



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for authorisation

lodged by

Seedvise Pty Ltd

in respect of

collective bargaining with Grain Buyers.

Date: 15 May 2014

Authorisation number: A91406

Commissioners:     Sims  
                             Schaper  
                             Rickard  
                             Court  
                             Walker

## Definitions

Collection Fee	A dollar amount paid by PBR Owners or Royalty Managers to Grain Buyers in exchange for the Grain Buyer calculating and collecting the relevant EPRs on their grain purchases and remitting the EPRs to the relevant PBR Owner/Royalty Manager.
End Point Royalty (EPR)	A per tonne royalty charged to Grain Growers who grow Royalty-earning Varieties. The royalty is “end point” because it is paid after cultivation and harvest.
Grain Buyer	A company that purchases grain harvested from Grain Growers. Purchased grain may be exported or on-sold for domestic use.
Grain Grower	A farmer cultivating, harvesting, and selling grain crops including, but not exclusive to, varieties of wheat, barley, and oats.
Plant Breeder	An entity that develops and propagates grain varieties, and then markets and distributes those varieties to Grain Growers. See also: PBR Owner.
Royalty-earning Variety	A grain variety that has been developed and marketed by, or has become the intellectual property of, a PBR Owner who charges to Grain Growers a per tonne royalty on harvested yields of the variety.
Royalty Manager	A manager licensed by a PBR Owner to oversee the collection of EPRs owing to the PBR Owner, and to maintain and promote Grain Buyer participation in the EPR system.
PBR Owner	A Plant Breeder whose grain variety is registered under the <i>Plant Breeders Rights Act (1994)</i> . Or an entity who owns the plant breeding rights of a registered variety.

See Figure 1 for further information.

## Summary

**The ACCC proposes to authorise, for five years, Seedvise Pty Ltd to collectively bargain on behalf of participating Royalty Managers with Grain Buyers over the terms and conditions on which End Point Royalties are collected and remitted to Royalty Managers (i.e. EPR Collection Agreements), including the Collection Fee paid to the Grain Buyers.**

### Next steps

**The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicant and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.**

The End Point Royalty (**EPR**) system is widely supported in the Australian grain industry as an effective method for plant breeders to recuperate the value of their intellectual property (i.e. the grain variety they have developed). Under the EPR system, owners of plant breeder rights (**PBR Owners**) collect a Royalty payment from Grain Growers on each tonne of the Grower's harvest (i.e. at the end point). Typically, PBR Owners appoint a Royalty Manager to keep records on all Grain Growers using their Royalty-earning Varieties. As there are more than 10,000 Grain Growers in Australia this can be highly costly.

Accordingly, encouraging Grain Buyers (who purchase grain from the Growers, and who are numbered only in the hundreds) to participate in the collection of EPRs has the potential to greatly simplify the administrative burden of monitoring the use of Royalty-earning Varieties and collecting associated EPRs. Under an automated system, Grain Buyers can identify the volume of each 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.

While participation of Grain Buyers is important to the effectiveness and efficiency of the EPR system, the collection of EPRs is not a core business area for Grain Buyers. Therefore to encourage their participation in the EPR system Royalty Managers pay Grain Buyers a Collection Fee.

Seedvise is an EPR Agent currently representing eleven Royalty Managers (who manage 204 Royalty-earning Varieties). Seedvise proposes to negotiate contracts on behalf of Royalty Managers with individual Grain Buyers over the terms and conditions on which EPRs are collected and remitted, including the amount of the Collection Fee. The contracts would allow the Grain Buyer to deal with each Royalty Manager on the same terms, thereby reducing the cost of participation for the Grain Buyer.

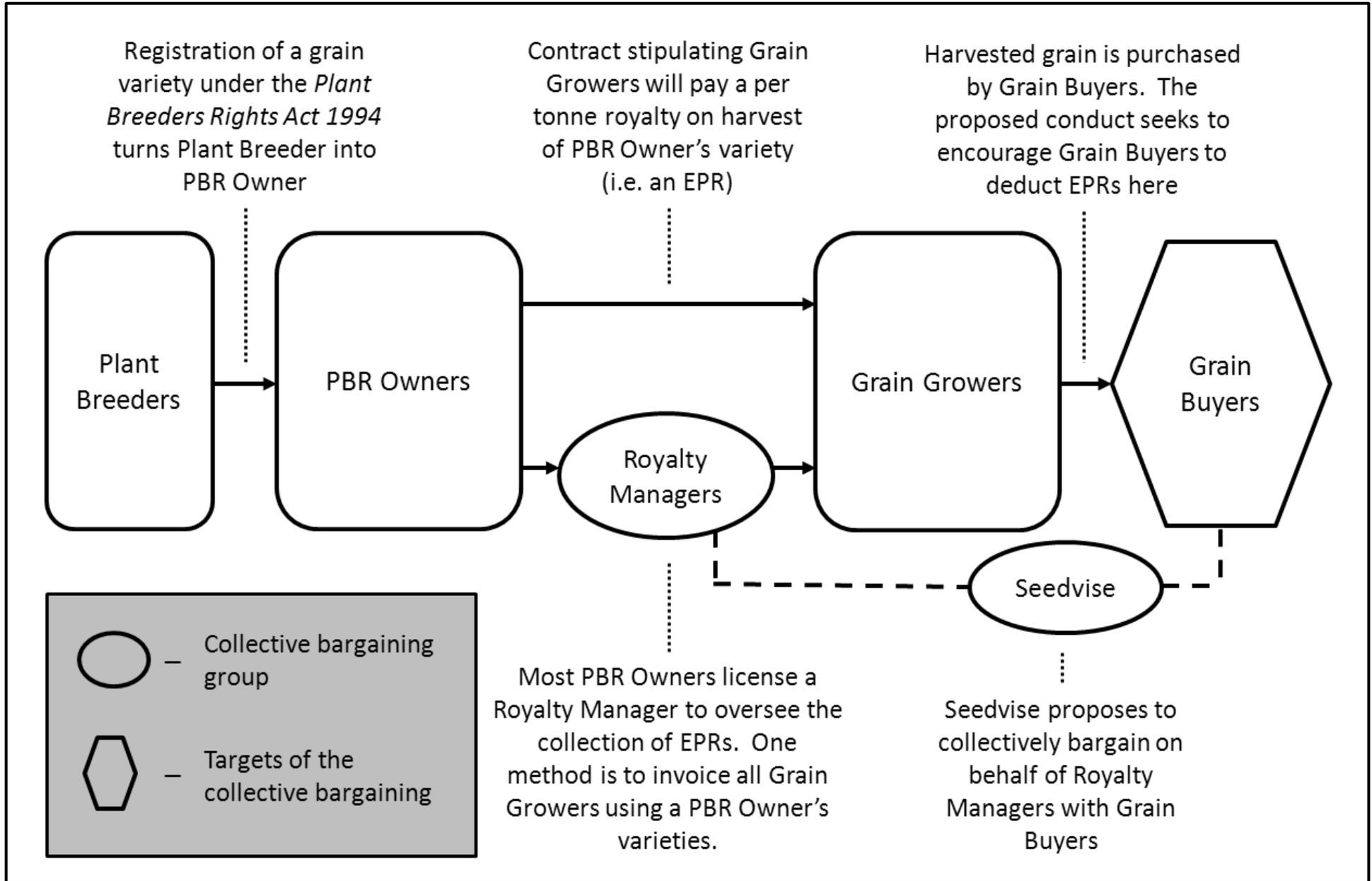
It is proposed that the Collection Fee (and other terms and conditions) would be tailored for each Grain Buyer to facilitate the highest level of participation by Grain Buyers at the lowest cost to Royalty Managers.

