

Question 1: We have a concern as to the farm saved seed exemption of the PBR Act. We use contracts to enforce a non propagation agreement, however it is not inconceivable that problems can arise whereas the contracted grower sells the business to a third person who has not signed the contract.

Question 2: This issue has no relevance to Ornamental Horticulture.

Question 3: It is my belief that more awareness needs to be expressed to sellers of Floriculture businesses that products within their business are covered by PBR, and that a PBR contract exists between them and the holder of the PBR right, and that the sale of a business that includes protected plant varieties is in breach of PBR unless they allow the PBR holder to enter into a new agreement with the new owner. This particularly applies to the floricultural industry as the agreement is usually that the grower is allowed to sell flower or foliage products but not new plants.

Question 4:

Question 5: The cost of legal redress to the majority of infringements that one can take against non compliers is excessive, as a typical infringement would be in the order of between \$1000 and \$15000 of unpaid royalty payments.

Question 6: It is my belief that the FMC would be easier to utilise and be a far less expensive option in the pursuit of a PBR enforcement action.

Question 7: As I deal exclusively in ornamental horticultural crops, the infringements to our PBR rights are generally carried out by small businesses therefore the lower the cost of redress on an infringement, the more likely we are to pursue damages through legal means.

Question 8: Currently the only mechanism available to us to gain entry onto a premises that we believe have infringed open our PBR rights is through a contract agreement on sale of plants to the grower to begin with. Generally but not always, these people are not the growers that purposely propagate protected varieties for profit without royalties being paid to the applicant. Also the most common method of discovering an infringement are from other growers within the same market place whose initial decision to inform us is because of the unfair financial advantage the infringing party has in that market

Question 9: It would greatly assist breeders in not only obtaining evidence but also a good deterrent to would be offenders would be if there was a representative of the PBR office able to in a non threatening way gain access onto a property provided by an applicant or their agent that they believe to have infringed their PBR rights. This may be done with or without the officer being accompanied by a representative of the applicant.

Question 10: Yes

Question 11: If possible this could be achieved without the need of a court order such as the Anton Pillar order or the Anton Pillar order can be used if the property owner declines entry.

Question 12: As my background is horticultural not legal, I find no difficulty with the terminology used in the PBR Act, however as yet we have not undertaken enforcement action and therefore I have no knowledge on how the interpretation of such phrases as 'essential characteristics' would be of benefit or not in a legal situation.

Question 13: Yes, I believe that awarding exemplary damages would indeed be considered by grantees that it would act as a strong deterrent and give them enough financial compensation to consider enforcing their PBR rights, also it would encourage parties that have been hesitant to consider using the PBR system to use PBR to protect their intellectual property rights as it relates to breeding plant varieties. As for the criteria for determining exemplary damages I suggest we use the model put forward by New Zealand. Or use criteria that '*the defendant wilfully ...*' so that exemplary damages would apply to someone who it can be shown, purposely infringed the PBR right.

Question 14:

Question 15: With the types of infringements that I envisage we will encounter I see that alternative dispute resolution would be used far more often than current enforcement, and would cover most (90%?) infringements. The remainder would be for purposely and malicious infringements which could be settled in the FMC with the added deterrent of awarding exemplary damages to the grantee plus the infringement penalty as handed down by the PBR Act. The mechanism that could begin the ADR would be as I outlined in my reply to question 9. Should access from an officer from IP Australia and the grantees representative not allowed onto a suspected infringed premises then stronger legal procedures would need to be applied.

Question 16: This area would be the largest area of loss that is sustained by the breeders that we act as agents for. I have attached an email to the PBR office from the breeder NIRP. Similar comments have also arisen from three different rose breeders since then. The amount of damage to the breeders far exceed the concerns of the local market as they see the need to prevent the end sale markets such as Australia, Japan, Europe, USA etc of varieties grown on a mass scale in countries like India and China that have not paid the breeder their royalties. It makes no sense to me that customs can make a seizure of product for all areas of Intellectual property with the exception of PBR.

Question 17: One would be for PBR to be included in the 'Notice of Objection' that customs use for all other areas of IP. Another would be to see how the EU system works as outlined in the attached email.

Last April, I attended a CIAPORA conference in Beijing, China where representatives from PVR/PBR officers from the region explained each countries approach to PBR issues. The Japanese procedure was an excellent example of how to deal with the importation of illegally grown flowers from markets especially China. If you need more

clarification on this I would be happy to send you the extract from the presentation made by Akira Nagata, director of Plant Variety Protection Office, Seeds and Seedling Division, Agricultural Production Bureau, Japan (email: akira_nagata@nm.maff.go.jp) I would also think that importers from these growers should be subject to similar infringement penalties as those local growers who have inadvertently found themselves in breach of the PBR Act; such as mediation.

Question 18:

Question 19:

Question 20:

Question 21 to 24: I believe their needs to be some type of body connected to PBR to assist in the enforcement of the grantees rights. This would include having people on the ground that can actively visit potential infringers with the assistance from a representative of the grantee to determine a breach of the act. I reserve the right to consider the funding and undertaking of this body at a latter date should the idea of such a body be agreed to. However for the record, I am very interested in the concept as presented in the issues paper.

Question 25: Yes their needs to be an awareness program. In the cut flower industry it would be beneficial to supply information through magazines such as a national trade publication the Australian Flower Industry magazine and possibility in the international magazine “Floraculture International”. Both of these magazines do allow editorial space for information to the industry and could be used to describe what PBR is, what it attempts to protect, changes to enforcement especially should the issues presented in this discussion paper become a reality and exposing convicted infringes to the act.

Question 26:

Question 27: My suggestion would be to look at the examples expressed in the attached email and to contact Mr Akira Nagata in Japan (details in the reply to question 17).

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