



FILE NO:  
DOC:  
MARB/PRISM:

Our Ref: PvR:EW:67396  
Your Ref: C2005/1861

11 May 2006

Ms Sue Philp  
Director  
Adjudication Branch  
Australian Competition & Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

1:13 pm

Email: **adjudication@acc.gov.au**

~~This document, including any attachments, may contain privileged and confidential information intended only for the addressee named above. If you are not the intended recipient please notify us. Any unauthorised use, distribution or reproduction of the content of this document is expressly forbidden.~~

*in, Hidesman  
C.M.*

Dear Ms Philp

**Australian Nurserymen's Fruit Improvements Company Limited ("ANFIC")- Application for Authorisation A90992**

Further to the 1 May 2006 pre-decision conference in respect of the draft Determination, **enclosed** are the following:

1. Our client's 11 May 2006 letter with reasons for the confidentiality request regarding the list of potential exceptional fruit varieties.
2. ~~The list of potential exceptional fruit varieties, subject to the confidentiality claim.~~
3. Additional information (8 pages) which clarifies points raised at the pre-decision conference.
4. A further copy of the diagram and notes provided at the pre-decision conference.

*Document withdrawn from Accc consideration*

Brisbane  
Telephone +61 7 3002 6700  
Facsimile 1300 368 717

Melbourne  
Telephone +61 3 8633 7500  
Facsimile 1300 365 323

Sydney  
Telephone +61 2 8270 8600  
Facsimile 1300 369 656

Norwest Business Park  
Telephone +61 2 8270 8600  
Facsimile 1300 369 656

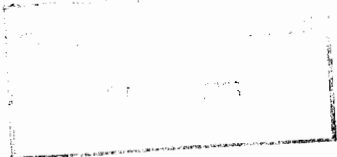
ABN: 37 246 549 189

**Summary**

ANFIC owns or is licensee of about 1200 varieties and they are not owned individually by any of the 12 ANFIC members. Possibly 10-30 of these varieties would be exceptional varieties. There is market demand for exceptional varieties and a goal of producing high quality fruit to create repeat sales and good returns.

The proposal protects competition and not competitors. The aim is to co-ordinate fruit production and marketing of ANFIC's exceptional fruit varieties. Without it, those exceptional fruit varieties will revert to commodity type varieties with minimal royalty to the breeders.

The nurseries all compete with each other but simply need a co-ordinated method to provide royalties and to ensure that investment and innovation in new varieties continues. Each of the growers in the clubs chooses between various market agents in relation to their exceptional fruit varieties.



incorporating the practice of  
**MICHELL SILLAR**  
ATTORNEYS

The existing IP regime does not cover the way in which the PBR holder can develop the fruit variety through commercialisation, investment and innovation.

The proposal relates to a very small proportion of fruit varieties where world-wide exceptional varieties will be less than 1% of all varieties. Without the proposal, the return to breeders will continue to decrease and there will be less incentive to be innovative and to improve varieties.

In essence therefore the public benefits are:

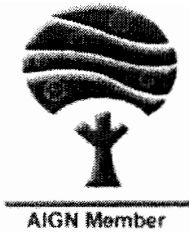
- Meet the demand for exceptional varieties;
- Incentive to be innovative and to develop those exceptional varieties;
- Improve the bargaining power of growers;
- Improve the viability of breeders; and
- Open up new marketing opportunities.

Yours sincerely  
**Home Wilkinson Lowry**



**Peter van Rompaey**  
Partner

Writer: Peter van Rompaey | (03) 8633 7579 |  
E-mail: [peter.vanrompaey@hwl.com.au](mailto:peter.vanrompaey@hwl.com.au)  
Postal: PO Box 3 Collins Street West, Melbourne, Victoria 8007  
Address: Level 21, 570 Bourke Street, Melbourne, Victoria 3000  
DX: DX 564 Melbourne



Australian Nurserymen's Fruit Improvement Co. Ltd

ANFIC Bathurst Office

PO Box 1011

201 Rankin Street

BATHURST NSW 2795, AUSTRALIA

Ph: (02) 6332 6960 – Fax: (02) 6332 6962

Mobile: 041 963 9509

E-mail: [info@anfic.com.au](mailto:info@anfic.com.au)

Web: [www.anfic.com.au](http://www.anfic.com.au)

---

Orcharding for the Future

Thursday, 11 May 2006

The General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

ANFIC Ltd  
PO Box 1011  
201 Rankin Street  
Bathurst NSW 2795

Dear Sir

**Re ANFIC Submission for Authorisation**

Please find attached a list of the potential ANFIC fruit varieties that have been identified as 'exceptional' fruit varieties for possible inclusion in Grower Clubs with the Commercial Company (Comco) associated with ANFIC.

