

End Point Royalty Collection in the Nursery & Garden Industry

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EXECUTIVE SUMMARY

We conducted ten semi-structured interviews with a range of businesses in the nursery & garden industry (NGI) to ascertain the typical supply chains, the utilisation of plant breeder's rights (PBR) and other intellectual property (IP) rights over plant varieties, and the mechanisms by which royalties for use of IP were extracted from various participants in the supply chain. We had a particular focus on the use of end-point royalties (EPRs), and a particular objective of understanding the extent to which EPR mechanisms in the NGI could be adopted for use in the cut-flower industry (CFI).

We found that the key participants in the NGI supply chain are:

- the breeder – who is typically also the owner of PBR on the variety (when protected)
- the agent – typically a local entity appointed by a foreign PBR owner to manage the variety locally
- the propagator – who produces and supplies plants to growers for growing
- the grower – who grows plants, for the purpose of selling either the plant itself or its produce (e.g. its fruit or flowers)
- the label manufacturer – who manufactures labels used when retailing plants
- the retailer – who sells the plant or its produce to customers
- the customer – who purchases the plant or its produce

We found that the mechanisms used in the NGI to obtain revenue for the growing of PBR-protected varieties included:

- an up-front/plant royalty – a royalty paid by a grower on each plant purchased from a propagator
- an annual/on-going royalty – a royalty paid by a grower annually on each plant being grown
- a pay-as-you-sell royalty – a royalty paid by a propagator and/or grower on each plant sold to the next stage in the supply chain
- a label royalty – a royalty paid by a grower on each label purchased from a label manufacturer

Both the annual/on-going royalty and the label royalty may be considered to be forms of an EPR. We found that the potential for use of a label royalty in the CFI is limited, because a label or an equivalent device (such as a sleeve) generally is not used on flowers sold by retailers, and neither retailers nor customers appear to have a need for such a device. There is, however, the potential for use of an annual/on-going royalty in the CFI, and it appears to offer a number of advantages to both the PBR owner and the grower.

In addition, we observed there was a significant level of misunderstanding of the nature and function of IP rights in general, and PBR in particular, among the various participants in the NGI supply chain, and serious practical difficulties with enforcement of those rights in the industry. We make a number of suggestions aimed at improving the understanding of PBR and other IP rights, and at making their enforcement more efficient and effective, including:

- providing additional educative resources on IP rights for plants
- encouraging the use of collective bodies to license and enforce IP rights
- developing low-cost, non-adversarial, services for resolving disputes about IP rights
- amending aspects of the PBR grant process and enforcement provisions

1. INTRODUCTION

(a) Background and Objective

1.1 The purpose of this study was to understand the practices within the nursery & garden industry (NGI) with the collection of end point royalties (EPR¹) for plant breeder's rights (PBR), with a view to determining whether the EPR model is applicable to other industry sectors, and in particular the cut flower (ornamental and native/wildflower) industry sector.

1.2 Our particular aim was to discover: what types of royalty collection mechanisms were being used by the NGI; how wide-spread was the use of a plant label as a royalty collection device; who collected the royalties; what were the difficulties encountered by using the different methods of royalty collection; whether the NGI was using or was amenable to using a separate body for royalty collection (similar to the approach adopted in the grains industry sector); what was the level of understanding of the PBR system in the NGI; and what was the role of trademarks within the NGI.

1.3 The motivation for this study was the success of the Australian grains industry sector in creating an EPR system that both encouraged further innovation by breeders and reduced the risks afforded to growers. The NGI was selected as the focus of the study because this sector in Australia has used an EPR collection method through a plant tag or label.

(b) Methodology

1.4 The study was instigated by the Plant Breeder's Rights Advisory Committee (PBRAC), and was undertaken by PBRAC members Christopher Prescott of Prescott Roses Pty Ltd and Andrew Christie of Melbourne Law School, University of Melbourne. The study consisted of semi-structured interviews with a range of NGI participants conducted by Prescott and Christie during February and March 2015, and a half-day forum on intellectual property and plants for members of Nursery and Garden Industry Victoria (NGIV) conducted by Prescott, Christie and Nik Hulse, IP Australia's Senior Examiner of PBR, in April 2015.

1.5 A total of ten interviews were carried out with representatives of NGI participants of the following types:

- Plant variety project management company (2)
- Plant label manufacturer providing royalty collection services (2)
- European label and image licensing company (1)
- Industry association (2)
- Fruit tree agent, grower, propagator and supplier for orchardists (1)

¹ It is to be noted that the "end point" in the phrase "end point royalty" does not necessarily mean the point at the very end of the commercial transaction chain for the plant or its produce (such as the sale to the consumer); rather, it means the point in the commercial transaction chain at which the plant or its produce has been grown.

- Turf breeder, agent and supplier (1)
- Nursery & garden industry propagators , suppliers, agents (3) and growers (1),
- Cut flower industry propagators, suppliers, agents (3), breeders and growers (1).

1.6 The participants interviewed were:

- **Anthony Tesselaar** and **Phillip Townsend** of Anthony Tesselaar Plants
- **Greg Neil** of Australian Roses
- **Graham Fleming** of Graham's Factree
- **Kylie Balmain** of Immij, and **Robert Wacker** of Floramedia (The Netherlands)
- **Craig Taberner** and **David Reid** of the Nursery & Garden Industry Victoria
- **Gideon Cox** of Ball Australia
- **Craig Bryson** of Sprint Horticulture
- **Marina Layt** of Ozbreed
- **Chris O'Connor** of the Nursery & Garden Industry Australia,
- **Stuart Eason** of Norwood Industries

2. INDUSTRY STRUCTURE

2.1 Before discussing PBR royalty capture points, it is first important to breakdown the industry supply chain explain the roles of each segment.