The ACCC considers that the proposed conduct will encourage Grain Buyers to participate in the EPR system, which will increase the effectiveness and efficiency of the EPR system, thereby generating a number of public benefits including cost savings for PBR Owners, Royalty Managers, and Grain Growers, and better value for Australian consumers.

The ACCC considers that the proposed conduct is unlikely to result in any significant public detriment. Participation in EPR collection of any form is voluntary for Grain Buyers, and Grain Buyers are not required to negotiate with Seedvise's collective bargaining group nor with Royalty Managers individually. Therefore, the ACCC considers that Grain Buyers will only choose to negotiate with Seedvise if it is in their interest to do so.

Authorisation does not extend to the collective setting of the EPR amount. It only covers the Collection Fee paid to Grain Buyers, and other terms and conditions regarding Grain Buyer participation in the collection of EPRs.

Figure 1: The grain supply chain and the proposed conduct



## The application for authorisation

1. On 17 January 2014, Seedvise Pty Ltd (**Seedvise**) lodged an application for authorisation under subsections 88(1A) and (1) of the *Competition and Consumer Act 2010* (the **CCA**) with the Australian Competition and Consumer Commission (the **ACCC**).<sup>1</sup>
2. Seedvise is seeking authorisation to collectively negotiate (or bargain) 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 will include the Collection Fee that Royalty Managers pay to Grain Buyers in exchange for the EPR collection service.
3. The Plant Breeders Rights Act 1994 (**the PBR Act**) allows owners of plant varieties to apply and collect an EPR on each harvested tonne of grain produced from their varieties. One way in which EPRs are collected is through an auto-deduction system in which Grain Buyers deduct EPRs from their payment to the Grain Grower and remit the EPRs to the PBR Owner.
4. Typically, PBR Owners license Royalty Managers to oversee the collection of EPRs owing to them and these Royalty Managers enter into auto-deduction arrangements with Grain Buyers. Seedvise proposes to Collectively Bargain on behalf of Royalty Managers.
5. The EPR system is described in greater detail at paragraphs 17 to 35 below.
6. Seedvise, on behalf of participating Royalty Managers, seeks authorisation to negotiate with Grain Buyers only in respect of the terms and conditions, including the Collection Fee, paid in exchange for Grain Buyers providing the EPR collection service.
7. Seedvise proposes to negotiate separate agreements with each individual Grain Buyer on behalf of participating Royalty Managers. It is the intention that each Grain Buyer will be paid the same Collection Fee by all participating Royalty Managers. Seedvise does not seek authorisation to negotiate with groups of Grain Buyers or to set a common Collection Fee, or terms and conditions, applicable to all Grain Buyers.
8. EPRs charged to Grain Growers by Royalty Managers or PBR Owners will continue to be set independently for each plant variety by each Royalty Manager/PBR Owner.
9. Seedvise is seeking authorisation for ten years.

## Background<sup>2</sup>

### *Seedvise*

10. Seedvise was founded in 2009 as an independent consulting company specialising in the grains industry, and also operates as an **EPR Agent**. EPR Agents are primarily responsible for contracting Grain Buyers to collect and remit EPRs on behalf of Royalty Managers associated with the EPR Agent. These agreements are referred to as **EPR Collection Agreements**.

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<sup>1</sup> Detailed information about the authorisation process is contained in the ACCC's Authorisation guidelines June 2013 available on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au).

<sup>2</sup> Unless otherwise referenced, all information in this section is taken from Seedvise's submission in support of its application for authorisation, including the following document provided by Seedvise in support of the application: Grains Research & Development Corporation, End Point Royalties Fact Sheet, September 2011 available at: <http://www.grdc.com.au/GRDC-FS-EndPointRoyalty>

11. Seedvise currently acts as the EPR Agent for eleven Royalty Managers, who manage a total of 204 Royalty-earning Varieties. Seedvise has sought authorisation on behalf of these eleven Royalty Managers. Seedvise also seeks authorisation on behalf of any future Royalty Managers contracted to Seedvise.
12. Seedvise also engages with other participants in the grain supply chain to promote the EPR system.

#### *The Australian grain industry*

13. There are over 13,000 grain growing businesses in Australia harvesting crops for domestic and export markets. In 2012 Australia produced over 43 million tonnes of grain crops, of which wheat was the majority (almost 30 million tonnes). Other significant crops include barley, sorghum, rice, and oats.<sup>3</sup>
14. Grain growing in Australia occurs in two broad areas: a stretch of land comprising southern Queensland, inland NSW, western Victoria, and southern SA; and the south-western region of WA. These two growing areas sell to different markets, with the eastern states selling two-thirds of their harvest domestically for human consumption and livestock feed, while WA exports 80-90% of its harvest.
15. Australian farmers grow many varieties of grain. For each plant type, Grain Growers may be able to choose from numerous Royalty-earning Varieties as well as a range of varieties that do not have royalties associated with them (e.g. older varieties). Penetration of newer varieties is quite high; approximately 80% of harvested wheat crops are Royalty-earning Varieties.
16. When a grain crop is harvested, Grain Growers sell the yield to Grain Buyers (this may occur after a period of storage while the Grain Grower waits for favourable terms). Grain Buyers then on-sell the grain either domestically or internationally. In 2012 Australia exported around 23 million tonnes of wheat alone, worth over \$6 billion.<sup>4</sup>

#### *End Point Royalties*

17. The PBR Act allows plant varieties to be registered by Plant Breeders. Once a variety is registered the Plant Breeder becomes the PBR Owner. The rights associated with PBR ownership may be sold or otherwise transferred like other property rights, meaning the PBR Owner is not necessarily the Plant Breeder. The intellectual property protections associated with PBR registration last for twenty years.
18. The PBR Act prohibits the selling or commercial propagation of a registered variety without the consent of the PBR Owner. Commonly, Grain Growers seeking to grow a registered variety are required to enter into an agreement under which they pay a royalty to the PBR Owner for each tonne of the variety harvested (i.e. an EPR). This variety is referred to as a Royalty-earning Variety.<sup>5</sup> The royalty is “end point” because it is paid after cultivation and harvest. PBR Owners may set the per tonne royalty rate at whatever level they wish.

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<sup>3</sup> Australian Bureau of Statistics, Australian Farming in Brief 2013, available at: [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/013A316AFB16FE6ACA257BCD00166531/\\$File/finalfarming%20in%20brief%202013.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/013A316AFB16FE6ACA257BCD00166531/$File/finalfarming%20in%20brief%202013.pdf) (Accessed on 3 April 2014).

