

The Senate

Economics
Legislation Committee

Intellectual Property Laws Amendment
(Productivity Commission Response Part 1
and Other Measures) Bill 2018 [Provisions]

June 2018

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Table of Contents

Membership of the Committee	iii
Chapter 1.....	1
Introduction	1
Conduct of the inquiry.....	1
Background.....	1
Overview of the bill.....	5
Legislative scrutiny	8
Financial Impact	8
Chapter 2.....	9
Views on the bill.....	9
Parallel importation of trade marked goods	9
Plant Breeder's Rights.....	12
Drafting.....	20
Committee view.....	21
Appendix 1	23
Submissions and additional documents.....	23

Chapter 1

Introduction

1.1 On 10 May 2018, the Senate referred the provisions of the Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018 (bill) to the Economics Legislation Committee (committee) for inquiry and report by 22 June 2018.¹

1.2 In his second reading speech, the Assistant Minister for Finance, Mr David Coleman MP, explained:

This bill delivers the first tranche of the Turnbull government's commitment to review and reform [Australia's] intellectual property arrangements, ensuring that they provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of creative works.²

Conduct of the inquiry

1.3 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions by 1 June 2018. The committee received nine submissions.³ Submissions are listed at Appendix 1.

1.4 The committee thanks all those who have assisted with the inquiry.

Background

1.5 The bill is largely the result of two independent reviews, and feedback received by IP Australia in response to public consultation on an exposure draft of the bill. These processes are discussed below.

Independent reviews

Intellectual Property Arrangements

1.6 The Productivity Commission (PC) recently completed a public and overarching inquiry into Australia's Intellectual Property (IP) system. The PC's final report was handed to the Australian Government on 23 September 2016 and published in December 2016.⁴ It made a number of key points, including:

1 *Journals of the Senate*, No. 97, 10 May 2018, p. 3093.

2 Mr David Coleman MP, Assistant Minister for Finance, *House of Representatives Hansard*, 28 March 2018, p. 3071.

3 Due to a technical issue with the Senate's online submission database, submissions from the following organisations were not received by the committee until 21 June 2018: Macpherson Kelley, *Submission 8*; and International Association for the Protection of Intellectual Property, *Submission 9*. As the committee is required to report by 22 June 2018, it has been unable to incorporate the issues raised in these submissions into this inquiry report.

4 Productivity Commission, Inquiry Report, *Intellectual Property Arrangements*, No. 78, 23 September 2016, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf> (accessed 25 May 2018).

- Australia's IP arrangements fall short in many ways and improvement is needed across the spectrum of IP rights.
- IP arrangements need to ensure that creators and inventors are rewarded for their efforts.
- Australia's patent system grants exclusivity too readily, allowing a proliferation of low-quality patents, frustrating follow-on innovators and stymieing competition.
- Copyright is broader in scope and longer in duration than needed—innovative firms, universities and schools, and consumers bear the cost.
- Timely and cost effective access to copyright content is the best way to reduce infringement.
- Commercial transactions involving IP rights should be subject to competition law.
- While Australia's enforcement system works relatively well, reform is needed to improve access, especially for small and medium sized enterprises.
- The absence of an overarching objective, policy framework and reform champion has contributed to Australia losing its way on IP policy.
- International commitments substantially constrain Australia's IP policy flexibility.
- Reform efforts have more often than not succumbed to misinformation and scare campaigns. Steely resolve will be needed to pursue better balanced IP arrangements.⁵

1.7 The Minister for Industry, Innovation and Science and the Minister for Communications released the government's response to the PC's inquiry in August 2017. The response supported a number of the PC's recommendations and acknowledged the importance of further consultations with stakeholders in respect of proposed changes to Australia's IP laws—including those changes proposed in the bill.⁶

Plant Breeder's Rights

1.8 Intellectual property rights are granted for new varieties of plants in Australia under the *Plant Breeder's Rights Act 1994* (PBR Act). The PBR Act gives to those who breed a new variety of plant the right to exclude others from exploiting the plant

5 Productivity Commission, Inquiry Report, *Intellectual Property Arrangements*, No. 78, 23 September 2016, p. 2, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf> (accessed 25 May 2018).

6 Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017, <https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf> (accessed 30 May 2018).

variety without the breeder's consent, thereby controlling how new plant varieties may be produced or reproduced.⁷

1.9 In 2005, the Howard Government asked the Advisory Council on Intellectual Property (ACIP), an independent body that advises the relevant Minister on intellectual property matters, to:

...inquire, report and make recommendations to the Australian Government on issues relating to the enforcement of plant breeder's rights in Australia and to consider possible strategies to assist Australian plant breeder's rights holders effectively enforce valid rights...⁸

1.10 On 18 January 2010, the then Minister for Innovation, Industry, Science and Research, Senator the Hon Kim Carr, released the ACIP report, *A review of enforcement of Plant Breeder's Rights*.⁹

1.11 ACIP's report identified a number of barriers to the effective enforcement of PBR that discouraged the development of new plant varieties and recommended legislative and procedural changes to the PBR Act. These included a recommendation to introduce exemplary damages in situations of flagrant or wilful infringement, based on similar arrangements that exist under the *Patents Act 1990* (Patents Act).¹⁰ This recommendation was subsequently accepted by the government in its response to the ACIP's report, in which it indicated amendments to the PBR Act would be sought to implement it.¹¹

Exposure draft process

1.12 Many of the recommendations made in the PC report and the recommendation identified above from the ACIP report require amendments to legislation that

7 *Plant Breeder's Rights Act 1994*, s. 11.

8 Australian Government, IP Australia, *Government Response - enforcement of Plant Breeder's Rights*, 21 April 2016, <https://www.ipaustralia.gov.au/about-us/public-consultations/archive-ip-reviews/ip-reviews/government-response-enforcement-pbr> (accessed 7 June 2018).

9 Australian Government, Advisory Council on Intellectual Property, *A review of enforcement of Plant Breeder's Rights: Final report*, January 2010, https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_final_report_review_of_enforcement_of_pbr_archived.pdf (accessed 7 June 2018).