(a) Breeder

2.2 The breeder is the person or enterprise who has undertaken the creation of a new plant variety. Under Australian PBR legislation, the breeder can adopt any of the following methods to create the new variety:

- ***Controlled pollination:*** Controlled pollination is the process in which the breeder purposefully chooses the parentage of a new variety for the purpose of transferring heritable characteristics from both varieties into the creation of the new variety.
- ***Open pollination:*** Open pollination is the process in which the breeder would have discovered a new seedling or a chance seedling, as the result of naturally occurring cross pollination or self pollination, without taking an active purposeful part in the pollination process.
- ***Genetic manipulation:*** Genetic manipulation is the process in which the breeder takes an active role in ensuring that a particular gene is included or present within the DNA sequence of the new plant variety. This can be by either inserting a gene that was previously not part of the genetic makeup of the plant species (commonly referred to as a Genetically Modified Organism or GMO), or ensuring that a particular gene that already exists in the plant species will present itself in the new variety.
- ***Spontaneous mutation or sport:*** A spontaneous mutation, which is commonly referred to as a sport, is the process in which the breeder discovers a section of an existing plant variety that has some morphological characteristics different from the rest of the plant and which are stable under cloning in asexual propagation.
- ***Induced mutation or sport:*** An induced mutation is the process in which the breeder takes an active role in producing changed morphological characteristics by methods such as exposing the parent variety to irradiation treatment or mutation due to manipulation of meristem in vitro propagation (also known as tissue culture).
- ***Selected from “source” material:*** The PBR Part 1 application form states that selection from source includes, but is not restricted to, selections: from within uncultivated populations, from landrace varieties or unnamed plants; or selected from heterogeneous material selected by a Genetic Resource Centre (GRC). The source material can be: a cultivated/obsolete variety; collected from the wild; a land variety (one which has been traditionally cultivated by farmers for their own use); or special genetic stock (e.g., breeding lines).²

² Part 1, Application for Plant Breeder’s Rights, General Information, Section 3, Q17.

(b) PBR Applicant/Owner

2.3 The applicant for PBR is the person or enterprise that applies for PBR in a variety, and will be the person who is the owner of PBR in the variety once it is granted. This person or enterprise is usually, but not always, the breeder of the variety. (This is formalised in the PBR Part 1 application form in section 1, Q3 where the applicant is required to explain how the ownerships rights were acquired by it – whether it be by assignment, by will or by other legal operation.)

(c) Agent

2.4 The agent is the person or enterprise that represents the interest of the PBR owner to the industry. The agent's role can range from simply collecting royalties and/or in the case of international breeders, providing an address for service for the purposes of correspondence with the PBR office, to offering a complete plant variety management system in which the breeder outsources all the steps in the supply chain to the agent. (For PBR purposes the PBR owner can nominate an agent by filing an "Authorisation of Agent" form with IP Australia to formalise the relationship without stipulating the extent of the agent's responsibilities with the exception of an authorisation to withdraw an application for PBR on behalf of the applicant or not.)

2.5 The breeder, the PBR applicant/owner and the agent are all participants in the supply chain that are involved with the PBR office.

(d) Propagator

2.6 The propagator is the person or enterprise that begins the initial stage of the commercial part of the plant growing process. A propagator creates the physical plant by means of either:

- ***Sexual propagation:*** by germinating seeds and supplying seedlings as plant plugs, tube stock or bare-rooted plants (in the case of deciduous plant varieties in winter) to growers; or
- ***Asexual propagation:*** by cloning plant varieties by cuttings, grafting or micro propagation (tissue culture) and supplying growers with young plants, either as plant plugs, tube stock or bare-rooted plants in the case of deciduous plant varieties in winter.

2.7 The propagator produces the plants for the growers from plant material initially supplied to them by the breeder/PBR owner/agent; from this plant material, the propagator propagates: first, to produce mother stock for further propagation; and secondly, to produce the new plant plugs for sale to growers.

2.8 The plant propagator can be the breeder, the PBR owner, the agent, the grower, or a separate entity with the sole purpose of supplying bulk amounts of young plants to the industry. The plant propagator could be seen as a risk for the PBR owner, as it has the means (the plant material), the skill, and the resources to produce additional young plants outside the PBR owner's control.

(e) Grower

2.9 The grower can be defined as being the person or enterprise who grows the young plants or seedlings to the sale or harvesting stage. Where the plants are grown for sale, the grower is also known as a wholesale nursery. Where the plants are grown for harvesting of its fruit or flowers, the grower is also known as an orchardist or cut-flower grower, respectively. The grower could also be the breeder, the PBR owner, the agent or the propagator but rarely a landscaper or the retailer, except for farm-gate or online sales. The grower's part in the supply chain is to receive the young plants/plugs and grow the plants to a commercially acceptable size, either in pots or rowed out in the field to be dug up as bare-rooted stock. A grower can also be the enterprise that purchases the young plants/plugs for the purpose of harvesting the fruit, foliage or flowers once these plants have matured, on an on-going basis for the life of the plant.

2.10 The grower's main skill is in the area of plant husbandry.

- Nursery industry plant growers purchase the plant plugs or young plants from propagators, continue to grow these into the finished plants, and then on-sell them to the retail or landscape sector.
- Turf growers purchase seed or runners, grow these into carpet like blocks of mature turf in open fields, dig the turf and then on-sell it to the landscape or retail sector.
- Fruit tree growers purchase their young plants from fruit tree propagators, grow the trees in orchards (it can take several years before fruiting takes place), then harvest the fruit during the fruiting season and sell this produce to the wholesale and retail sectors.
- Cut-flower growers purchase plant plugs or young plants from propagators, grow these into productive flowering plants (which can take as little as a couple of months to a couple of years depending upon the species), then harvest the flowers (which can be seasonal for some species, whilst others can be in production year round) and sell them to the wholesale and/or retail sectors.

2.11 The grower can be seen as a risk to the breeder/PBR owner, as they have the plant material, but would need the skills and the production resources of a propagator, to produce additional plants.

(f) Label Manufacturer

2.12 The plant label manufacturer is a person or enterprise that is allied to the nursery and garden industry, similar to the plastic pot manufacturer and chemical supplier. The label manufacturer's chief role is to supply promotional and marketing material to the grower, so as to assist in the plant's sale at the retail end of the supply chain. The label manufacturer is not involved in the plant growing process; however the label's place of importance within the industry has created the opportunity for the PBR owner to use the plant label as a royalty collection device, a system which appears to be unique to Australia due to the initiative started by one of the label manufacturers in the 1980's.

(g) Landscaper

2.13 The landscaper is the person or enterprise that uses finished plants in garden design or indoor plant scapes. The landscaper sources the required plants from growers to create gardens in the area of amenity horticulture for both public (government) and private clients. The landscaper or landscape designer will generally buy plant varieties on mass, and have no need for the plant to have a label or tag (except as an identifier of the different plants being used). The landscaper will usually purchase plants on a job-by-job basis and will buy in quantities to fulfil each individual job. Some landscapers will also offer a maintenance service for their clients.

