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**Submission by the Agricultural Business Chamber (Agbiz) on the  
Draft National Policy on Intellectual Property, published in the  
Government Gazette No. 36816, Notice 918.**

**To the Department of Trade and Industry (*the dti*)**

For Attention: Ms Meshendri Padayachy, [MPadayachy@thedti.gov.za](mailto:MPadayachy@thedti.gov.za)

***Background***

The **Agricultural Business Chamber (Agbiz)** is a voluntary and dynamic **association of agribusinesses** with the mission to negotiate and position for a favourable agribusiness environment so that its members can perform competitively and profitably, and prosper as a result. The function of Agbiz is also to ensure that agribusinesses plays a constructive role in the country's shared economic growth, development and transformation, and to create an environment in which agribusinesses of all sizes and in all sectors can thrive, expand and be competitive.

The turnover/exposure of members of Agbiz is in excess of R200 billion per annum and is a very significant employer, making it not only a major role player and stakeholder in the agro-food and related industries of South Africa, but also in the economy of South Africa as a whole. Members of Agbiz are active in all the major agro-food value chains in South Africa, including the grain, wine, fruit, red meat, poultry, dairy and vegetable value chains. As the principal representative of agribusiness in South Africa, Agbiz represents

the views of its members in a number of national structures and bodies, both statutory and non-statutory.

## ***Introduction***

Agbiz notes and welcomes the opportunity to comment on the gazetted draft National Policy on Intellectual Property, as published in the Government Gazette No. 36816, Notice 918, and recognises the intention of the Policy to improve on upholding and strengthening Intellectual Property Rights.

**Agbiz advocates for strong protection and recognition of Intellectual Property rights as these incentivise R&D investment, innovation and technology development necessary to stimulate economic growth and employment.**

A number of Agbiz members hold registered Plant Breeders' Rights, which is an internationally and locally well-recognized form of Intellectual Property. Many other members hold patents (agrochemicals), which is another form of Intellectual Property.

- 1.1 Plant breeders' rights in South Africa are currently protected under the Plant Breeders' Rights Act 15 of 1976 (**Plant Breeders' Rights Act**). We are aware that a draft Plant Breeders' Rights Bill has been prepared (the **Bill**). However, we are not aware of the status of the Bill.
- 1.2 The Draft IP Policy appears to propose, at page 17 under Chapter 1, Paragraph G (Plant Variety Protection (Patents in Plant Varieties)) and at page 22 under Chapter 3 (Agricultural and Genetic Resources), as follows –
  - 1.2.1 "...developing countries should not provide patent protection for plants and animals as is allowed under the [Agreement on Trade Related Aspects of Intellectual Property Rights (**TRIPS Agreement**)]", as patents impose restrictions on the use, exchange and resale by farmers and researchers;
  - 1.2.2 "...specific exceptions to the exclusive rights of plant breeders and research must be provided for";

- 1.2.3                    “[i]t is important that a clear exception to [any] patent right [should be] included in the legislation to allow farmers to reuse the seed”;
- 1.2.4                    “[t]he [plant variety protection (PVP)] system that South Africa follows should be amended in the context of the recommendations [contained in the Draft IP Policy]...”;
- 1.2.5                    the “Plant Varieties Act” (which is presumably a reference to the Plant Breeders’ Rights Act), should be amended to allow farmers to “reuse, resell and exchange seeds in the spirit of the [International Treaty on Plant Genetic Resources for Food and Agriculture] and to suit the South African conditions”.

## 2.     **Agbiz Comment**

- 2.1                    In Agbiz view, the stated intention of the Draft IP Policy, particularly in the context of plant variety protection, appears to be inappropriate within a South African context, and any legislative change adopted as a result of the recommendations contained in the Draft IP Policy, as outlined above, may, in addition to having a number of adverse unintended consequences for the South African economy, be susceptible to legal challenge. In this regard, Agbiz makes the following submissions –

- 2.1.1                    It is likely (as outlined in **Part A** below), that the recommendations of the Draft IP Policy (which would likely be implemented in the form of an amendment Act), would result in the infringement of all industry stakeholders’ constitutional property rights in terms of section 25 of the Constitution which in turn, Agbiz submits, may result in any legislative changes, as proposed in Chapter 3 of the

Draft IP Policy, being subject to legal challenge;

2.1.2 There is a real likelihood that the stated intention of the Draft IP Policy will have the effect of disincentivising investment and research, development and innovation in South Africa, particularly in the context of plant varieties. For example, it is unlikely that a multinational organisation will permit its germplasm to be introduced into South Africa, nor will it be inclined to invest in research, development and innovation in this country, where it cannot ensure that it will enjoy appropriate and adequate protection;

