



Draft determination and interim authorisation

Application for revocation of A91406
and the substitution of authorisation AA1000438
lodged by
Seedvise Pty Ltd
in respect of
collective bargaining with grain buyers

Authorisation number: AA1000438

Date:	19 June 2019
Commissioners:	Rickard Keogh Court

Summary

The ACCC proposes to re-authorise Seedvise Pty Ltd (Seedvise) to enable it to collectively negotiate, on behalf of participating royalty managers, with grain buyers over the terms and conditions on which End Point Royalties (EPR) are collected by grain buyers and remitted to royalty managers.

Legislation protects plant breeders' rights by allowing owners of plant varieties (PBR Owners) to apply and collect an EPR on each harvested tonne of grain produced from their seed varieties. PBR Owners may set the per tonne royalty rate at whatever level they wish. Most PBR Owners appoint a royalty manager to oversee collection of their EPRs. Participating royalty managers appoint Seedvise to collectively negotiate with grain buyers over the terms, conditions and method by which EPRs are payable.

The ACCC previously granted authorisation to Seedvise on 11 June 2014. That authorisation is due to expire on 4 July 2019.

Seedvise seeks re-authorisation for five years. In recognition that the arrangements appear to have operated well to date and that no concerns were raised by interested parties prior to this draft determination, the ACCC proposes to grant authorisation for 10 years.

The ACCC has also decided to grant interim authorisation for Seedvise to give effect to the Arrangements while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for revocation and substitution

- 1.1. On 25 March 2019, Seedvise Pty Ltd (**Seedvise**) lodged an application to revoke authorisation A91406 and substitute authorisation AA1000438 for the one revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. Seedvise seeks re-authorisation in relation to the Arrangements described below. This application for authorisation AA1000438 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The ACCC can grant authorisation for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits. Authorisation provides businesses with legal protection under certain provisions of the Act.

2. Background

Seedvise

- 2.1. Seedvise is an independent consulting company founded in 2009 which specialises in the grains industry. It operates as an End Point Royalty (**Royalties**) Agent for 13 royalty managers, who manage a total of 234 royalty-earning winter crop seed varieties.

The EPR system

- 2.2. The *Plant Breeders Rights Act 1994* (the **PBR Act**) allows owners of plant varieties (**PBR owners**) to apply and collect an EPR on each harvested tonne of grain produced from their varieties. PBR owners may set the per tonne royalty rate at whatever level they wish. Most PBR owners appoint a Royalty Manager to oversee collection of their EPRs.
- 2.3. Grain growers seeking to grow a royalty-earning variety are generally required to pay a royalty to the PBR Owner, or appointed Royalty Manager, for each tonne of the variety harvested.
- 2.4. There are two main collection methods in use – the auto-deduction system, which Seedvise submits is currently used to collect around 90% of EPRs, and the paper invoice system, which is currently used for the remaining 10%:
 - Under the auto-deduction system, royalty managers deduct EPRs from the payment made by the grain buyer to the grain grower, and transfer this amount back to the PBR Owner. That is, grain buyers identify the volume of each royalty-earning variety that they buy and subtract the relevant EPR from their payment to the grain grower. The grain buyer then transfers the EPR to the royalty manager.
 - Under the paper invoice system, royalty managers need to request that grain growers with crops of royalty-earning varieties fill out an EPR Harvest Declaration Form. Royalty managers verify the information provided in the Form and then invoice the grain grower.
- 2.5. The Arrangements relate to the auto-deduction system. Seedvise submits that the auto-deduction system is preferred by PBR owners and royalty managers because there are more than 13,000 grain growers in Australia, but only several hundred grain buyers so it is a more efficient and effective way of collecting EPRs.
- 2.6. Seedvise submits that, while participation of grain buyers is important to the effectiveness of the EPR system, the collection of EPRs is not a core business area for grain buyers. Accordingly, since the Arrangements were first authorised,
- 2.7. Seedvise submits that royalty managers pay grain buyers a collection fee (currently 30 cents per tonne for the first harvest) to better cover grain buyers' costs of participation and to encourage participation by grain buyers. After the first harvest, the collection fee reverts to 12 cents per tonne. Seedvise submits that the 12 cent fee applies more generally across the industry even though since 2008 royalty managers and grain buyers have been free to negotiate different fees. As an EPR Agent, Seedvise contracts grain buyers to participate in the auto-deduction method and remit EPRs to participating royalty managers.

