previously undertaken by ACIP on PBR, and encourages the government to continue to seek advice from ACIP on general policy issues relating to the regime.

The Committee sets out its views on each of the three options proposed in the Consultation Paper, as follows:

**Option 1: A consultative group supported by IP Australia**

The Committee is familiar with, and generally supportive of, the use of consultative groups by IP Australia. A number of its members are regular participants in the existing consultative groups for designs, patents and trade marks. It considers such groups to be useful conduits to government for providing advice on the operation of the relevant IP regimes, as well as for exchange of information generally. The Committee considers that creation of a consultative group for PBR would be valuable.

The Committee notes, however, that this option suffers from a major weakness. Given that members of a consultative group typically provide their time for free and bear their travel costs, the Committee fears that there is a low likelihood of participation by members of the plant breeding industry. The plant breeding industry typically consists of small-scale businesses, for whom the opportunity cost of providing a representative for participation in a consultative group is high. Yet, it is precisely these members who are likely to have the most relevant specialist technical expertise that the government seeks to access. Thus, the Committee is concerned that Option 1 will not result in meaningful, if any, participation by those from whom the government most wishes to obtain input.

In the Committee’s view, the most likely outcome of Option 1 is that the significant majority of the participants in such a consultative group will be professional advisors (in particular, lawyers and/or patent attorneys) to members of the plant breeding industry. While such advisors have a valuable contribution to make, they are likely to lack the desired degree of specialist technical expertise. Accordingly, while the Committee supports the adoption of Option 1, it does not consider that this option alone will be sufficient to provide the government with the full range of necessary advice on PBR.

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

As the Committee understands it, this option is primarily internal to government. As such, it is unlikely to be the optimal mechanism for obtaining input from stakeholders external to government. It also runs the risk of lacking transparency. For these reasons, the Committee does not support this option.

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

The Law Council understands that, under this option, participants of an ad-hoc expert group could be (and, in the Law Council’s view, should be) engaged on a basis whereby their travel costs are met and they are remunerated for their time. The Law Council

believes there is much merit in this option. In particular, the Law Council considers that ad-hoc engagement of specialists is the most appropriate means for obtaining advice on many of the specialist technical issues of the type on which PBRAC has previously advised (e.g. seed availability during drought, application for extension of duration of rights) and on which advice might likely be sought in the future (e.g. exemption of taxa from the farm saved seed provisions).

Accordingly, the Law Council recommends that the Australian government adopt Option 3 in respect of the most important technical issues. In the Law Council's view, Option 3 is complementary to Option 1, whereby a consultative group would be convened regularly for consideration of other matters.

### **C. ADVICE ON MAKING REGULATIONS AND IMPOSING CONDITIONS**

The Committee has considered the question of whether there are any issues with the proposal to remove section 42 from the legislation. Given that the 1991 UPOV Convention, to which Australia is a party, requires members to extend protection to all plant genera and species, the Committee considers that section 42 is redundant and may be removed from the legislation without negative consequences.

The Committee has briefly considered the question of whether there are any issues associated with the proposal to remove section 49 from the legislation or alternatively to provide the Secretary or Registrar (instead of the Minister) with the power to impose conditions on the grant of PBR at the variety level. While the Committee understands the argument that section 49 adds a level of uncertainty to the PBR system, it is not convinced that this uncertainty is so great as to justify abolition of the provision. Although it does not have any particular example in mind, the Committee considers that it is feasible that a situation may arise in which the imposition of conditions on the grant of PBR at the variety level is necessary. Given that fact, the Committee believes it would be undesirable to remove from the legislation the mechanism by which such conditions may be imposed, without further detailed consideration of the matter. (The Committee notes that detailed consideration of this issue may be a matter on which the government should seek specialist technical advice, under Option 3 as set out in the Consultation Paper.) Accordingly, the Committee does not, at this stage, support the proposal to remove section 49 from the legislation.

The Committee does not, at this stage, wish to express a view on whether the power to impose conditions should remain with the Minister or should, instead, be provided to the Secretary or the Registrar.

If you have any questions regarding this submission or would like further information or background to that raised in the submission, please contact the Committee Chair, Richard Hamer, by phone on 03 9613 8864 or via email: [richard.hamer@allens.com.au](mailto:richard.hamer@allens.com.au)

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves  
**Chairman, Business Law Section**