

**20 Years of Plant Breeder's  
Rights in Australia  
Symposium**

**Canberra**

**Friday, 8 June 2007**

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# welcome

Welcome to ACIPA's *20 Years of Plant Breeder's Rights in Australia* Symposium.

After much debate, and several draft Bills, the *Plant Variety Rights Act 1987* came into force on 1 May, 1987 introducing the first scheme for the protection of new varieties of plants in Australia. In passing the new law, the Government hoped that plant breeder's rights would stimulate plant breeding in Australia and encourage foreign breeders to import new varieties into Australia. Opponents of the scheme believed that the new law would restrict access to genetic material and in so doing stifle plant breeding. It was also argued that plant materials should not and could not be owned as they were part of nature.

The symposium marks the twentieth anniversary of plant breeder's rights in Australia by reflecting upon some of the challenges, controversies and successes of the scheme. Speakers will focus on the impact of plant breeder's rights upon farmers, plant breeders and various industry sectors. The symposium will also consider possible future directions of the scheme including interactions with patent and trade mark law.

ACIPA would like to thank the National Museum of Australia for their sponsorship of this event.

**Kathryn Adams and Jay Sanderson**  
**Convenors**

# program

- 9.30-9.45      **Registration**  
Visions Theatre, National Museum of Australia, Lawson Crescent,  
Acton Peninsula
- 9.45-10.30    **Welcome – Kathryn Adams**
- 9.50-10.30    **Keynote Address**  
**Doug Waterhouse:** *International and National Perspective of PBR  
over the last 20 Years*
- 10.30-11.00   ***Morning Tea***
- 11.00-12.00   **Session 1: Has the Plant Breeder's Rights scheme met its  
objectives?**  
**Donald Coles:** *A Users Perspective of Plant Breeder's Rights:  
Risk or Reward?*  
**Garry Fullelove:** *Plant Breeder's Rights from the Perspective of  
an Organisation Tasked with Economic Development*  
**Ralph Wilson:** *What about Grower's Rights and Obligations*
- 12.00-12.40   **Session 2: How to improve the Plant Breeder's Rights  
scheme?**  
**Graham Fleming:** *Enforcing Plant Breeder's Rights: A Perspective  
from a Rights Owner/Licensee*  
**Geoff Budd:** *Plant Breeder's Rights and the Grains Industry: How  
to get Practical Outcomes using the Legal Framework*
- 12.40-1.40    ***Lunch***
- 1.40-2.20      **Session 3: Future Directions I**  
**Dr Warwick Stiller:** *Plant Breeder's Rights, Patents or Something  
Else?*  
**Jay Sanderson:** *Disparity Between Science and Law?  
Distinctiveness and Essential Derivation as (possible) Examples*

2.20-2.40      ***Afternoon Tea***

2.40-3.30      **Future Directions II**

**Dr Matthew Rimmer:** *Rebel, Rebel: Plant Breeder's Rights and Trade Mark Law*

**Dr Paul Brennan:** *Plant Variety Intellectual Property Rights in a Challenging and Changing Future*

3.30            **Close**

## the speakers

### Welcome and Symposium Chair

#### Kathryn Adams

**Kathryn Adams** is a Senior Research Fellow with ACIPA. She is an Agricultural Scientist and a lawyer, having held senior positions in a wide range of organisations. She was the first Registrar of Plant Breeder's Rights in Australia, has practiced as a solicitor and an agricultural microbiologist, and has held senior positions in R&D management and investment areas, including Executive Director of the Energy R&D Corporation, Executive Director of the Forest and Wood Products R&D Corporation, Director of the Queensland Horticulture Institute and Executive Director with the Queensland Environmental Protection Agency. She is on a number of Boards, a Fellow of the Australian Institute of Company Directors and is involved in Alternative Dispute Resolution. She has particular interest in the links between public policy, law and agricultural industry development.

## **Keynote Address: *An International and National Perspective of Plant Breeder's Rights over the last 20 Years***

### **Doug Waterhouse**

**Doug Waterhouse** has a long history in plants and plant variety protection. After graduating as a quantitative geneticist, he worked in both the public and private sectors for more than 20 years as a plant breeder and director of research – releasing varieties in more than 100 species for agricultural and environmental purposes.

In the 1990s Doug joined the Department of Agriculture, Forestry and Fisheries to head up the PBR office and to develop government policy on variety protection. Since 1995 Doug has been Chairman of the Plant Breeder's Rights Advisory Committee and was in charge of upgrading Australia's membership of the International Union for the Protection of New Varieties of Plants (UPOV) to meet 1991 standards.