2.1.3 the probable disinvestment or reduced future investment by multinational organisations will be likely to have the unintended consequence of negatively affecting the Millennium Development Goals and the Department of Agriculture, Forestry and Fisheries' stated strategic aim of ensuring food security; and

2.1.4 The probable disinvestment or reduced future investment by multinational organisations will be likely to have further unintended consequences, such as job losses and, contrary to the stated intention of the Draft IP Policy, adverse effects on a number of empowered agricultural enterprises (which may be negatively affected as a result of the disinvestment or reduced future investment).

2.2 This submission is divided into two parts:

2.2.1 **Part A** sets out the Agbiz submissions with respect to the recommendations contained in Chapter 3 of the Draft IP Policy in the context of a possible arbitrary deprivation of plant breeders'

property (i.e. plant breeders' intellectual property rights) in terms of Section 25 of the Constitution, which may result in any legislative changes (such as an amendment Act), as proposed in the Draft IP Policy, being subject to legal challenge.

- 2.2.2                    **Part B** sets out additional specific submission in relation to various recommendations included in the Draft IP Policy in relation to the protection of plant breeders' rights and plant varieties.

## **PART A: ARBITRARY DEPRIVATION OF PLANT BREEDERS' PROPERTY**

### **3.     The Constitutional right to property**

- 3.1                    Section 25 of the Constitution protects (1) the right not to be deprived of property except in terms of law of general application that does not permit the arbitrary deprivation of property, and (2) the right that property will not be expropriated except in terms of a law of general application, for a public purpose or in the public interest and on payment of compensation, the amount of which and the time and manner of payment which, if not agreed, is just and equitable.

- 3.2                    While the term "property" has not been defined in the Constitution, or in Section 25 of the Constitution specifically, Agbiz submits that it is generally accepted by the courts that the failure to mention a particular class or kind of property (such as intellectual property) in the property clause does not necessarily exclude that class of property from protection under section 25, and that intellectual property rights are, in fact, protected under section 25 of the Constitution. In Agbiz' view, this inclusion is generally justified on the following three grounds: (i) a blanket exclusion of incorporeal property from the protection of Section 25 would be a very crude way of balancing competing private and public property interests; (ii) foreign law generally favours a wide interpretation; and (iii) intellectual

property rights are important to the economic development of South Africa.

- 3.3 As such, Agbiz submits that intellectual property rights in the form of patents, trademarks, copyright and plant varieties / plant breeders' rights are likely to be recognised by our courts as constitutional property, to the extent that this question is ever directly addressed by the courts. In other words, Agbiz submits that the protections provided to plant breeders in terms of the Plant Breeders' Rights Act, and in particular in terms of Section 23 of the Plant Breeders' Rights Act, would likely fall within the ambit of "property" for the purposes of Section 25 of the Constitution.

#### 4. **Deprivation of property**

- 4.1 To the extent that plant breeders' intellectual property rights are recognised as property for the purposes of Section 25 of the Constitution, Agbiz submits that a deprivation of those rights would infringe plant breeders' constitutional rights to property.

- 4.2 Agbiz submits that the term "deprivation" is given a very wide meaning in South African law, and includes any interference with the use, enjoyment or exploitation of private property (although a deprivation will generally fall short of actual acquisition of the property). In this regard, Agbiz submits that the recommendations contained in Chapter 3 of the Draft IP Policy would, *prima facie*, interfere with the use or enjoyment of plant breeders' rights and would thus constitute a deprivation of property. In other words, the recommendations in Chapter 3 of the Draft IP Policy propose that the existing legislation should be amended to allow farmers to "reuse, resell and exchange seeds", which would fundamentally interfere with the use and enjoyment of plant breeder's rights. This, in turn, would result in a significant destruction of value in the enterprises conducted by plant breeders, given that their value lies primarily in the intellectual property that they develop and sell to commercial farmers on

an annual basis.

