



**OMBUDSMAN
TASMANIA**

**Report on the investigation into a complaint by
ANTHONY & REBECCA KEACH (trading as Keach Pastoral)
against
THE DEPARTMENT OF JUSTICE &
THE DEPARTMENT OF HEALTH & HUMAN SERVICES**

[File 0607017]

OCTOBER 2007

TABLE OF CONTENTS

1. INTRODUCTION	1
2. THE COMPLAINT AND JURISDICTIONAL ISSUES	2
2.1 The complaint	2
2.2 The issues covered in this report	2
3. ADMINISTRATIVE ACTION BY THE PACB	4
3.1 General factual and regulatory background	4
3.2 Threat of prosecution – chronology	5
3.3 Commentary	14
4. LICENSING ISSUES	19
4.1 Licence administration	19
4.2 The grower licence	19
4.3 The processor's licence	21
4.4 Controlling the area sown	21
5. RECOMMENDATIONS	26

1. INTRODUCTION

Tasmania is a world leader in the commercial production of the opium poppy (*Papaver somniferum*), and now supplies about half of the global medicinal opiate market. The State is ideally suited to the production of this crop, with the security offered by its remoteness and island status, with its political stability, and with its highly suitable climate and highly fertile soils.

Having started in 1970/1, when approximately 560 ha of poppies were grown, the Tasmanian poppy industry is now worth in excess of \$90 million per annum in an average year. In the 2005/6 season, 700 growers grew approximately 10,000 ha of poppies for two processing companies, Tasmanian Alkaloids Pty Ltd (TA) and GlaxoSmithKline Ltd (GSK).

The industry is overseen by the Poppy Advisory & Control Board (PACB), an administrative entity falling under the Department of Justice (DOJ). Amongst its other tasks, the Board makes recommendations to the Minister administering the *Poisons Act 1971* (the Minister for Health and Human Services) on the licensing of growers. The opium poppy is a prohibited plant under the Act, and it is an offence to grow or cultivate the poppy without a licence to do so, and other than in accordance with the conditions and restrictions attaching to such a licence.

The PACB operates in an international milieu, in that the State's poppy industry is effectively Australia's poppy industry, and the industry needs to operate in compliance with the *Single Convention on Narcotic Drugs 1961* (the *Single Convention*), and the subsequent *1972 Protocol Amending the Single Convention*, to which Australia is a signatory. The operation of these two instruments is overseen by the International Narcotics Control Board (INCB). Internationally, Tasmania has earned a reputation for having a tightly regulated and well managed industry.

This report arises from the refusal of a licence to a poppy grower for the 2005/6 growing season. The decision to refuse the licence was made by a delegate of the Minister administering the *Poisons Act.*, based upon the conclusion that the grower had grown more than he had contracted with TA to grow in the previous growing season. By reason of the provisions of the *Ombudsman Act 1978*, I am not able to question the merits of that decision, but I have investigated the process followed by the PACB prior to the making of the decision, and some aspects of the licensing system which I consider to be deficient. This report is the result of those investigations. It criticises the process followed by the PACB, and makes recommendations for adjusting the licensing system.

2. THE COMPLAINT AND JURISDICTIONAL ISSUES

2.1 The complaint

On 20 July 2006 I received a complaint under the *Ombudsman Act* from Anthony and Rebecca Keach, trading as Keach Pastoral Co, about the denial to Mr Keach of a licence under s 52 of the *Poisons Act* 1971 to grow and cultivate opium poppies for the 2005/6 growing season. The complaint was nominally made against the DOJ and the Department of Health & Human Services (DHHS). The decision of which the Keachs complained was one taken by Mr Richard Bingham on 8 November 2005 as a delegate of the Minister administering the *Poisons Act*. It was taken against the background of action taken by the PACB. I regard the complaint as essentially being against Mr Bingham and the PACB.

This report does not deal with the merits of Mr Bingham's decision. I do not have power to do so, by reason of the combined effect of s 12(5)(a) of the *Ombudsman Act* and s 23AA(4) of the *Acts Interpretation Act 1931*. The first of these provisions states that the Ombudsman is not entitled to question the merits of any decision made by a Minister, and the second states that a delegated function or power that is duly exercised by a delegate is to be taken to have been exercised by the delegator.

I note in passing that s 12(5)(a) does not forbid me from dealing with the process followed by a Minister or a Ministerial delegate in making a decision, so long as that does not involve questioning the merits of the decision. This would enable me to deal, for instance, with procedural fairness issues. I note in this respect that the Keachs raised the concern with me that Mr Bingham had previously been the Chairman of the PACB, raising a possible perception of bias. However, this is an issue which Mr Bingham raised with the Keachs' solicitor, Sean McElwaine, prior to Mr Bingham making his decision, and Mr McElwaine stated at the time that he had no objection on this ground to Mr Bingham proceeding.

I should also mention in passing that the Keachs applied to the Supreme Court under the *Judicial Review Act 2000* for the review of Mr Bingham's decision - see *Keach v. Minister for Health and Human Services* [2006] TASSC 28. (The application was unsuccessful.) Section 20(1) of the *Ombudsman Act* provides -

"Where an aggrieved person has exercised, or exercises, a right to cause the action to which a complaint relates to be reviewed by a court or by a tribunal established under an Act, the Ombudsman shall not investigate, or continue to investigate, the action unless he is of the opinion that there are special reasons justifying its investigation or its further investigation."

The action which was the subject of the Court proceedings was Mr Bingham's decision, not any action by the PACB. This provision has not therefore been relevant to the investigation of the issues dealt with in this report.

2.2 The issues covered in this report

The report addresses two issues only –

- whether the processes followed by the PACB prior to the making of Mr Bingham's decision were fair; and
- whether the licensing system administered by the PACB needs adjustment in light of the Keach case.

3. ADMINISTRATIVE ACTION BY THE PACB

3.1 General factual and regulatory background

Under s 52 of the *Poisons Act*, it is an offence to grow or cultivate the opium poppy without a licence. Such licences are issued on an annual basis. Accordingly, a person wishing to grow poppies in a forthcoming growing season must apply to the Minister for a licence. A licence will not be issued to a person who does not have a current contract with one of the two licensed processing companies with respect to the crop. The established practice is for the grower's licence application to be submitted to the PACB by the processing company, not the grower, together with a copy of the contract between the company and the grower.

Mr Keach had two such licences for the growing season 2004/5 which were supported by a contract with Tasmanian Alkaloids Pty Ltd (TA). The first licence was issued on 2 July 2004 and the second was issued on 3 September 2004. The second licence was accompanied by a letter from the Board saying that the licence superceded the first.

Neither licence specified an area of poppies that Mr Keach was entitled to grow. Each was however expressed to be subject to General Conditions on the reverse, the first of which was that –

"Papaver somniferum is only grown on the number of hectares specified in the agreement to grow oil poppy entered into between the Licensee and TASMANIAN ALKALOIDS "

Turning to the contract between Mr Keach and TA, this did not specify any number of hectares which Mr Keach was to grow. The contract involved agreement to grow poppies "as detailed on the "Application for Licence to Grow Papaver Somniferum" pursuant to the Poisons Act (1971) Tasmania". The contract also dealt with various requirements in respect of the "Area", defined in the document to mean "that part of the Grower's land on which it has been agreed between the parties that the poppy crop is or will be sown as detailed on the Licence". All of this is at best obscure.