<sup>4</sup> Ibid.

<sup>5</sup> A royalty system is not required under the PBR Act and agreements between PBR Owners and Grain Growers can include any terms and conditions negotiated by those parties, including alternative mechanisms for compensating the PBR Owner for the use of their intellectual property. However, the royalty system is increasingly a standard approach to this commercial relationship.

19. As noted, PBR Owners typically license Royalty Managers to oversee the collection of EPRs owing to them.
20. Royalty-earning Varieties are the product of research and development programs that utilise techniques such as selective breeding and/or genetic modification. Historically, much of Australia's grain breeding research was undertaken by the Grains Research and Development Corporation (**GRDC**)—a statutory corporation that reports to the Department of Agriculture—and other publicly funded bodies. However, most of these public plant breeding bodies have been—or are in process of being—privatised, and grain varieties are now largely developed by commercial Plant Breeders who earn revenue via their Royalty-earning Varieties. Privatisation has increased the degree of foreign investment in Australian plant breeding activities, though Seedwise submits that all Plant Breeders to which their application relates are Australian companies.
21. Plant breeding is almost always undertaken in the same country the variety is expected to be grown as tailoring the variety to local conditions is critical for its productivity. Seedwise submits that of the 201 varieties its Royalty Managers distributed in the 2013/14 season, only six were bred internationally and they had very limited 'geographical fit' in Australia.
22. The first EPR varieties were released in 1996 and grain produced from approximately 180 EPR varieties now makes up the majority of Australia's grain crops.
23. Grain growing has a number of characteristics that make an EPR system an efficient mechanism for distributing economic surplus between PBR Owners and Grain Growers. Specifically:
  - Grain Growers often purchase a small amount of a new variety and plant it as a test/breeding crop. If the Grain Grower is happy with the test crop they will harvest it and use the yield to plant a commercial size crop the following season without needing to purchase additional propagation materials from the PBR Owner. Under this practice, revenue from the upfront sale of propagation materials to Grain Growers is small and may not be adequate to recover the PBR Owner's cost of research and development.
  - An EPR system allows Grain Growers to share risk with PBR Owners. When considering whether to grow a new variety, Grain Growers face uncertainty over that variety's productivity and therefore the Grain Grower's earnings. Under the EPR system an unproductive variety will not generate a large volume of EPRs for the Grain Grower to pay, which reduces the cost of a poor season for the Grower.
  - Compensating PBR Owners at the end of the harvest also reduces upfront costs for Grain Growers, and encourages the uptake of newer varieties and the continued research and breeding of more productive varieties.
  - A per tonne royalty provides a feedback mechanism to PBR Owners and rewards PBR Owners that develop productive varieties. By waiting until the end of the harvest to calculate the EPRs accruing to each PBR Owner, the EPR system ensures that feedback is based on the productivity of the particular variety. Over time, these EPR revenues should lead to more productive varieties as talented Plant Breeders are rewarded while Breeders of unproductive varieties are not.

24. The EPR system is widely supported in the Australian grain industry, with all limbs of the supply chain acknowledging the benefits and efficiencies of the system.<sup>6</sup> Similarly, submissions provided to the ACCC which commented on this issue all supported the EPR system.
25. The ACCC also notes that the 2010 Productivity Commission report on Wheat Export Marketing Arrangements stated “*Plant Breeding, and varietal development and improvement, are critical elements in the success of the grain industry. They enable growers to increase productivity of their crops, better service new markets, and to address production constraints such as drought, frost, disease and weed competition.*”<sup>7</sup> The Productivity Commission concluded that “*A well functioning system for the collection of End Point Royalties to protect plant breeders’ rights is important to the continued investment in new wheat varieties.*”<sup>8</sup> The Productivity Commission recommended that “*Reforms and initiatives to improve the collection and enforcement of End Point Royalties... should be implemented expeditiously.*”<sup>9</sup>
26. There are two main collection methods for End Point Royalties (See Figure 2):
- *Paper invoice to Growers*—At the end of the season, Royalty Managers seek out Grain Growers with crops of Royalty-earning Varieties and request that they fill out an EPR Harvest Declaration Form. The form requires the Grain Grower to declare the:
    - Quantity of seed sown
    - Quantity of harvest grain sold
    - Quantity of harvest grain used on farm
    - Quantity of harvest grain warehoused at the end of April each year
    - Quantity of harvest grain retained for planting
    - Quantity and name of the entity where the harvest grain was sold.

Where possible, Royalty Managers verify the information in the EPR Harvest Declaration (e.g. checking quantities sold with Grain Buyers) and then invoice the Grain Grower for the appropriate EPRs.

- *Auto-deduction by Buyers*—As the Grain Grower sells their harvested crop to Grain Buyers, the Grain Buyer identifies the variety and deducts the EPR from their payment to the Grain Grower. The Grain Buyer then remits these EPRs to the Royalty Manager. In exchange for this service, the Grain Buyer is paid a Collection Fee by the Royalty Manager. This Collection Fee was initially set by the Australian Wheat Board (**AWB**) in 1998 at \$0.12 per tonne<sup>10</sup>, and Seedwise submits that it has remained at \$0.12 across the industry even though Royalty Managers and Grain Buyers have been free to negotiate different Collection Fees since 2008.

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<sup>6</sup> The ACCC notes that tensions may still arise over specific elements of the system, such as the Collection Fee or a Royalty-earning Variety’s royalty rate.