3. The Arrangements

- 3.1. Seedvise seeks re-authorisation to collectively negotiate, on behalf of participating royalty managers, with grain buyers over the terms and conditions on which EPRs are collected by grain buyers and remitted to royalty managers. These terms and conditions, known as EPR Agreements, include the collection fee that royalty managers pay to grain buyers in exchange for the EPR collection service (the **Arrangements**).

- 3.2. The Arrangements are substantively the same as those authorised in 2014, apart from agreement amongst royalty managers of the 30 cents per tonne collection fee described above.
- 3.3. Seedvise seeks re-authorisation for itself, the 13 royalty managers which it currently represents¹, and other royalty managers which may be added during the period of authorisation.
- 3.4. Seedvise submits that, since the arrangements were first authorised in 2014, it is still actively engaged in attracting grain buyers to establish EPR Collection services on behalf of royalty managers.
- 3.5. Since the current authorisation A91406 expires on 3 July 2019, Seedvise also seeks interim authorisation to give effect to the Arrangements while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in Section 7.
- 3.6. Seedvise seeks re-authorisation for a further five years.

4. Consultation

- 4.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Arrangements. The ACCC invited submissions from a range of potentially interested parties including industry participants, industry representative bodies and government agencies.
- 4.2. The ACCC received three submissions in support of the application from the Australian Seeds Federation (**ASF**), the Grain Industry Association of Western Australia Inc (**GIWA**) and PGG Wrightson Seeds (Australia) (trading as **GrainSearch**).
- 4.3. **ASF**, a representative body for the seed supply chain, submits that Seedvise's work has benefited growers, breeders, royalty collectors and grain accumulator/buyers by making the process of EPR collection simpler and easier.
- 4.4. **GIWA**, whose members include plant breeders, submits that that the Arrangements are highly regarded globally as an efficient and effective way to meet grower variety demand by rewarding plant breeders economically for varietal development. The Arrangements attract national and international cutting edge investment in plant breeding technologies. The EPR collection system has contributed to the growth of the West Australian export grain industry to become a \$7 billion agri-food sector and is very widely supported by grain buyers and the 4,000 grain growers in Western Australia.
- 4.5. **GrainSearch**, a party to the Arrangements, strongly supports re-authorisation. It submits that a large part of its total income is derived from the collection of EPRs from its five commercial cereal varieties. There is no viable alternative model to negotiate EPR collections. Without the Arrangements, GrainSearch submits that it would be unable to perform its ongoing evaluation and commercialisation roles as it has limited resources (1.5 Full Time Equivalent staff). By representing all EPR companies collectively, Seedvise is able to gain audience and effectively negotiate EPR collection. In turn, this increases confidence of the industry to increase evaluation of a range of feed wheat and barley material.

¹ The 13 royalty managers currently contracted to Seedvise are identified in the Application. They are Australian Grain Technologies Pty Ltd, InterGrain, SeedNet, Nuseed, NPZ Australia Pty Ltd, GOGGO Ltd, Grainsearch, Advanta Seeds (t/a Pacific Seeds), Heritage Seeds, Elders Rural Services Australia Ltd, Seed Force Pty Ltd, Agronomy for Profit and Seed Exchange Australia Pty Ltd.

