

AUSTRALIAN PLANT BREEDER'S RIGHTS

SCOPE OF PROTECTION

Plant Breeder's Rights (PBR) are a form of intellectual property, like patents and copyright, and are administered under the Plant Breeder's Rights Act 1994. PBR confers exclusive commercial rights with respect to a registered variety. The PBR owner, with regard to propagation of the registered variety, has the exclusive right to:

- a) produce or reproduce the material;
- b) condition the material for the purpose of propagation (conditioning includes cleaning, coating, sorting, packaging and grading);
- c) offer the material for sale;
- d) sell the material;
- e) import the material;
- f) export the material; and
- g) stock the material for any of the purposes described in (a) to (f).

In certain circumstances, principally if the breeder has not had a reasonable opportunity to exercise the right on the propagating material, PBR extends to harvested material and, subject to a similar set of qualifications, to products obtained from harvested material.

REGISTRABLE VARIETIES

In order for a variety to be eligible for Australian PBR it must be distinct, uniform and stable. A variety is distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the priority date. A variety is uniform if it is unvarying in its relevant characteristics on propagation, subject to the variation that may be expected from the particular features of its propagation. A variety is stable if its relevant characteristics remain unchanged after repeated propagation.

PRIOR USE OF THE VARIETY

Exploitation of the variety before making an Australian PBR application is permitted provided it is done within strict time limits. Sales of the variety in Australia are allowed for up to 12 months before lodging an application and sales overseas are allowed for up to 4 years (6 years for trees and vines). Sales outside these time limits will prohibit the grant of PBR for the variety.

PREVIOUS OVERSEAS PBR APPLICATIONS

If foreign PBR applications have been made for the variety, the priority date of the earliest foreign application may be preserved, providing the Australian PBR application is lodged within 12 months of the earliest foreign application (a certified copy is required).

Sydney

Level 21, 60 Margaret Street
Sydney, NSW 2000
Australia

Telephone +61 2 9777 1111
Facsimile +61 2 9241 4666

Brisbane

7 Clunies Ross Court
Brisbane Technology Park
Eight Mile Plains, QLD 4113

Telephone +61 7 3147 8020
Facsimile +61 7 3147 8001

Newcastle

Level 1, IDC House
University Drive
Callaghan, NSW 2308

Telephone +61 2 4921 7366
Facsimile +61 2 4921 7367

General

DX 10339
Sydney Stock Exchange

Email: email@ShelstonIP.com
Internet: www.ShelstonIP.com

APPLICATION PROCEDURES

To prepare and file an Australian PBR application we will require:

- a) authorisation to act as the agent in Australia for the variety in question;
- b) details of the applicant, origin of the variety and comparisons to other similar varieties (to establish a *prima facie* case for eligibility);
- c) a photograph of the new variety; and
- d) a certified copy of the first foreign PBR application (if applicable).

Once the application has been accepted, the variety will be subject to provisional PBR protection.

The next stage in the application process will be examination, requiring, within 12 months of the lodgement of the application, a formal request and payment of an examination fee. Examination may involve a comparative growing trial to demonstrate the distinctness, uniformity and stability of the variety. However, a comparative growing trial may not be required providing:

- a) the variety has been test grown in an International Union for the Protection of New Varieties of Plants (UPOV) member country using UPOV test guidelines and test procedures;
- b) the most similar varieties of common knowledge (including those in Australia) have been included in the distinctiveness, uniformity and stability trial or the new variety is so clearly distinct from all the Australian varieties of common general knowledge that further test growing is not warranted; and
- c) sufficient data and descriptive information is available to publish a detailed description of the variety in the accepted format in the official *Plant Varieties Journal*.

The results of any growing trial, whether carried out in Australia or elsewhere, must be reviewed by an accredited Qualified Person. We can engage the services of a suitable Qualified Person on behalf of the applicant.

Before Australian PBR can be granted, propagating material for the variety must be deposited in a Genetic Resources Centre. Typically the propagating material is seed and the quantity must be sufficient to conduct a growing trial.

Following examination, a description and photograph comparing the new variety with similar varieties will be published in the *Plant Varieties Journal*. This will be followed by a six-month period for objection or comment.

Upon successful completion of all the requirements, resolution of objections (if any) and payment of the certificate fee, a Certificate of PBR will be granted.

TERM

Australian PBR protection lasts for up to 20 years from the date of grant (25 years for tree and vine varieties), subject to the payment of annual renewal fees.

COSTS

It is difficult to provide an estimate of costs, as it is not possible to predict whether a comparative test trial will be required, or whether the Examiner will raise any objections. We estimate that our charges (not including payment of official fees) would be in the region of AU\$3,000 to \$4,000 for filing the application, attending to the request for examination, processing acceptance of the application and monitoring, checking and processing the Certificate of Registration. This does not include letters of advice or any responses to Examiner's objections, or the organising of comparative trials. This estimate also does not include charges payable to the Qualified Person. A list of the official fees payable to the Australian PBR Office is provided below (current as at 1 February 2009).

Application	\$300
Examination – single application	\$1400
Examination – application based on overseas test data	\$1400
Examination – multiple application rate applicable only to 2 of more varieties of the same species tested at the same site and when applications and descriptions are lodged simultaneously by the same applicant and QP and examined simultaneously	\$1200
Examination – at an authorised Centralised Testing Centre	\$800
Certificate	\$300
Annual	\$300

GENERAL COMMENTS

We emphasise that the costs mentioned above are estimates only. The final charges will be subject to a number of indeterminate factors such as inflation and increases in official fees. The costs will also vary from case to case according to complexity and the actual amount of work involved, which cannot always be predicted accurately in advance. Please note that all indicative cost estimates are exclusive of Goods and Services Tax (GST), which would be charged in addition where applicable.

We also emphasise that this summary is intended simply to provide a brief overview of general PBR procedures, and should not be regarded in any way as advice or as an exhaustive treatise on Australian PBR Law. There is no substitute for detailed advice from a Patent Attorney aware of the relevant factual scenario. Accordingly, if you have any questions or require any further information or clarification, please do not hesitate to contact us.