As it turned out, Mr Keach claimed that he had oral agreement with TA's field officer, Peter Lyndsay, to grow an area of 41 hectares. Mr Lyndsay claimed that he agreed to 39 hectares. The licence applications were unclear. The first, dated 21 June 2004, said that the area proposed to be sown was 38 hectares. The second, dated 17 August 2004, proposed an area of 16 hectares in a different location, but was endorsed with the words "Replaces lost ha from Pine One", that being the name of the paddock nominated in the first application to receive the crop. TA's sowing report to the Board stated that 39 hectares had been sown.

The origins of Mr Bingham's decision, and of my involvement, go back to a letter sent by TA to the PACB after the harvesting of the crop. That letter was dated 28 January 2005, and reported that –

- the area contracted for had been 39 hectares;
- Tony Keach had indicated to the company's field officer that "the correct area licenced (sic) and contracted had been sown";

- it had become obvious during harvesting that "the area was much larger than licenced (sic) because of the tonnage of crop harvested";
- based upon GPS mapping carried out by their field staff, the contracted area had been exceeded by 11.4 hectares, or 29%.

This led to a letter from the PACB to Mr Keach on 31 January 2005, seeking an explanation. A letter from the Board to TA of 7 February 2005 subsequently reported that the matter had been referred to Tasmania Police because of a "possible violation of the *Poisons Act 71*". A letter from the PACB to Mr Keach of 16 February 2005 subsequently confirmed police involvement, commencing –

"I write for the purpose of confirming our recent discussion which included my indication to you that the matter of possible breach of Licence under the Poisons Act 71 has been referred to Tasmania Police for their investigation."

The papers provided to me include a letter to the Manager of the PACB, Terry Stuart, from Tim Ellis QC, the Director of Public Prosecutions (DPP), dated 9 March 2005. This letter confirms advice that Mr Ellis apparently gave in conference the previous day, that a prosecution of Mr Keach would not be successful. The letter referred to circularity between the licence and the contract with TA, and the lack of certainty and precision as to the area which Mr Keach was licensed to grow.

However, the fact that no prosecution was to be instituted was not made known to the Keachs until 13 October 2005. On that day, Mr Bingham sent the Keachs' solicitor, Shaun McElwaine, by email a draft of his intended decision on whether to grant Mr Keach a licence for the 2005/6 growing season, paragraph 1.5 of which revealed that "the PACB and Tasmania Police have decided on the basis of advice from the DPP that for legal reasons a prosecution could not be sustained". The next day, on 14 October, Detective Glen Ball of Tasmania Police wrote to Mr McElwaine, saying amongst other things that –

"Having regard to Mr Ellis' advice, no proceedings were, or will be, initiated against your client for the alleged over sowing (sic) of poppies during the 2004-05 season at his 'Bluegong' property."

Between early February 2005 and mid-October 2005, the Keach's were thus under the apprehension that prosecution might occur. They chose to exercise their right to silence in these circumstances, and this they thus did until Mr Bingham had released a first draft of his decision.

3.2 Threat of prosecution – chronology

It is necessary to go into greater detail about the continued threat of prosecution between early February 2005 and mid-October 2005. The chronology of events is as follows –

- 28 January 2005** Richard Rockcliff, Field Operation Manager with TA, wrote to Terry Stuart, Manager of the PACB, claiming that Mr Keach had grown an area of poppies greater than that for which he was licensed and contracted. See above details.
- 31 January 2005** Terry Stuart wrote to Mr Keach asking various questions in relation to the allegation of oversowing. The letter concluded by drawing

attention to certain "disciplinary options" available to the Board "in regard to breaches of the Poisons Act 1971 and of licence conditions", including "prosecution and refusal of future applications for licences issued under the Act".

4 February 2005 Mr Keach replied by a letter faxed to Mr Stuart on this date. He said that he believed that he had "an explanation for the discrepancy (sic) in area" and that he was waiting for his surveyor to inspect and survey the site.

7 February 2005 Mr Stuart wrote to Rick Rockcliff of TA, telling him in part that the case had been referred to Tasmania Police for investigation.

15 February 2005 Mr Stuart and a PACB inspector, David Cullen, visited the Keach property to inspect where the poppy crop had been grown. The stubble had already been ploughed in. Since prosecution was under contemplation, and it was a term of a grower's licence that the poppy material remaining on the land be destroyed within 7 days of harvest, it is surprising that steps to accurately determine the area of the crop by survey while the stubble was still present had not been taken.

16 February 2005 Mr Stuart wrote to Mr Keach, saying that "the matter of possible breach of Licence under the Poisons Act 71 has been referred to Tasmania Police for their investigation".

17 February 2005 A survey of the crop areas was undertaken by Lester Franks Survey & Geographic Pty Ltd (Lester Franks) for the PACB and Tasmania Police.

2 March 2005 Mr McElwaine wrote to the PACB, responding to its letters to Mr Keach of 31 January and 16 February, amongst other things asserting his client's right to remain silent and not answer the PACB's questions. He asked the Board to advise the relevant Tasmania Police officers of Mr Keach's election to maintain silence, and asked that all future correspondence be with him.

4 – 8 March 2005 Statements were obtained by Tasmania Police between these dates from 3 TA employees (Lindsay, Rockcliff and Jolly), and the harvesting contractor, Cameron Bryant. The papers provided to me also include a statement by Terry Stuart, manager of the PACB, dated 4 March 2005 and a statement of DA Cullen dated 17 February 2005.

9 March 2005 The DPP wrote to the PACB, confirming advice given to Mr Stuart and John Galloway, Chief Pharmacist in the DHHS, the previous day. See details given above in section 2.1 of this report. The letter stated –

"I do not believe that a prosecution of Mr Keach would be successful. The basic problem is that the licence does not state what area is permitted to be sown, so that it can be said that an excess is prohibited."

The letter went on to say that the relevant condition in the licence, limiting the growing of poppies to the number of hectares "specified in the agreement" with TA, was "incapable of supporting a criminal prosecution which requires certainty and precision". It concluded –

"As for the future licensing of Mr Keach, it would be open for the Minister or a delegate to seek an explanation of the apparent discrepancy between the area applied for and that (on the available evidence) which was sown. I note that Mr Keach's own letter, faxed 4 February 2005, appears to acknowledge and claim to be able to explain a "discrepancy", and it is a relevant matter for the Minister to be concerned about."

16 March 2005

A meeting took place of a "Special Subcommittee" of the PACB to discuss the Keach case. The Chairman of the subcommittee was the Chairman of the PACB, Dr Peter Patmore. The others present were Detective Inspector Glen Ball, Officer in Charge of the Drug Investigation Service of Tasmania Police, Sergeants Darren Hill and Scott Flude from the same branch of Tasmania Police, John Galloway, Terry Stuart and Michael Hart, Manager of the Vegetables Branch of the Department of Primary Industries, Water and Environment.