He sits on a range of international standard setting committees looking at variety testing procedures and recently his contribution to variety development was recognised with election as honorary patron of the Asia Pacific Seed Association.

In 2006 he was elected President of the UPOV Council.

## **Session 1: Has the Plant Breeder's Rights Scheme met its objectives?**

**Donald Coles**

### ***A Users Perspective of Plant Breeder's Rights: Risk or Reward?***

Plant breeder's rights were designed as a general form of intellectual property rights for plant breeders. The scheme was not necessarily designed, or managed, to meet the specific needs of plant industries, and as a consequence, plant breeder's rights may suit some industries better than others. This paper considers to what extent plant breeder's rights may be achieving its goal for some plant industries but not for others. In doing so, the paper will detail the seed industry, where plant breeder's rights have been constructive but where there is also a need to outline the next set of directions.

**Donald Coles** has been studying and working in the seed industry for over 30 years. Founder of Access Genetics Pty Ltd (now owned by Nufarm Ltd) Donald manages his family grass seed company Valley Seeds Pty Ltd. Valley Seeds has been breeding grasses since 1975 and has activities in all other aspects of assessment, registration, production and marketing of pasture and turf seed.

Donald has had many industry positions including: Vice-President of the Australian Seed Federation (ASF) from 1994 to 1997 and a Director from 1988 to 1997; Founding and immediate past Chairman of the ASF Biotechnology Committee 2000 to 2006; Founding Chairman, Plant Breeders and Proprietary Marketers Group (ASF); and he is currently a member of Office of the Gene Technology Regulator Community Consultative Committee.

**Garry Fullelove**

### ***Plant Breeder's Rights from the Perspective of an Organisation Tasked with Economic Development***

This paper explores how the Queensland Department of Primary Industries and Fisheries has used the plant breeder's rights system both in Australia and overseas to underpin its investment in crop breeding and to deliver significant economic growth for target industries. The paper uses several case studies to show how the plant breeder's rights system in most (but not all) instances has been able to add value to the outcomes of the Horticultural & Forestry Screening breeding programs.

**Garry Fullelove** is the Business Manager for the Horticulture & Forestry Science (H&FS) business unit of the Queensland Department of Primary Industries and Fisheries. He has been with the Department for over twenty four years beginning as an extension officer to the fresh and processing vegetable industry in the Lockyer Valley. This was followed by twelve years in the Bundaberg region working with the fruit and vegetable industries including the local mango industry where the B74 and A67 mango varieties (now branded as 'Calypso') were first bred and tested. His final stint in the field was working with the Queensland and National citrus industry in both an industry development role and a research role. He has been Business Manager for the last three years, during which time many of the breeding programs of H&FS have led to significant varietal releases involving the associated intellectual property protection and commercialisation issues.

## **Ralph Wilson**

### ***What about Grower's Rights and Obligations?***

This paper considers whether plant breeder's rights have delivered any real benefits to a growers' ability to take control of their product. While the paper suggests that the answer to this question is (probably) yes, there is still a body of resistance amongst growers for rewarding breeder's efforts in developing new varieties. Some of these issues will be specifically discussed.

**Ralph Wilson** grew up in Wagga and completed a Diploma of Applied Science (Agriculture) at Wagga Agricultural College. Ralph worked as a field officer (horticulture) for Mountain Main Foods Co-operative and then for the NSW Forestry Commission before purchasing an orchard in Batlow. Ralph completed a Graduate Diploma in Business (Management) at Monash University in 1995.

Ralph has been involved in community, sporting and industry organisations both in Batlow and industry wide. Ralph served as a Director (8 years) and Chairman (2 years) of Batlow Fruit Co-Operative and also on the Board of the Australian Pome Fruit Improvement Program for 6 years and 2 years as chairman. Ralph was also appointed by the Minister to the Board of the Murrumbidgee Unregulated Streams Management Committee for 4 years. Ralph assisted with gathering information from visits to USA, South Africa and New Zealand for the preparation of the benchmarking report into Australia's Apple Industry in 1995. Ralph has also completed study trips to USA, Europe and New Zealand.

