

ABRI Discussion paper

**The responsibilities of breed societies for the
management of herdbooks in relation to pedigree
information and genomics.**

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Introduction

Advances in genomic testing are creating opportunities for closer or different analysis of animal genetics than in the past. This may cause discoveries of animals registered in herdbooks which current technology and practice identifies as not qualifying to be registered in a particular class or not qualifying at all to be registered in the herdbook.

As the custodians of herdbooks breed societies have particular legal responsibilities relating to the integrity of their breed's herdbook. This brief discussion paper will raise some of the issues and legal responsibilities breed societies have concerning the management of their herdbooks against the backdrop of the advances in genomic testing technology.

The issues

A number of issues arise in the new genetic testing landscape regarding the management and maintenance of a herdbook. Those issues include:

- What does a breed society do in circumstances where a complaint is made that an animal is incorrectly registered in the herdbook and the complainant claims they have genetic test results to prove it?
- What does the breed society do where the society itself has information suggesting that an animal may not meet the standards necessary for it to be registered in the herdbook?
- What does a breed society do when a complainant seeks proof that a particular animal has the genetic characteristics permitting it to be registered in the herdbook?
- What are the obligations that a breed society has to inform members or the public concerning an amendment to a registration in the herdbook?
- What procedures should a breed society follow if it decides to investigate complaints or queries concerning the registration of an animal in the herdbook?
- Are there any legal obligations that a breed society must follow when investigating doubts about an animal's registration?
- Can a breed society unilaterally amend a herdbook if an animal's registration is proven to be incorrectly recorded in the herdbook?
- What implications, if any, arise if unilateral action is taken by a breed society to amend a herdbook?
- What is the nature of the representations made by a breed society in relation to registration of an animal in the herdbook?
- Is doing nothing an option when faced with allegations that an animal is incorrectly registered in the herdbook?

Is doing nothing an option?

The simple and short answer is, "no".

There are significant risks for a breed society encountering the first three issues identified above and not responding. If an animal is incorrectly registered in a herdbook then the breed society is at risk of allegations that it is:

- in breach of its constitution/rules/by-laws;

- engaging in misleading and deceptive conduct and making false representations under the Australian Consumer Law;
- breaching its duty of care in the management and maintenance of the herdbook; and
- breaching contracts it may have with commercial partners (if applicable).

These allegations can be made even if the breed society has acted in good faith at all times, including at the time of registration of the animal.

Any person relying on the integrity of the herdbook that subsequently suffers loss due to a breakdown in the integrity of the herdbook exposes a breed society to being sued and a claim for damages made. If the affected animal's genetics have been widely used across more than one generation of offspring, potential losses could be large. The breed society could then be the target of a legal claim for those losses, because the breed society managed the herdbook and publicly 'guaranteed' the genetic status of the animal.

Breed Society herdbook integrity

As managers of herdbooks for breeds, each breed society is representing to its members, the industry, to wholesale and retail purchasers of the breed and of associated branded products, and indeed to the world at large, that animals on the register:

- meet the particular breed society's requirements for registration;
- have a particular genetic heritage; and
- have a stated specific purity of genetic makeup.

In short, as the custodian of a herd book a breed society is guaranteeing the integrity of the herdbook. The integrity of the herdbook allows both members of a breed society and the public to confidently rely on the representations made in the herdbook when making commercial and financial decisions.

Obligations imposed on breed societies

As the custodian/manager of a herdbook a breed society has a number of legal obligations imposed on it including:

- a duty of care to members and the public who have access to the herdbook to maintain it to an appropriate standard;
- avoiding making false representations in the herdbook;
- not engaging in misleading and deceptive conduct relating to the herdbook or any information contained in it; and
- ensuring that it complies with any contractual obligation created under the relationship it has between its members and the society.

To meet the above obligations a breed society must ensure that it:

- maintains an accurate, complete and up-to-date herdbook;
- uses the most accurate genetic/genomic technological processes available to promote the integrity of the herdbook i.e. outdated processes from previous industry standards must be

abandoned in favour of current scientific knowledge and technology, provided that this new standard has industry and scientific acceptance; and

- takes action when scientific evidence suggests an animal is incorrectly registered to amend the herdbook.

These obligations are aimed at ensuring that anyone accessing the information in the herdbook can rely on the representations made in it to the extent that in so relying on that information they do not suffer any detriment.

Insurance

Breed societies should review their insurance coverage to ensure:

- liability arising because of errors in the herdbook, however made, are covered by professional indemnity insurance, or other insurance cover as recommended by the insurance provider or broker; and
- the Directors & Officer's insurance policy that breed societies should have covers the same liability.

Foundational genetic data

Breed societies ought to ensure that the foundational breed genetic data, against which animals are compared, is accurate and accepted beyond reproach. This is essentially ensuring the definition of the breed used by the society is accepted by the members of the society and the industry. Risk arising from this issue should be modest given that the societies will have considered this at length at the time of establishing the herdbook, and as such the definition ought to be thorough and well thought out.

Brand liability

In addition to legal liability is the risk to the integrity of the breed society, its brand and reputation in the industry, with flow-on risks to the brand of the breed in circumstances where the integrity of the herdbook is in doubt. If members, the industry and the public have doubts as to the integrity of the herdbook, this necessarily causes uncertainty as to the breed's integrity. It should not be forgotten that the herdbook is the foundation of all faith in the breed as a distinct identity for the animals, separate from each other breed.

Potential changes (if applicable) to promote integrity of the herdbook

A number of matters should be attended to by breed societies to promote the integrity of their herdbooks including:

- ensuring that their constitutions, rules or by-laws (depending upon the structure of the breed society) make provision for:
 - the board to direct that an animals registration in the herdbook can be investigated;
 - amendments of the herdbook including cancellation of an animals registration;
 - imposing an obligation on members to disclose all relevant material/results/information in relation to the genetics of their animals registered in the herdbook;

- having policies in place which provide for a transparent and procedurally fair investigation process when allegations arise concerning the registration of an animal in the herdbook; and
- having a transparent and fair appeals policy and procedure for the member/animal owner to object to the cancellation or amendment of an animal's registration in the herdbook.

A note on natural justice

A member must be afforded natural justice i.e. procedural fairness, in the process of amendment/cancellation of an animal's registration in the herdbook and in any appeals procedure. If not, the member may have a legal cause of action to have the decision to cancel/amend the animal's registration reviewed by the Supreme Court. Procedural fairness requires, among other things, that:

- the member receives written notice of intended investigation and any proposed action that may arise following the investigation such as cancellation or deregistration of an animal's registration in the herdbook;
- giving the member a real opportunity to "be heard" that is make submissions, call evidence including provide test reports if applicable to the decision maker prior to deregistration and respond to adverse findings; and
- the relevant policies and procedures must be documented and made available to all members, and must be authorised in the Constitution/rules/by-laws.

The Supreme Court is reluctant to second guess the merits of a decision which is made in an apparently fair way. However, it is quite willing to order that a decision was reached in a way which did not give the affected person natural justice.

The prompt, fair and transparent action of a breed society executive, supported by the board, in removing ineligible animals from the herdbook, will reinforce the integrity of the breed and herdbook. Action should be taken promptly (whilst leaving enough time for procedural fairness) to ensure potential accruing liability caused by the error is minimised.