The minutes of the meeting included the following –

"The Chairman outlined the advice received from Crown Law with regard to the prospect of prosecution for breach (sic) of condition 1 of the Licence issued to Tony Keach. The advice received indicated that the Licence, condition 1, through its attempt to limit the number of hectares, is incapable of supporting a criminal prosecution, which requires certainty and precision.

*Following lengthy discussion the Subcommittee resolved that :
Acting on Crown Law legal advice and exercising its discretion, the Subcommittee would not, at this time, recommend proceeding (sic) against Anthony Charles Keach for breach (sic) of Licence number 348, general condition 1."*

The words "at this time" in this last paragraph are curious, in that the advice of the DPP had effectively closed off any potential for a prosecution for a breach of the condition to be undertaken.

The minutes record various other decisions, but no reference was made to the possibility that any further investigation would be carried out by the police. It would seem that there was little prospect of any future prosecution at this point.

23 March 2005

The Chairman of the PACB, Dr Peter Patmore, wrote to Mr McElwaine in a letter which includes the following passages –

"Since receiving your letter the Board has obtained legal advice in relation to the crop in excess of the contracted 39 hectares. The Board

accepts that for forfeiture to occur your client must be found guilty of an indictable offence.

The Board is also of the view that it cannot demand withholding of payment to your client. However, if a prosecution was successful the Crown would seek the funds payable to Mr Keach in relation to the excess hectares.

The decision to prosecute is a matter for Tasmania Police.

The Board has contacted Tasmanian Alkaloids and informed them of this position

However, this issue has two aspects; the first is the criminal question that has been referred to Police; the second is the need for the Board to fully investigate this matter and determine whether your client should be issued a licence for future poppy cultivation."

I comment that there is no evidence in the documentation provided to me by the Board that any consideration was given to any indictment of Mr Keach for a crime, at any time. Further, as just indicated, it had just been agreed at the meeting of the Special Subcommittee on 16 March (at which the investigating police officers were present) that a prosecution for breach of licence would not be recommended, in light of the advice received from the DPP. The above letter properly brought to Mr Keach's attention, through his solicitor, that the Board would need to be satisfied of his fitness to obtain a licence under s 52 in the future, but gave the misleading impression that prosecution for growing "excess hectares" remained a real possibility.

1 April 2005

Shaun McElwaine replied to Dr Patmore, saying amongst other things

—

"Your letter is disappointing. Perhaps I did not give enough detail in my earlier letter. The problem which my client faces is that there is a police investigation, and he will not be making a statement nor participating in an interview. What follows therefore is written strictly without prejudice and must not be used in any subsequent prosecution proceeding."

The PACB did not respond to this letter, to disabuse Mr McElwaine of his belief that the police investigation was current.

4 May 2005

A meeting of the PACB took place on this date. The minutes record discussion of the Keach case, but do not refer to any current investigation. Inspector Glen Ball was a member of the Board, and is recorded as having been present.

1 June 2005

Dr Patmore wrote again to Mr McElwaine informing him that the *"Board is now commencing investigations into the circumstances surrounding your clients growing of 50.4 hectares of Papaver*

Somniferum". He stated that the *"investigation is preliminary to preparing a report to the relevant minister"*. He said that statements would be obtained from Peter Lindsay, Peter Jolly and Rick Rockliff from Tasmanian Alkaloids and from Terry Stuart.

Dr Patmore's letter invited Mr Keach to nominate other individuals from whom statements might be taken, and indicated that after statements had been obtained the Board would be contacting Mr McElwaine with details of the report that it was going to provide to the Minister, giving Mr Keach the opportunity to comment in the event that the report was critical of Mr Keach or made any adverse recommendations.

I interpolate here that there is no evidence in the papers provided to me that the Board carried out any significant investigation of Mr Keach's activities in the 2004/5 growing season after the commencement of June 2005. What it did do was write to TA on the same date, seeking the permission of Messrs Lindsay, Jolly and Rockliff to have access to the statements already obtained by Tasmania Police. The Board apparently received copies of the statements thereafter.

- 3 June 2005** The PACB received an application from Mr Keach for a licence for the 2005/6 growing season. This was lodged on his behalf by GlaxoSmithKline Limited.
- 7 June 2005** The Manager of the PACB wrote to Mr Keach acknowledging his licence application, informing him that *"the Board is yet to make a determination as to your suitability to be granted a licence"* and that *"the Board will be in a position to make a decision after it has reviewed your activities in the last growing season"*.
- 5 July 2005** The PACB met on this date, and amongst other things discussed the Keach case. They discussed the witness statements which had been obtained by Tasmania Police in March, concluded that they gave ground for concern about Mr Keach's conduct, and agreed that copies should be provided to him in the process of making a final decision about his suitability to be recommended for a licence in the forthcoming growing season.
- 11 July 2005** Dr Patmore wrote to Shaun McElwaine enclosing various documents, including the police statements, and seeking any response that Mr Keach might wish to make to these documents before making recommendations to the Minister as to whether Mr Keach should have a licence for the forthcoming season.
- 28 July 2005** Mr McElwaine replied to Dr Patmore, thanking him for his letter of 11 July 2005, but pointing out "a problem" with the invitation given to Mr Keach to comment on the materials attached to that letter. Mr McElwaine stated –

"My client is aware that this matter has been referred to the Tasmania Police for investigation. Doubtless as you have been made aware, my client has declined to make a statement.

...

My client would like to provide a very detailed response to the materials attached to your letter and in particular would like to provide you with some very useful information as to how Tasmanian Alkaloids Pty Ltd has conducted itself and purportedly administered the system to date. The problem is that my client does not wish to give any of that information nor provide a detailed response if there is any likelihood that what he gives to you will or may be subsequently used against him in any criminal proceeding.

It seems to me that there are two ways to resolve this difficulty. Either my client receives confirmation from Tasmania Police that he is not to be the subject of prosecution (that seems so because of the long period which has now expired since the investigation began and one would have thought that if there was a case, it would have been the subject of a complaint by now) or the Board can give to my client ... an assurance in writing that anything that he does provide in response to your letter will not be referred to the Tasmania Police...."

1 August 2005

Dr Patmore replied to Mr McElwaine stating –

"Any investigation by Tasmania Police is a matter between your client and Police.

The Board cannot, and will not, give undertakings not to refer matters to the Police. If the information it receives warrants investigation. This policy applies to any person, not just your client.

The Board will make a decision in relation to Mr Keach on the information it has available to it. If your client chooses not to avail himself of the opportunity to provide a response as requested that is a matter for him."

