

9 August, 2010

Community Affairs Committee
Inquiry into gene patents

Rijk Zwaan Australia, a vegetable seed company, has taken note of and contributed submissions to ACIP's review of patentable subject matter. For some general comments on Rijk Zwaan Australia and the breeding sector we kindly refer you to our submission in the framework of the Review of Australia's Patent System sent to Mr. Moore of IP Australia, on May 6, 2009 (copy attached).

In this document we refer to the exclusion of plant varieties in the European Patent Convention. This exclusion is closely connected to the fact that there is a separate intellectual property system for the protection of plant varieties; the plant breeders' right system. Plant breeders' rights offer, on the one hand, adequate protection by temporarily providing the plant breeders' right holder with exclusivity regarding production and sales of propagating material of the protected variety and on the other hand, plant breeders rights offer through the breeders' exemption other plant breeders the opportunity to use protected varieties for developing improved varieties and to exploit these varieties freely. Through these two provisions, the plant breeders' right system allows breeding companies to realise return on investment enabling them to continue to invest in developing improved varieties, whilst other plant breeders are not obstructed in further innovation. The latter aspect, the breeders' exemption, is characteristic of the plant breeders' right system and should not be overruled by the patent system that only provides for a limited experimental use exemption.

As the Australian legislation provides plant breeders' rights for the protection of plant varieties we strongly support the exclusion of plant varieties in the Australian Patent Act. In this respect we also support the exclusion of processes of crossing and selection from patentability. If such processes would not be excluded, plant varieties would still be patentable by process patents. This was also a reason for the exclusion of essentially biological processes (processes such as crossing and selection) from patentability in the European Patent Convention. We hereby send you the text of the exclusion in the European Patent Convention:

Art. 53: European patents shall not be granted in respect of:

- a. inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

2.

b. Plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

In addition we would like to note that the exclusion of plant varieties and essentially biological processes in the European Patent Convention has not prevented that plant varieties are being patented indirectly through patents for certain breeding methods, plants or traits of plants. In order to restore the exclusion of plant varieties from patentability and to stop patents overruling the plant breeders' right system, it is important to take legislative measures. As indicated in the submission above, our proposal is to allow under patent law the use of biological material for developing new varieties as well as the use and exploitation of such new varieties. By implementing this, the breeders' exemption is properly safeguarded even when plant varieties are indirectly patented. For your information we attach the position of Plantum NL on this issue. Plantum NL is the Dutch association for breeding, production, tissue culture and trade of seeds and young plants representing about 500 businesses in the Netherlands. Rijk Zwaan very much supports the Plantum position.

We specifically refer to the item under "Mutual interests of the patent holder and society as a whole (page 4)" in the Plantum position. The increased use of patent rights for biological materials will result in reducing the diversity of the plant breeding and seed supply industry for Australian agriculture. Australia already has one of the most concentrated seed supply industries in the world, due to its relatively small market and specific quarantine regulations. Further concentration will have a negative impact on cost to farmers of improved genetic material and will reduce innovation. Less diversity in planting material can potentially expose Australian farmers to increased production risks and consumers to health risks associated with more limited dietary diversity.

Our previous submissions have been made in confidence however as this debate is gathering currency in our industry we are happy for our submission to be made public. Of course we are willing to provide any further information to clarify our submission.

Yours sincerely,

Arie Baelde
General Manager