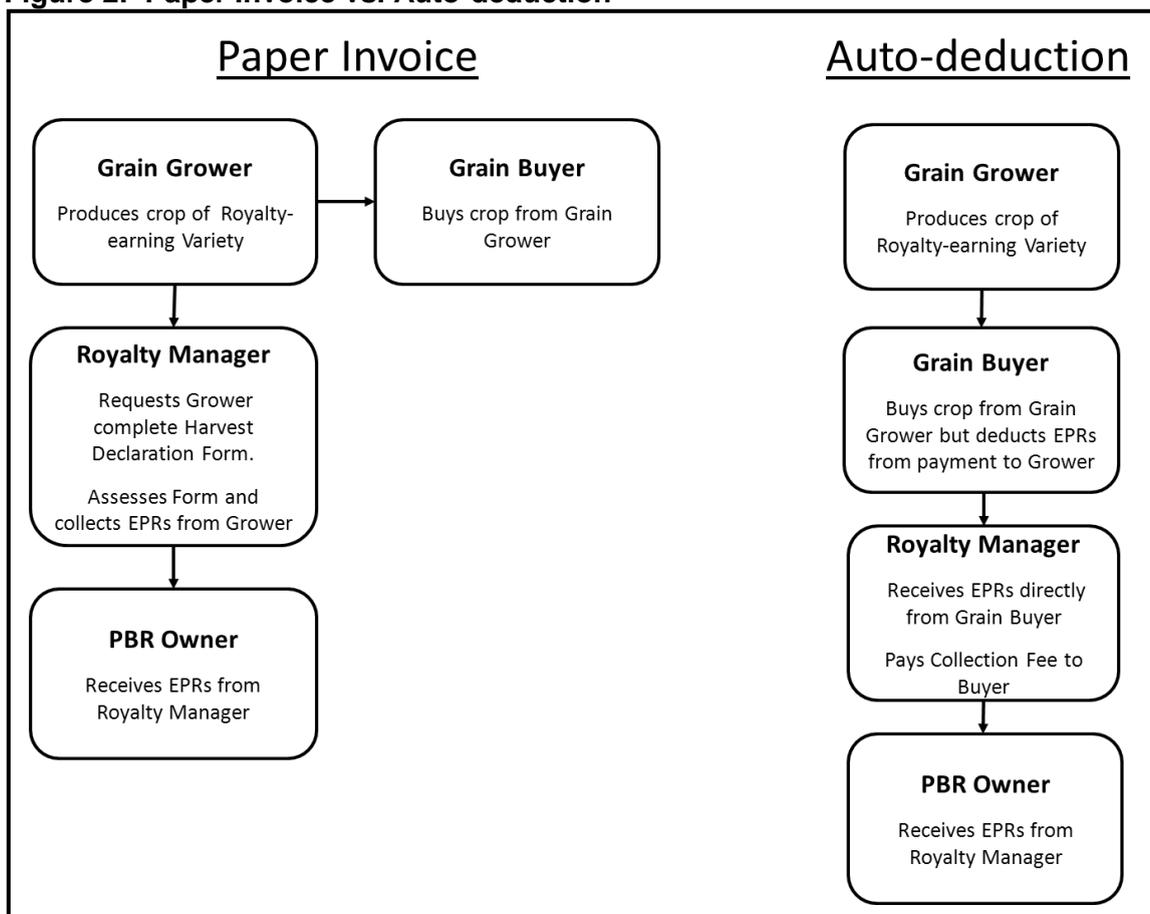
<sup>7</sup> Productivity Commission, Inquiry Report into Wheat Export Marketing Arrangements, Chapter 8, page 361. Available at: <http://www.pc.gov.au/projects/inquiry/wheat-export/report> (Accessed on 29 April 2014).

<sup>8</sup> Ibid, page 343.

<sup>9</sup> Ibid, page 365.

<sup>10</sup> Seedwise submits that this \$0.12 fee was set following negotiations between representatives of the Department of Agriculture and Fisheries Western Australia (the owner of a number of EPR varieties at the time) and the AWB.

**Figure 2: Paper Invoice vs. Auto-deduction**



27. Seedwise submits that most Grain Buyers who already participate in the auto-deduction collection method are larger Buyers. For such Grain Buyers, the cost of installing and maintaining auto-deduction facilities is spread across the significant volumes of grain in relation to which they collect EPRs, meaning their per tonne cost of participation is low. For these Grain Buyers, existing incentives (e.g. the current Collection Fee) are sufficient to induce them to participate, but for smaller Grain Buyers—who do not benefit from the same level of economies of scale—the per tonne cost of participation is likely to be higher and existing incentives (and/or additional incentives individual Royalty Managers are able to offer) may not be sufficient to compensate them for the cost of installing and maintaining auto-deduction facilities.

28. Seedwise submits that the paper invoice collection method is significantly more costly for Royalty Managers, as well as being less accurate. This view is supported by the Australian Government’s Advisory Council on Intellectual Property (**ACIP**), who noted in the final report of its review into the enforcement of Plant Breeder’s Rights that submissions had identified the following concerns with the EPR system, particularly in regards to the paper invoice collection method:

- Quantifying the Grain Grower’s obligations to PBR owners.
- High transaction costs in identifying these obligations.
- Frustration in dealing with the large amount of paper work that is required to report the Grower’s obligations to PBR owners.

- Identifying and quantifying unreported use of protected varieties.<sup>11</sup>
29. ACIP also noted the administrative burdens of the paper invoice system and the benefits of transitioning to a system in which EPRs are collected at ‘bottlenecks’ in the supply chain (e.g. the auto-deduction collection method):
- Most concerns raised with ACIP over [PBR] rights were in relation to the grains industry, where there are tens of thousands of growers and a relatively small number of accumulators, traders and end users. It is not cost effective for [PBR Owners] to audit the payment of royalties by such a large number of growers. An EPR system based on the narrower points in the supply chain transfers the administrative burden from growers to other organisations and can be a more efficient system overall.*<sup>12</sup>
30. Regarding the issue of variety identification, ACIP noted that it is not an infringement under the PBR Act to knowingly declare a PBR protected variety to be a non-PBR protected variety<sup>13</sup>, which can increase the cost of enforcing PBR rights. However, ACIP also noted that variety identification technologies for most varieties have developed to a point where they are cost effective and transportable, which suggests that the cost of variety identification may be falling, making the auto-deduction collection method increasingly cost effective.<sup>14</sup>
31. In general, it is difficult to estimate how effective current EPR collection methods are at recovering royalties as the quantity of Royalty-earning Varieties grown without having an EPR recouped is not known. However, Seedwise estimate that for wheat around 70-80% of EPRs are collected, for barley around 70-75%, and for a crop like chickpeas around 55-60%. Of these EPRs, Seedwise estimates that around 87% are collected via the auto-deduction system and 13% via paper invoice. Uncollected EPRs may be a result of inaccurate paper invoice reporting or Royalty Managers being unable to locate crops of their Royalty-earning Varieties.
32. Seedwise’s application for authorisation relates to the terms and conditions, including the Collection Fee, of participation in the auto-deduction system. Seedwise proposes to negotiate (on behalf of Royalty Managers) with individual Grain Buyers a Collection Fee that will adequately incentivise the Grain Buyer to participate in the auto-deduction collection method and thereby reduce the need for paper invoicing and increase the overall effectiveness of the EPR system.
33. Participating Royalty Managers currently individually contract an EPR Agent (Seedwise) to negotiate with Grain Buyers to collect and remit EPR’s using the auto-deduction scheme. Each Royalty Manager provides Seedwise with broad instructions and parameters with regards to the terms and conditions of the contract Seedwise may enter into with the Grain Buyer, including but not limited to, the Collection Fee. This means each Grain Buyer has different agreements with each of the eleven Royalty Managers (albeit, each of the eleven agreements is negotiated with Seedwise on behalf of each Royalty Manager).

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<sup>11</sup> Australian Council on Intellectual Property, Review into the enforcement of Plant Breeder’s Rights, Final Report, section 17.2 Available at: <http://www.acip.gov.au/reviews/all-reviews/review-enforcement-pbr/> (Accessed on: 29 April 2014)

<sup>12</sup> Ibid, section 7.1.3.

<sup>13</sup> ACIP note that it may raise concerns under the Competition and Consumer Act (2010) but are not aware of any case law on the issue.

