



BUCHANAN'S NURSERY

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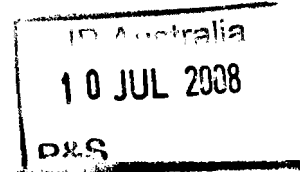
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Sean Applegate
Secretariat
Advisory Council on Intellectual Property
PO Box 200
WODEN ACT 2606



RE: Response to Review of Enforcement of Plant Breeder's Rights Options Paper

Dear Sean,

Thank you for the opportunity to comment on the Review of Enforcement of Plant Breeder's Rights Options Paper.

WHO WE ARE

Buchanan's Nursery is the Australian master licensee for Bradford Genetics of Le Grand, California (www.bradfordgenetics.com) the world's leading breeder of stonefruits for the commercial fruit grower. We have been in this role since the early 1980's. We have obtained PBR grants for over 50 varieties of stonefruit, including peaches, nectarines, plums and cherries. Our first PBR was granted in 1998, ten years ago. All patents are held in the name of Lowell Glen Bradford, et al.

OUR EXPERIENCE WITH INFRINGEMENT

We have had **SIGNIFICANT** experience with infringement in our industry over the years.

Before launching into any investigation or enforcement of our rights, we suspected there would be a small percentage of infringement, somewhere in the order of 10 -- 15%.

A few years ago we became members of NLA-AU in an attempt to enforce our rights, educate the growers and nurseries, hopefully recover some lost royalties, and continue good relationships with our long-standing customers. Through NLA-AU we began random orchard inspections.

NLA-AU has inspected over twenty random farms and only ONE of those farms was found to have no infringing trees. Fully 95% of farms inspected had infringing trees, ranging from a small percentage of the orchard to 100% of some orchards. Even "leaders" in the industry were found to have large quantities of infringing trees, some produced by leading nurseries,

most produced by rogue nurseries. Almost no trees had been produced by the fruit growers themselves.

One case went all the way to Federal Court and was settled in court ordered mediation. Every tree on that farm was illegitimate. The trees had been obtained from a rogue nursery. Before the court action the grower had full knowledge of his obligations under PBR. Once court action began, he immediately claimed 'innocent infringement'. The settlement of this action resulted in the lawyers getting paid handsomely, and us receiving very little, even though the grower did pay a substantial sum.

After active enforcement through farm inspections, one court action and word of mouth we now believe that about 50% of all trees are infringing. Further we have heard unsubstantiated rumors that leading nurseries with their own intellectual property are surreptitiously producing trees of our varieties 'under the table'. Even if these rumors are not true, the thought of it happening produces great angst. The potential financial damage is enormous as well. Just imagine your income being cut in half! That has already happened to us.

We have had minimal positive support from the PBR office. In fact, during a conversation with one very senior official in the PBR office, he suggested that a rogue nursery was 'just a young fellow having a go'. When we heard that, we truly felt the PBR office was on the side of the infringers, not on the side of the IP holders.

The cost and time factors can make enforcement prohibitive. The process is very lengthy and very expensive just to start. And it becomes more expensive to proceed to litigation. We believe 'innocent infringement' is too easy to hide behind—we've encountered this with both fruit growers and rogue nurseries

Further we have found no DNA labs in Australia that are willing to stand behind their work to prove a variety's origin. We are currently using an overseas lab for these jobs.

SECTION 3.4: FARMER'S PRIVILEGE AND ASEXUALLY PROPAGATED TAXA

The breeding end of the stonefruit (and other permanent crops) industry would completely cease if growers were allowed to reproduce more trees from legitimately purchased trees. Breeders would not release new varieties to the public because they would have no hope of any return on their investment of time and money to create a new variety. Australian consumers would suffer with inferior varieties which will only become more inferior to those available in the rest of the world. Fruit growers would not be able to compete with further advanced varieties on the export markets. Nurseries and others who share in the breeders' royalties would no longer receive an income. We can't emphasize strongly enough that you must choose Option 14. Further, changes to the legislation should be retrospective, not merely prospective.

SECTION 3.8 PRE-GRANT ENFORCEMENT

After reading the analysis in Section 3.8 we believe Option # 28 would be the best choice.

SECTION 4.1

Section 4.1 surmises that the low number of PBR cases is a result of the small number of rights granted under PBR. We strongly disagree. We believe the low number of cases is a result of the cost of enforcement being OUTRAGEOUSLY EXPENSIVE. Further, recoveries are generally small because the size of farms is not large enough to warrant the

cost of enforcement. As well, fruit growers and rogue nurseries can easily weasel out of liability by claiming innocent infringement or hiding assets so no recovery is possible.