As is plain from the minutes of the meeting of the Special Subcommittee of the Board on 16 March, Dr Patmore had long known that there was no prospect of a prosecution against Mr Keach for a breach of the licence condition.. This letter was correct on a literal reading, but, read with the letter to which it was responding, maintained the impression that a prosecution was still under consideration, and to that extent was misleading. To be sure, the Board would have felt obliged to pass to the police any evidence provided to it by Mr Keach which would have warranted investigation, but the particular matter previously being investigated and of which Mr Keach was given notice on 16 February - "the matter of possible breach of Licence under the Poisons Act 1971" - was no longer being investigated and, to Dr

Patmore's knowledge, would not be, whatever evidence might come forward.

9 August 2005

A meeting of the PACB took place on this date. The meeting was chaired by Dr Patmore, and Detective Inspector Ball was again present.

The Keach case was the main item for discussion. The minute that relates to this item merits citation in full, and reads –

“Agenda Item 3:

Consider any response received from Tony Keach to the statements sent to him concerning his apparent excess area sown last season, prior to making a recommendation to the Minister as to his suitability to be issued a licence to grow poppies in season 2005-06. (An application has been received from Tony Keach, to enable Keach Pastoral Company to grow poppies in accordance with a contract it has with GlaxoSmithKline).

- *The Chairman tabled and explained the recent correspondence with the Solicitor acting on behalf of Tony Keach. He indicated that copies of relevant reports and Statements have been sent to Tony Keach through his Solicitor, he also noted that no challenge has been made to the matters raised within those Statements.*

Following general discussion, Board Members accepted the veracity of the Statements in the absence of any rebuttal.

There appears to be three particular grounds for concern regarding the actions and understanding of Tony Keach;

1. *The change to the original 38 hectares area contracted with Tasmanian Alkaloids was driven by the actions of Tony Keach when he planted poppy crop on the second location, prior to receiving approval to do so,*
2. *There were two distinct occasions when spraying advances were made to Keach Pastoral, based on the agreed 39 hectares under contract,*
3. *The widely known industry position of oversupply and particularly the expressed position of Tasmanian Alkaloids with regard to achieving a reduction of 30% in area as a target outcome for the season. This target has been published by the Company and discussed with Tony Keach by the Tasmanian Alkaloids Field Officer.*

The Board resolved to recommend to the Minister that the application for licence to grow 32 hectares of poppies in season 2005/2006 be refused on the grounds that the applicant appears to have been involved in a large scale deception during the past season, which in the absence of a satisfactory explanation, leaves the Board with no

alternative other than to consider the applicant to be an unsuitable person to be a holder of a licence.

The Board also resolved that the Minister be made aware that the apparent actions of this applicant were such that the very high international reputation of the industry may be put at risk unless strong action is taken on this serious issue."

The Board had thus formed a very serious view of Mr Keach's conduct, based on the statements obtained by the police and on the fact that Mr Keach had not challenged the content of those statements. However, it was apparent from Mr McElwaine's letter of 28 July that his client wished to put material in rebuttal, but was being deterred by the threat of prosecution. By its own failure to inform Mr Keach that there would be no prosecution for breach of the licence condition, the Board had caused the very circumstance upon which it was relying to corroborate the truth of the statements of the TA employees.

18 August 2005 Recommendations from the PACB to the Minister for Health and Human Services were in preparation in the middle of August. Detective Inspector Glen Ball of Tasmania Police sent an email to Terry Stuart on this date, apparently commenting on a draft of the Board's recommendations, stating –

"It might be advisable to indicate that Tasmania Police conducted a full investigation into this matter and that Keach would have faced a criminal charge contrary to s 52 of the Poisons Act 1971 if it were not for a technical flaw in his licence."

19 August 2005 Dr Patmore sent an email to Terry Stuart, commenting upon the email from Detective Inspector Ball, saying –

"Hi Terry, I am not too sure I would put the police matter in the reasons - that is a confirmation that police won't be proceeding and I would rather he found that out through police channels."

24 August 2005 The Board received a letter from Mr Keach inviting the members of the Board to visit his property for an on-site inspection and discussion.

26 August 2005 Terry Stuart wrote to Mr Keach, thanking him for his invitation, but advising him that the Board had made a decision on his licence application, and would be informing him of the outcome in the near future.

29 August 2005 By a letter of this date, Terry Stuart gave Mr Keach a further 7 days "to respond in writing to the Board's recommendation to the Minister for Health and Human Services prior to the recommendation being sent". This letter was in response to a telephone request by Mr Keach that day to personally present "a case or explanation to the Board". A copy of the Board's "decision and recommendation" was attached to the letter. The Board recommended against the grant of a licence on the basis,

inter alia that Mr Keach had "shown himself not to be a fit and proper person to be granted a licence".

- 5 September 2005** Mr McElwaine wrote to the Minister for Health and Human Services, with detailed submissions. The letter referred to the difficulty faced by Mr Keach in responding to the Board's recommendations when he had not been advised whether or not a prosecution was to be undertaken. The letter said that Mr McElwaine had been instructed to provide the response "upon the basis that what is contained within this letter is solely a response to (the Board's) recommendation and must not be used against him as part of any prosecution for an offence".
- 6 September 2005** The PACB finalised its recommendations to the Minister. The Board sent a copy of its recommendations to the Minister with a letter which stated that the decision of the Board to recommend against the grant of a licence was unanimous, and based upon "the serious nature of the attempt, by Mr Keach to deceive Tasmanian Alkaloids for the purpose of gaining a financial advantage".
- 28 September 2005** Richard Bingham was appointed as a temporary employee of the Department of Health and Human Services, preliminary to Mr Bingham receiving a delegation from the Minister administering the *Poisons Act* enabling Mr Bingham to make the decision on whether Mr Keach should receive a licence.
- 5 October 2005** Shaun McElwaine wrote to the Minister, seeking "urgent consideration" of Mr Keach's licence application, saying that Mr Keach had a contract with Glaxo to plant poppies for the present season, and that the ground would need to be prepared for the crop by the end of the following week. Glaxo had told Mr Keach that the final possible date for sowing the crop would be Friday, 21 October.
- 6 October 2005** The Minister made the intended delegation to Mr Bingham.
- 7 October 2005** Richard Bingham spoke to Mr McElwaine by telephone. His note of the conversation records that Mr Bingham believed that the PACB had decided against prosecution. The note records that he was to check on this "and see whether PACB is prepared to advise this formally".
- 10 October 2005** Richard Bingham spoke to Dr Patmore, who said, according to Mr Bingham's file note –
- "Police should make a call on prosecution".*
- Mr Bingham subsequently spoke to Detective Inspector Ball who said that he would arrange for a letter to go to Mr McElwaine on the subject.
- 11 October 2005** Mr McElwaine wrote to Mr Bingham, referring to their telephone conversation on 7 October 2005. He said that he awaited written

advice on whether Mr Keach would be the subject of prosecution proceedings, and saying that –

"In the event that prosecution proceedings are not to be commenced, then Mr Keach will ... provide a full and detailed explanation in response to the various allegations which are made against him."