Confidentiality is sought for this list of 'exceptional' fruit varieties based on existing Confidentiality Agreements with the owner/breeders of these varieties and the sensitive nature of commercialization negotiations yet to begin for these varieties within the Australian Fruit Industries.

The negotiation position of ANFIC and Comco would be compromised at this early stage due to some varieties still in Plant Quarantine before release in Australia and the incomplete testing of these varieties under Australian growing conditions.

Yours truly,

Dr Gavin Porter  
General Manager.



AIGN Member

## Australian Nurserymen's Fruit Improvement Co. Ltd

ANFIC Bathurst Office

PO Box 1011

201 Rankin Street

BATHURST NSW 2795, AUSTRALIA

Ph: (02) 6332 6960 – Fax: (02) 6332 6962

Mobile: 041 963 9509

E-mail: [info@anficc.com.au](mailto:info@anficc.com.au)

Web: [www.anficc.com.au](http://www.anficc.com.au)

### Orcharding for the Future

Thursday, 11 May 2006

## **ANFIC Submission for Authorization and Request for Additional Information**

### **1.0 Introduction**

#### **Why did ANFIC apply for an ACCC ruling?**

Some Australian fruit growers had begun to make comments that 'Grower Clubs' and coordinated marketing/closed loop marketing activities were illegal in Australia. ANFIC via the ANFIC Board then sought advice on how best to address these grower comments and an ACCC Authorization was thought to provide the best option.

#### **Why form 'Grower Clubs' at all?**

Many of the owner/breeders that ANFIC represents in Australia have begun to request both tree and production royalties for their new fruit varieties. These royalties were requested to assist in the funding of their breeding programs.

Fruit production royalties are commonly based on a % of the FOB price received in the marketplace for the fruit. One of the only accurate methods to collect this fruit production royalty was through the formation of 'Grower Clubs' which provides a greater degree of control over information of prices received by growers from Market Agents.

#### **Why was the establishment of ComCo, the commercial arm of ANFIC, suggested to coordinate these 'Grower Clubs'?**

ANFIC as a not-for-profit company is prohibited from distributing any income generated to its members.

Tree sales by the ANFIC Nursery Members has been declining for the past 10 years (50% decrease) due to many factors, nonetheless being Australian Fruit Industry rationalization through non-viable orchards ceasing production and a significant reduction of new plantings as a result. Large growers are buying these non-viable orchards to provide a sustainable orchard size and



Members of Nursery & Garden Industry, Australia (NGIA)

Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia

ACN 002 865 849

Investment Companies are expanding into horticulture by aligning their businesses with existing orchard operations.

For ANFIC Nursery Members to also survive in the Australian Fruit Industries they service, there is a need for additional income streams which may be generated through the coordination of 'Grower Clubs' and charging for the market coordination services provided.

An ANFIC Nursery member's only source of income is through tree sales to Australian Orchardists. Increasing tree sales and therefore increasing profits from fruit growers is only adding to the problem of existing oversupply of fruit in the market.

Grower returns from the sale of all fruit produced (from both public and protected fruit varieties, as new and old varieties) has also been declining due to rapid oversupply of fruit from new fruit varieties and low market prices. Wholesale market prices have not increased during the last 20 years with increases in retail prices NOT indicative of the price received by the growers. This is a global issue and not isolated to Australia!

### **What is ANFIC's Vision for the Future of the Australian Fruit Industries?**

1. Global fruit industry rationalization will continue to occur with decreasing numbers of growers and marketers and larger organizations producing fruit for sale to consumers.
2. The supermarket chains globally are increasing in size and % of all fruit sold to consumers, although in Australia, independent retailers contribute approx. 30% of fruit sold to consumers in Australia.
3. Differentiation (uniqueness) in the marketplace will become increasingly difficult and commodity prices will result for most fruit sold.
4. Grower options may include growing fruit varieties for 'Grower Clubs' as part of the total mix of varieties in their operations eg Public varieties may provide the majority of fruit sold to maintain total fruit sales but profits may be generated from 'Grower Club' varieties to enable their businesses to remain viable. Exclusivity of access to new fruit varieties or membership of 'Grower Clubs' may provide access to some market agents and then provide additional fruit sales of commodity varieties at the same time.
5. 'Exceptional' fruit varieties will make up less than 1% of all varieties bred throughout the world. These varieties easily justify the request by an owner/breeder for a fruit production royalty.
  - a. These varieties need to be something special, unique and differentiated in the marketplace.
  - b. A main example is the Pink Lady® (Cripps Pink cv.) apple; it is a public variety in Australia and a 'Grower Club' coordinated variety



