

SUBMISSION TO THE AUSTRALIAN GOVERNMENT
ADVISORY COUNCIL ON INTELLECTUAL PROPERTY

By: PETER OLLERENSHAW
Owner – Bywong Nursery

At Bywong Nursery we have been breeding and developing a range of Australian native plants for the horticulture market.

Breeding work commenced slowly, 20 years ago, and it is now a major part of our business. We currently have 18 plants protected by Plant Breeders' Rights and have further plants in various stages of testing that may well be PBR candidates.

Our work is entirely self funded and would not be possible without receiving PBR royalties. While we grow some of our varieties, most are licenced out to other growers or propagators.

Most of the offences that we are aware of are small in individual value and we would prefer to see a system that deters infringement rather than the need to take legal action.

ANSWERS TO QUESTIONS:

Q1. No. Does not apply.

Q2. No. Does not apply.

Q3. There is a general awareness of protected varieties in the nursery industry. More education would be helpful, explaining how returns to breeders will allow them to develop new products with improved performance to suit changing markets.

Q4. At this stage with the type of plants we breed it probably does.

Q5. Yes. It is very daunting.

Most of our detection of non-compliance comes from licenced wholesale growers that we have in different states. They usually advise us by phone that they have been visiting other nursery growers and have noticed some of our PBR plants being grown there. As I live near Canberra and the offending grower may be in Hobart or Perth, there is an immediate difficulty of being able to check on their report. Added to this the offending growers are generally wholesale and not open to the public. So, it is unlikely they will allow me to enter and gather evidence for prosecution. On the one occasion where we were able to check on a nursery in Victoria, we found that they were growing our plants, but judged that the quantity involved was too small to make legal action worthwhile. It was likely to cost us far more in time and effort and legal costs than the value of the plants or the royalty lost.

Q6. If costs were lower in the FMC we would be more likely to take legal action.

- Q7. I don't know.
- Q8. Evidence collection is very difficult. The distance the offender is from you is often considerable. They are not open to the public, so you have to gain access. If the offender learns of your interest there is unlikely to be any evidence to collect when you arrive.
- When we have telephoned offenders it is remarkable how often the plants vanish. They don't have our varieties any more!
- Q9. I feel that an experienced officer with the rights to enter and inspect suspected premises would be useful.
- Q10. Yes. I am a small business operator. I don't have the time, resources, or legal clout to confront offenders.
- Q11. You obviously require proof to take any legal action. An official body to follow up on hearsay evidence would be useful.
- Q12. No.
- Q13. I expect that the introduction of exemplary damages would have a dramatic effect on legal redress. Both from the decision to take action and also more likely, the deterrent it would send to potential offenders.
- Q14. I feel that criminal sanctions are unlikely to work or be imposed.
- Q15. Mediation may be a useful first option. It may be possible to incorporate into existing processes. I don't think it should be mandatory or a replacement for other action.
- Q16. We have no knowledge of people importing our plants or parts of them back into Australia. However, we have had reports of our plants growing in other countries without our consent.
- Q17. Don't know.
- Q18. No. We feel that our varieties are well described and can be identified easily.
- Q19. No.
- Q20. No. Not with our varieties, due to the low number of varieties available within the genus. These technologies may deter PBR applications if they were mandatory.
- Q21. I would be generally in favour of a co-ordinating body for plant breeders.
- The body would have to be independent of the PBR Office.
 - Having an educational role would be useful but not necessary.
 - It is difficult to see how a voluntary membership would work.

- It should have the ability to enforce rights, but more importantly the ability to take quick investigative action.
- Collection of royalties gives the collector a lot of knowledge about an individual's business. It may also involve collecting money from outside Australia. I'm not sure that this would be done best by a central body.
- I expect it would have a greater enforcement capacity, undertaking selective judicial actions would be especially important in deterring infringers. I think it would also benefit the plant variety industry in providing a link between them.

Q22. It would be useful to have a central body you could contact for advice. The advice may be for your options if there has been a suspected offence, or it might also be support and encouragement for new or small breeders to take on a PBR application.

Q23. The people who report incidents to me are unlikely to collect evidence against their neighbours, customers, or well-known names in the industry. This would be best done directly by an official not connected to the community or industry.

Q24. Most likely.

Q25. ?

Q26. Yes. An independent body with appropriate legal powers which could take the necessary action, from inspection to prosecution.

Q27. No.