12 October 2005 Mr Bingham sent a draft decision to Mr McElwaine by email, refusing Mr Keach's licence application. Paragraph 1.5 of this decision recorded Mr Bingham's understanding that the PACB and Tasmania Police had decided on the basis of advice from the DPP that for legal reasons a prosecution could not be sustained. Mr Bingham referred to his request for written confirmation of this situation from Detective Inspector Ball.

14 October 2005 Detective Inspector Ball wrote to Mr McElwaine to inform him that, based on the advice from the DPP, no prosecution would be commenced. His letter included the following –

"I can confirm that a police investigation was undertaken, examining the alleged breach of provisions within the Poisons Act 1971 relative to the growing of papaver somniferum (opium poppy).

...

A copy of written advice received by the PACB from Mr T J Ellis QC, Director of Public Prosecutions, was provided to police. The advice highlighted a technical deficiency in the poppy licensing regime, a deficiency that could not support a criminal prosecution of Section 52 of the Poisons Act 1971. Having regard to Mr Ellis' advice, no proceedings were, or will be, initiated against your client for the alleged over sowing [sic] of poppies during the 2004-5 season at his 'Bluegong' property."

18 October 2005 Mr and Mrs Keach met with Mr Bingham on this date, and made detailed submissions to him on why the draft decision provided to Mr McElwaine on 12 October 2005 should not stand.

20 October 2005 Mr Bingham issued Reasons for Decision, refusing the licence application.

8 November 2005 Mr Bingham issued final Reasons for Decision, having reconsidered his Reasons of 20 October, in light of submissions made by Mr McElwaine in the meantime.

3.3 Commentary

It is clear that prosecution of Tony Keach was never in prospect after the DPP's advice of 9 March 2005, and certainly after the advice was considered by the Special Subcommittee of the Board on 16 March. The DPP's advice was the foundation for the letter from Detective Inspector Ball of 14 October which informed Mr McElwaine that no prosecution would be

undertaken, and there is no suggestion in the paperwork that a prosecution on grounds not considered by the DPP at that stage was ever contemplated.

It took the intervention of Mr Bingham to obtain the letter from Detective Inspector Ball, which opened the way for the Keachs to make full submissions dealing with the allegations made. This was some 7 months after the DPP's advice had been given. Had the PACB told Mr Keach that he would not be prosecuted for breach of s 52 of the *Poisons Act* once the Board knew that this was not possible, the course towards the decision on whether he should have a licence for the 2005/6 season would have been much easier.

What concerns me - which is why I have set out the chronology in such detail - is that the PACB subsequently gave the impression, contrary to their own understanding, that a prosecution remained a possibility. This occurred in each of the letters from Dr Patmore to Mr McElwaine of 23 March and 1 August. Dr Patmore also made a deliberate decision on 19 August not to include information in the draft recommendations to the Minister which would indicate to Mr Keach that the Police would not be proceeding with a prosecution, even though Detective Inspector Ball had said that he considered it advisable for this material to be included.

These and other features of the chronology leave one with the impression that the PACB deliberately sought to cultivate the belief in Mr Keach and his legal adviser that a prosecution might occur, even though they knew from early March that this would not happen.

In commenting on a draft of this report, Dr Patmore made these points concerning the failure of the Board to inform Mr Keach that he was not to be prosecuted –

- "1. You have correctly identified that the Board and I were informed at an early stage that, due to a technicality in the licence provisions, Mr Keach could not be successfully prosecuted under the Poisons Act for growing poppies without a licence. However you fail to recognise that there is nothing to suggest that the Police in their investigations, or due to future admissions made by Mr Keach, could not have contemplated prosecution for other offences. For example, conspiracy to grow trafficable quantities of a prohibited substance or dishonestly obtaining a financial advantage. The notification of inability to prosecute one offence does not necessarily lead to the inability to prosecute others. In this instance the Board did not have information as to the status of other police investigations nor did it ever seek such information.*
- 2. The PACB does not have a statutory footing – it is an administrative arm of the Government and as such does not have the powers to prosecute. The PACB has always maintained a clear distinction between its administrative role and the prosecutorial and investigative role of the police. Any decisions as to prosecution remain the province of the police. On this basis I hold the view that it is the role of the police to inform a person who has been investigated whether or not they are to be prosecuted. To do otherwise is akin to expecting the complainant in an assault to inform the alleged assailant that they will not be prosecuted – it is simply not their role.*
- 3. Mr Keach, from an early stage, was formally represented by an experienced legal practitioner. As such his advisor was expected to have a clear understanding of the investigation and prosecution process. If he had not been*

so represented then there is an argument for the PACB to have adopted a different approach. In any event his lawyer was informed clearly that decisions on prosecution were a police matter – but for reasons best known to him he failed to contact police and inform himself."

My views on these points are as follows –

1. Dr Patmore would have known if the Police were contemplating other charges against Mr Keach, once it was known that Mr Keach could not be prosecuted under s 52 of the *Poisons Act*. Detective Inspector Ball was the Officer-in-Charge of the Drug Investigation Service, which was the very section within Tasmania Police which had carried out the initial investigation. He participated in the Special Subcommittee meeting on 16 March 2005, and in the three subsequent meetings of the Board over the relevant period at which the Keach case was discussed - on 4 May 2005, 5 July 2005 and 9 August 2005. If wider investigations or other charges had been in contemplation, the Board would have been informed. This would have been highly relevant to its consideration of Mr Keach's licence application.

As it is, Dr Patmore's email to Terry Stuart of 19 August 2005 shows that he knew that the decision not to prosecute under s 52 had been a decision not to proceed against Mr Keach at all.

2. It is not the case that decisions on prosecution are always the province of the police. They are often taken by the DPP, sometimes in conjunction with the agency responsible for the administration of the relevant legislation. That in large measure is what happened here. The PACB referred the allegation of licence breach to the police for factual investigation, but at the same time went to the DPP for advice on the prospects of success. They were advised that a prosecution against Mr Keach for a breach of the conditions of his licence would not succeed, and that advice was accepted by the Special Subcommittee on 16 March 2005, when it decided, in the presence of the police officers who had been responsible for the investigation, not to recommend to the Board that proceedings be taken against Mr Keach. The Board was thus centrally involved in the decision not to prosecute, and the Board would not have been trespassing on the role of the police if it had told Mr Keach through his solicitor that the investigation had been completed and that he was not going to be prosecuted under s 52. Alternatively, the Board could have encouraged Detective Inspector Ball to notify Mr Keach that a prosecution was not going to be undertaken, just as Richard Bingham did when he took over the matter.
3. It is the case that Mr McElwaine could have gone directly to the police and enquired of them whether his client was to be prosecuted. Nonetheless, he knew that the PACB had referred the matter to the Police, and he could fairly assume that the Board would know whether a prosecution was going to arise. In my view, it was fair for him to assume that the Board would tell him if there was not going to be a prosecution, and he should not have needed to go to the police to find out something which should so obviously have been in the Board's knowledge, and which was so central to the flow of the correspondence between himself and the Board.

The question arises at this point whether the outcome of Mr Keach's licence application would have been different if Dr Patmore had told Mr McElwaine in his letter of 23 March 2005 that Mr Keach was not to be prosecuted.