## **5. Arbitrary deprivation of property**

5.1 While it is permissible, in terms of Section 25 of the Constitution, for a law of general application to deprive a person of property, such deprivation must not be arbitrary. In Agbiz view, the recommendations contained in Chapter 3 of the Draft IP Policy are, if implemented, likely to amount to an arbitrary deprivation of plant breeders' rights in terms of section 25(1) of the Constitution, for the following reasons –

5.1.1 it is unreasonable to place the economic burden of allowing the reuse, reselling and exchange of seeds by farmers onto the plant breeders, particularly as plant breeders' income primarily accrues from the sale of their propagating material;

5.1.2 private sector research, and the research conducted by plant breeders, is incentivised by the protection of their rights, which in turn incentivises economic development in South Africa (i.e. plant breeders will invest more money in researching better and more effective propagating material if plant breeders' rights, and therefore their income and the return on their investment, is protected);

5.1.3 the Millennium Development Goal to eradicate extreme hunger and poverty is fundamentally based on the issue of food security; depriving plant breeders' of the protection of their rights is likely to have the unintended consequence of reducing investment, and research, development and innovation, in respect of plant varieties and improvements on those plant varieties (including increased yield), which could negatively affect food security and, in turn, the

achievement of the Millennium Development Goals and the Department of Agriculture, Forestry and Fisheries' stated strategic aims in this regard;

5.1.4 there are less restrictive ways in which to assist farmers in developing countries, such as through educational programmes, particularly in respect of better farming practices, or through the donations of seeds;

5.1.5 there is no demonstrated or rational connection between allowing farmers to reuse, resell and exchange seeds developed by plant breeders and the protection of farmers in developing countries in respect of the selection, development and conservation of those farmers' indigenous varieties (i.e. the kind of crops generally grown by poor farmers); and

5.1.6 despite the claims in Chapter 3 of the Draft IP policy that plant varieties protection poses a threat to the practices of many farmers in developing countries of reusing, exchanging and reselling seeds, farmers in South Africa are, in any event, already (and have been for a number of years) prohibited from exchanging and reselling seeds developed by plant breeders in South Africa in terms of the current legislative framework.

5.2 For the reasons given above, Agbiz submits that there seems to be a high risk that the purpose of any deprivation of plant breeders' rights will not be legitimate or compelling given South Africa's unique context and the importance of economic development and research in South Africa. In Agbiz' view, it would further be unreasonable to place the burden of the deprivation on the plant breeders without the inevitable occurrence of a decrease in income for the plant breeders and, in turn, in the funding allocated by plant breeders for research, development and innovation in



respect of plant varieties and improvements to plant varieties. As such, Agbiz submits that the proposed deprivation contemplated in the recommendations contained in Chapter 3 of the Draft IP Policy is arbitrary. Agbiz submits further that it is highly improbable that a deprivation that is in conflict with Section 25 could be saved as a reasonable and justifiable limitation in terms of Section 36 of the Constitution (despite Section 25 not being explicitly excluded from the limitation analysis in terms of Section 36).

- 5.3 As such, any legislative changes to the current regulatory framework in South Africa (such as an amendment Act), as proposed in Chapter 3 of the Draft IP Policy, is likely be the subject of a legal challenge on the basis that such legislative changes will amount to an arbitrary deprivation of property and, accordingly, an infringement of Section 25(1) of the Constitution.

## **PART B: ADDITIONAL SUBMISSIONS**

### **6. Submission: Objectives of the Draft IP Policy**

- 6.1 Agbiz submits that a strong intellectual property system, which enhances the integrity and credibility of intellectual property rights granted under that intellectual property system and which complies with the applicable principles of international instruments (such as the TRIPS Agreement), will assist in achieving and realising the objectives set out in the Draft IP Policy.
- 6.2 Similarly, it is submitted that the recognition in the Draft IP Policy that intellectual property should promote research, development and innovation in all sectors should be seen as an important element of, and an underpinning principle of, the Draft IP Policy. However, Pioneer does not agree with the view that appears to permeate the Draft IP Policy (namely, that a strong system of intellectual property protection is a

barrier to the realisation of the objectives of economic development and increased innovation). To the contrary, Agbiz believes that a strong system of intellectual property protection is fundamental to achieving these objectives. In this regard, Agbiz submits that the prospect of obtaining appropriate and adequate protection of intellectual property rights is a pre-requisite for investment in research, development and innovation, particularly in the context of plant varieties, the cost of which is generally high.