(h) Retailer

2.14 The retailer is the person or enterprise that buys finished plant varieties from growers and on-sells them to the general public. The retailers can be split into two categories: (i) small retailers, such as retail nurseries, garden supplies outlets, florists etc; and (ii) large retailers, i.e. chain stores such as Bunnings. These businesses are usually not set up with the ability to propagate and therefore are not considered as risks to the PBR owner's intellectual property rights. Plants sold in retail outlets commonly require a label or tag as plant identifiers as well as bar code devices and marketing material. Retailers will generally treat plant varieties as perishable items and will discard plants as they become commercially unviable due to disease or damage.

(i) Customer

2.15 The customer or consumer of a plant variety is the general public that will purchase a plant as gifts or for their own use from retail outlets or online. The general public can also be the customers of landscapers, as can Government departments, industry and architectural businesses. The customer can be characterised as the person who buys a plant or the recipient of a ready-made garden or interior plant scape.

3. FINDINGS

(a) Revenue Collection Mechanisms

(i) Used by breeder/PBR owner

3.1 The financial return received by the breeder/PBR owner is for its intellectual property in the variety that is the subject of PBR. This return is usually termed as a breeder's royalty, and is collected in a range of ways:

- By a **plant royalty**, also known as an up-front royalty, paid by the grower on each plant plug sold by the propagator. This royalty is either collected by the plant propagator from the grower and remitted to the breeder/PBR owner, or is collected by the breeder/PBR owner/agent invoicing the grower using information about plug sales supplied by the propagator. Interviewees observed that this was the most widespread method of royalty collection for the breeder, and suggested that all or the majority of the royalty collected at this stage was collected for the breeder. In certain circumstances, the agent will subtract an administration charge from this royalty prior to forwarding the royalty payment to the breeder. This is the easiest method by which a breeder can obtain returns, as at this stage the supply chain is at a narrow point with few entities involved and there are direct business-to-business connections between the breeder, the agent and the propagator. The issue in enforcing this method is that without monitoring further down the supply chain, infringement by self propagation of these plants can go unnoticed.
- By an **annual fee** paid by the grower which was based upon the amount of plants that were initially purchased from the propagator and was invoiced by the breeder/PBR owner/agent on an on-going basis until such time as the grower notified the breeder/PBR owner/agent that these plants were no longer in production. This could be characterised as an **on-going royalty** in the case where the retail product is sourced from the variety as harvested material rather than the plant itself. In this case the breeder/PBR owner also required an up-front royalty from the grower for the purchase of the plant, with the ongoing component shared between the breeder and the agent (where one was used). This was seen as an improved system of collection over an EPR, as the breeder/PBR owner was not required to force growers to comply with licensee restrictions that they considered onerous. This system of collection does depend upon the desire and ability for the PBR owner to monitor the grower's planting on an on-going basis. It also maintains a communication channel between the breeder/PBR owner/agent and the grower for future plant sales. It would also require the breeder/PBR owner/agent to connect with new owners should the grower sell their business.
- By a **pay-as-you-sell royalty**, paid by propagators and/or growers, once the plant is sold to the next stage of the supply chain. This system worked on the basis that the growers and propagators, who were licensed by the breeder/PBR owner/agent, would self-report on sales on a monthly or quarterly basis. The self reporting was seen as beneficial as it was envisaged that the growers and propagators would be less likely to report inaccurate sales numbers due to the physical process of a written inventory report. The breeder/PBR owner/agent backed up this reporting system with on-site visits, and the use of mystery shoppers that would either purchase plants and see if they were included on the inventory sales report, or establish if the licensee would offer alternative plants to those of the PBR owner when specifically varieties of the

PBR owner were asked for by a perspective customer (which could be due to the grower receiving a larger portion of the return from the sale price of the substitute plant). It was also possible in the area of turf sales for the breeder/PBR owner to use online devices, such as Google maps, to note where plantings of turf were occurring and to match these up with sales reports from suppliers in the area.

- By a **label royalty** paid by the grower on the purchase of labels used when supplying the plant to a retailer for sale to a customer. The royalty is collected in one of two ways: (i) as part of the purchase price of the label paid by the grower, which is remitted to the breeder/PBR owner/agent by the label manufacturer; or (ii) upon invoicing of the label purchasers by the breeder/PBR owner/agent to the grower, from the labels that the breeder/PBR owner/agent had purchased themselves from the label manufacturers. This system of collection is made possible by the necessity of a plant variety requiring a label in the case of retail sales. It was suggested that the label as a royalty capture device was the norm in the NGI in Australia. This is an example of an end-point royalty (EPR).
- In the case of turf, by a **royalty paid on each metre²** of turf sold by the grower. The turf is sown by seed or by runners (small sections of turf cuttings) by the grower in open fields and harvested by lifting the fully-grown turf along with a section of the top-soil that contains the roots. This is usually rolled into serviceable -sized pieces that are placed onto prepared lawn beds in a line by line pattern. The royalty is collected by the breeder/PBR owner by issuing an invoice on the amount of metre² of turf that the grower has sold to the retailer or landscaper. This is achieved by the licensed grower filling out a sales inventory report of the metre² of turf sold on a monthly basis. This is another example of a pay-as-you-sell royalty.

(ii) Used by agent

3.2 The financial return received by the agent is for the services of managing the PBR owner's rights. This return is obtained from different parties in different ways:

- By an administration fee deducted from the royalties collected for the breeder/PBR owner. The agent invoices the propagators/growers for the breeder/PBR owner's royalty, whether that is collected as an up-front royalty, a pay-as-you-sell royalty, an annual fee/on-going royalty, or a label royalty. Built into the amount invoiced will be the administration fee, which the agent will use this return to pay any costs incurred in obtaining PBR protection. This is formalised in six-monthly or annual reports to the breeder/PBR owner, which can include details such as the names of the growers who have paid the royalties, numbers of plants each grower has sold, an indicated monetary amount that the breeder requires as royalty return per plant, less the costs incurred (for PBR/administration) by the agent.
- Instead of or in addition to an administration fee, by a licence fee or a marketing levy paid by growers. This fee/levy is incorporated in the marketing strategy, where the agent takes an active role in creating a marketing system in which the growers wish to participate. This can be in the form of a marketing campaign that consists of in-store banners, special labels and advertising, and is usually paid by the growers on the purchase of the plant label.