10 Australian Government, Advisory Council on Intellectual Property, *A review of enforcement of Plant Breeder's Rights: Final report*, January 2010, p. 116, https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_final_report_review_of_enforcement_of_pbr_archived.pdf (accessed 7 June 2018).

11 Australian Government, IP Australia, *Government Response - enforcement of Plant Breeder's Rights*, 21 April 2016, <https://www.ipaustralia.gov.au/about-us/public-consultations/archive-ip-reviews/ip-reviews/government-response-enforcement-pbr> (accessed 7 June 2018).

IP Australia is responsible for. IP Australia proposed to implement the recommendations in a staged manner through two separate bills.¹²

1.13 The first is this bill, which incorporates a number of accepted recommendations from the PC report including phasing out of the innovation patent system, the PBR recommendation and the majority of the trade mark recommendations.¹³ It also addresses a number of other high priority trade mark and PBR issues, and some measures from a draft Intellectual Property Laws Amendment Bill 2017, which was also consulted on.¹⁴

1.14 From 23 October to 4 December 2017 IP Australia released an exposure draft of this bill for public consultation, to which it received 19 non-confidential submissions.¹⁵ Following this process, IP Australia issued a response summarising the matters raised by submitters, and, where appropriate, proposed amendments to the exposure draft legislation to address specific concerns which have ultimately been incorporated in the bill.¹⁶

1.15 The second is the IP Laws Amendment (Productivity Commission response Part 2 and other measures) Bill (Part 2 bill), which will also include a number of accepted recommendations from the PC report. These include the inventive step reforms, introducing an objects clause into the Patents Act, and changes to Crown use and compulsory licensing of patents and designs. In addition, it is proposed that a

12 Australian Government, IP Australia, *News and community: Implementation of the Government response to the Productivity Commission's 2016 report into Australia's Intellectual Property (IP) Arrangements*, 21 November 2017, <https://www.ipaustralia.gov.au/about-us/news-and-community/news/implementation-government-response-productivity-commissions-2016> (accessed 7 June 2018).

13 Australian Government, IP Australia, *News and community: Implementation of the Government response to the Productivity Commission's 2016 report into Australia's Intellectual Property (IP) Arrangements*, 21 November 2017, <https://www.ipaustralia.gov.au/about-us/news-and-community/news/implementation-government-response-productivity-commissions-2016> (accessed 7 June 2018).

14 Remaining measures from the draft IP Laws Amendment Bill 2017 have been put on hold pending further consideration at a later date. See Australian Government, IP Australia, *News and community: Implementation of the Government response to the Productivity Commission's 2016 report into Australia's Intellectual Property (IP) Arrangements*, 21 November 2017, <https://www.ipaustralia.gov.au/about-us/news-and-community/news/implementation-government-response-productivity-commissions-2016> (accessed 7 June 2018).

15 IP Australia, *Draft Legislation: Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill and Regulations 2018*, 28 March 2018, <https://www.ipaustralia.gov.au/about-us/public-consultations/draft-legislation-intellectual-property-laws-amendment-productivity> (accessed 7 June 2018).

16 IP Australia, *IP Australia response to public consultation on exposure draft of Intellectual Property Laws Amendment (Productivity Commission response part 1 and other matters) Bill and Regulations 2017*, https://www.ipaustralia.gov.au/sites/g/files/net856/f/ip_australia_response_to_consultation_on_draft_ip_laws_amendment_pc_response_part_1_legislation.pdf (accessed 30 May 2018).

number of technical fixes and red-tape reducing measures will also be included in the Part 2 bill.¹⁷

1.16 Consultation on a number of policy proposals planned to be included in the Part 2 bill occurred from 30 August to 17 November 2017. Subject to Government priorities, the Part 2 bill is intended for introduction to Parliament in 2018. Further consultation on an exposure draft of the Part 2 bill is also anticipated prior to introduction.¹⁸

Overview of the bill

1.17 As stated above, the purpose of the bill is to make improvements to Australia's IP rights legislation to ensure it better meets its objectives of promoting and incentivising investment in creativity, innovation, research and technology.¹⁹

1.18 The bill makes amendments to several areas of Australia's IP legislation including the:

- *Copyright Act 1968* (Copyright Act);
- *Designs Act 2003* (Designs Act);
- *Olympic Insignia Protection Act 1987* (the Olympic Insignia Protection Act);
- Patents Act;
- PBR Act; and the
- *Trade Marks Act 1995* (the Trade Marks Act).

1.19 The bill is divided into two schedules. Schedule 1 consists of four parts which give effect to some of the government's response to the PC's Inquiry Report—*Intellectual Property Arrangements*.²⁰ Specifically, schedule 1 of the bill implements the following four PC recommendations:

- changes to essentially derived variety (EDV) declarations in the Plant Breeder's Rights Act (recommendation 13.1);
- reducing the grace period for trade mark non-use actions (recommendation 12.1);

17 Australian Government, IP Australia, *News and community: Implementation of the Government response to the Productivity Commission's 2016 report into Australia's Intellectual Property (IP) Arrangements*, 21 November 2017, <https://www.ipaustralia.gov.au/about-us/news-and-community/news/implementation-government-response-productivity-commissions-2016> (accessed 7 June 2018).

18 IP Australia, Public consultation on several Intellectual Property (IP) matters, 16 March 2018, <https://www.ipaustralia.gov.au/about-us/public-consultations/public-consultation-several-intellectual-property-ip-matters> (accessed 15 June 2018).

19 Explanatory Memorandum, p. 1.

20 Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017, <https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf> (accessed 25 May 2018).

- clarifying the circumstances in which the parallel importation of trade marked goods does not infringe a registered trade mark (recommendation 12.1); and
- reforming section 76A of the Patents Act, which requires patentees to provide certain data relating to pharmaceutical patents with an extended term (recommendation 10.1).²¹

1.20 Schedule 2 consists of 21 parts which implement a number of measures to streamline and align the administration of the Australian IP system, and will implement a number of other IP law measures, mostly related to PBR enforcement.