<sup>14</sup> Australian Council on Intellectual Property, Review into the enforcement of Plant Breeder’s Rights, Final Report, section 17.2 Available at: <http://www.acip.gov.au/reviews/all-reviews/review-enforcement-pbr/> (Accessed on: 29 April 2014)

34. However, Grain Buyers are under no obligation to enter into agreements to collect EPR's on behalf of Royalty Managers and many, particularly smaller, Grain Buyers do not collect EPRs when purchasing grain from Growers.
35. As noted, the EPR Collection Fee for Grain Buyers who do elect to enter into EPR Collection Agreements is currently \$0.12 per tonne across the industry, which is the rate set by the AWB in 1998, despite Royalty Managers being free to determine their own Collection Fees.

## Submissions

36. The ACCC received submissions from ten interested parties in response to the application for authorisation. Submissions were received from PBR Owners/Plant Breeders, Royalty Managers, Grain Buyers, Grain Growers, and government bodies.
37. The submissions received are summarised below. Substantive issues raised in the submissions are considered in the relevant parts of the ACCC Assessment section of this draft determination.

### *Seedvise*

38. Seedvise submits that Plant Breeders are reliant on incomes generated from EPRs to fund their variety development programs. Without income from EPRs, the benefits generated by their development of increasingly productive varieties will be diminished.
39. Seedvise submits that factors impacting on the effectiveness and efficiency of the current EPR collection system include:
  - The need for growers to complete an annual harvest declaration post-harvest each year to declare what grain they produced by variety and to which Grain Buyer they sold it.
  - A large number of smaller Grain Buyers not agreeing to support the automatic deduction of EPRs from their payments to Grain Growers.
  - The feed grain market segment currently does not record details on the variety of grains purchased. This limits the ability of EPRs to be deducted from payments to Grain Growers in this market segment and means that some Growers are avoiding paying royalties.
40. Seedvise submits that the proposed arrangements will allow PBR Owners and Royalty Managers to discuss and implement strategies that will remove some of the administrative burden experienced by Growers under the current system and attract smaller Grain Buyers to support methods that will improve the effectiveness and efficiency of EPR collection.
41. In particular, Seedvise submits that common terms and conditions will simplify the EPR collection process for Grain Buyers and alleviate the costs associated with Grain Buyers negotiating and managing individual contracts with each of the eleven Royalty Managers. In this respect, Seedvise argues that it is not practical for Grain Buyers to have a different EPR Collection Fee for each Royalty Manager.
42. Seedvise also submits that easing the administrative burden on Grain Buyers will encourage smaller Grain Buyers who do not currently support the automatic deduction of EPRs to participate in the scheme. Further, the proposed arrangements will facilitate the negotiation of different rates for individual Grain Buyers meaning smaller Grain Buyers, whose systems and scale of operations mean they would incur higher costs in collecting EPRs than larger Grain Buyers, can be offered higher Collection Fees to provide an incentive for them to participate in the scheme.

43. Seedwise submits that this will also assist Grain Growers as the more Grain Buyers that participate in the scheme the less EPRs that Growers will need to remit through the less efficient paper invoice system.

*PBR Owners, Plant Breeders, and Royalty Managers*

44. The Australian Seed Federation (the **ASF**), a representative body for the seed industry, supports the application for authorisation and the EPR system, submitting that EPR revenue has resulted in a significant level of private investment in Australian plant breeding. The ASF submits that the most efficient method for EPR collection is for Grain Buyers to calculate and collect EPRs when purchasing Royalty-earning Variety harvests from Grain Growers.
45. The ASF also submits that a Grain Buyer being paid the same Collection Fee regardless of which Royalty Manager they are collecting the EPR on behalf of is likely to generate benefits as a fragmented approach to EPR collection would frustrate Grain Buyers and increase their cost of participation. The ASF notes that Royalty Managers that do not wish to pay the Collection Fee set under the proposed conduct would remain free to negotiate individually with Grain Buyers.
46. Soy Australia Ltd and the Australian Oilseeds Federation Inc. (**ASAOF**) lodged joint submissions that support the EPR system but query a key goal of the application for authorisation—a uniform Collection Fee. ASAOF submit that a flexible Collection Fee, determined independently by each Grain Buyer, would be a more effective and efficient outcome. ASAOF submit that smaller Grain Buyers find the cost of the auto-deduction EPR system prohibitive, and that allowing Grain Buyers to set a Collection Fee commensurate with their respective costs for EPR collection may encourage greater participation.
47. In response, Seedwise clarified that the intent of the proposed conduct is that a common Collection Fee to be paid by each Royalty Manager that deals with the particular Grain Buyer be negotiated, having regard to the individual Grain Buyer's respective costs for EPR collection. It is not intended that all Grain Buyers be paid the same Collection Fee.
48. Seednet, a Plant Breeder, supports the application for authorisation and the EPR system. Seednet submits that a uniform Collection Fee is better than individually set fees as Grain Buyers may be put off by the undesirable complexity of having to assess the value of collecting different varieties.

*Grain Buyers*

49. CBH Grain Pty Ltd (**CBH**) supports the application for authorisation in principle, though would not support Royalty Managers agreeing on a lower Collection Fee. CBH submits that the EPR auto-deduction system has resulted in more efficient and manageable EPR collection for both CBH and Grain Growers.
50. However, CBH submits that setting up the EPR auto-deduction system and the necessary business processes to effectively administer the system is a significant cost. CBH also submits that collecting EPRs for Royalty Managers exposes Grain Buyers to the risks associated with failing to remit the correct EPRs to Royalty Managers.
51. CBH submits that a lower Collection Fee than is currently paid to Grain Buyers would reduce participation by Grain Buyers. CBH submits that the proposed conduct should not result in EPR Collection Agreements in which Grain Buyers are subject to less favourable terms.
52. In response Seedwise notes that Grain Buyers are under no obligation to collect EPRs on behalf of Royalty Managers and that it is conscious of not imposing further

costs or risks on Grain Buyers that may result in Grain Buyers deciding to opt out of the auto-deduction collection method.

53. Grain Trade Australia Ltd (**GTA**) supports the application for authorisation and the EPR system in general. GTA submits that allowing Royalty Managers to collectively negotiate with Grain Buyers on EPR Collection Agreements, including the amount of the Collection Fee, will improve the effectiveness and efficiency of the EPR system.
54. GTA also submits, in identical terms to ASF, that a uniform Collection Fee is likely to generate benefits as a fragmented approach to EPR collection would frustrate Grain Buyers and increase their cost of participation. GTA notes that Royalty Managers that do not wish to pay the Collection Fee set under the proposed conduct would remain free to negotiate individually with Grain Buyers.

#### *Grain Growers*

55. The WA Farmers Federation (**WAFF**) broadly supports the application for authorisation and the EPR system, noting that a more efficient EPR system reduces costs to Grain Growers. However, WAFF submits that authorisation should be granted for five years instead of the requested ten so that the proposed conduct can be reviewed sooner to ensure that it is in the best interests of all parties. In response Seedwise submits that given the cost and time involved in preparing an application for authorisation a ten year authorisation is more appropriate.
56. WAFF also submits that there should be greater transparency around the setting of the Collection Fee, including justification for any increases, and that Grain Growers and Buyers should receive full disclosure of relevant information to ensure anti-competitive behaviour is not occurring. In response Seedwise submits that publishing the fees paid to each individual grower would undermine Seedwise's negotiating position, could potentially facilitate collusion among Grain Buyers in relation to Collection Fees, and result in large Grain Buyers—whose relative costs in collecting EPRs are lower than smaller Grain Buyers—seeking the same fees as smaller Grain Buyers who may otherwise be being paid more to encourage them to participate in the scheme.
57. WAFF also submits that increases in the Collection Fee should not be incorporated into the EPR that Grain Growers pay to Royalty Managers. In response Seedwise submits that the Collection Fee is paid by Royalty Managers to Grain Buyers, and so any increase in the Collection Fee would represent an increase in costs to Royalty Managers only.