Members of Nursery & Garden Industry, Australia (NGIA)  
Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
ACN 002 865 849

internationally (International Pink Lady Alliance (IPLA). Overseas growers must comply with high fruit quality standards to market fruit under the Pink Lady® trademarks throughout the world's major markets. Fruit production royalties are collected at various points throughout the supply chain.

- c. There will probably never be another fruit variety like Pink Lady® (Cripps Pink cv.) bred and grown as widely anywhere in the world.
6. Fruit growers will always have access to a large range of fruit varieties in all fruit industries (Competition between competing international fruit breeding programs represented in Australia will always occur).
  - a. Some of these varieties will be public varieties (no royalties, freely grown and propagated, oversupply of fruit produced quickly occurs, commodity prices received by growers)
  - b. Some of these varieties will attract a modest tree royalty only (no coordinated marketing)
  - c. Some of these varieties will attract both a modest tree and a production royalty (no coordinated marketing)
  - d. Some of these varieties will attract both a modest tree royalty and a production royalty with additional support (closed loop, coordinated marketing information between growers and market agents, limited acreage based on market intelligence information to avoid oversupply and moderate returns to all participants)
7. New fruit varieties may be classified in the future as:
  - a. Exceptional (<1%)
  - b. Superior (<10%)
  - c. Good (10 – 50%)
  - d. Average (50%+)
  - e. Classification will not only be based on tree and fruit quality characteristics BUT also on shelf life, post harvest storage life, market acceptance, health benefits, reduced costs of production, etc.
  - f. Classification will also be based on the royalty requirements of the owner/breeder whether justified by the fruit quality characteristics or not!
8. New fruit varieties imported into Australia, or developed from the small number of Australian breeding programs, may or may not be PBR protected! There are other methods of protecting against illegal propagation, sales and fruit marketing eg DNA fingerprinting, NLA-AU education and enforcement, trademarks, contracts, etc.
9. ANFIC and the Nursery members still need to sell trees but not for the sake of industry survival, as large sales of trees and subsequent



Members of Nursery & Garden Industry, Australia (NGIA)  
Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
ACN 002 865 849

plantings leads to rapid oversupply of fruit within 5-6 years eg large sales of Bradford stonefruit varieties in Australia leads to overproduction of these new varieties within 5-6 years.

The financial breakeven point for a stonefruit planting in Australia is approx. 6-8 years. If overproduction occurs within 5 years, then Australian growers need to replant unprofitable varieties every 5-6 years WITHOUT recovering their capital costs! This rapid turnover of new fruit varieties is encouraging unsustainable fruit production in Australia.

10. Another contrasting example of fruit variety development in Australia is the Australian cherry industry. Greater than 80% of all new cherry plantings in Australia are public varieties! The new cherry varieties are not superior to the public varieties eg either increased returns are not realized or no decrease in production costs. (More than 200 new cherry varieties have been trialed in Australia with less than 1% of these new varieties being planted in commercial quantities.)
11. ANFIC has always had the best interests of the Australian Fruit Industries at the core of its industry service. ANFIC, a 22 year old company retaining its original membership into a 2<sup>nd</sup> generation, is testimony to its survival through support of the Australian Fruit Industries we serve.
12. Some of ANFIC's views of service to the Australian Fruit Industries are contrary to our competitors:
  - a. **New fruit tree rootstocks are made available to the industry for public, ANFIC or competitor varieties.**
  - b. ANFIC recommends to growers to plant the best fruit varieties available, even if these are not ANFIC managed fruit varieties. ANFIC will often recommend competitor varieties over its own to Australian fruit growers.