The Keachs have submitted to me that the outcome would have been different, for they say that they would have had an opportunity to put detailed explanations to the PACB before the Board made any decision on whether it would recommend to the Minister that Mr Keach be given a licence. They would have put before the Board a survey of the poppy areas at issue which was conducted by GJ Walkem in the first week of February 2005, before the poppy stubble had been ploughed in. This gave a measurement of 48.5 ha. (In contrast, there were 2 other surveys - one by TA on 28 January 2005 of 50.45 ha, also done before ploughing in, and the one by Lester Franks on 17 February 2005, commissioned by the PACB and done after ploughing in, which yielded a total area of 50.37 ha.) They would have gone on to seek to explain the difference between the Walkem figure of 48.5 ha. and the figure of 41 ha which they claim that they were authorised by TA's field officer, Peter Lindsay, to sow. They say that the figure of 41 ha was given by their seed drill area meter, and that the drill did not cover all of the area within the perimeters of the areas of poppies sown. This was because it did not include such areas as drains, wet areas, centre pivot tow tracks, and lanes. More importantly, they say that some of the area sown comprised raised beds, and the beds were overwidth because their bedformer had been faulty. This meant that the full width of the beds was not sown, leaving wider gaps than usual between the drill runs.

One can only speculate as to whether the PACB would have been satisfied by these explanations. Richard Bingham was not, for he concluded that Mr Keach had nonetheless sown an area which was at least 7% more than that agreed with Mr Lindsay. However, that conclusion was first drawn in somewhat pressured circumstances, two days after the Keachs had put their submissions to him, in the one and only meeting held between them. It is reasonable to suppose that more extensive exchanges would have taken place between the Keachs and the PACB if the Keachs had been given the opportunity to develop their case and put it to the Board well before the Board was called upon to make a recommendation to the Minister.

Under those circumstances, a number of unfortunate elements of the history that I have set out would have been avoided –

- The PACB would not have made their decision to recommend that the Keach licence application be refused without having heard what Mr Keach had to say - indeed basing the decision upon the exercise by Mr Keach of his right to silence. It is ironic in this respect that the Board should have said in its letter of recommendation to the Minister dated 6 September 2005 that "the Board feels obliged to view Mr Keach's actions, in the absence of timely and satisfactory explanation, as being capable of bringing this significant and important industry into disrepute".
- The licensing decision would not have been made under such time pressure. The facts of the case were complex, and deserved appropriate elaboration by the Keachs, and unpressured consideration by the PACB and the person making the decision.
- The situation would not have arisen in which the Keachs did not manage to put submissions until after a draft decision against their interests had been written, only two days before the (first) decision to refuse Mr Keach a licence was made.

The end result of the process was a denial to Mr Keach of procedural fairness. Although the PACB offered him the opportunity to make submissions prior to making its recommendation to the Minister - a recommendation which Mr Bingham later had before him at the time of his

deliberations - this was a hollow offer, since Mr Keach had informed them that he intended to exercise his right to silence, and the Board was withholding from him the information needed for him to abandon that defensive position.

I conclude by noting that my criticisms of the PACB here go to process not outcome. Since it is unlikely that similar circumstances will recur, I see no need to make specific recommendations for the future in relation to this issue.

4. LICENSING ISSUES

4.1 Licence administration

My early enquiries into the Keach complaint gave me concerns about the manner in which the licensing system was operating. My main concern at that time arose from the fact that two changes to the intended sowing plans for "Bluegong" had been implemented by Mr Keach and Peter Lindsay before Mr Keach could receive a revised licence. These changes were the sowing of "Pond 3" on 11 August 2004 and the sowing of the two additional areas at the southern end of Pine 1 on 25 August 2004, steps which were taken long before the issue of the revised licence on 3 September 2004. Early discussions with Terry Stuart established that this sort of lag time between changes to sowing plans and the issue of revised licences is quite common, but accepted as being necessary due to the exigencies of farming. However, the result is that farmers are routinely breaking the law, with the acceptance of the PACB, in that it is forbidden under s 52 of the *Poisons Act* to grow or cultivate an opium poppy plant other than under and in accordance with the conditions and restrictions specified in a licence granted under the section. This cannot be allowed to continue. If the licensing system is not sufficiently flexible to meet the reasonable requirements of the industry, it needs to be adjusted.

I was also concerned at the poor drafting of some provisions in the standard form of grower licence, at the fact that an important provision in the form of manufacturing licence granted to the processing companies does not reflect normal practice, at the quality of the standard-form contract in use between TA and its growers and how that related to the form of grower licence in use, and at the apparent inadequacy of s 52 of the *Poisons Act*.

In working on the case, I have also become interested in the issue of whether it is necessary to limit the area grown by a grower through the terms of the grower licence.

4.2 The grower licence

As a result of the Keach case, the terms of the first condition in the General Conditions of a grower's licence have been changed.

The former condition read –

"Papaver somniferum is only grown on the number of hectares specified in the agreement to grow oil poppy entered into between the Licensee and [NAME OF PROCESSING COMPANY] (in this licence referred to as the "Company")."

This has now been changed to read –

"Papaver somniferum is only grown in accordance with the agreement to grow oil poppy entered into between the Licensee and [NAME OF PROCESSING COMPANY] (in this licence referred to as the "Company")."

This condition is unsound, for it makes it a condition of the licence that the grower comply with a document which is outside the PACB's control (which may or may not include

adequate limitations as to area). The condition should be reviewed. The licence should itself contain all of the requirements with which the grower should comply in the course of growing a crop, and should not be dependent upon any other document, particularly one over which government has no control.

The policy behind the replacement condition would seem to be reflected in the following passage in email submissions made to Mr Bingham by Mr Stuart on 20 October 2005 –

"Finally, the only reason (from a Licensing perspective) that area and locations reporting is significantly important is to enable the PACB to fulfil its obligation to check these locations for acceptable security, give them a graded assessment of risk and to ensure that (so far as is practical) all poppy plants sown are either harvested or in some way destroyed. This ensures that inappropriate diversion of poppy crop is avoided. While the PACB may sometimes check measure areas, it is somewhat rare and not seen as particularly relevant to maintaining security. What is important is observance of the company-grower "grower agreement" (contract) by all parties."

This last sentence is strange. The contents of the grower agreement are not controlled by government, and many of the terms of the standard-form agreements which are in use are of no relevance to the licensing relationship between the Minister (or delegate) and the grower. What would seem to be of importance, however, in the control of the industry is that a grower does not grow poppies without first having a contract with one of the processing companies to purchase the harvest.

Before I leave the grower licence, I observe that the General Conditions of the licence are not well drawn. I recommend that the PACB submit these to the Office of the Solicitor-General for reconsideration. The PACB needs to consider beforehand what requirements it generally needs all growers to comply with in the growing of a crop, upon pain of prosecution if necessary. The discussion in section 4.4 of this report may help in this regard. The conditions should be drawn so that it will be clear whether a condition has been breached, and to maximise the chances of proving a breach, so that they can be properly enforced.