1.21 Details of schedules 1 and 2 are set out below.

Schedule 1: Responses to the Productivity Commission

1.22 Parallel imports are where genuine goods that are sold overseas are brought into Australia and on-sold without the trade mark owner's consent. Part 1 repeals a provision in the Copyright Act and amends the Trade Marks Act to clarify the circumstances in which the parallel importation of trade marked goods does not infringe a registered trade mark.

1.23 The PBR Act extends protection of registered varieties to essentially derived varieties (EDVs). EDVs share all the essential characteristics of a registered plant variety but are clearly distinct and qualify for PBR registration in their own right. Part 2 amends the PBR Act to allow an application for an EDV declaration to be made in instances where the plant variety subject of the EDV application is not a registered PBR or undergoing application for PBR.

1.24 Unused trade marks on the trade marks register can be challenged by a third party taking a non-use action against the trade mark. Part 3 amends the Trade Marks Act to change the period that must elapse before certain actions of non-use actions of trade mark can be taken.

1.25 Part 4 amends the Patents Act to remove a requirement for patentees to provide the Secretary of the Department of Health with certain data relating to pharmaceutical patents with an extended term.

Schedule 2: Other measures

1.26 Part 1 amends the Trade Marks Act to ensure that the Registrar of Trade Marks can appropriately amend trade mark applications to comply with the legal personality requirement for applicants.

1.27 Part 2 amends the Patents Act, Designs Act, PBR Act, and Trade Marks Act to ensure that certain written actions by the Commissioner of Patents, Registrar of Designs, Registrar of PBR and the Registrar of Trade Marks (collectively 'the Commissioner and the Registrars') can be undertaken by any means of communication, including electronic means.

21 Productivity Commission Inquiry Report, *Intellectual Property Arrangements*, No. 78, 23 September 2016, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf> (accessed 25 May 2018).

1.28 Part 3 amends the Patents Act, Designs Act, PBR Act, and Trade Marks Act to simplify how documents and evidence are filed, or fees are paid.

1.29 Part 4 amends the Patents Act to remove unnecessary signature requirements.

1.30 Part 5 amends the Patents Act, Designs Act, PBR Act, and Trade Marks Act to enable the Commissioner and the Registrars to arrange for a computer program under their control to make decisions, exercise powers and comply with obligations under the legislation. To ensure that there are appropriate protections in place it also gives the Commissioner and Registrars the power to substitute any automated decision if they are satisfied that the decision is incorrect.

1.31 Part 6 amends the PBR Act to simplify the requirement for an applicant for PBR to provide an address for service of documents.

1.32 Part 7 amends the Patents Act to modernise and consolidate the requirements for patent documents.

1.33 Part 8 amends the Patents Act, Designs Act, PBR Act, and Trade Marks Act to align and improve protections against unjustified threats of infringement.

1.34 Part 9 amends the PBR Act to clarify that PBR can be granted to two or more breeders jointly, and to ensure that the Registrar can correct errors in the Register of Plant Varieties.

1.35 Part 10 amends the Trade Marks Act to clarify that the Trade Marks Registrar may require a person to give security for the costs of a wider range of opposition proceedings.

1.36 Part 11 aligns the PBR Act with the other Acts by giving the courts the power to award additional damages for infringement of PBR.

1.37 Part 12 amends the PBR Act to allow an exclusive licensee of PBR to bring proceedings for infringement for the right they license.

1.38 Part 13 amends the Patents Act and the Trade Marks Act to provide for the disclosure and publication of personal information about registered patent and trade marks attorneys to assist the public in verifying an attorney's registration.

1.39 Part 14 amends the PBR Act to transfer the statutory powers and obligations of the Secretary of the Department of Industry, Innovation and Science with regard to the PBR to the Registrar of PBR.

1.40 Part 15 amends the Copyright Act, Olympic Insignia Protection Act and Trade Marks Act to provide the Comptroller-General of Customs with more flexibility in the method of issuing notices of seizure.

1.41 Part 16 amends the Patents Act and the Trade Marks Act to correct oversights in the drafting of the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* to ensure that several offences committed by companies can be prosecuted in the same five year timeframe as applies for several offences committed by individuals.

1.42 Part 17 corrects references to the Designs Act in the Olympic Insignia Protection Act.

1.43 Part 18 repeals the provisions in the Patents Act that would have provided for single application and examination processes for trans-Tasman patents, which were not enacted by New Zealand.

1.44 Part 19 and item 353 in Part 20 amends the PBR Act to clarify alignment with the International Convention for the Protection of New Varieties of Plants.

1.45 Part 20 relieves the Commissioner of Patents of the obligation to sell copies of complete specifications (as they are now published online) and makes consequential amendments to the *Plant Breeder's Rights Act following the Statute Update (Smaller Government) Act 2018*.

1.46 Part 21 repeals the whole of the *Patents Amendment (Patent Cooperation Treaty) Act 1979*, as it is spent.

Legislative scrutiny

1.47 The Explanatory Memorandum (EM) states that the bill engages the following human rights: the right to privacy, the right to enjoy the benefits of scientific progress and its application; and the right to the protection of interests resulting from one's scientific production. However, the EM also states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.²² The Parliamentary Joint Committee on Human Rights considered the bill in its *Report 4 of 2018* and made no comment.²³

1.48 The bill was also considered by the Senate Standing Committee for the Scrutiny of Bills in its *Scrutiny Digest 5 of 2018*, and no comment was made.²⁴

Financial Impact

1.49 The EM states that the bill is expected to have no financial impact on the Commonwealth.²⁵

22 Explanatory Memorandum, pp. 4–10.

23 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018*, 8 May 2018, p. 96.

24 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, p. 31.

25 Explanatory Memorandum, p. 3.

Chapter 2

Views on the bill

2.1 This chapter summarises the views on the Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018 (bill) raised by submitters to the inquiry.

2.2 Comments received on the bill focussed predominantly on the proposed amendments to the parallel importation of trade marked goods and the *Plant Breeder's Rights Act 1994* (PBR Act). This chapter examines the evidence received in relation to these measures as well as touching on some of the general comments made in relation to the language used in the bill.