**Logical Steps in the Coordinated Marketing of ANFIC Managed  
'Exceptional' Fruit Varieties in Australia**

1. ComCo approaches growers in various fruit production areas around Australia to determine their interest in becoming a member of an 'Exceptional' Fruit Variety Grower Club.
2. Once committed growers have signed contracts as members, these growers are requested to place orders for trees with an ANFIC Member Nursery **of their choice.**
3. Committed Grower Club members pay deposits to the ANFIC Member Nursery and await delivery of the trees.
4. ComCo approaches Market Agents and Marketers, based on input from the committed growers (established and historical supply chain



Members of Nursery & Garden Industry, Australia (NGIA)  
 Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
 ACN 002 865 849

networks), in Australian markets to determine their interest in becoming an Authorized Marketer of this ‘exceptional’ fruit variety. (Non-performance of the Authorized Marketer may result in a new Marketer being chosen in consultation with the committed growers)

5. Authorized Marketers sign on as Committed Marketers for the ‘Exceptional’ Fruit Variety Grower Club.
6. Once fruit trees have begun to produce fruit, ComCo coordinates production information from all production areas to relay to the Marketers and then coordinates with the committed growers, the harvesting, packing and transport of fruit to the Marketers.
7. ComCo enforces fruit quality standards determined by the ‘Exceptional’ Fruit Variety Grower Club each season to ensure fruit quality for the consumer is the highest possible.
8. Authorized Marketers market the fruit through the wholesale domestic markets, direct to supermarkets or exported to overseas buyers. Grower returns are paid as per the standard supply chain network system for all fruit marketed in Australia.
9. ComCo coordinates royalty collection based on grower and marketer’s records and remits the royalty to ANFIC for remittance to the owner/breeder.

## **2.0               Royalty Obligations**

The question has been raised; where is the demand for the formation of ‘Grower Clubs’ coming from?

### **Owner/Breeder Requirements**

It is important to note here that owner/breeders of new fruit varieties are demanding both tree and production royalties, not just because of a perceived greater market return expected from the sale of higher quality fruit by growers, BUT rather due to a need for an increased return to support their fruit breeding programs.

As Variety Management Agents representing these breeding programs in Australia, there are contractual obligations to ensure that accurate collection of both tree and production royalties occurs. Globally, the formation of ‘Grower Clubs’ ensures that accurate production royalty information is available through a closer coordination of growers and their fruit production levels and marketers, the wholesale market prices received and returns made to growers.

The ‘Grower Club’ model for coordinated marketing and fruit production royalty collection is then expected by the owner/breeders for some



Members of Nursery & Garden Industry, Australia (NGIA)  
Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
ACN 002 865 849



'exceptional' fruit varieties imported into Australia for commercial production by Australia's fruit industries.

'Grower Club' models may or may not be developed with acreage restrictions. Acreage restriction is based on the market capacity of a new variety, IN IT'S MARKET WINDOW. An 'exceptional' fruit variety may have a harvest window of 2 weeks within one geographical location, which can be extended by planting in other geographical locations to a total marketing window of 6 weeks.

Wholesale fruit market capacity can then be calculated as a volume per week for 1 'exceptional' fruit variety. One (1) new fruit variety within its market timeslot would average less than 2-5% of the varieties marketed during this marketing window!

These calculations can then be extrapolated to a total acreage capable of producing that fruit volume. Competition between all sectors of the marketing supply chain will determine the final price received by the grower.

In all cases, the retail market price paid by consumers DOES NOT reflect the wholesale price received by the growers. The average wholesale price received by Australian growers has not increased during the last 20 years while grower's costs of production have increased on average by 10% per year.

Coordinated marketing of 'exceptional' fruit varieties through the 'Grower Club' model greatly improves market intelligence of fruit volumes, time of harvest, coordinated transport to all capital city markets to ensure regular supply to consumers and maintenance of the high fruit quality standards required for the 'exceptional' fruit variety.

While other production royalty models exist for 'exceptional' fruit varieties eg a \$/hectare model, owner/breeders are reluctant to embrace these models as they do not accurately reflect the potential returns possible by growers and marketers especially in export markets. Variety Managers regularly negotiate for easier production royalty management options, but are not always successful in convincing owner/breeders of these.

### **Closed Loop Marketing and Plant Breeders Rights in Australia**

Less than 10% of fruit varieties managed by ANFIC in Australia have Plant Breeders Rights (PBR) protection. This situation is based on historical relationships with International owner/breeders before Plant Breeders Rights was available in Australia. Exclusive contractual agreements have been developed between owner/breeders and ANFIC. Dependent on the owner/breeders requirements for PBR or the ability to gain a return on the PBR costs through tree sales, has largely dictated the number of PBR applications submitted for approval.