S 52 of the *Poisons Act* needs revisiting in this connection. S 52(1) states –

"A person shall not, except under and in accordance with a licence granted or deemed to have been granted by the Minister under this Part and in accordance with the conditions and restrictions specified in the licence, grow or cultivate a prohibited plant."

Some of the conditions in the grower licence do not go to the manner in which poppies are grown or cultivated - for instance the destruction of regrowth, or ensuring that the processing company gives notice to the Minister of sowing or harvest. To ensure that the licence conditions can be enforced by prosecution, s 52 should separately contain the Ministerial power to licence a person to grow or cultivate a prohibited plant, make it an offence to grow or cultivate a prohibited plant without such a licence, and make it an offence to fail to comply with the conditions or restrictions of such a licence. I note in saying this that it is apparent from s 49(1)(d) of the Act that it is intended that the power to grant a licence to grow or cultivate a prohibited plant be sourced in s 52, but that s 52(1) itself suggests that the power to licence lies elsewhere in the Part.

4.3 The processor's licence

The terms of the licence issued to the processing companies generally seem to be better drawn than the terms of the grower licence. However, this licence contains the following provision, at clause 2.1(f) -

"The holder of this licence shall ensure, where it is agreed that a contracted grower shall increase the original licensed area, that an endorsement to the original contract is forwarded to the Poppy Advisory & Control Board prior to the sowing of an additional area."

The policy behind this provision would seem to be to make sure that all the poppy crop is covered by a contract with one of the processing companies, and I have observed above that this does seem to be an important requirement in the proper control of the industry.

As it happens, neither company uses an "endorsement to the original contract" when authorising the growing of an increased area, so that this provision is currently being observed in the breach. This is not surprising, since neither company uses a contract which limits the area sown by the grower. What does happen is that where it is agreed between the company and the grower that an area is to be cultivated which is not covered by the existing licence, the grower submits a fresh licence application to the PACB through the company. This document is not, however, in the nature of an endorsement to any pre-existing contract.

This raises one major deficiency in the TA standard-form agreement with growers. This commences with a declaration that the grower has agreed "to grow poppies as detailed on the "Application for Licence to Grow Papaver Somniferum" pursuant to the Poisons Act (1971) Tasmania ..., and sell and deliver the entire crop to TasAlk, subject to the terms and conditions of this Agreement". There is nothing in the document which enables these words to be read as referring to multiple applications. Nor are such applications scheduled to the agreement, or incorporated by reference.

It is apparent from this discussion that the PACB needs to either require compliance with clause 2.1(f) or obtain assurance in some other way that a grower does not increase the area of poppies grown without first having a contract in place with one of the companies for whole of the crop.

4.4 Controlling the area sown

There seems to be some equivocation by the PACB on whether it is necessary to control the area which a grower grows.

In section 4.2 of this report, I have quoted a passage from an email submission made to Mr Bingham by Mr Stuart on 20 October 2005. That passage would seem to suggest that the PACB is not concerned to control the exact area which a grower grows. Compatibly with this, the first of the General Conditions in a grower's licence no longer refers to the number of hectares grown.

However, given the policy position expressed in Mr Stuart's email submission, it is hard to understand why the PACB was so concerned at what it saw as oversowing by Mr Keach that it recommended against him receiving a licence. It is also hard to understand why, for the 2006/7 growing season, the PACB has sought fit to very closely control the area of poppies

cultivated on the Keach property. For this season, his licence contains the following special conditions –

- "1. The licensee shall not participate in the sowing of the crop.*
- 2. The crop shall be sown by a drilling contractor who is approved by the PACB, and who acts under the direct control and supervision of a GlaxoSmithKline Field Officer.*
- 3. Immediately before sowing commences, GlaxoSmithKline shall measure the 20 hectare area allocated for the crop using GPS and provide a written report to the Poppy Advisory and Control Board certifying the area to be sown.*
- 4. Immediately after sowing is completed, GlaxoSmithKline shall measure the area sown to poppies using GPS and provide a written report to the Poppy Advisory and Control Board certifying the area which has been sown to poppies.*
- 5. All poppy seed intended for sowing shall remain under the control of GlaxoSmithKline."*

Interestingly, these conditions control area through the use of GPS, whereas the area meter on the seed drill has been the standard measure in the management and licensing of the industry to date. They are also expressed as imposing those restrictions on GSK, not on the person previously accused of oversowing. I note that the end result of limiting the area to 20 ha as measured by GPS is that the area actually sown will be less, for that simply establishes the boundaries within which sowing takes place.

The PACB has to decide whether it wishes to control through grower licences the area that growers grow. The alternative is to control area through the licences of the two processing companies. Some control over area is necessary for the purposes of reporting to the INCB, together with overall industry control. Article 19 of the *Single Convention* requires each State Party to provide the INCB in each year with an estimate, amongst other things, of the "area (in hectares) and the geographical location of land to be used for the cultivation of the opium poppy". Article 20 also requires it to report, amongst other things, the "Ascertainable area of cultivation of the opium poppy". The control over area is all part of making sure that there is a balance between supply and demand, reducing the risk that any part of the crop is diverted to the illicit trade.

To put this in context, it is perhaps helpful to note the nature of the functions of the INCB. These are usefully given (to the extent presently relevant) in the following passage from Annex II to its Report for 2005, accessible from its website –

"Broadly speaking, INCB deals with the following –

- (a) As regards the licit manufacture of, trade in and use of drugs, INCB endeavours, in cooperation with Governments, to ensure that adequate supplies of drugs are available for medical and scientific uses and that the diversion of drugs from licit sources to illicit channels does not occur.*

...

(b) *As regards the illicit manufacture of, trafficking in and use of drugs, INCB identifies weaknesses in national and international control systems and contributes to correcting such situations.*

...

In the discharge of its responsibilities, INCB :

(a) *Administers a system of estimates for narcotic drugs and a voluntary assessment system for psychotropic substances and monitors licit activities involving drugs through a statistical returns system, with a view to assisting Governments in achieving, inter alia, a balance between supply and demand;*

...

(c) *Analyses information provided by Governments, United Nations bodies, specialized agencies or other competent international organizations, with a view to ensuring that the provisions of the international drug control treaties are adequately carried out by Governments, and recommends remedial measures.*

(d) *Maintains a permanent dialogue with Governments to assist them in complying with their obligations under the international drug control treaties and, to that end, recommends, where appropriate, technical or financial assistance to be provided."*

Tasmania is the only place in Australia where the opium poppy is cultivated commercially. The PACB thus plays a central role in the fulfilment by Australia of its obligations under the *Single Convention*. The statistics on cultivation which it generates are the statistics on the subject which are reported to the INCB. The licensing system for growers and processors must therefore be conducted in a way which gives confidence that those statistics are correct.