Parallel importation of trade marked goods

2.3 The submissions received from the Intellectual Property Committee of the Business Law Section of the Law Council of Australia (IPC),¹ Professor Robert Burrell and Professor Michael Handler (Burrell and Handler)² and Dr Ana Penteadó,³ commented on the proposed amendments to the parallel importation of trade marked goods.

2.4 As discussed in Chapter 1, schedule 1, part 1 of the bill implements the Productivity Commission's Recommendation 12.1,⁴ by amending the *Trade Marks Act 1995* (Trade Marks Act) to clarify the circumstances in which the parallel importation of trade marked goods does not infringe a registered trade mark.

2.5 IP Australia informed the committee that parallel imports are where genuine goods that are sold overseas are brought into Australia and on-sold without the trade mark owner's consent. IP Australia explained that:

Parallel importation of trade-marked goods supports competition and the Trade Marks Act is intended to permit parallel imports. However, there is uncertainty around the current provisions, and recent legal decisions have increased the difficulty of importing legitimate goods into Australia. Some trade mark owners have employed particular strategies to prevent parallel importation, contrary to the original policy intent of the Trade Marks Act.⁵

1 Law Council of Australia, *Submission 4*.

2 Professor Robert Burrell and Professor Michael Handler, *Submission 5*.

3 Dr Ana Penteadó, *Submission 7*.

4 Productivity Commission Inquiry Report, *Intellectual Property Arrangements*, No. 78, 23 September 2016, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf> (accessed 25 May 2018).

5 IP Australia, *Submission 6*, p. 7.

2.6 As such, the reforms proposed in schedule 1, part 1 of the bill are intended to ensure that:

...parallel imports of legitimately marked goods are not taken to infringe an Australian registered trade mark when the goods have first been brought to market by the registered owner of that mark or another person who has (or had at the relevant time) some sort of relevant commercial or contractual relationship with the registered owner.⁶

Reasonable inquiries

2.7 Proposed subsection 122A(1) of the bill sets out the criteria that must be met in order for a person's activities to be taken as not infringing a trade mark:

- Paragraph (a) requires that the goods the person has used the trade mark on are similar to the goods covered by the Australian trade mark registration.
- Paragraph (b) requires that the person who would otherwise have infringed the mark must have made reasonable inquiries in relation to the trade mark before the time of use.
- Paragraph (c) requires that a reasonable person would have concluded that the trademark was applied to, or in relation to, the goods by or with the consent of the registered owner or authorised user of the trade mark, or a person who has significant influence over how the registered owner or authorised user uses the mark.⁷

2.8 With respect to paragraph (b) the Explanatory Memorandum (EM) makes clear that the nature of the inquiry will depend on what the hypothetical objective reasonable person would do in the circumstances. The EM states:

Requesting and receiving a certificate of authenticity from the supplier would be sufficient in most circumstances. However, the extent of the inquiries will be determined by the facts of the situation. For example, where the supplier is widely known or suspected to supply counterfeit goods or where the goods are being offered at suspiciously low prices or through dubious trade channels, more searching inquiries may need to be made, such as contacting the trade mark owner to confirm consent. Conversely, by way of example, if the goods are purchased from a retailer widely known to be the licensed distributor of the trade mark owner at the normal price of genuine goods in the relevant market, then no further inquiries may be needed.⁸

2.9 With respect to paragraph (c) the EM clarifies that the 'reasonable person...would have concluded' test is objective, and not intended to involve determining the subjective knowledge of the actual person. The EM states:

6 Explanatory Memorandum, p. 13.

7 Explanatory Memorandum, pp. 14–15.

8 Explanatory Memorandum, p. 14.

...the question should be: what would a hypothetical reasonable person in the importer's situation (with the information obtained from the reasonable inquiries) conclude?⁹

Stakeholder opinion

2.10 While generally supportive of the proposed amendments to the parallel importation of trade marked goods, IPC suggested that the present wording in the bill will allow the importation and sale of counterfeit goods, provided that the importer made reasonable inquiries and a reasonable person would have concluded they were genuine. IPC were concerned that:

...the parallel importation provisions of the Bill have adverse unintended consequences and do not reflect the Government's intention, which the IPC understands was to implement the recommendations of the Productivity Commission. As drafted, the provisions will undermine the ability of trade mark owners to prevent the importation and sale of counterfeit goods in Australia.¹⁰

2.11 In contrast, Burrell and Handler suggested that the 'reasonable inquiries' elements of proposed subsection 122A(1) overcame the problem that it may be impossible for a parallel importer to be absolutely certain that the goods are in fact legitimate. Burrell and Handler observed that:

All that the importer can do is make reasonable inquiries as to whether the trade mark had been applied by or with the consent of one of the parties listed in (c), and act on that information in a reasonable manner. As IP Australia has explained, without such a provision parallel importation would remain 'unacceptably risky' and the 'supply of parallel imports to the Australian market' would remain stifled.¹¹

2.12 As such, Burrell and Handler were of the view that the approach proposed in paragraphs 122A(1)(b) and (c) of the bill represented a sensible way forward, noting that :

- an importer who makes reasonable inquiries and reaches the reasonable conclusion that the goods are legitimate, but who unwittingly imports counterfeit goods, will not be liable for damages up to the point in time it is notified that the goods are counterfeit;
- brand owners can still pursue remedies against the supplier; and¹²
- IP Australia's response to the [public] consultation was thoughtful and led to the proposed provision being altered in important respects.¹³

9 Explanatory Memorandum, p. 14.

10 Law Council of Australia, *Submission 4*, p. 1.

11 Professor Robert Burrell and Professor Michael Handler, *Submission 5*, p. 3.

12 Professor Robert Burrell and Professor Michael Handler, *Submission 5*, p. 4.

13 Professor Robert Burrell and Professor Michael Handler, *Submission 5*, p. 1.

2.13 Dr Penteadó also commented on the proposed 'reasonable inquiries' and 'reasonable person' tests, and expressed the view that the tests 'are unpredictable, which is of subjective nature, not objective nature of what is reasonable.'¹⁴ However, as noted above, the EM provides that the reasonable person test 'is intended to be objective, and is not intended to involve determining the subjective knowledge of the actual person.'¹⁵