**7. Submission: Chapter 1, Paragraph G (Plant Variety Protection (Patents in Plant Varieties))**

In response to the recommendations set out in Paragraph G of Chapter 1 of the Draft IP Policy, Pioneer makes the following submissions:

- 7.1 The statement that South African legislation should not be averse to “access to technology” for technological advancement and climate change must be balanced against a plant breeder’s rights to the technology developed by that person, most often at considerable cost to that person. The protection of these rights is fundamental to the promotion of investment in research, development and innovation in all sectors (which is, in fact, one of the objectives set out in the Draft IP Policy). The protection of plant breeders’ rights and the promotion of investment in research, development and innovation will, in turn, promote technological advancement, access to technology, and economic growth. The merit of Agbiz submission in this regard appears to be recognised in the recommendations contained Chapter 3 of the Draft IP Policy which provides that “...since South Africa has a growing biotechnology-related sector, it *must* allow certain types of patent protection in this area” (italicised emphasis added).
- 7.2 The statement that plant breeders’ rights should not be granted at the

expense of other traditional agricultural systems or natural seeds and plants must be seen in the light of the existing South African plant variety protection regime, as well as the regime contemplated in the Bill. The Plant Breeders' Rights Act and the Bill set out clear requirements for the protection of plant breeders' rights: the Plant Breeders' Rights Act provides for the protection of any prescribed plant if that plant is new, distinct, uniform and stable, while the Bill provides for the protection of all plants, not only prescribed plants (as is the case in the current Plant Breeders' Rights Act), excluding fungi and algae, if that plant is new, distinct, uniform and stable and has an acceptable variety denomination. Accordingly, the current and proposed regimes do not operate at the *expense of* other traditional agricultural systems or natural seeds and plants, but rather aim to protect those plants and plant varieties that are new, distinct, uniform and stable (i.e. the current and proposed regimes aim to protect a plant breeder's right to the technology developed by that person).

## 8. **Submission: Chapter 3 (Agriculture and Genetic Resources)**

In response to the recommendations set out in Chapter 3 of the Draft IP Policy, Agbiz makes the following submissions:

- 8.1 The Union for the Protection of New Varieties of Plants (**UPOV**) treaties adopt a *sui generis* system of protection (that is, a system that is unique, or of its own kind) especially tailored to the needs of plant breeders. The TRIPS Agreement requires World Trade Organisation members to protect new plant varieties using patent rights, a *sui generis* system or some combination thereof. With respect to the statement that developing countries should not provide patent protection for plants and animals as is allowed under the TRIPS Agreement, Agbiz notes that the South African Patents Act 57 of 1978 currently prevents the patenting of any variety of animal or plant or any essentially biological process for the production of

animals or plants, not being a micro-biological process or the product of such a process. Instead, plant varieties are protectable under the Plant Breeders' Rights Act. Thus, what is sought to be achieved by this recommendation is already essentially catered for under South African law.

8.2 Chapter 3 of the Draft IP Policy also appears to suggest that "...UPOV is not suitable for developing countries that do not have significant commercial agriculture". In this context, Pioneer submits that South Africa, unlike other developing countries, has a well-developed commercial agricultural sector, and that this statement should thus, arguably, not be applicable in a South African context.

8.3 Insofar as the recommendation that specific exceptions to the exclusive rights of plant breeders must be provided for is concerned, Agbiz notes that the Plant Breeders' Rights Act currently recognises certain limited exceptions to the rights of plant breeders in respect of propagating material (including the so-called **Farmer's Right**<sup>1</sup>). The Farmer's Right also appears in the Bill, albeit in an amended form. Accordingly, the current and proposed regimes appear to address the imperative identified in this particular recommendation. In essence, this means that farmers have the right under the current Plant Breeder's Rights Act to replant seed from harvested grain on their farms.

8.4 With respect to the recommendation that the plant varieties protection regime followed by South Africa should be amended (i.e. to allow farmers to reuse, resell and exchange seeds), we reiterate our submissions set out

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<sup>1</sup> Where a farmer who on land occupied by him or her uses harvested material obtained on such land from that propagating material for purposes of propagation, provided that harvested material obtained from the replanted propagating material shall not be used for the purposes of propagation by any person other than that farmer.

in **Part A** of this document. Agbiz submits further that the “South African conditions” considered in this particular recommendation must, in accordance with the objectives of the Draft IP Policy, take into account that a strong intellectual property promotes research, development, innovation, technological advancement and economic growth.

8.5 Finally, with respect to the final two recommendations set out in Chapter 3 of the Draft IP Policy, while Agbiz welcomes the call for additional funding to be allocated to public sector research in relation to agricultural development, Agbiz submits that the current regulation of competition in South Africa is robust and fully equipped to address all relevant matters which may arise in that regard.

## 9. **Conclusion**

Agbiz appreciates the opportunity to comment on the Draft IP Policy and is committed to working, and engaging further, with the Department of Trade and Industry and government with a view to finding a commercially feasible approach to the imperatives identified in the Draft IP Policy, which will be beneficial to all stakeholders.



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Dr John Purchase

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