5. ACCC assessment

- 5.1. The ACCC has conducted its assessment of the Arrangements in accordance with the relevant authorisation test contained in the Act.
- 5.2. Seedvise seeks re-authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act², the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 5.3. In order to assess the effect of the Arrangements and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.
- 5.4. The ACCC considers that the relevant area of competition is likely to be EPR collection services.
- 5.5. In both the future with and without the Arrangements, the ACCC considers that there is an incentive for both royalty managers and grain buyers to reach mutually beneficial EPR Collection Agreements.
- 5.6. Over time, direct negotiation between individual royalty managers and grain buyers would be likely to result in variation between the terms and conditions (including the Collection Fee) offered to provide incentives for participation in the auto-deduction method.
- 5.7. Without the Arrangements, PBR owners, or appointed royalty managers, would need to identify each grain grower or grain buyer where an EPR may be payable. Royalty managers would then need to separately negotiate and enter into EPR Agreements to cover the collection of EPRs. To the extent that grain buyers, especially smaller ones, decide not to separately enter into EPR Agreements, the ACCC considers that the Arrangements are likely to result in a greater proportion of EPRs collected using the auto-deduction method and increase the rate at which payable EPRs are collected.

Public benefits

- 5.8. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*³
- 5.9. The ACCC considers that the PBR system is important to supporting a profitable and competitive plant breeding industry in Australia. By rewarding the development of increasingly productive crop varieties, the PBR system promotes research intended to deliver better value for grain growers and consumers. The ACCC considers that any

² See subsection 91C(7).

³ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

measures which increase the efficiency and effectiveness of the collection and payment of EPRs to PBR owners are likely to result in public benefits.

5.10. Seedwise submits that that EPR auto-deduction represents a highly efficient method of locating Royalty Earning Varieties and collecting EPRs. Interested parties who made submissions in relation to the Arrangements support this view, as did the Australian Government's Advisory Council on Intellectual Property in its *Review into the enforcement of Plant Breeder's Rights – Final Report*.⁴

5.11. The ACCC considers that the Arrangements are likely to result public benefits from:

- *Greater efficiency in the negotiation and operation of EPR Collection Agreements* - There are more than 13,000 grain growers in Australia, but only several hundred grain buyers. Rather than requiring that grain buyers enter into agreements with each of the 13 royalty managers contracted to Seedwise, the Arrangements allow grain buyers to enter into a single agreement with Seedwise. The Arrangements will enable the use of the same terms and conditions for use of royalty-earning varieties managed by each royalty manager. While Seedwise will need to separately maintain agreements with each of the 13 royalty managers, the ACCC considers that the Arrangements are likely to result public benefits associated with reducing the costs of negotiating and entering into such agreements for the collection of EPRs.
- *Greater rate of EPR collection* - The ACCC notes that Seedwise's estimates of the proportion of payable EPRs collected have risen since the arrangements were first authorised in 2014. For example, in 2014, Seedwise submitted that around 70-80% of EPRs were collected for wheat, around 70-75% for barley and around 55-60% for chickpeas. In 2019, Seedwise submits that this is now around 75-80% for wheat, 75-80% for barley and around 65-70% for chickpeas. The ACCC considers that the collection of a greater proportion of payable EPRs is likely to result in public benefits by encouraging more efficient levels of investment in research and development of new royalty earning varieties.
- *Other administrative efficiencies* - The ACCC considers that the Arrangements are likely to result in greater use of the auto-deduction system for EPR collection rather than the paper invoice system. Unlike the paper invoice system, the auto-deduction system does not require that grain growers keep records/invoices beyond what is already necessary to facilitate the sale/purchase of grain in order to determine the EPRs that they owe. In 2014, Seedwise submitted that the rate of auto collection was 87%. In relation to the application for re-authorisation, Seedwise submits that auto-deduction covers 90% of collections today with a corresponding fall in the rate of paper invoicing. The ACCC considers that these other administrative efficiencies and reduced transaction costs are a public benefit.
- *Setting collection fees*: Under the Arrangements, royalty managers agree to pay grain buyers a collection fee (currently 30 cents per tonne for the first harvest). The ACCC considers that the collection fee is likely to encourage greater participation by grain buyers by better covering their costs of participation and simplifying the negotiation of cost recovery by setting a standard fee.

Public detriments

5.12. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

⁴ https://www.ipaaustralia.gov.au/sites/default/files/acip_final_report_review_of_enforcement_of_pbr_archived.pdf Accessed: 22 May 2019.