Perhaps the first question to ask is whether there is a need to licence growers at all, leaving it to the companies to contract with any grower they wish. The answer to this would seem to be that some form of licensing system of growers is essential if there is to be a commercial industry for the production of what is rightly a prohibited plant, and to give assurance to the INCB that Australia has effective controls in place over that industry. It is also important to make sure that only fit and proper persons are involved in the industry.

If growers are to be licensed, the next question is whether it is necessary to use the licences to limit the area grown, and the location where growing takes place. The alternative would be for the licences issued to the processing companies to limit, as they do now, the area which the company has under cultivation, and to also require the companies to put in regular returns which provide details to the PACB of –

- all growers with whom contracts for the growing of poppies are made;
- in respect of all sowings - the location, the area in hectares sown, and the date or dates of sowing;
- all crop losses; and

- in respect of all harvesting - the location, the area in hectares harvested, the tonnage harvested, and the date or dates of harvest.

Although this is clearly a matter for the PACB and policy-makers, I suggest that this latter course is best, for various reasons –

- Area is only of secondary relevance. What the international regulation system administered by the INCB seeks to do is maintain a balance between supply and demand in the licit opiate trade. Prime importance therefore attaches to the quantities of alkaloid in stock and produced, and the area under cultivation is only important as a way of controlling the amount of alkaloid produced in each season. The quantities of alkaloid held and produced by the companies are necessarily controlled through the licences granted to the companies. It is the companies who need to ensure that they do not produce more alkaloid than is permitted. And it is at the company level that audits are most efficiently and effectively conducted to make sure that the controls on the industry are being observed.
- Controlling area through growers' licences makes it necessary to issue a fresh licence if the grower chooses to grow a greater area of poppies than is covered by the existing licence, or chooses to grow all or part of the crop in a different location than that licensed. It is not always practicable to wait for a fresh licence before such a decision is implemented, as current practice demonstrates. The end result of controlling area through grower licences will be, as occurred in the Keach case, that increases in area or changes in location will be licensed after the event, meaning that breaches of s 52 of the *Poisons Act* will routinely occur, to which the PACB understandably, but inappropriately, will be turning a blind eye. As already stated, it is essential that the licensing system is designed to avoid such a situation.
- The need to amend licences where the area sown or the location is to be altered creates administrative work that might otherwise be avoided. The process for applying for a licence might also be simplified if area and location is not an issue at that stage. Further, controlling area and location through the companies opens up the possibility that grower licences might be issued for a period covering more than one grower season.
- As indicated in the passage from the email from Terry Stuart to Richard Bingham which is quoted in section 4.2, the PACB only very rarely check-measures areas sown, basically relying upon the information which it receives from the companies. From a practical perspective, therefore, there is little utility in directly controlling the area grown or cultivated by a grower.

In relation to growers, it would seem that the primary need is to only license individuals who are fit and proper participants in the industry, and to impose necessary controls in relation to husbandry and security of the crop. The essentials here would seem to be –

- not sowing any area unless the grower has a current contract with a processing company for the crop to be harvested from that area;
- proper fencing;

- destruction of residual poppy material after harvest;
- destruction of any crop not harvested;
- destruction of the crop if so required by the Minister;
- destruction of regrowth;
- allowing inspection of the crop;
- reporting to the PACB any crop loss;
- reporting to the Police any interference with the crop; and
- taking reasonable steps to ensure that livestock are not exposed to poppy plants, poppy stubble or regrowth.

On the basis of this discussion, I recommend that the PACB review the form of the both the grower and manufacturing licences in use, so that the manufacturing licences are the mechanism through which the State obtains control over the area sown and through which it requires the delivery of the information which it needs to provide the statistics on cultivation to the INCB which are required under the *Single Convention*. The focus of the grower licences should be on conditions which relate to proper standards of husbandry and to protecting the security of the crop. If control over area is exerted through the manufacturing licences, this opens up the possibility for grower licences to be issued for more than one year, but in that event it is necessary for the *Poisons Act* to include a clear power to revoke a licence in the event that the conditions or restrictions of a licence are breached.

5. RECOMMENDATIONS

In concluding this report, and based on the discussion in sections 3.3 and 4.1 to 4.4, I make the following recommendations –

1. I recommend that the PACB clearly decide whether the area of poppies sown and cultivated by a grower needs to be controlled through the grower's licence. I have suggested that it does not, and that controlling the area through the processor's licence would produce a system which is more responsive to the realities of sowing a crop. Relying upon processors' licences as the means of controlling the area cultivated is one way in which the PACB can avoid the situation in which, as occurred in the Keach case (see section 4.2), a greater area than that authorised by a grower's licence is sown, with the grower then being in breach of his or her licence until the licence has been varied. The licensing system must not be operated in such a way, or be so designed, that when allowing for the exigencies of farming, participants in the industry are commonly breaking the law.

If the decision is made to try to limit the area of poppies sown and cultivated through grower licences, then it may be appropriate, in trying to avoid disputes over area of the kind that have arisen in the Keach case, to have the sowing and harvesting reports lodged with the Board countersigned by the farmer or contractor who is responsible for that work and the company field officer under whose oversight the work was conducted.

2. I also recommend that the terms of the grower's licence be revisited. This will be necessary in any event if my suggestions about change to the licensing system are accepted. However, the conditions of the licence are not clear, and are not sufficiently precise to found a prosecution under s 52 of the *Poisons Act*. I hence recommend that the licence conditions be submitted to the Office of the Solicitor-General for review. At all events, Condition 1 should be deleted, for it is not appropriate to make it a condition of the licence that the licensee comply with a document which is not within the PACB's control, or which deals with matters which are not pertinent to the licence.
3. Linked to revision of the General Conditions of the grower licence, I also recommend that s 52 of the *Poisons Act* be amended, to clearly provide the source of the power to licence, and to make it an offence to fail to comply with the conditions and restrictions of a licence. There should also be express power to revoke a licence issued under the section.
4. I also recommend that clause 2.1(f) of the processor's licence be revisited, for the wording of the provision is not consistent with the practice that is followed by the processing companies when it is agreed that the area to be grown by a grower is to be increased. Either that, or this paragraph in the processors' licences should be enforced.

As to recommendations 2, 3 and 4, I am informed by the Secretary of the DHHS that work has already commenced to overhaul the licensing system with a view to addressing issues that I have raised in this report, and that advice "on relevant matters and processes will be sought from the Office of the Solicitor-General". I am also told that the *Poisons Act* is currently under review, with the comment being made that "this will provide an important opportunity to address structural issues in the current Act which may be problematic".

On this last point, I recommend that consideration be given to legislation which regulates the commercial opiate industry separately from the *Poisons Act*, and that the PACB be placed on a statutory footing. (I recognise in saying this that the Secretary of the DOJ has indicated that her Department and the DHHS "have been working on amendments to constitute the PACB as a statutory entity over a considerable period of time".) The present arrangements for managing the industry may have been appropriate for a fledgling industry, but are anachronistic for controlling an industry which has achieved such significance to the Tasmanian economy and such significance within the global licit opiate market.

SIMON ALLSTON
OMBUDSMAN

4 October 2007