Use of a 'deceptively similar' mark

2.14 In addition to acknowledging that the bill goes a long way to fixing the defects in the current law, Burrell and Handler raised a 'relatively minor issue' about the ability of the new parallel importation of trade marked goods provisions to protect against the use of 'deceptively similar' trademarks. Burrell and Handler explained that:

Currently, the s 123 defence [in the Trade Marks Act] applies only if the defendant uses 'a registered trade mark'. By virtue of s 7(1), this extends to use by the defendant of a mark that is 'substantially identical' with the registered mark. The draft 122A(1) applies in exactly the same way. However, as soon as the defendant goes beyond this to use a 'deceptively similar' mark, the defence falls away.¹⁶

2.15 This issue was not raised during the exposure draft consultation¹⁷ and is not listed on IP Australia's public policy register as a policy issue that is currently being addressed.¹⁸

Plant Breeder's Rights

2.16 The submissions received from Rijk Zwaan Australia (RZA), the Australian Seed Foundation (ASF) and CropLife Australia (CropLife) addressed the proposed amendments to the PBR Act only. Overall, these submitters were supportive of the bill's proposed reforms to the PBR Act, noting that they:

- clarify the circumstances where an Essentially Derived Variety (EDV) declaration can be applied for;
- strengthen the position of the PBR owner/exclusive licensee; and
- should act as an increased deterrence of potential infringers.¹⁹

14 Dr Ana Penteadó, *Submission 7*, p. 8.

15 Explanatory Memorandum, p. 14.

16 Professor Robert Burrell and Professor Michael Handler, *Submission 5*, p. 4.

17 IP Australia, *Draft Legislation: Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill and Regulations 2018*, 28 March 2018 <https://www.ipaustralia.gov.au/about-us/public-consultations/draft-legislation-intellectual-property-laws-amendment-productivity> (accessed 7 June 2018).

18 IP Australia, *Policy Register*, <https://www.ipaustralia.gov.au/policy-register> (accessed 14 June 2018).

19 Rijk Zwaan, *Submission 1*, p. 1; Australian Seed Foundation, *Submission 2*; CropLife Australia, *Submission 3*.

2.17 Notwithstanding this support, these submitters also expressed some concerns about the drafting of the bill and suggested that the reforms needed to go further to provide adequate protection for plant breeders, including via the introduction of a United Kingdom-style Information Notice System (INS).

2.18 The submission received from Dr Penteadó also commented on the amendments related to PBR.²⁰

Essentially derived variety declarations

2.19 The PBR Act extends protection of registered varieties to EDVs. EDVs share all the essential characteristics of a registered plant variety but are clearly distinct and qualify for PBR registration in their own right. As discussed in Chapter 1, schedule 1, part 2 of the bill seeks to amend the PBR Act to allow an application for an EDV declaration to be made in instances where the plant variety subject of the EDV application is not a registered PBR or undergoing application for PBR.²¹

2.20 IP Australia informed the committee that the purpose of this amendment is:

...to close a loophole that allows breeders of derived varieties to free-ride on protected plant varieties. The Bill proposes to expand the circumstances where an EDV declaration can be applied for to ensure PBR holders are protected, regardless of whether breeders of a derived variety have applied for PBR or not.²²

2.21 To give context to the current loophole, IP Australia provided the committee with the following example:

...where a grower holds a PBR for a certain crop, and a competitor files for a PBR for a slightly different variety of the same crop, the competitor can be required to share their royalties with the original grower. However, if the competitor exploits the current loophole by choosing not to file for a PBR, they can commercialise their crop and cannot be required to share their royalties.²³

2.22 Under the reforms proposed in the bill, the original grower will be able to share in their competitor's royalties.

2.23 Noting that 'it is likely that the EDV is very similar to the earlier variety and in most cases protection is not filed for', the ASF agreed with IP Australia that the proposed reforms would close a loophole that exists where an EDV cannot be declared if no PBR application has been made for the later variety.²⁴

2.24 In offering their support for this proposal, ASF noted that the changes proposed in the bill in relation to EDVs will simply bring Australia's PBR law more in

20 Dr Ana Penteadó, *Submission 7*, pp. 10–16.

21 Explanatory Memorandum, p. 4.

22 IP Australia, *Submission 6*, p. 7.

23 IP Australia, *Submission 6*, p. 7.

24 Australian Seed Foundation, *Submission 2*, p. 1.

line with the International Convention for the Protection of New Varieties of Plants (1991) (UPOV).

Assessment

2.25 As a result of the proposed reforms, the assessment of a second variety as registrable for EDV declarations for non-PBR protected second varieties is required, as the second variety will not have already been assessed as per the ordinary registration requirements for PBR.²⁵

2.26 RZA did not consider it appropriate to require the second variety to meet all the ordinary criteria for registration, including the criterion that the variety has not been exploited or has been only recently exploited. RZA argued that:

According to UPOV, the second variety only needs to qualify as a variety. To qualify as a variety, it is not relevant whether a plant grouping has already been exploited or not. Further, we consider it impossible to determine when a third party has exploited another variety for the first time.²⁶

2.27 However, the EM to the bill clarifies that:

Given that a successful EDV declaration will mean that the applicant for a declaration's PBR will extend to the second variety, fulfilment of the ordinary registration criteria for PBR is required.²⁷

Test growing

2.28 Under the proposed reforms, the Registrar of PBR (Registrar) may order a 'test growing' if it would assist them in making a decision regarding the application for an EDV declaration. In such circumstances, the bill provides that the applicant for an EDV declaration is required to pay all costs associated with the test growing.²⁸

2.29 RZA argued that the applicant for the declaration should only pay the cost of the test growing in case the second variety is assessed not to be an EDV:

In case the second variety is assessed to be an EDV, the breeder of the second variety should bear the cost. It is important to note that the breeder of the second variety not only has been infringing a PBR by selling the EDV without permission, but could have avoided the cost by asking permission from the applicant to commercialize the second variety as soon as he intended to sell the EDV.²⁹

25 Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018, s. 41A.