(iii) Used by propagator

3.3 The financial return received by the propagator is for the supply of the plant plug or young plant. This return is obtained by way of the purchase price paid for the plug or young plant by the grower – either as:

- A portion of the purchase price, where the purchase price also includes a plant royalty/up-front royalty that the propagator forwards to the breeder/PBR owner by way of periodic sales reports; or
- As the purchase price for the physical plant, where the plant royalty/up-front royalty is invoiced directly to the grower by the breeder/PBR owner/agent separately, using information about plug sales, including grower's details, plant varieties and quantities that the grower has purchased provided by the propagator.

(iv) Used by grower

3.4 The financial return received by the grower is for the sale of the “finished” plant to the retail or landscape sector, or of the produce from the plant to the retail or wholesale sector. This return is obtained by way of the purchase price paid for the plant or the produce.

3.5 The methods of return for growers depends upon the industry sector they are in:

- Nursery industry plant growers receive their return from the purchase price paid by the purchaser of the plant, on a per-plant basis.
- Turf growers receive their return from the purchase price paid by the purchaser of the turf, on a per area of turf basis.
- Fruit tree growers receive their return from the purchase price paid by the purchaser of the harvested fruit, on a per volume of fruit basis.
- Cut flower growers receive their return from the purchase price paid by the purchaser of the harvested flower, on a per bunch of flowers basis.

(v) Used by label manufacturer

3.6 The financial return received by the label manufacturer is for the printing of the label and for any additional services provided in association therewith, such as design of the label (including production of artwork and text), warehousing and distribution of the label, and collection of breeder's royalty through the label purchase price.

3.7 Typically, the label manufacturer obtains its return for the following services in the following manner:

- Printing of the label – through a portion of the label purchase price.
- Design of the label – through direct charging to the breeder/PBR owner/agent.
- Warehousing and distribution of the label – through direct charging to the breeder/PBR owner/agent or through a portion of the label purchase price.
- Collection of breeder's royalty – through a portion of the label purchase price.

3.8 Where the label manufacturer collects the breeder's royalty through the label purchase price, this royalty is a portion of the purchase price that is remitted to the breeder/PBR owner/agent.

(vi) General observations

3.9 The mechanisms used to collect royalties were mostly determined by the agent (when one was appointed), and were chosen so as to maximise the agent's ability to ensure collection of these royalties. The relative efforts of the agent in seeking compliance with royalty payment, and with enforcement of the breeder/PBR owner's IP rights, appeared to depend upon the individual agent's business model and to be in proportion to the amount of return the agent received.

3.10 The mechanisms that were developed for royalty collection appeared designed to ensure that licensed propagators and growers complied with their payment obligations, rather than to identify and restrain unlicensed propagators and growers undertaking illegal propagation. Licensed propagators and growers were able to be monitored more closely by the use of more than one royalty collection mechanism, and/or by the active participation of the breeder/PBR owner/agent in periodical visits to these businesses.

(b) Label as an EPR Collection Mechanism

3.11 It was expressed that in the NGI the plant label was the primary device for breeders to receive the breeders royalty. There were, however, exceptions to this, being where: (i) the value of the variety was low, such that adding additional costs to the label made the plant variety unviable against other generic plants of similar type; and (ii) where the label was used to differentiate plants grown by certain growers, by creating a more eye-catching label or by changing the name of the variety on the label – in this case the label was seen as a device to collect a marketing levy in which little, if anything, was collected for the breeder.

3.12 It was also suggested that the label was but one of a series of royalty collection mechanisms used within the NGI supply chain. In these instances, the label was not only used to collect the royalty, but also was part of the checks and balances that the PBR owner/agent utilised to track plant volumes from licensed growers, by matching labels purchased against reports of plants sold. The label also provided the ability to advertise the IP rights (be they PBR or trade mark) applicable to the variety, so that purchasers at the retail level were made aware of the intellectual property pertaining to the purchased plant.

3.13 The system of collecting a breeder's royalty through the label purchase price is unique to Australia, although there have been some efforts by Australian label manufacturers to expand the system into other countries. The system was developed by one particular Australian label manufacturer in response to a request from a section of the NGI, and has been adopted by others in the label manufacturing industry due to the demands of PBR owners and others who release new plant varieties into the marketplace.

3.14 The success of the label as an EPR collection device is also due to the growers relying on the label manufacturing businesses to supply all their label needs. The collection of the royalty is an accepted part of the label purchase experience.

3.15 The monies collected by the label manufacturer did not always include an EPR that was paid to the breeder. We observed that there were occasions where the returns collected through the label included a marketing levy (typically for labels to which the plant breeder applied a trademark) and this levy was collected for the agent as the trademark owner (rather than for the breeder as the PBR owner).

3.16 In general, the labels for plant varieties that were the subject of PBR protection status had a greater monetary return figure to the breeder/PBR owner/agent than those that were subject only to trademark protection.

3.17 A similar EPR collection mechanism was seen in fruit growing. Growers of a PBR protected variety of fruit tree were required to place stickers on all fruit from the tree that was supplied for sale. It was reported that some growers found this to be an onerous requirement that provided no financial benefit to them, because they considered that purchasers of the fruit did not discriminate between fruit with and without the sticker, whilst other growers found that the use of stickers provided an advantage through brand recognition.

3.18 We were informed that label manufacturers in Europe were not involved in the collection of EPR's or levies. They do, however, offer other services that contribute to collection of royalties by breeders/PBR owners, such as:

- By producing labels with security mechanisms by which an authorised (by the breeder/PBR owner) label can be distinguished from non-authorised label, such as incorporating micro-dots and hidden watermarks into the image, and printing with inks containing synthetic DNA. These mechanisms are designed so that the supplier of an infringing label is not aware of them and therefore would not replicate them. This makes it easier for the breeder/PBR owner to prove infringement in the situation where plants have been supplied with non-authorised labels.
- By establishing a library of photographs of plants to be used on authorised labels (and other marketing material, such as catalogues and websites). The photo library owner agrees to supply these photos only to label printers authorised by the breeder/PBR owner to print labels for their varieties, meaning that non-authorised labels will not have the authorised photograph – making it easier for the breeder/PBR owner to prove infringement in the situation where plants have been supplied with non-authorised labels.
- By providing image search and detection services, to identify photographs from the photo library that are being used on websites to market a plant variety without authorisation. This makes it easier for the breeder/PBR owner to locate the unauthorised supply of, and hence likely infringement of PBR in, the plant variety.