#### *Government bodies*

58. GRDC supports the application for authorisation and the EPR system. GRDC specifically submits that a Grain Buyer being paid the same Collection Fee regardless of which Royalty Manager they are collecting the EPR on behalf of is appropriate as, once a Grain Buyer has put in place auto-deduction facilities, the cost of collecting and remitting EPRs does not depend on the variety or PBR Owner.
59. GRDC also submits that, absent the proposed arrangements, the Collection Fee is unlikely to become an element of product differentiation between varieties, meaning a uniform approach (both in the Collection Fee and other appropriate terms and conditions) would reduce the administrative complexity of the EPR system without influencing the competitive dynamics of the industry.
60. The Department of Agriculture, Fisheries and Forestry Queensland (**DAFFQ**) supports the application for authorisation and submits that the EPR system provides a critical source of revenue that underpins the research and development of increasingly productive and resilient grain varieties. DAFFQ submits that the

proposed conduct will better incentivise Grain Buyers to participate in the EPR system thereby improving the revenue stream accruing to PBR Owners.

61. Department of Agriculture and Food, Western Australia (**DAFWA**) supports the application for authorisation and the EPR system. DAFWA submits that EPR revenues that it has earned have been re-invested in its plant-breeding research and development programs, and that any measures that increase the efficiency of the EPR system are likely to improve participation and therefore increase EPR revenues to Plant Breeders.

## **ACCC assessment**

62. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests<sup>15</sup> contained in the CCA. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
63. In order to assess the effect of the proposed 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.

## **The relevant area of competition**

64. The ACCC considers that the area of competition directly affected by the proposed arrangements is that for the EPR collection services. As discussed at paragraph 26, Royalty Managers can seek to collect EPRs directly from Grain Growers using the paper invoice system or they can contract with Grain Buyers to collect EPRs as an automatic deduction from the amount paid by the Grain Buyer to the Grower when purchasing grain.
65. The ACCC notes that the proposed conduct is limited to negotiations between Royalty Managers and Grain Buyers over the terms and conditions of EPR Collection Agreements, including the Collection Fee, which is only a small component of the transactions and other commercial interactions taking place in the Australian grain industry. However, the ACCC considers that the effect the Collection Fee may have on incentivising participation in the EPR system means the proposed arrangements have the potential to affect the grain supply chain from Plant Breeders through to Grain Buyers.

## **The future with and without**

66. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
67. Seedvise submits that negotiations between Royalty Managers and Grain Buyers over the auto-deduction collection method and the Collection Fee have been fragmented, and that there has been no change to the Collection Fee since it was set by the AWB in 1998. Seedvise submits that Grain Buyers have communicated to Royalty Managers that negotiating with individual Royalty Managers is prohibitively costly and time consuming, which resulted in Seedvise establishing its EPR Agent

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<sup>15</sup> Subsections 90(6), 90(7), 90(5A) and 90(5B). The relevant tests are set out in Attachment A.

service in order to streamline the interaction between Grain Buyers and Royalty Managers.

68. The ACCC considers that there is an incentive for both Royalty Managers and Grain Buyers to reach mutually beneficial EPR Collection Agreements, and that such commercial incentives are likely to continue to exist should collective negotiation not take place. However, Grain Buyers entering into EPR Collection Agreements would continue to have to enter into separate agreements with each Royalty Manager they collect EPRs on behalf of. Further, as current industry experience illustrates, many Grain Buyers—especially smaller ones—are likely to continue to not enter into EPR Collection Agreements. In relation to grain purchased by these Grain Buyers, Royalty Managers would continue to seek to recover EPRs through the paper invoice system and, as is currently the case, potentially not recover EPRs at all from some Grain Growers.
69. Absent collective negotiation it would be expected that, over time, direct negotiation between individual Royalty Managers and Grain Buyers would produce variations of the current standard terms and conditions (including the Collection Fee) offered to provide incentives for greater participation by Grain Buyers in the auto-deduction collection method.
70. Seedwise argues that individual negotiation is a less efficient means of broadening participation in the scheme and, in respect of some Grain Buyers, would not provide sufficient incentives for them to participate. These arguments are considered in the ACCC's assessment of the public benefits of the proposed collective bargaining arrangements.

## Public benefits

71. Public benefit is not defined in the CCA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>16</sup>
72. The ACCC considers that the EPR system is important to supporting a profitable and competitive private plant breeding industry in Australia. The ACCC also considers that the EPR system promotes the research and development of increasingly productive crop varieties, leading to better value for Grain Growers and end consumers.
73. The ACCC therefore considers that any proposed arrangement that would improve the effectiveness and efficiency of the EPR system is likely to generate a public benefit.
74. In this respect, the ACCC agrees with the industry view that the EPR auto-deduction collection method—in which Grain Buyers deduct EPRs from their payments to Growers and remit the EPRs to Royalty Managers—represents a highly efficient method for locating Royalty-earning Varieties and collecting EPRs.
75. Similarly, the ACCC accepts that the paper invoice collection method (as summarised at paragraph 26) imposes significant administrative costs on Royalty Managers as they are required to keep track of the use of their Royalty-earning Varieties across Australia's more-than-10,000 Grain Growers, and to individually invoice the relevant Growers. The ACCC also accepts that the paper invoice

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<sup>16</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

collection method imposes administrative costs on Grain Growers in the form of Harvest Declaration Forms and the record keeping required to accurately complete the declaration.