26 Rijk Zwaan, *Submission 1*, p. 1.

27 Explanatory Memorandum, p. 21.

28 Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018, s. 41E.

29 Rijk Zwaan, *Submission 1*, p. 1.

2.30 However, the EM to the bill justifies the requirement that the applicant for a declaration pay all costs associated with the test growing as follows:

As the applicant would benefit if the variety is declared an EDV, it is reasonable for them to bear the costs of test growing. If the EDV application is successful the applicant could be expected to recover any cost as part of a licence negotiation with the second breeder.³⁰

2.31 In addition, IP Australia's response to the public consultation on the exposure draft of the bill directly addressed this issue and indicated that, on balance, it is appropriate that the applicant for an EDV declaration must pay all costs associated with the test growing. IP Australia stated:

No clear case was made for why the second breeder should pay, as the second breeder gains no benefit and it raises the potential of vexatious applications and unfairness to the second breeder if the second variety is found not to be essentially derived. On the other hand, a successful EDV applicant will gain PBR protection from the test growing, and could recover any costs as part of a licence negotiation with the second breeder.³¹

2.32 RZA also raised with the committee the possibility of the breeder of the second variety supplying different material for testing, and suggested that in order to avoid fraud an independent expert be appointed by the Registrar who collects material of the second variety. RZA argued that:

...the breeder of the initial variety should be allowed to provide material of the second variety to be included in the test growing. In case the material supplied by the breeder of the second variety appears to be different from the material of the second variety supplied by the breeder of the initial variety, further investigation is necessary.³²

2.33 However, the EM to the bill makes clear that:

If the applicant for a declaration fails to comply the Registrar must refuse the application for a declaration.

The onus is on the applicant for a declaration to establish all relevant matters and so it is reasonable to expect them to provide the material necessary to conduct a test growing if the Registrar deems this to be necessary.

If an interested person fails to provide the material, the Registrar may draw an unfavourable inference from their failure to do so. The Registrar has the discretion whether to draw an inference, as, for example, an interested person could have an interest in the second variety without having any

30 Explanatory Memorandum, p. 24.

31 IP Australia response to public consultation on exposure draft of Intellectual Property Laws Amendment (Productivity Commission response part 1 and other matters) Bill and Regulations 2017, p. 7.

32 Rijk Zwaan, *Submission 1*, p. 1.

propagating material (e.g. they wish to commercialise it, but have not yet done so and have no plants in their possession).³³

2.34 In addition, all final decisions relating to the application for a declaration are subject to merits review by the Administrative Appeals Tribunal (AAT),³⁴ ensuring 'all parties have an appropriate opportunity to challenge a relevant decision that affects their interests'.³⁵

Protections against infringement

2.35 As discussed in Chapter 1, schedule 2, part 8 of the bill improves protections against unjustified threats of infringement proceedings in the PBR legislation,³⁶ and part 11 gives further power to the Federal Court and the Federal Circuit Court to award additional damages under the PBR Act when a PBR in a plant variety is infringed.

2.36 Stakeholders agreed that the current PBR legislation does not provide adequate protections,³⁷ 'leaving farmers and other small businesses in that sector more vulnerable to unjustified threats of infringement proceedings'.³⁸ The current statutory power to award damages only permits a court to award damages to compensate the grantee for the actual loss suffered, which 'limits the flexibility of the court to deter particularly wilful or blatant infringements'.³⁹

2.37 In order to address this problem the bill seeks to introduce provisions to allow a threatened person to apply to a court for:

- a declaration that the threats are unjustifiable;
- an injunction against continuance of the threats; and
- the recovery of any damages sustained as a result of the threats of infringement proceedings.⁴⁰

2.38 In addition, the bill proposes that where damages are awarded in the first instance, the court will have the power to award additional damages.

2.39 The EM states:

33 Explanatory Memorandum, p. 24.

34 The only exception is a decision by the Registrar to convert an EDV application made under the new section 41A (non-PBR-protected second variety) to an EDV application made under the existing section 40 (PBR-protected second variety). See Explanatory Memorandum, p. 25.

35 Explanatory Memorandum, p. 24.

36 Part 8 amends the *Patents Act 1990*, *Designs Act 2003*, PBR Act, and the Trade Marks Act to align and improve protections against unjustified threats of infringement.

37 See for example, Australian Seed Federation, *Submission 2*; and CropLife Australia, *Submission 3*.

38 Explanatory Memorandum, p. 56.

39 Explanatory Memorandum, p. 65.

40 Explanatory Memorandum, p. 56.

It is intended that these provisions will operate in the same way as the equivalent provisions for the award of additional damages for trade mark and patent infringement. Noting that it can be difficult to calculate compensatory damages, courts have in the past awarded a nominal amount in compensatory damages, which then enlivens the power to award substantial additional damages.⁴¹

2.40 In this context, the EM highlights that under the current law the level of damages provided in the first instance may be insufficient to deter some unjustified threats of infringement proceedings:

For example, for a well-resourced business the benefit gained from hindering a competitor by making unjustified threats of infringement proceedings may outweigh the cost of ordinary compensatory damages for making such threats. Similarly, threatened persons may be discouraged from taking action that could benefit the public generally because obtaining only ordinary compensatory damages provides insufficient incentive (e.g. if the threatened persons are individual customers).⁴²

2.41 The bill aims to address these problems and the proposed reforms respond directly to the recommendation in the Advisory Council on Intellectual Property (ACIP) report to introduce exemplary damages in situations of flagrant or wilful infringement, based on similar arrangements that exist under the *Patents Act 1990* (Patents Act).⁴³

Stakeholder opinion

2.42 CropLife supported the amendments to introduce:

- protections against unjustified threats of infringement proceedings in the PBR legislation; and
- additional damages for unjustified threats of infringement proceedings in the Patents, Trade Marks, Designs and PBR legislation.⁴⁴

2.43 The ASF also offered its in principle support for the amendments, but raised concerns 'about how a threat can be determined to be unjustified, bad or flagrant and what criteria are used to prove this'.⁴⁵

2.44 IP Australia's response to the public consultation on the exposure draft of the bill directly addressed concerns raised regarding what constitutes a 'blatant or flagrant' unjustified threat warranting an award of additional damages. IP Australia explained:

41 Explanatory Memorandum, p. 64.

42 Explanatory Memorandum, p. 56.

43 Australian Government, Advisory Council on Intellectual Property, *A review of enforcement of Plant Breeder's Rights: Final report*, January 2010, p. 116, https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_final_report_review_of_enforcement_of_pbr_archived.pdf (accessed 7 June 2018).