SECTION 4.2

Section 4.2 discusses a change of jurisdiction from FCA to FMC. We couldn't agree more with the comment that "any action that may facilitate legitimate litigation will be a good thing as it will expand the body of case law and so help to bring certainty to all players involved in PBR."

Although we agree that a change of jurisdiction is not likely to change the thieving culture that currently exists, we do believe that if enforcement is cheaper and faster in a different jurisdiction, there could potentially be more enforcement which should deter infringers.

SECTION 5 ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution could be the best thing to happen to PBR. Because of its lower cost it would likely encourage more action against growers with infringing trees and rogue nurseries. A small amount spent on establishing an ADR process could produce a great benefit to the industry. Choose Option 33.

SECTION 6 CRIMINAL SANCTIONS AND PBR

After reading the analysis of Section 6 we believe Option 35 is the best choice.

SECTION 7 ACQUISITION OF EVIDENCE

Acquiring evidence to support a PBR case is very difficult. We've found most fruit growers to be less than forthcoming with the truth. We support the adoption of Option 38.

SECTION 8 CUSTOMS PROVISIONS FOR PBR

After reading Section 8 thoroughly, we support the adoption of Option 42.

AQIS could be a further benefit to PBR holders on the export end. A lot of fruit is exported from Australia and we believe much of that fruit is inspected by AQIS on its way out of the country. Simply reading the variety name on the end of the box and reporting that information back to us would give us grounds to approach growers and inspect their farms. If that grower hasn't bought legitimate trees of that variety, he would have serious questions to answer.

SECTION 9 EXEMPLARY DAMAGES

Given the reluctance of the government to prosecute criminally, exemplary damages could be one way to deter the theft that is currently taking place. We believe Option 44 is the best choice.

We believe exemplary damages are necessary to deter infringement. That deterrence should be both general, that is, deterring all fruit growers from planting infringing trees. Further, deterrence should also be specific, that is, deter fruit growers from repeatedly infringing. Possible methods of determining an amount of exemplary damages should include a multiple of profits generated by the trees. For example, the grower should be made to pay ten times the profit generated from the trees since they were planted. If the trees have not yet produced a crop, exemplary damages could be calculated as a multiple of the profit that would have been generated by the tree had it been farmed for the life of the tree. The formula can be expressed as follows: ((profit/year x twelve years) x ten).

SECTION 10.5 ROLE FOR GOVERNMENT, QUESTION 1.

Currently government bodies don't have enough resources to enforce the PBR legislation as it is written. As an example, PBR violations can be enforced by the Federal Police but it doesn't happen. We would prefer to see resources dedicated to enforcement rather than to administration of End Point Royalty schemes.

SECTION 11 EDUCATION AND AWARENESS

Question 1 and 2

We have some suggestions on how to improve education and awareness of PBR within the stonefruit industry. Our suggestions are by no means exhaustive and any other suggestions brought by others would be most welcome. Our suggestions are as follows:

- Ads in trade journals emphasizing 'don't risk it'. Trade journals include:
 - Coastal Fruit Growers Newsletter published by Sandra Hardy of NSW DPI
 - Good Fruit & Vegetables
 - WA Fruit Grower www.wafga.com.au
- Presentations at local grower group meetings
 - Summerfruit group in Swan Hill, www.summerfruit.com.au
 - Cobram fruit growers, contact Russell Fox at IK Caldwell 03-5872-1166
 - WA Fruit Growers

Presentations to grower meetings should include the following:

- What is PBR
- Cost to develop a variety
- Time to get a return on development costs
- Benefit to Australia of access to new varieties
- Benefit to individual growers of access to new varieties
- Cost to Australia & individual growers if new varieties are not available
- Damage done by bootleg nurseries

Question 3

Yes

SECTION 13....MENDACIOUS VARIETY DECLARATION

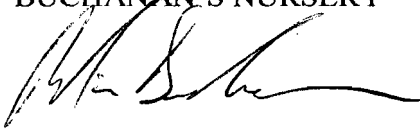
Based on our experience we have come to the conclusion that rogue nurseries regularly produce trees of PBR protected varieties but give them false names. We have heard of nurseries telling fruit growers, 'I can give you something very very similar to <protected variety name> but I can't call it by its real name'. Anything that can be done to deter these rogue nurseries will help. The greatest deterrence would be for a criminal prosecution. We strongly recommend you adopt Option 46.

QUESTION 7, PAGE 76

We believe that establishing EPR systems is primarily the responsibility of industry. It is NOT appropriate for the Government to facilitate this. Please use the government's limited resources for enforcement.

Again, thank you for the opportunity to comment on the Options Paper. We would be very eager to participate in any group discussions, interviews or other 'get-togethers' in an effort to further improve PBR outcomes.

Yours sincerely,
BUCHANAN'S NURSERY



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