Members of Nursery & Garden Industry, Australia (NGIA)  
Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
ACN 002 865 849

In the past 20 years, ANFIC non-propagation agreements have been signed by commercial Orchardists on the sale of contracted/protected fruit varieties to protect against illegal propagation. This method of variety protection has provided a great amount of protection especially as these agreements provide for entry onto growers properties. No amount of protection though, either non-propagation agreements or Plant Breeders Rights, will protect a new fruit variety unless enforcement is possible.

Nurseries have been reluctant to litigate against their own 'clients' so industry compliance has been largely voluntary and restricted to growers 'doing the right thing'. Additional methods of protecting new fruit varieties have included DNA fingerprinting (nominally as an addition to PBR), National Licensing Association – Australia (NLA-AU, a commercial litigation company representing some owner/breeders in Australia) and trademarks on fruit sold.

The ANFIC ACCC submission is related to the formation of multiple 'closed loop' marketing groups either with or without PBR protection of 'exceptional' fruit varieties. While the PBR Act does not prescribe commercialization of a new variety, owner/breeders have requested royalties through contractual agreements in many cases without PBR protection.

### **3.0 The Bottom Line**

Retail prices paid by consumers do not reflect the returns received by growers. Market Agents and Supermarket chains each receive approx. 100% mark-up returns regardless of the supply of fruit while the growers are more impacted by oversupply. For example, the previous season's closure of the Taiwanese stonefruit export market resulted in a large quantity of export fruit destined for the domestic market. While consumers enjoyed lower than normal prices for fruit (\$2-3/kg), growers received returns much lower than their cost of production (~50c/kg).

While a great outcome for all participants of the sales of an 'exceptional' fruit variety may be higher wholesale market prices, it would be more appropriate to expect the same prices as for other commodity fruit varieties. The real benefits to growers, and therefore consumers, is potentially returns based on lower costs of production eg disease tolerant varieties requiring less or no chemical sprays or varieties with lower labour requirements to achieve the yields or fruit sizes needed in the markets. Production of these more 'grower friendly' varieties may also see more sustainable grower returns.

Committed growers of these 'exceptional' fruit varieties would plant these new varieties as a part of the whole orchard variety mix. 'Exceptional' fruit varieties would most probably account for less than 5% of growers plantings as we are talking about single varieties with a small harvest window. Growers need access to a number of fruit varieties that have a harvest window from the beginning to the end of the season. Typically for a high chill stonefruit grower,



Members of Nursery & Garden Industry, Australia (NGIA)  
Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
ACN 002 865 849

harvest begins in mid-December and finishes in March/April. This harvest season may include harvesting of more than 30 varieties in any one orchard.

Marketing opportunities are becoming more difficult for growers in Australia. It is interesting to note how many of the Australian Fruit Industries are following those in the UK, EU and USA where market access is equally as important as wholesale market price. Growers must be able to sell and market all of their fruit to remain viable businesses. Market access could be achieved for an individual grower if he grows an 'exceptional' fruit variety and the buyer then buys other commodity fruit at the same time.

ANFIC Nursery members have also commented on the value of propagating ANFIC fruit varieties that provide them also with market access. Growers wishing to buy new exclusive fruit varieties from an ANFIC Nursery will in many cases also purchase public varieties as at a 'one stop shop'. The same may be true in fruit marketing in the future.

In all cases, whether we are talking about ANFIC as the variety manager, the ANFIC Nursery members or Australian fruit growers, the propagation or production of 'exceptional' fruit varieties will always be a small percentage of the mix of protected and public varieties grown. It may just provide a balanced mix for the sustainable future of our Australian Fruit Industries.



Members of Nursery & Garden Industry, Australia (NGIA)  
Registered Office: 201 Rankin St., Bathurst NSW 2795 Australia  
ACN 002 865 849

