

Productivity Commission Draft Report Intellectual Property Arrangements April 2016

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I would confine my response to chapter 12 Plant Breeders Rights, and in particular the area of Essentially Derived Varieties (EDV), by offering my response to the information request 12.1.

INFORMATION REQUEST 12.1

Would extending essentially derived variety coverage to all plants reduce the potential for patent ‘sniping’ of varieties protected by Plant Breeder’s Rights?

My concern is that there is a discrepancy in what the PBR office accepts as an EDV which I believe is far narrower in its interpretation to fully protect the plant breeder’s rights on an existing PBR’d variety, and extending EDV coverage to all plants will not reduce the potential for patent ‘sniping’ under current practices.

It is my opinion that the PBR office need to strengthen the criteria as to what defines an EDV. I maintain that all mutations and GMOs by definition are EDVs as they are predominantly derived from the initial variety, particularly when they retain a very high genetic conformity to the initial variety. The current provision that a mutation or a GMO cannot be declared a EDV whenever it contains an important characteristic which differentiates it from the initial variety, does not take into consideration that the commercial viability of a plant variety depends upon a series of important characteristics, and that a change in one regardless as to how significant it is, does not preclude the “breeder” of the mutation or GMO from exploiting the initial breeder’s genetic inheritance of all the other important characteristics.

The current position of the PBR office leaves open uncertainty to the plant breeder as to what constitutes an EDV, as analysis of characteristics is a subjective observation and may not take into consideration aspects such as climatic differences that have some influence as to how plant characteristics present themselves.

This should be considered separate to plant plagiarism, which is a question of minimum distance and should not be entangled with the concept of EDV.

The Commission is also seeking feedback on the practicalities of developing and implementing a market-impact test to complement existing tests of essentially derived variety status.

It should not be too complicated to adhere to the concept that all mutations and GMO plant varieties fall under the criteria of an EDV regardless to the significance of the difference of a single characteristic, and that two people should have the rights to the second variety, and that neither cannot exploit the variety without the authorisation of the other party.

In the case of when an EDV is the result of a series of back-crossing to incorporate many of the initial variety's important characteristics and retains a very high level of genetic conformity to the initial variety, it will be up to the holder of the initial variety to prove to panel of experts, such as PBRAC, as to the distinctness, the use of material of the initial variety and a very high degree of genetic conformity to prove predominate derivation. This may be achieved with the use of DNA analysis.