(c) Limitations on use of EPR Collection Mechanisms

3.19 The following were the limitations expressed by the interviewees with the use of EPR collection mechanisms:

- ***The value of the variety:*** Several of the interviewees indicated that the use of a label as an EPR device was dependant on the value of the plant variety being sufficiently high to justify the requirement that the grower purchase a relatively high-cost label.

Low value, quick turnover, stock such as seedling lines were more likely to attract an up-front royalty only.

- ***The non-requirement for use of labels in certain segments:*** Certain customers, such as landscapers, broker outlets and direct sales (farm gate or online), do not require the plant to have a label. Accordingly, some propagators or growers are tempted to sell PBR-protected plant varieties to these customers without purchasing labels, and thereby robbing the breeder/PBR owner of the opportunity to collect a royalty as part of the label purchase price.
- ***The practice of renaming a variety:*** Some of the interviewees identified a practice in which a PBR-protected plant variety is sold under a different name. This could be for *bona fide* marketing reasons such as to differentiate the plant from plants of the same variety grown by other growers or to increasing sales of the plant due to improved market awareness of the plant under the new name (in which case an EPR could still be collected through the use of the different label), or it might be to avoid payment of a breeder's royalty (since either no label is used or the label used is different from the one on which the breeder/PBR owner collects its royalty).
- ***Non-payment of royalties should the grower go into receivership:*** It was suggested that reliance solely on an EPR could place the breeder/PBR owner/agent at risk of non-payment in cases where the propagator/grower goes out of business. If the plants in stock are sold by the liquidator, the breeder/PBR owner/agent could be seen as an unsecured creditor and not be able to receive all the payment that had been anticipated. This would be of concern particularly in high-value plant stock that may take many years to reach maturity.
- ***Environmental concerns with the use of a plastic label:*** It was suggested that in certain European countries, including in particular Germany, consumer activism over environmental concerns about plastic have led to plastic labels not being used. Propagators were forced to stop supplying labels due to this form of consumer activism. This was seen as a possible future concern in Australia.
- ***Grower resistance to use of EPR device:*** This limitation is particularly relevant where the EPR device is not a label used by the NGI. An example is cut-flower roses, where part of the breeder's royalty was collected on the grower's purchase of the flower sleeve (the wrapping used to wrap flower bunches). It was found that growers were unwilling to use the sleeves, either because the growers already marketed their flowers in their own branded sleeves or because the growers would not use any sleeve as it was an unnecessary product for the retail sale of flowers (since a florist would buy bunches of flowers from the growers or flower wholesalers and would generally unwrap them for sale in the delivered bunch state, or use the flowers from several different suppliers to create mixed bunches or in their floral design pieces). Another example is fruit, where part of the breeder's royalty was collected on the sale of fruit on which stickers were required to be placed. This created some friction with some growers, due to what they perceived to be onerous conditions (the need to physically apply the sticker to each piece of fruit) without what they considered to be any resulting marketing benefit (their belief being that there was no differentiation of fruit at the retail end – i.e., that many retailers didn't separate the branded fruit from unbranded fruit).

(d) Compliance Systems

3.20 The types of compliance systems used by breeders/PBR owners/agents to ensure propagators and growers comply with royalty obligations include the following:

- ***Trusted partner networks:*** This system is where the breeder/PBR owner/agent develops a limited network of partner businesses in whom they trust to propagate and/or grow the variety. The model is created by developing trust within the business-to-business relationship. This system benefits the propagator/grower by having a degree of exclusivity over a plant variety and/or benefits of a marketing program that in turn provides them with a better return than from generic lines.
- ***Supply chain networks:*** This system is where the breeder/PBR owner/agent has developed a closed-chain network, where each process within the supply chain has in-built mechanisms to detect non-compliance. In these systems the operator will specify who can grow plants, how many plants can be grown, the geographical areas the grower is able to supply, the periodicity of reports and/or onsite visits, and all aspects of the supply chain including labels, plugs, pots and other items associated with the sale of potted plants
- ***Non-propagation agreements:*** This system is where the breeder/PBR owner/agent allows the supply of young plants to a grower under a contract in which the grower agrees not to propagate additional plants from the plants supplied.
- ***Pay-as-you-sell model:*** This is a system in which propagators and growers are required to report to the breeder/PBR owner/agent, on a monthly or quarterly basis, the number of plants or plugs that they have sold in these periods.
- ***Industry collective body:*** This system is set up by a group consisting of a large proportion of the breeders/PBR owners/agents in a specific market, who create an association that uses a cooperative approach to ensure that growers comply with their royalty payment obligations. Under this system the association can request written reports from, and conduct onsite audits of, the growers involved. It is seen as beneficial that all members participate in these audits as a collective rather than as individuals, reducing the prospect of being isolated when insisting that growers meet the conditions specified by the breeder/PBR owner. This system can offer benefits to the growers who participate, such as enabling access to protected varieties, marketing and quality assurance programs etc. This system relies on the breeders/PBR owners/agents having the ability to work in collaboration and on growers agreeing to participate, and is discussed in further detail below.

(e) Industry Collective Body

3.21 The purpose of an industry collective body is to have an external party to monitor, administer and enforce the rights of breeders/PBR owners/agents. This arrangement enables a suitable distance to be maintained between the breeder/PBR owner/agent on the one hand and the propagator/grower on the other hand. This is useful because, unlike with other IP rights where infringers are usually competitors of the rights owner, with PBR infringers are either customers or potential customers of the PBR owner. This fact provides a disincentive for the PBR owner to bring an infringement action, since that may result in a breakdown in the business relationship between them. Having an external party that represents a majority of breeders/PBR owners to exercise their rights would provide an improved opportunity for compliance, as the financial risk to an infringing grower is magnified when the repercussions

of the infringement may result in more than just the one breeder/PBR owner refusing to supply the grower in the future.

3.22 The use of an industry collective body already exists to some extent in the NGI, with the label manufacturers collecting royalties on up to the 65% of the product that is sold through the retailer outlets. The service offered by the label manufacturers benefits both breeders/PBR owners (by providing an effective mechanisms for royalty collection) and propagators/growers (by ensuring that competitors are not able to undermine their sales by supplying cheaper protected plant varieties into the supply chain).