44 CropLife Australia, *Submission 3*, p. 1.

45 Australian Seed Federation, *Submission 2*, p. 1.

We consider that further defining a flagrant unjustified threat in the legislation would limit the court's flexibility to tailor the remedy to the circumstances of the case. The intention is that a court will have considerable discretion, although IP Australia notes that additional damages for blatant or flagrant infringement have been part of patents, trade marks and designs legislation for a number of years, and the courts have developed a number of principles for assessing this. We would expect that the courts will use similar principles for assessing blatant or flagrant unjustified threats.⁴⁶

2.45 The EM to the bill also notes that the introduction of additional or exemplary damages in situations of flagrant or wilful infringement reflect similar arrangements in the Patents Act, to bring PBR into alignment with other IP rights.⁴⁷

Exclusive licensees

2.46 As discussed in Chapter 1, schedule 2, part 12 of the bill amends the PBR Act to allow an exclusive licensee of a PBR to bring proceedings for infringement for the right they license.

2.47 The ASF endorsed this proposal; however, it expressed the view that 'this should not be a right but a negotiated opportunity developed by the PBR owner and the licensee in the license agreement' and suggested that this was not clear in the bill.⁴⁸

2.48 CropLife also conditionally supported the amendment because it 'is consistent with the rights available to exclusive licensees in respect of other IP rights'.⁴⁹ However, it recommended that instead of the inclusion of an 'automatic' right, the right should be made conditional upon prior written consent by the PBR owner. CropLife suggested that:

Such an approach facilitates the opportunity for both parties (the grantee and exclusive licensee) to negotiate on the right to sue infringers. Through a negotiation process, the PBR owner and the licensee can further refine the modalities of the right to sue and management of actual infringement cases in the license agreement. This will provide an appropriate balance between the rights of the PBR grantee and the licensee to sue infringers.⁵⁰

2.49 IP Australia's response to the public consultation on the exposure draft of the bill directly considered these issues and expressed the view that:

Broadening the reach of the licensee's rights to bring infringement proceedings for partial rights would take PBR legislation beyond the scope

46 IP Australia response to public consultation on exposure draft of Intellectual Property Laws Amendment (Productivity Commission response part 1 and other matters) Bill and Regulations 2017, p. 11.

47 Explanatory Memorandum, p. 65.

48 Australian Seed Federation, *Submission 2*, p. 2.

49 CropLife Australia, *Submission 3*, p. 1.

50 CropLife Australia, *Submission 3*, p. 1.

of the patents legislation on which it is based. This requires further policy analysis and is beyond the scope of the current proposal.⁵¹

2.50 Noting that the scope of exclusive licensees for patents is an issue that has previously been raised by stakeholders for policy consideration, IP Australia indicated that they 'will add the issue of the scope of PBR exclusive licensees to this issue, and consider both of them together as part of future policy work'.⁵²

Information Notice System

2.51 In addition to the reforms proposed in the bill, ASF and CropLife suggested that the recommendation in the ACIP's report to introduce a United Kingdom-style INS in Australia be implemented.⁵³

2.52 CropLife argued that the recommendation to introduce an INS was one of the most significant in the ACIP's report as it would enable PBR owners to obtain information from alleged infringers on the source of plant material. CropLife explained that:

The introduction of a UK-style Information Notice System would mean PBR owners may be able to require a notice from growers suspected of infringing PBR, which states the source of specific plant material and products. A failure to comply within a set time could be counted against the grower in any subsequent court action.⁵⁴

2.53 The ASF also informed the committee that in the government response to the ACIP's report it accepted the recommendation to introduce an INS, pending a feasibility study, and in this context, ASF requested that IP Australia prioritise its introduction.⁵⁵

2.54 In their submission to the inquiry, IP Australia acknowledged these suggestions and explained that:

This bill prioritises the implementation of the Government's response to the PC's recommendations. Implementing an INS is not one of the PC's recommendations, and the resources to progress further work on an INS are not presently available. IP Australia intends to progress policy work on the INS in consultation with the PBR CG [PBR Consultation Group] in the

51 IP Australia response to public consultation on exposure draft of Intellectual Property Laws Amendment (Productivity Commission response part 1 and other matters) Bill and Regulations 2017, p. 13.

52 IP Australia response to public consultation on exposure draft of Intellectual Property Laws Amendment (Productivity Commission response part 1 and other matters) Bill and Regulations 2017, p. 13.

53 Australian Seed Foundation, *Submission 2*, p. 2; CropLife Australia, *Submission 3*, p. 2.

54 CropLife Australia, *Submission 3*, p. 2.

55 Australian Seed Foundation, *Submission 2*, p. 2

future. Subject to other Government priorities and resource constraints, IP Australia expects this will be progressed in 2019 at the earliest.⁵⁶

Public Access to Plant Varieties

2.55 CropLife's submission to the inquiry also raised issues concerning public access to plant varieties covered by the PBR.⁵⁷

2.56 IP Australia's website explains that it is a PBR requirement that the grantee ensures reasonable public access to their plant variety within two years of grant.⁵⁸ As observed by CropLife,⁵⁹ the only exemption to this requirement is provided for in subsection 19(11) of the PBR Act, which states:

This section does not apply in relation to a plant variety in respect of which the Secretary certifies, in writing, at the time of the grant of PBR, that he or she is satisfied that plants of that variety have no direct use as a consumer product.