## **Session 2: How to improve the Plant Breeder's Rights Scheme?**

**Graham Fleming**

### ***Enforcing Plant Breeder's Rights: A Perspective from a Rights Owner/Licensee***

The *Plant Breeder's Rights Act 1994* (Cth) has been written in 'plain English'. This has raised a number of issues for people trying to 'anticipate' how a judge may interpret the law and creates difficulties for the plant breeder's rights owner who wishes to defend their rights. This paper explores some of the challenges facing the rights owner including: allowing access to property; proving the identity of suspect cultivars; 'innocent infringement'; and interpreting the language of the *Plant Breeder's Rights Act* in regard to terms such as 'harvested material'.

**Graham Fleming** is an owner of Fleming's Nurseries. Fleming's Nurseries has been one of the largest wholesale suppliers of deciduous fruit and ornamental trees to the retail garden centres, related markets and the orchard industry for approximately 50 years. Fleming's Nurseries have recently started cracking down on 'illegal propagation', or the growing of 'illegally propagated' trees within the orchard industry. Fleming's have now settled more than 10 cases, and are currently in the middle of other litigation. Fleming's Nurseries have spent over one million dollars for legal advice and representation over the last few years.

**Geoff Budd**

### ***Plant Breeder's Rights and the Grains Industry: How to Get Practical Outcomes Using the Legal Framework***

The plant breeder's rights system underpins protection of plant breeding in the grains industry, and has widespread support. But the grains industry's experience to date with the plant breeder's rights system has been mixed. Small margins for plant breeders, lack of co-ordination within the industry, and concerns about how the *Plant Breeder's Rights Act* works in practice mean that plant breeders' interests have not been protected as well as is needed. This is becoming a bigger issue as the grains industry adopts end point royalties, increasing reliance on effective and efficient interaction between the *Plant Breeder's Rights Act* and contracts.

The paper will outline some of the changes the industry and Government can implement to make the plant breeder's rights system more effective including: refinements to the Act; more education about plant breeder's rights and greater industry co-operation.

**Geoff Budd** is the General Counsel and Board Secretary of the Grains Research and Development Corporation (GRDC). He has been with GRDC for 6 years and is responsible for GRDC's legal affairs, compliance and risk management. For the last 5 years, Geoff has also been GRDC's nominee on the board of Pulse Australia Ltd, the pulse industry's peak body. He is married with two young children and is currently undertaking Course 13 of the Australian Rural Leadership Program. Geoff holds a Master of Laws specialising in intellectual property and is a graduate of the Australian Institute of Company Directors. Before joining GRDC, Geoff was a solicitor at Freehills.

## Session 3: Future Directions I

**Dr Warwick Stiller**

### ***Plant Breeder's Rights, Patents or Something Else?***

Over recent years there has been an increasing requirement for plant breeders and companies involved in producing new plant cultivars to improve the financial return from their research. This has fuelled interest in strengthening the intellectual property position that is held over plant cultivars. This paper asks whether plant breeder's rights are just one potential avenue for protecting plant varieties (and ensuring returns from the breeding of a new cultivar). The paper shows that there is increasing interest in further restricting access of new cultivars, above what the plant breeder's rights scheme offers. Increasingly, patents are being sought to protect new cultivars, with the expectation that this stronger form of protection will prevent competitors using these cultivars in their own breeding programs and hence provide a greater competitive advantage. This paper discusses the current forms of protection available and the implications that additional protection may have for breeders and plant based industries.

**Dr Warwick Stiller**, after completing a Bachelor of Applied Science through The University of Queensland, conducted a PhD project on breeding cotton for enhanced water-use efficiency through The University of Sydney. In 1998 Dr Stiller commenced with the CSIRO cotton breeding program, developing varieties suited to their international markets, later changing focus to concentrate on developing varieties for dryland production systems in Australia. Along with three other breeders, Dr Stiller currently has responsibility for developing cotton varieties to be released through CSIRO's commercial partner 'Cotton Seed Distributors'. This arrangement sees CSIRO's share of the planting seed market in Australia exceed 90%. In addition, Dr Stiller has responsibility in coordinating the quality assurance/quality control of the cotton breeding program as well as the IP protection of CSIRO's cotton varieties in Australia and overseas.

**Jay Sanderson**

### ***Disparity Between Science and Law? Distinctiveness and Essential Derivation as (possible) Examples***

The interface between science and law is ripe with the potential for misunderstanding and confusion and raises conflicts that are, at the same time, scientific, technical and legal. In relation to plant breeder's rights, the progressive elucidation of the structure and function of nucleic acids (DNA and RNA) has paved the way for the manipulation of biological materials at a cellular and molecular level. This has raised a number of

challenges for the plant breeder's rights scheme. This paper will briefly examine two areas of plant breeder's rights that are particularly susceptible to the interaction between science and law: the assessment of distinctiveness and essential derivation. In doing so, the paper considers how advances in science and technology might impact upon future plant breeder's rights schemes.