3.23 The NGI peak bodies were interested in the concept of an industry collective body, as they could see benefits for their membership with the service provided by such a scheme, and with the revenue created by administering such a scheme able to be invested into other industry initiatives (such as educating the industry on IP matters, advising or assisting their members in ascertaining infringements, and advising or assisting in the enforcement of rights including through ADR).

3.24 The stone fruit tree producers have created an association named ‘Fruit Rights Australia’, a peak body through which breeders/PBR owners monitor and enforce their IPR’s. The main purpose of this group is to educate growers on the advantages of supplying their customers with new protected varieties and on the obligations the growers need to meet relating to the IPRs of these varieties. The members benefit by being part of a collective that can audit and visit growers that have signed on; and the growers benefit by acquiring the right to grow these protected varieties along with additional marketing support for the varieties and education about the varieties (such as growing tips).

4. CONCLUSIONS AND RECOMMENDATIONS

(a) Revenue Collection Mechanisms

4.1 We assess the potential for the cut flower industry (CFI) to adopt the various royalty collection mechanisms utilised in the NGI, as follows:

- **Plant royalty:** Payment of an up-front royalty when the grower purchases the plug or young plant is currently the commonly accepted method used by the CFI breeder/PBR owner/agent to collect their returns. As with the NGI, the possibility of infringement further down the supply chain can occur in the absence of additional monitoring – from propagators and/or growers either (i) buying flowers from the retail sector (with or without knowledge of PBR status on the plant variety) and then self-propagating for their own or another’s use, to sell the flowers, or (ii) self-propagating from plants initially supplied by the breeder/PBR owner/agent, to add to or replace the initial plants.
- **Annual fee/on-going royalty:** An on-going royalty paid annually by the grower could be used in the CFI, due to the harvested material, rather than the plant itself, being the saleable item. It could also be adapted to permit the grower to self-propagate from their own plants (however sourced) and to continue to harvest material into the future, subject to the grower informing the breeder/PBR owner/agent of the amount of plants they have propagated and being willing for the breeder/PBR owner/agent to inspect the planting to monitor plant numbers. Use of this royalty mechanism would redress the issue of lost revenue in the situation where the grower self-propagates new plants without the permission of the breeder/PBR owner/agent – a situation that is currently difficult to prevent or prove.
- **Pay-as-you-sell royalty:** An EPR in the form of a pay-as-you-sell royalty could be developed for the CFI, in which the royalty is collected from growers on the basis of the number of flower bunches sold. This approach relies on the self-reporting by the growers at monthly or quarterly intervals. As seen in the NGI, it would require monitoring by the breeder/PBR owner/agent to ensure compliance, as flower growers may be tempted to falsely report actual sales.
- **Label royalty:** A label, tag or other device, such as a flower sleeve or wrap, could be used as an EPR collection device, by the breeder/PBR owner/agent requiring that growers must use such a device on all the flower bunches sold. This type of collection system could be integrated into the existing NGI model, where the label manufacturer collects the royalty on behalf of the breeder/PBR owner/agent. However, additional monitoring by the breeder/PBR owner/agent would need to be implemented, as the retail sector of the CFI does not currently require these product devices for the sale of cut flowers.
- **Royalty per metre²:** A royalty paid on each metre² of plants being grown for cut flowers could be utilised by the CFI, as growers partly select the varieties that they grow by yield (which is usually expressed as stems per metre²), particularly for highly intensive greenhouse growing. This approach would be somewhat different to that adopted in the NGI for turf, where the royalty is paid on each metre² of turf sold. In the CFI sector it could be collected as an annual fee (i.e. an on-going royalty) on each metre² of plants being grown, for so long as the grower keeps the variety in production, including in cases where self-propagation is permissible. This kind of system provides the potential for having differing royalty rates that differentiate between high-yield

and low-yield varieties, with higher yielding varieties attracting a higher per metre² royalty. In this way it could encourage breeders to develop higher yielding varieties, since those would return higher dividends to them. This is different from the current practice of breeding cut flower plant varieties of an acceptable production level and asking the same royalty for all varieties, regardless of the returns that can be obtained by the grower.

(b) Label as an EPR Collection Mechanism

4.2 The use of the plant label as an EPR collection device in the NGI has been successful due to the necessity of having plant tags or labels attached to all plants sold in the NGI retail sector, the on-going symbiotic relationship between the plant breeders/PBR owners/agents and the label manufacturers, and the high proportion of growers who purchase all their labels from just two manufacturers.

4.3 The experience of the fruit tree sector shows that this approach can be problematic when the device has to be attached to the produce of the plant rather than the plant itself – at least when the retail sector for the produce does not require such devices to be present to enable sales. Without a demand for such a device from this part of the supply chain, some growers are not keen to use them as they consider that they add additional costs that are not seen as essential to the sale, and attempts by the breeder/PBR owner/agent to force these growers to comply can generate resentment.

(c) Limitations on use of EPR Collection Mechanisms

4.4 The main limitation with EPRs on plants, or on the products harvested from them, is the necessity of having a collection device, such as a label, that is part of the retailer's business requirements (such as for stock handling, product branding, etc). As explained above, if the retail sector does not have a need for such a device then it will be very difficult to encourage growers to purchase such a device, as it will simply be seen as adding to the cost of producing the product for no benefit.

4.5 We understand that currently retailers in the CFI generally have no business requirement for a device such as a sleeve. Accordingly, we see little potential for use of EPRs in the CFI in the foreseeable future.

(d) Compliance Systems

4.6 Since most of the compliance systems are designed to maintain compliance within the framework of an organised supply chain, their success depends on maintaining the business-to-business relationship between the breeder/PBR owner/agent and the propagator and the grower. A breakdown in these relationships can create financial losses for both parties. A particular situation that can give rise to a breakdown in these relationships is a dispute about infringement of IP rights. Such disputes can easily escalate, given the adversarial nature of the legal system.

4.7 We recommend that there be early intervention in disputes about IP rights. Such intervention should be non-adversarial, and should seek to resolve the dispute without recourse to legal proceedings. Alternative dispute resolution (ADR) mechanisms such as mediation and early neutral evaluation are particularly suitable for use in the NGI, given its

size and the need to maintain good relationships between the parties. We note that the Advisory Council on Intellectual Property (ACIP) in its 2010 *Review of Enforcement of Plant Breeder's Rights* recommended that IP Australia facilitate ADR for parties in PBR disputes, including through establishing a register of ADR service providers with PBR and plant breeding experience. That recommendation was accepted by government, but appears not yet to have been implemented. We support that recommendation.