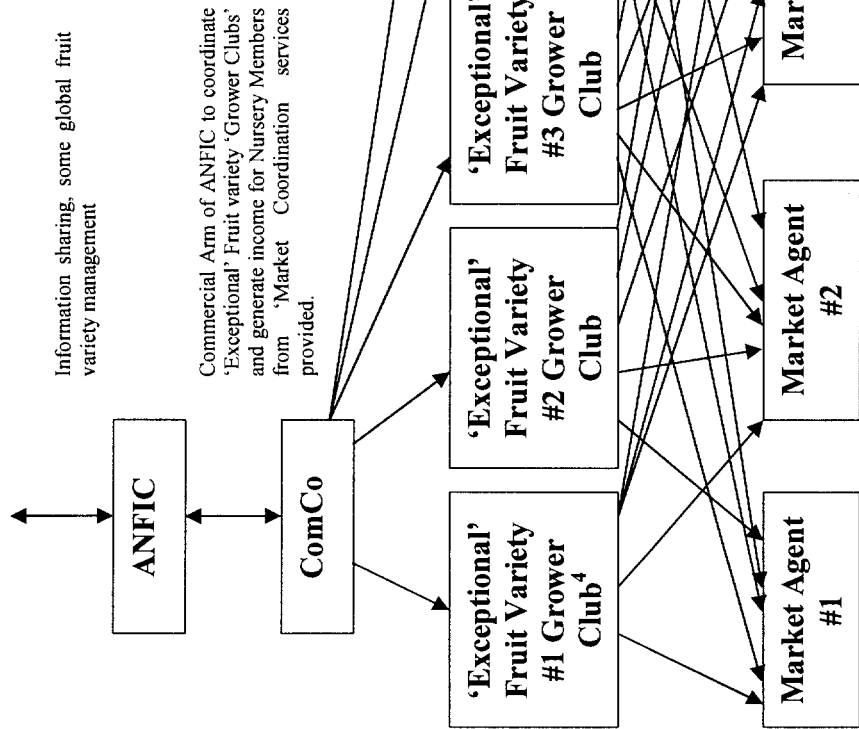
## NOTES:

1. The Associated International Group of Nurseries (AIGN) is a not-for-profit Company formed more than 20 years ago to share information on International Nursery business and new varieties. During its development, AIGN has also become a Global Fruit Variety Manager, by securing the global propagation rights to some varieties and provided sublicenses to members, such as ANFIC, for the territories they manage eg Australia. Currently we globally manage approx. 5 new fruit varieties. AIGN has recently entered into a Joint Venture Company with the New Zealand and Australian Apple and Pear Industries to globally manage propagation rights to the New Zealand HortResearch apple and pear varieties. The joint venture company is know as Prevar® (Premium Varieties). AIGN (and ANFIC) is working together with industry not against it.
2. The International Nursery Network (INN) is a competing global nursery group to AIGN and includes 24 of the largest fruit tree nurseries from 7 countries. This group is much larger than AIGN and manages more than 20 new fruit varieties.
3. There are approx. 75 other Fruit Variety Management companies around the world that ANFIC is aware. These fruit variety managers manage either single varieties eg Kanzi® apple or breeding programs eg Zaiger Genetics (Californian stonefruit varieties)
4. ANFIC has the Australian rights to Intellectual Property for >1200 fruit varieties (ranging from apples and pears, through stonefruit to bananas and pineapples).
  - a. Of these 1200 varieties, only 200 are sold commercially with approx. 200 varieties on trial.
  - b. Stonefruit varieties (peach, nectarine, apricot, cherry and plum) are by far the largest category sold in Australia.
  - c. New stonefruit varieties would account for 35% of the Australian stonefruit industry. (100 public varieties, 250 new stonefruit varieties available from all sources) Potentially there are 15-20 new stonefruit varieties available through ANFIC that could be classed as 'exceptional'.
  - d. The Australian apple industry is based predominantly on public varieties with new apple varieties accounting for <5% of all new plantings. (10-20 public varieties, 10 new apple varieties available from all sources) Potentially there are 3 new apple varieties available through ANFIC that could classed as 'exceptional'.
  - e. The Australian citrus industry is also based predominantly on public varieties with new citrus varieties accounting for <10% of all new plantings. (20 public varieties, 10-20 new citrus varieties available from all sources) Potentially there are 6 new citrus varieties available through ANFIC that could classed as 'exceptional'.

**ASSOCIATED  
INTERNATIONAL GROUP OF  
NURSERIES (AIGN)<sup>1</sup>  
(8 INTERNATIONAL  
MEMBERS)**

**OTHER  
INTERNATIONAL  
NURSERY GROUPS EG  
INTERNATIONAL  
NURSERY NETWORK  
(INN)<sup>2</sup>**

**OTHER  
VARIETY  
MANAGERS  
EG SINGLE  
VARIETY OR  
BREEDING  
PROGRAMS<sup>3</sup>**



Voluntary membership from growers, contracted to produce fruit, package fruit in multiple packhouses and market fruit through existing supply chain networks developed over generations of fruit growers. All members of these 'Grower Clubs' are discreet businesses in their own right and forming strategic alliances for sustainable returns for all participants.