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁵

5.13. When considering collective bargaining conduct, the ACCC generally considers that the anti-competitive effects of collective arrangements are likely to be limited if the following factors are present:

- The current level of competition between members of the bargaining group in their dealings with the target are low, such that the difference between the level of competition with or without collective bargaining may also be low.
- The agreement does not restrict the ability of parties to compete in other ways, for example on quality or service.
- There is voluntary participation in the arrangements.
- There are restrictions on the coverage, composition and representation of the bargaining group.

5.14. The ACCC considers that the Arrangements are likely to result in limited if any public detriments. In particular, the ACCC notes that:

- The current level of competition between royalty managers in setting EPR collection terms and conditions is currently low. Collection Fees have remained at 12 cents per tonne across the industry even since 2008 royalty managers and grain buyers have been free to negotiate different fees. The ACCC considers that royalty managers do not compete against each other for the grain buyer's business in relation to the collection of EPRs. Rather, the collection of EPRs by a royalty managers follows a grain buyer's decision to purchase of a particular royalty earning variety. The ACCC also considers that entering into arrangements with one royalty manager does not affect the grain buyer's incentive or ability to enter into similar agreements with other royalty managers. Accordingly, the ACCC considers that the Arrangements are unlikely to significantly reduce competition between royalty managers over the collection fees they offer grain buyers.
- Participation in the arrangements is voluntary. Grain buyers are under no obligation to collect EPRs on behalf of royalty managers and, in the event that they choose to do so, will be able to elect whether to negotiate with Seedwise's collection bargaining group or with individual royalty managers.
- The Arrangements do not restrict new participating royalty managers from joining the bargaining group.

Balance of public benefit and detriment

5.15. The ACCC is satisfied that the Arrangements are likely to result in public benefits associated with delivering cost savings and efficiencies in the negotiation and operation of EPR Collection Agreements. In turn, is likely to increase participation and rate of collection of EPRs. These public benefits would outweigh any likely detriment to the public from the Arrangements.

6. Draft determination

The application

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 6.1. On 25 March 2019, Seedvise Pty Ltd (Seedvise) lodged an application to revoke authorisation A91406 and substitute authorisation AA1000438 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000438 was made under subsection 91C(1) of the Act.
- 6.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 6.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Arrangements are likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Arrangements.
- 6.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Arrangements would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Arrangements, including any lessening of competition.
- 6.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 6.6. The ACCC proposes to revoke authorisation A91406 and grant authorisation AA1000438 to enable Seedvise and royalty managers contracted to Seedvise during the period of authorisation to collectively negotiate on behalf of participating royalty managers with grain buyers over the terms and conditions on which End Point Royalties (EPRs) are collected by grain buyers and remitted to royalty managers. These terms and conditions include the collection fee that royalty managers pay to grain buyers in exchange for the EPR collection services (the **Arrangements**).
- 6.7. The Arrangements may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 6.8. Seedvise seeks re-authorisation for five years. Recognising the ACCC's conclusion on public benefits and detriments, that the arrangements appear to have operated well to date and that no concerns were raised by interested parties prior to this draft determination, the ACCC proposes to grant authorisation for 10 years. The ACCC invites submissions on the proposed period of re-authorisation.
- 6.9. This draft determination is made on 19 June 2019.

7. Interim authorisation

- 7.1. Authorisation A91406 expires on 4 July 2019. Seedvise requested interim authorisation to give effect to the Arrangements while the ACCC is considering the substantive application.
- 7.2. The ACCC has decided to suspend the operation of authorisation A91406 and grant interim authorisation for the Arrangements in substitution for the authorisation suspended. The ACCC has decided to grant interim authorisation having considered the following:

- interim authorisation will preserve the status quo
- Seedvise and other interested parties may experience harm should interim authorisation not be granted
- the ACCC's preliminary assessment, described in this draft determination, that the Arrangements are likely to result in public benefits
- the Arrangements have not changed substantively since it was first authorised in 2014.

7.3. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

8. Next steps

8.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.