4.8 We also encourage the NGI peak industry bodies, such as the NGIV and the NGIA, to consider implementing a low-cost dispute resolution process for their members, similar to the way in which peak bodies in other industries, such as franchising, have done.

(e) Industry Collective Body

4.9 We consider that voluntary collective bodies (i.e. voluntary membership-based organisations that act on behalf of all members collectively) have the potential to play highly valuable roles in the collection of royalties and in the enforcement of PBR in the NGI. Using collective action to collect royalties can significantly increase efficiency through scale, thereby improving the financial returns to breeders/PBR owners/agents while also reducing the financial burden on growers and propagators. A collective body is also able to undertake cost-effective monitoring of, and education about, compliance with IP rights, as well provide a less confrontational approach to dispute resolution through promotion and use of ADR procedures.

4.10 We note that ACIP in its 2010 *Review of Enforcement of Plant Breeder's Rights* considered that there are potentially significant benefits to be gained from such organisations, and that government has a facilitative role to play in their establishment, but only once their structure and function has been agreed by the relevant industry sector. While we consider that this approach is correct in principle, we believe that in practice a rather more pro-active approach is warranted, given the small size and fragmented nature of the NGI and related plant industry sectors. In particular, we consider it would be desirable for government to provide guidelines to assist those wishing to establish such a collective body in understanding their responsibilities to comply with the relevant legal provisions, such as the competition law regulations on collusive behaviour.

4.11 The NGI peak bodies already have an accreditation service to which member growers can voluntarily subscribe – the Nursery Industry Accreditation Scheme Australia (NIASA). Under the NIASA, growers operate according to a set of best management practice guidelines (which relate to such matters as crop hygiene, crop management practices and general site management), and are subject to an annual visit from an industry development officer to ensure compliance with them. This scheme conceivably could be extended to include IP monitoring activities. For example, the best practice management guidelines might be extended to include compliance with any PBR over the varieties being grown, and the annual inspection might be extended to include monitoring of the grower's compliance with those obligations.

5. RELATED OBSERVATIONS

(a) Intellectual Property Rights

5.1 We observed that intellectual property (IP) rights within the NGI are used: (i) to deter propagators/growers from unauthorised propagation (i.e. propagation on which a royalty is not paid, either because the plants were not supplied by the breeder/PBR owner/agent, or because they were supplied by the breeder/PBR owner/agent but the royalty collection mechanism was avoided); and/or (ii) to differentiate plant varieties grown by one or a selected cohort of grower nurseries from the majority in order to increase the revenue return from these varieties for these participants. It was stated that the majority of new plant varieties released in Australia were from international plant breeders, and that these new plant varieties (both with PBR and without PBR protection) were released into the Australian market by agents acting on behalf of the overseas breeders.

5.2 PBR was used as the main deterrent against the unauthorised propagation of protected varieties by propagators and/or growers. PBR has been used broadly on higher-value plant varieties. The concept of PBR as a plant variety protection with legal standing was widely understood by the industry at large. However, the plant varieties on which a breeder's royalty was collected were not always the subject to PBR protection. Whether or not PBR was obtained on a variety was mostly determined by the commercial value of the product sold. Where plants of the variety were low-value and/or had a short commercial life span, breeders often forewent obtaining PBR protection for the variety, on the ground that the time and cost of obtaining PBR protection was not warranted.

5.3 Trade marks (both registered and unregistered) were often used to provide a form of market exclusivity for a plant variety, either in addition to or instead of PBR protection. The view was expressed that the legal exclusivity provided by a trade mark was typically misunderstood by growers, with the result that an assertion of the existence of a trade mark by a breeder/agent often had the effect of misleading growers into believing they could not propagate the variety for sale without the authorisation of the breeder/agent. In this manner, a trade mark (registered or unregistered) often performed the role of providing *de facto* PBR-like protection at little or no cost to the breeder.

5.4 Concern was expressed by a number of interviewees about a pervasive lack of understanding in the NGI about the different IP rights capable of being used in relation to plants and plant varieties. The number and the nature of the questions asked at the half-day IP Forum for NGIV members, at which we participated, confirmed that there appears to be a low level of understanding in the sector about the different purposes and effects of a PBR, a registered trade mark and an unregistered trade mark.

5.5 We consider to be valid the concern from several members of the NGI that there is confusion regarding the purpose of the differing types of IP rights applicable to plants and plant varieties, and what entitlement these different types of IP have over the ownership and use of plant varieties. We believe that one solution to this problem is to conduct further educational activities, including in particular workshops similar to the NGIV IP Forum that was held in Cranbourne, Victoria in April 2015. The objective of that forum was to involve industry members in a Q & A session about the practical effect of the different IP rights. This was achieved by having a trio of speakers – a senior examiner from the PBR office, an IP law academic and an industry PBR professional – explaining the types of IP rights available to the

industry, the role of IP Australia as the Government agency responsible for granting these rights, the scope and legal effect of those rights, and why IP rights are important for facilitating innovation in the industry. Many questions were submitted prior to the forum and those questions, and the many others asked by audience during the forum, were addressed at some length. The general consensus of participants was the forum was highly successful.

5.6 To encourage NGI participants to become more innovative in the breeding of plant varieties, the relevant IP rights need to be focused in such a way as to enable breeders to obtain sufficient financial gain to make breeding new varieties commercially attractive and viable. A number of concerns about obtaining and enforcing PBR were raised by interviewees, and we discuss those immediately below.

(b) Obtaining PBR

(i) Requirement of distinctiveness

5.7 Concern was expressed with the interpretation and the application by the PBR Office of the criterion of one variety being “clearly distinguishable” from another variety. The criterion of a later variety being “clearly distinguishable” from any earlier variety plays two roles under the legislation: (i) as a requirement that must be satisfied for PBR to be granted in relation to the later variety (s. 43); and (ii) as a characteristic that must be present for the later variety to not fall within the scope of PBR granted to any earlier variety (s. 13).

5.8 The concern expressed about the criterion of “clearly distinguishable” was that the PBR Office interpreted and applied it in a manner that made it too easy for a later, very similar, variety (sometimes called a “me too” variety) to obtain PBR protection and/or to avoid being considered to be within the scope of the PBR granted to the earlier variety to which it is similar. In particular, it was felt that a very minor cosmetic difference that did not, of itself, provide a difference of commercial value nevertheless was considered by the PBR Office as sufficient to satisfy the requirement for grant of PBR for the variety and/or to fall outside the scope of protection proved by PBR for the earlier variety. This, in turn, was considered to substantially diminish the practical value of the PBR granted over the earlier variety, and thus the commercial benefit of the PBR system to breeders.