76. Accordingly, the ACCC considers that encouraging Grain Buyers (who are numbered in the hundreds rather than the tens of thousands) to participate in the collection of EPRs via the auto-deduction collection method has the potential to greatly simplify the administrative burden of monitoring the use of Royalty-earning Varieties and collecting associated EPRs.
77. Whilst most large Grain Buyers already participate in the auto-deduction collection method, Seedwise argues that there are two related impediments to auto-deduction being adopted for remaining Grain Buyers, particularly smaller ones:
  - i. The transaction costs involved in:
    - setting up systems to accommodate auto-deduction, and
    - negotiating an EPR Collection Agreement with each Royalty Manager.
  - ii. The level of Collection Fees offered by Royalty Managers individually not being sufficient to cover these costs.
78. The ACCC considers that the proposed conduct is likely to overcome these impediments by setting Collection Fees that adequately compensate Grain Buyers for participating in EPR auto-deduction, and to minimise the administrative cost of their participation.
79. The ACCC accepts that some Grain Buyers, particularly smaller ones who do not benefit from economies of scale to the same degree that larger Grain Buyers can, may find the existing Collection Fee amount inadequate to compensate them for the cost of (a) installing and maintaining an EPR auto-deduction system and (b) negotiating EPR Collection Agreements with up to eleven Royalty Managers.
80. The ACCC considers that collective bargaining by Seedwise on behalf of Royalty Managers has the potential to increase Grain Buyer participation in auto-deduction by facilitating negotiations that result in Collection Fees that reflect the cost of participation for each Grain Buyer. While it remains open to individual Royalty Managers to negotiate fees with Grain Buyers that reflect these costs, the volume of a single Royalty Manager's Royalty-earning Varieties purchased by a Grain Buyer—particularly smaller Grain Buyers—will often not be sufficient to justify the cost of establishing auto-deduction facilities unless the Collection Fee is set at a very high level.
81. In addition, if an individual Royalty Manager was to offer a Collection Fee that would justify the upfront investment in auto-deduction facilities, other Royalty Managers would then be able to 'free ride' on the Royalty Manager that has funded the Grain Buyer's upfront investment. This 'first mover disadvantage' may reduce the willingness of individual Royalty Managers to pay Grain Buyers cost-reflective Collection Fees and therefore stifle investment in EPR auto-deduction facilities.
82. Similarly, individual Royalty Managers may be unwilling to offer a higher Collection Fee due to concerns that doing so will put them at a competitive disadvantage to other Royalty Managers (who may have negotiated lower Collection Fees). Allowing the Royalty Managers to collectively bargain would reduce information asymmetries that may have stopped them from offering a higher Collection Fee individually.
83. Tailoring each Collection Fee to the needs of the respective Grain Buyer should induce most Grain Buyers to install auto-deduction facilities at the lowest cost to Royalty Managers, where efficient to do so. The ACCC notes that Royalty Managers may not be willing to pay a Collection Fee high enough to induce the Grain Buyers with the highest cost of participation. However, the ACCC considers that this would

still represent an efficient outcome as Royalty Managers should be willing to pay cost-reflective Collection Fees to all Grain Buyers whose participation in the auto-deduction collection method would reduce the Royalty Managers' costs to a greater degree than the higher Collection Fee increases them. Accordingly, if Royalty Managers are unwilling to induce some (very high cost) Grain Buyers to participate in auto-deduction, it is likely because doing so would represent a net cost increase for Royalty Managers.

84. The ACCC also accepts that the administrative cost of implementing an EPR auto-deduction collection method is increased if the Grain Buyer is required to negotiate terms and conditions separately with up to eleven Royalty Managers. The ACCC considers that a single negotiating process will reduce the administrative burden associated with EPR auto-deduction and make participation more attractive for Grain Buyers. Given that Royalty Managers may be unwilling to offer higher Collection Fees individually, and that some Grain Buyers are reluctant to incur the additional administrative costs associated with accounting for different Collection Fees from different Royalty Managers, the ACCC considers that individual negotiations between Royalty Managers and Grain Buyers are unlikely to induce the same level of further participation in EPR auto-deduction.
85. Collective negotiating will also lead to transaction costs savings for Grain Buyers who already participate in the auto-deduction scheme, and the Royalty Managers with which they negotiate, in their negotiations over EPR Collection Agreements.
86. As referred to in paragraph 75, to the extent that the proposed arrangements increase participation in the auto-deduction collection method, this will also reduce transaction costs for Grain Growers as the paper invoice method imposes an administrative burden on Grain Growers in the form of record keeping and invoicing in order to determine the EPRs that they owe. Whereas under the auto-deduction collection method no record keeping beyond that which is already necessary to facilitate the sale/purchase of the grain is required.
87. As noted at paragraph 31, it is estimated that significant volumes of grain are currently harvested without any EPR being paid. Facilitating a more widespread adoption of the auto-deduction collection method will also reduce the incidence of avoidance of payment of EPRs.
88. Accordingly, the ACCC considers that the proposed collective bargaining conduct is likely to result in public benefits in the form of increased EPR collection via auto-deduction by Grain Buyers, which in turn improves the effectiveness of the EPR system and promotes the research and development of more productive crops for Grain Growers and Australian consumers.

## **Public detriments**

89. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:
  - ...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.<sup>17</sup>
90. 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:

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<sup>17</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 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.
  - There is no collective boycott involved.
91. The ACCC considers that the proposed conduct broadly satisfies these criteria. 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 Seedvise's collection bargaining group or with individual Royalty Managers. Further, no collective boycott activity is proposed.
92. The ACCC considers that competition between Royalty Managers in setting EPR collection terms and conditions is currently low. The ACCC notes that Collection Fees have not changed since the AWB set a standard rate of \$0.12 in 1998, even though Collection Fees have been unregulated for a number of years. The ACCC also considers that Royalty Managers do not compete against each other for Grain Buyer business in relation to collection of EPRs. Rather, the potential for each Royalty Manager to negotiate with Grain Buyers over EPR Collection Agreements is dependent on the Grain Buyer purchasing one of the Royalty Manager's Royalty-earning Varieties from Grain Growers. Further, entering into an EPR Collection Agreement with one Royalty Manager does not impact on the Grain Buyer's capacity or incentives to enter into similar agreements with other Royalty Managers. Accordingly the ACCC considers that the proposed conduct is unlikely to significantly reduce competition between Royalty Managers over the Collection Fees they offer Grain Buyers.
93. While all interested parties were supportive of the proposed arrangements a few raised specific concerns in relation to the arrangements.
94. CBH submits that the EPR system imposes significant costs and risk on Grain Buyers and that any arrangements aimed at increasing the take-up of auto-deduction by Grain Buyers should not impose further costs or risk on Grain Buyers. CBH also raises concerns that the proposed arrangements may result in lower Collection Fees being paid to Grain Buyers.
95. The ACCC notes that that the purpose of the proposed arrangements is to induce increased participation in the auto-deduction collection method, which would not be achieved by imposing costly or otherwise onerous terms and conditions upon participating Grain Buyers.
96. The ACCC also notes that participation in EPR collection of any form is voluntary for Grain Buyers, and that Grain Buyers are not required to negotiate with Seedvise's collective bargaining group nor with Royalty Managers individually. Therefore, the ACCC considers that Grain Buyers will only choose to negotiate with Seedvise if it is in their interest to do so.
97. In addition, Seedvise submits that, if anything, the proposed arrangements will result in higher Collections Fees as, acting collectively, Royalty Managers will be able to agree on Collection Fees that provide an incentive for Grain Buyers to participate in the auto-deduction scheme.

