Plant Breeders Rights in Australia: Protecting intellectual property

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The agricultural sector is an incredibly important part of the Australian economy. It contributes, at farm-gate, three percent to Australia’s total gross domestic product (GDP).

What rights are available to the plant breeders within the Australian agricultural sector to protect their intellectual property?

Australia provides multiple and potentially overlapping options for registering intellectual property in plant-based innovations and for enforcing those acquired rights.

Plant Breeders Rights

Plant Breeders Rights (PBR) are exclusive rights offered to breeders to protect new varieties of plants, algae and fungi which are produced by traditional breeding and transgenic modification. This gives a commercial breeder the ability to earn a return on their investment. PBR extends not only to the plant varieties themselves, but also to the reproductive material of the plant and to other varieties that are “essentially produced” from the protected variety.

PBR is administered in Australia under the Plant Breeder’s Right Act 1994 which is comparable to the legislation provided in other countries that are members of the UPOV (International Union for the Protection of New Varieties of Plants) convention. Under the UPOV convention, an Australian PBR applicant can claim priority in an equivalent application made in a UPOV member country if that subsequent application is made within 12 months of the Australian filing date. Likewise, a foreign filed applicant can claim priority in an Australian PBR application if filed within 12 months of the UPOV member country foreign filing.

A PBR application in Australia must be filed within:

- one year of first sale in Australia and within six years from a first overseas sale for woody plants; or
- four years from first overseas sale for all non-woody plant varieties.

To be eligible for registration, the distinguishing features of the variety must be:

- distinct (new);
- uniformly exhibited amongst a population of the plant variety; and
- stably inherited across successive generations.

Trialling in Australia is generally required to establish these requirements, unless testing results on a foreign originating application is available if growing conditions would be similar to those in Australia (e.g. in a glasshouse).

Once the Examiner assigned to the PBR application is satisfied from the trialling results, the PBR application will be granted. The term of a PBR is 20 years from the date of grant for non-woody plants and 25 years for woody plants (such as trees and vines).
A granted PBR only provides exclusive commercial rights to a registered plant variety. It does not include preventing a customer from saving farmed seed (subject to certain conditions) nor breeding for non-commercial or experimental purposes.

If you think someone is infringing your PBR, possible remedies can include:

- injunctions to stop further propagation and including urgent relief;
- damages for financial losses suffered; and
- destruction of infringing plants and costs.

**What patent protection is available for a plant breeder?**

To be patentable for the purposes of an Australian standard patent, the plant variety has to be novel (new), have an industrial application and be inventive. Claims can include:

- the plants themselves;
- plant parts;
- plant cells;
- isolated DNA sequences or proteins;
- modified sequences (such as heterologous promoter - gene constructs); and
- methods of production or use.

In practice, it is difficult to obtain a granted Australian standard patent to a traditionally bred plant variety without demonstrating that technical steps requiring human intervention have been essential in the production of the plant variety. Traditional breeding techniques using naturally occurring parent plants are usually not considered to meet the inventive step threshold. Plants and animals, and the biological processes for their generation, are not patentable subject matter for an Australian innovation patent. However, it is possible to apply for an innovation patent on processes that use a plant or animal, or part of them, that does not result in the generation of a plant or animal.

The term of a standard patent is 20 years and eight years for an innovation patent. Patents can provide a broader scope of protection by covering any plant encompassed within the scope of the claims, rather than the single plant variety usually covered under a PBR. However, a granted PBR application cannot be invalidated on the basis of lack of inventive step.

**Further advice**

If you are breeding plants and would like to know the appropriate form of registered protection, please contact our Intellectual Property team for further discussion or advice. The right form of protection will depend on the nature of the plant variety but could be afforded dual PBR/patent protection to ensure broader protection and could extend the term for plant-based innovations.

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