5.9 We consider to be valid the concern that the PBR Office interprets and applies the “clearly distinguishable” criterion in a manner which makes it too easy for a very similar variety to obtain PBR protection and/or to avoid being considered to be within the scope of the PBR granted to the earlier variety. We believe that a solution to this problem is to amend the interpretation and application of the criterion “clearly distinguishable” (which is not defined in the PBR Act), so as to require that the later variety exhibits at least one commercially valuable characteristic that is not present in the earlier variety. Every plant species has morphological characteristics that are deemed to be the important for the commercial value of the plant. (In the case of ornamental plant species, for example, a cosmetic characteristic might be a commercially valuable one, whereas this is unlikely to be the case in other plant species, such as grains.) We suggest that the technical guidelines for each of the different plant species differentiate between commercially valuable characteristics and other morphological characteristics, and that the requirement of “clearly distinguishable” (the so called “minimum distance” requirement) be determined by consideration only of commercially valuable characteristics. We note that a somewhat similar proposal, albeit in

the context of the definition of an “essentially derived” variety, was made by ACIP in its 2010 *Review of Enforcement of Plant Breeder’s Rights*, but was not accepted by government.

(ii) Disposal of accepted applications not satisfying requirements for grant

5.10 Concern was expressed with the way in which the PBR Office dealt with applications that had been “accepted” (i.e. pending, in the sense that the application has been filed, is complete and demonstrates *prima facie* distinctiveness of the variety, but has not yet been examined) which subsequently appeared to not satisfy the requirements for grant of PBR. In particular, concern was expressed that in such a situation the PBR Office was reluctant to make a determination that a non-satisfying application should be “refused”, and preferred instead to request the applicant to “withdraw” such an application – with the result that an application could remain pending for a long period of time should the applicant not acceded to the request to withdraw it.

5.11 It was said that the failure of the Office to refuse such an application had an inappropriate effect, given that the legislation provides that the applicant of an accepted application is taken to have the same rights as a grantee (other than the right to commence an action for infringement). It was also said that such a failure prejudiced the grantee of PBR in an earlier variety to which the variety of the accepted application was alleged to be so similar as to be infringing, in that the grantee felt unable to commence an infringement action while the Office’s determination of whether the later variety was clearly distinguishable was pending.

5.12 We do not know whether the concern with the way in which the PBR Office deals with accepted applications that do not satisfy the requirements for grant is valid. Should the concern be valid, we believe that the solution appears to be for the Office in such a situation to refuse the application, rather than request its withdrawal.

(c) Enforcing PBR

(i) Who may sue for infringement

5.13 Concern was expressed that the PBR Act provides that an action for infringement can only be brought by the “grantee” – that is, the person entered on the Register as the holder of the PBR in the variety (which includes, where the variety has been declared to be an essentially derived variety, the holder of the PBR in the variety from which it was derived). This can give rise to difficulties in the situation where a foreign grantee chooses to administer its PBR by way of a local agent – an apparently common arrangement. Even though the local agent will typically have been granted an exclusive licence to the PBR, the local agent has no standing to bring an action for infringement of the PBR. To stop an infringement it is therefore necessary for the local agent to persuade the foreign grantee to commence legal proceedings.

5.14 It was said that often a foreign grantee is not strongly motivated to commence legal proceedings, because of the cost and/or the administrative burden in doing so. When the foreign grantee declines to commence legal proceedings for infringement, the local agent is left in a difficult position, as it has no way to enforce its exclusivity and thus protect its revenue stream.

5.15 We consider to be valid the concern that an exclusive licensee cannot bring an action for PBR infringement. We note that this problem does not arise in relation to most of the other Australian IP regimes. Under the relevant legislation, it is possible for an exclusive licensee of a copyright and a patent, and for an authorised user of a registered trade mark, to commence legal proceedings in their own name (subject only, in case of copyright or patent, to joining the grantee as a either a plaintiff or a defendant). We also note that this problem also does not arise under the PVR legislation of New Zealand, where a licensee (not necessarily an exclusive licensee) has the right to bring an infringement action in respect of the variety the subject of the licence.

5.16 We believe that the solution to this problem is to amend the PBR Act to provide that an exclusive licensee, like an exclusive licensee of a copyright or a patent, may bring an action for infringement of the variety the subject of the licence. We note that the Law Council of Australia made such a proposal to IP Australia in November 2014.

(ii) Obtaining evidence of infringement

5.17 Concern was expressed with the difficulties of grantees obtaining the evidence necessary to bring an infringement action. To demonstrate that a suspected unauthorised (and hence infringing) growing of a PBR variety is in fact occurring, it is often necessary to gain access to the property of the alleged infringer to inspect what is being grown. A provision permitting access to inspect a property is usually contained in the contract by which a grower is granted a licence to grow a PBR variety. Self-evidently, however, such a contractual provision only applies where the suspected infringer has a licence agreement with the grantee or exclusive licensee; where the suspected infringer has no such licence agreement, the grantee may only enter the infringer's property where it has a court order entitling it to do so.

5.18 It was said that, as general rule, the courts are reluctant to grant an order allowing someone to access to another person's property merely on the suspicion that infringement is occurring on the property. As a result, it is often very difficult for a grantee to obtain the evidence necessary to enable commencement of an infringement action, despite having strong reasons to suspect infringement is occurring.

5.19 We consider to be valid the concern that grantees face particular difficulties in obtaining the evidence necessary to commence an action for infringement. We believe that a way to ameliorate this problem is to amend the PBR Act to introduce a procedure similar to the Information Notice Scheme (INS) that is contained in the UK PBR legislation. Under the INS, a grantee may request a suspected infringer to provide information about the source of harvested material suspected to have been obtained from infringing plants. Where the suspected infringer does not provide such information with 21 days of its request, the grantee may commence legal proceedings against the suspected infringer and the court will presume (unless the suspected infringer provides evidence to the contrary) that harvested material was obtained though unauthorised (i.e. infringing) use of the protected variety. We note that ACIP made this proposal in its 2010 *Review of Enforcement of Plant Breeder's Rights*, and this proposal was accepted in principle by the government but has not yet implemented.