98. The WAFF submits that there should be greater transparency as to how the Collection Fee is set, including justification for increases and full disclosure of relevant information to Grain Growers and Grain Buyers.
99. The ACCC considers that publishing the Collection Fee agreed with each Grain Buyer would weaken Seedvise's bargaining position in future negotiations as other Grain Buyers who observe Seedvise's willingness to pay a higher Collection Fee would claim that they also require a high Collection Fee to compensate them for the cost of the auto-deduction collection method. In particular, larger Grain Buyers—who are in a stronger bargaining position—may seek Collection Fees commensurate with those paid to smaller Grain Buyers, who Seedvise submits are likely to be offered higher fees due to higher cost, per tonne, incurred by them in collecting EPRs.
100. The ACCC also notes that the purpose of the proposed conduct is to reduce costs associated with the EPR system for Royalty Managers and Grain Growers by increasing participation in the auto-deduction collection method and reducing the need for EPR paper invoicing. In addition, as noted above, this should also increase EPR revenue for PBR Owners. Accordingly, the ACCC considers that any increase in the Collection Fee under the proposed conduct would only be economic for Royalty Managers if it was offset by an administrative cost saving and/or an increase in EPR revenue that outweighs the higher Collection Fee Royalty Managers agree to pay. Therefore, any increase in the Collection Fee should be more than offset by an increase in EPR revenue and administrative cost savings, and the monetary savings associated with these efficiency gains may be shared with Grain Growers via PBR Owners competing for Growers to take up their varieties.
101. The ACCC notes that if the proposed arrangements are successful in inducing additional Grain Buyers to invest in systems that enable them to make automatic deductions of EPRs, Seedvise may have the incentive to renegotiate EPR Collection Agreements after the Grain Buyer has made the upfront investment in auto-deduction facilities. Post-investment, the Grain Buyer's bargaining position would be weakened as they require Collection Fee revenue to recover the investment cost and therefore cannot credibly threaten to stop participating in auto-deduction. However, the ACCC notes that each Grain Buyer's bargaining position is strong when negotiating the initial EPR Collection Agreement and Buyers would be unlikely to enter into agreements that allowed the Collection Fee to be renegotiated before their investment in auto-deduction facilities was recovered. Further, the high cost of the paper invoice method would minimise Seedvise's incentives to seek to introduce terms and conditions that jeopardise Grain Buyers' ongoing participation in the auto-deduction collection method.
102. The ACCC notes that—as with any collective bargaining arrangements—when a group of competitors get together to collectively negotiate in relation to a particular issue this increases the potential that they may collectively agree on issues outside the scope of the authorised conduct. In response to this issue, Seedvise submits that all parties to the proposed conduct are aware of their legal obligations under the CCA, and understand what topics can and cannot be discussed.
103. The ACCC notes that authorisation does not extend to the collective setting of the EPR amount. As EPR rates are publicly available, any jump or trend upwards in the period after the collective conduct was entered into would be identifiable, and may prompt further investigation.
104. Accordingly, the ACCC considers that the proposed conduct is unlikely to result in any significant public detriments.

## **Balance of public benefit and detriment**

105. The ACCC considers that the collective bargaining conduct is likely to result in public benefits by increasing the efficiency of the operation of the auto-deduction collection method and participation in the auto-deduction collection method, thereby improving the effectiveness of the EPR system as a whole. The ACCC considers that an effective EPR system has the potential to support a competitive and profitable private plant breeding industry in Australia, which in turn will generate more productive crops for Grain Growers and better value for Australian consumers.
106. The ACCC considers that the proposed conduct is unlikely to result in any significant public detriment as negotiations with Grain Buyers are voluntary for all parties, and the current level of competition between Royalty Managers over EPR Collection Agreement terms and conditions is currently low.
107. On balance, the ACCC considers that the proposed conduct is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

## **Length of authorisation**

108. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>18</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will continue to outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
109. Seedvise is seeking authorisation for ten years. The ACCC notes that WAFF made a submission calling for the period of authorisation to be limited to five years in order to allow for a review of the authorisation sooner, and to ensure that the proposed conduct is in the best interest of all parties.
110. In response to WAFF's submission, Seedvise submits that its EPR Agent agreements with Royalty Managers and EPR Collection Agreements with Grain Buyers are based on three years terms, with the current agreements set to expire in August 2016. Given the regular expiry and renegotiation of these agreements, and the costs associated with the authorisation process, Seedvise submits that a ten year period is more appropriate.
111. The ACCC notes that the proposed arrangements are a new initiative in attracting more Grain Buyers to participate in the auto-deduction collection method, the success of which is as yet untested. The ACCC considers that a five year period of authorisation is appropriate initially. The ACCC considers that reviewing the proposed arrangements after a five year period will encourage interested parties to assess the effect of the arrangements and assist the ACCC in reviewing the public benefits and detriments potentially arising under authorisation.
112. Regarding Seedvise's concerns about the cost of authorisation, the ACCC notes that re-authorisation is less costly than the initial authorisation application, and that—should the public benefits submitted by Seedvise and accepted by the ACCC in this draft determination be realised during the term of the proposed five year authorisation—it is unlikely that the re-authorisation process would be a significant burden on Seedvise. If in five years' time Seedvise applies for re-authorisation and, with the benefit of having observed the arrangements for five years, the ACCC considers that the public benefits continue to outweigh the public detriments, the ACCC is able to re-authorise for a longer period of time.

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<sup>18</sup> Subsection 91(1).

113. Further, the ACCC notes that if, as submitted by Seedvise, its current EPR Agent agreements are set to expire in August 2016 and that the standard EPR Agent agreements have a three year term, the next set of agreements entered into will expire at around the same time as a five year authorisation, which may allow future EPR Agent agreements to align with ACCC re-authorisation.
114. The ACCC also notes that, regardless of the term of authorisation granted by the ACCC, should WAFF or any other interested parties have concerns with the proposed conduct during the term of the authorisation they are able to bring those concerns to the ACCC's attention. The ACCC would have regard to any such concerns raised in deciding whether an earlier review of the authorisation was warranted.
115. Accordingly, the ACCC proposes to grant authorisation for five years.

## **Draft determination**

### **The application**

116. On 17 January 2014, Seedvise Pty Ltd lodged an application for authorisation A91406 with the ACCC. Application A91399 was made using Form B Schedule 1 of the Competition and Consumer Regulations 2010. The application was made under subsection 88 (1 and 1A) of the CCA for authorisation to enable the applicants to collectively negotiate (or bargain) 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 will include the Collection Fee that Royalty Managers pay to Grain Buyer in exchange for the EPR collection service.
117. The Applicants seek authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the CCA.
118. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### **The net public benefit test**

119. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed arrangements for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

### **Conduct for which the ACCC proposes to grant authorisation**

120. The ACCC proposes to authorise Seedvise Pty Ltd to collectively bargain on behalf of participating Royalty Managers with Grain Buyers over the terms and conditions on which End Point Royalties are collected and remitted to Royalty Managers (i.e. EPR Collection Agreements), including the Collection Fee paid to the Grain Buyers.
121. The ACCC proposes to grant authorisation for Seedvise's collective bargaining group to negotiate separately with individual Grain Buyers, not with Grain Buyers as a group. Accordingly, EPR Collection Agreements negotiated under the authorised conduct will be specific to each Grain Buyer.
122. The ACCC proposes to extend authorisation to Royalty Managers that nominate Seedvise as their EPR Agent in the future.

123. The ACCC proposes to grant authorisation A91406 for five years.

124. This draft determination is made on 15 May 2014.

### **Further submissions**

125. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.

## Attachment A - Summary of relevant statutory tests

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.