2.57 Currently, the only recognised situation where a plant variety may have no direct use as a consumer product is in cases where a parent variety is required for the continuing reproduction of a hybrid variety.⁶⁰

2.58 In their submission, CropLife recommends that:

IP Australia starts working on a template for applicants to complete, invoking this exception. Once this procedure has been made easier, seed companies can feel more confident filing for parent lines in Australia.⁶¹

2.59 However, in April 2017 IP Australia published an 'Application for Exemption from Reasonable Public Access' form on their website.⁶²

Drafting

2.60 Dr Penteadó's submission to the inquiry made a number of suggestions to improve the amendments proposed by the bill, including in relation to the language and expressions used. One example was the use of the expression 'on or after'.⁶³

56 IP Australia, *Submission 6*, p. 6.

57 CropLife Australia, *Submission 3*, p. 2.

58 IP Australia, *PBR in detail*, 16 June 2016, <https://www.ipaustralia.gov.au/plant-breeders-rights/understanding-pbr/pbr-detail> (accessed 14 June 2018).

59 CropLife Australia, *Submission 3*, p. 2.

60 IP Australia, *PBR in detail*, 16 June 2016, <https://www.ipaustralia.gov.au/plant-breeders-rights/understanding-pbr/pbr-detail> (accessed 14 June 2018).

61 CropLife Australia, *Submission 3*, p. 2.

62 IP Australia, *Plant Breeder's Rights Act 1994 – Sub-Section 19 (11): Application for Exemption from Reasonable Public Access*, https://www.ipaustralia.gov.au/sites/g/files/net856/f/form-exemption-under_-section-19-11.pdf (accessed 14 June 2018).

63 Dr Ana Penteadó, *Submission 7*, pp. 8–10.

2.61 The bill is a government bill and therefore was drafted by the Office Parliamentary Council (OPC)⁶⁴ in accordance with drafting directions issued by the First Parliamentary Counsel.⁶⁵ The OPC states that it:

...actively encourages the use of plain language in legislation and is a leader in developing and using plain language techniques...[and is] committed to reducing unnecessary complexity in legislation.⁶⁶

Committee view

2.62 The committee notes that key parts of the bill originate from recommendations made by independent reviews, and that the provisions of the bill have been subject to extensive consultation. In particular, the committee commends IP Australia for its thoughtful response to the public consultation on the exposure draft of the bill which ultimately led to provisions of the bill being altered in important aspects.

Parallel importation of trade marked goods

2.63 The committee acknowledges the current uncertainty around the parallel importation of trade marked goods and concerns raised about the importation and sale of counterfeit goods. However, the committee is of the view that the proposed 'reasonable inquiries' and 'reasonable person...would have concluded' tests represent a sensible way forward, in that they overcome the problem that it may be impossible for a parallel importer to be absolutely certain that goods are in fact legitimate.

2.64 The committee notes the issue raised by Burrell and Handler regarding the ability of the new parallel importation of trade marked goods provisions to protect against the use of 'deceptively similar' trademarks. The committee considers that as this issue already exists with respect to current section 123 of the Trade Practices Act and it was not raised as part of the extensive consultation process undertaken in respect of this bill, it would be more appropriately addressed separately with IP Australia.

Plant Breeder's Rights

2.65 The committee agrees with stakeholders that the reforms proposed in the bill will clarify the circumstances where an EDV declaration can be applied for, strengthen the position of the PBR owner/exclusive licensee and act as an increased deterrence of potential infringers.

2.66 The committee considers that the reforms proposed in the bill will close a current loophole that exists where an EDV cannot be declared if no PBR application has been made for the later variety. In this context, the committee notes the concerns raised about the criteria for registration required for the second variety. However, as a

64 Legal Services Directions 2017 [F2017L00369], s. 3.

65 Office of Parliamentary Counsel, *Drafting Manual: edition 3.1*, February 2016.

66 Office of Parliamentary Counsel, *Drafting resources: Plain language*, <https://www.opc.gov.au/drafting-resources/plain-language> (accessed 15 June 2018).

successful EDV declaration will mean that the applicant for a declaration's PBR will extend to the second variety, the committee supports the approach taken in the bill, such that fulfilment of the ordinary registration criteria for PBR is required.

2.67 With regard to the requirement in the bill that the applicant for a declaration pay all costs associated with test growing, the committee is of the opinion that as the applicant would benefit if the variety is declared an EDV, it is reasonable for them to bear the costs. The committee also understands the concerns raised about fraudulent behaviour in the supply of material for testing by the breeder of the second variety. However, the committee observes that where material is not provided the Registrar of PBR may draw an unfavourable inference, and that all final decisions relating to an application for a declaration are subject to merits review by the AAT.

2.68 It is apparent to the committee that the current PBR legislation does not provide adequate protections to farmers and other small businesses that are vulnerable to unjustified threats of infringement proceedings. The committee is encouraged by the support shown for the proposed amendments to introduce protection against unjustified threats of infringement and additional or exemplary damages in situations of flagrant or wilful infringement. In this context, the committee notes that these amendments bring PBR into alignment with other IP rights.

2.69 The committee is aware of the issues raised by stakeholders regarding the scope of licensee's rights to bring infringement proceedings for patents, and welcomes IP Australia's advice that this issue will be considered as part of future policy work. Likewise the committee notes that IP Australia intends to progress policy work on the Information Notice System, and that it has published an 'Application for Exemption from Reasonable Public Access' form on their website.

Drafting

2.70 The committee notes the concerns raised by Dr Penteadó in relation to the language and expressions used in the bill. However, the committee observes that the bill was drafted by OPC in accordance with drafting directions issued by the First Parliamentary Counsel.

Recommendation 1

2.71 The committee recommends that the bill be passed.

Senator Jane Hume

Chair

Appendix 1

Submissions and additional documents

Submissions

1. Rijk Zwaan Australia
2. Australian Seed Federation
3. CropLife Australia
4. Law Council of Australia
5. Professor Robert Burrell and Professor Michael Handler
6. IP Australia
7. Dr Ana Penteadó
8. Macpherson Kelley
9. International Association for the Protection of Intellectual Property (AIPPI)