

Article Information

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Beyond The Seed: Why Plant Breeders' Rights Matter

The International Convention for the Protection of New Varieties of Plants ('UPOV Convention') provides the international framework for plant variety protection and underlies the Plant Breeder's Rights Act 1994 (Cth) ('PBR Act').^[1] Under this regime, new plant varieties are recognised as a form of protectable intellectual property,^[2] with rights granted following a successful application to the Registrar of Plant Breeder's Rights.

Background

Under the PBR Act, applications for plant breeder's rights (PBR) are filed with and examined by IP Australia (through the Plant Breeder's Rights Office). PBR provides certain exclusive rights in relation to the propagating material of a registered plant variety.

Rights

Overview

PBR are a form of intellectual property protection for new varieties of plants, conferring exclusive rights over the production and commercialisation of a variety's propagating material (being the plant's reproductive material, such as seeds, cuttings, or tissue cultures). Specifically, PBR confers the exclusive right to do, or to licence another person to do, the following acts in relation to propagating material of the variety:

- Produce or reproduce the material;
- Condition the material for the purpose of propagation;
- Offer the material for sale;
- Sell the material;
- Import the material;
- Export the material;
- Stock the material for any of the purposes described above.^[1]

PBR will be infringed where any of these acts occurs in relation to propagating material of the variety without authorisation from the rights holder (being the grantee, an assignee, or an exclusive licensee).

Duration

PBR is a qualified right having a fixed term, ^[2] commencing on the day the right is granted and ^[3] continues for 25 years for trees and vines, and 20 years for all other plant species.^[4] Failure to pay the annual renewal fee will result in the rights lapsing. Importantly, once PBR expires, the designated^[5] variety name cannot be registered as a trade mark because, as the official name of the variety, it lacks both inherent and acquired distinctiveness.^[6]

Requirements for Registration

Article 5(1) of the UPOV Convention establishes that PBR may be granted where the variety is new, distinct, uniform and stable (often referred to as the 'DUS criteria').^[7] In addition to these requirements, the PBR Act requires that the plant variety have a breeder and either not have been commercially exploited, or only recently so.^[8]

Of particular relevance for intellectual property purposes, a plant variety will be considered distinct if 'it is clearly distinguishable from any other variety whose existence is a matter of common knowledge'.^[9] 'Clearly distinguishable' means that the difference is clear and consistent, and 'common knowledge' is given its ordinary meaning.^[10]

Formalities

To acquire PBR, the breeder of a plant variety must make an application to the Registrar of Plant Breeder's Rights.^[11] If the Registrar is satisfied on a prima facie basis that distinctness has been established, that the application is in proper form, and that no other application for the same variety has an earlier priority date, the application must be accepted.^[12]

Objections

A person may object to the grant of PBR if their commercial interests would be adversely affected by the granting of the right. Any objection must set out particulars of how the objector's^[13] commercial interests would be affected, and why the Registrar cannot be satisfied of the relevant matters under sections 26(2) and/or 44(1)(b) of the PBR Act.^[14] The applicant is given a period of time to respond to the objection, and both parties may make further submissions. Notably, the Act does not provide for opposition to an already granted PBR or a procedure for the grant to be reassessed.^[15]

Enforcement

Who and what action can be taken?

An action for infringement of PBR may be brought in the Federal Court of Australia or the Federal Circuit and Family Court of Australia, but only by the grantee or an exclusive licensee of the grantee.^[16] A 'grantee' is defined in the PBR Act as the person currently entered on the Register as the holder of that right.^[17]

What constitutes an infringement of PBR?

PBR in a plant variety is infringed when an unauthorised person performs any of the acts referred to in section 11 of the PBR Act.^[18] Infringement may also occur through use of a variety name or synonym that is not the registered name of a variety.^[19] Section 53 creates strict liability,^[20] meaning the court will not consider the infringer's intention when determining liability.^[21]

Are any defences available?

The grantee of PBR cannot exert monopoly rights over the registered plant variety in all circumstances. Examples of acts that will not infringe PBR include:^[22]

- acts done privately and for non-commercial purposes; or
- acts done for experimental purposes; or
- acts done for the purpose of breeding other plant varieties.

Of these exceptions, the most contentious in practice is the experimental purposes defence. This defence will likely fail where the experiment has a commercial or profit-making purpose. Accordingly, both the nature and purpose of the act must be considered.^[23]

The court will decline to award damages or order an account of profits against an 'innocent' infringer.^[24] However, to rely on this protection, the infringer must satisfy the court that, at the time of the infringement, they were not aware of, and had no reasonable grounds for suspecting, the existence of the relevant PBR.^[25] Otherwise, the infringer may be liable for damages or an account of profits.

Exhaustion

PBR is exhausted after the first authorised sale of the registered variety.^[26] However, exhaustion will not occur if there is further production or reproduction of the material, or the material is exported to a country that does not provide PBR protection for the variety, and the material is used in that country for purposes other than final consumption.^[27] These exceptions protect PBR holders when their varieties are used outside Australia.

Key Takeaways

- PBR are a form of intellectual property which protects new varieties of plants. It attaches certain rights associated with producing and commercialising the propagation material of a plant variety.
- PBR will only be granted if the variety has a breeder, is distinct, uniform, stable and has not been exploited. It must also comply with the formalities within the PBRA Act.

- Infringement proceedings may be brought in the Federal Court of Australia or the Federal Circuit and Family Court of Australia. Several defences are available, including protection for innocent infringers who were unaware of the relevant PBR.

[1] PBRA s 11.

[2] *Buchanan Turf Supplies Pty Ltd v Registrar of Trade Marks* [2015] FCA 756 at 19.

[3] PBRA s 22(1).

[4] PBRA s 22(2).

[5] *Plant Breeder's Rights Regulations* 1994 reg 4, Sch 1.

[6] *Ibid* n.4.

[7] *UPOV Convention* art 5(1).

[8] PBRA s 43(1).

[9] PBRA s 43(2).

[10] Westlaw AU, *The Laws of Australia*, vol 23 (at 17 July 2026) 23 Plant Breeder's Rights [23.5.220] (*'The Laws of Australia'*); PBRA s 43(9).

[11] PBRA s 24(1).

[12] PBRA s 30(2).

[13] PBRA s 35(1).

[14] PBRA ss 26(2), 44(1)(b).

[15] *The Laws of Australia* 23.5.570.

[16] PBRA s 54(1).

[17] PBRA s 3.

[18] PBRA s 11; s 53(1)(a).

[19] PBRA s 53(1)(c).

[20] PBRA s 74(1A).

[21] *Criminal Code Act* 1995 (Cth) s 6.1.

[22] PBRA s 16.

[23] *The Laws of Australia* 23.5.970.

[24] PBRA s 57(1).

[25] *Ibid*.

[26] PBRA s 23.

[27] *Ibid*.

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