**Jay Sanderson** is a Research Fellow with the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BAppSci, BA and LLB (Hons). Jay has been involved in projects on the *Agreement on Trade Related Aspects of intellectual Property* and plant genetic resources in the South Pacific. Jay's main research area lies in plant intellectual property and he is currently completing a PhD in law looking at the plant breeder's rights scheme.

## Future Directions II

**Dr Matthew Rimmer**

### ***Rebel, Rebel: Plant Breeders' Rights and Trade Mark Law***

This paper explores the interaction between plant breeder's rights and trade mark law. It considers the overlap between the two regimes; and the doctrinal devices designed to preserve the integrity of the two systems. Historically, plant breeder's rights were intended to serve an important marketing function - as well as promote innovation amongst plant breeders. The *Plant Breeder's Rights Act 1994* (Cth) provides remedies for the unauthorised use of a name of a variety entered onto the Register in relation to any other variety. This paper considers a number of cases, both Australian and International, that relate to the relationship between plant breeder's rights and trade marks. The paper concludes by emphasising that in the future, there will need to be a reconsideration of the interplay between plant breeder's rights and trade mark law.

**Dr Matthew Rimmer** is an Associate Director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from The Australian National University, and a PhD in law from the University of New South Wales. Matthew is a member of the Copyright and Intellectual Property Advisory Group of the Australian Library and Information Association, and a director of the Australian Digital Alliance. He has published articles on intellectual property, media and IT law, gene technology regulation, and traditional knowledge.

Matthew Rimmer was a chief investigator in an ARC Discovery Project, 'Gene Patents in Australia: Options for Reform' (2003-2005). He has published a number of articles on gene patents, and their impact on research, health-care, and competition. His work considers how the law accommodates new frontier technologies - such as genomics, proteomics, bioinformatics, stem cell research, and nanotechnology. He edited the December 2006 thematic issue of *Law in Context*, entitled 'Patent Law and Biological Inventions'. He is currently writing a monograph on intellectual property and biotechnology.

Matthew Rimmer was a chief investigator in an ARC Linkage Project, 'The Protection of Botanical Innovation' (2003). He is an authority on plant breeder's rights, agricultural patents, technology use agreements, and genetic use restriction technologies. He is also an expert on issues surrounding access to genetic resources, informed consent, and benefit-sharing.

## **Dr Paul Brennan**

### ***Plant Variety Intellectual Property Rights in a Challenging and Changing Future***

The Australian Government sought to stimulate plant breeding in Australia by the introduction of plant variety rights in 1987. The purpose was to provide varieties for Australia's plant based industries by Australian plant variety innovation and through improved access to overseas bred varieties. The Government's intention was also to maintain a strong public plant breeding system particularly for the major crops. The relevance of these ambitions in the current and future operating environment for Australian (and international) plant variety based industries will be examined through an analysis of plant breeding activity and trends for a range of plant based commodities and operating environments. This will be discussed in light of the 'Review of Enforcement of Plant Breeder's Rights' being conducted by the Advisory Council on Intellectual Property (ACIP), although the outcome of this review is not yet available.

**Dr Paul Brennan** has a detailed understanding of the breeding imperatives for over thirty agricultural and horticultural species either as a consultant or as a breeder. As a breeder, Dr Brennan was intimately involved with the release of twenty three wheat varieties which occupied between twenty and twenty five percent of the Australian wheat growing area over an extended period. Other crops in which Dr Brennan has been involved include rice, sugarcane, barley, oats, apples, pears, kiwifruit, mangoes, peach and potatoes.

Currently, Dr Paul Brennan is a consultant in plant breeding, the application of biotechnology to plant breeding and plant intellectual property management. He is one of the principals in the recently established consulting consortium, CropGen International ([www.cropgeninternational.com](http://www.cropgeninternational.com)). Dr Brennan is a member of the Advisory Council on Intellectual Property (ACIP) which advises the Australian Government on policy matters relating to intellectual property. ACIP is currently conducting an enquiry into enforcement of plant breeder's rights in Australia which Dr Brennan is chairing. Dr Brennan has been a member of the Plant Breeder's Rights Advisory Committee since 2000. He is a previous director of the Queensland Wheat Research Institute and a non executive director of the Sugar Research and Development Corporation.