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Plant Breeder's Rights – an Australian nursery and garden industry perspective

Whether you are a nursery operator, a propagator or a wholesaler you will, at some time, come across plant varieties that are protected by plant breeder's rights (PBR).

In this Nursery Paper, Jay Sanderson and Kathryn Adams from the Australian Centre for Intellectual Property in Agriculture (ACIPA) explore the Australian PBR scheme, outlining the criteria for PBR protection, the scope of the right, the application process and the exceptions to PBR protection.



Plant Breeder's Rights – an Australian nursery and garden industry perspective

What are Plant Breeder's Rights (PBR)?

The PBR system aims to encourage the development of new plant varieties by providing a temporary monopoly over new varieties. In doing so, PBR give breeders and other participating parties an opportunity to recoup the money they have invested in the development process. To achieve this, the scheme gives the breeder of a new variety specific commercial rights.

By obtaining PBR, the owner of the right can exclude others from using the variety without their consent. This provides a commercial framework to enable plant breeders to 'own' their varieties and to set the terms and conditions (including royalty payments) for their use by others.

PBR in the nursery and garden industry

Since the PBR scheme was introduced in 1987, there have been over 5,000 applications accepted by the PBR Office. A majority (over 3,000) of these applications have come from the nursery and garden industry. In 2006 alone, almost 160 (or 57 per cent) of the accepted applications were from the nursery and garden industry (see Table 1 for a list of some of the most commonly protected garden and nursery varieties). This means that the nursery and garden industry is the most frequent user of the PBR system in Australia and as a consequence, those involved in the nursery and garden industry need to be aware of the rights, obligations and restrictions associated with using PBR protected varieties.

Rose	Over 700 PBR varieties
Petunia	Over 130 PBR varieties
Apples	Over 100 PBR varieties
Lavender	Over 60 PBR varieties
Impatiens	Over 200 PBR varieties

Table 1. Number of applications for selected plants, 1987 – 2007.

Applying for PBR

The PBR system is administered by the PBR Office which is part of IP Australia (see www.ipaustralia.gov.au). For a plant variety to be protected by PBR, applicants must go through a testing and evaluation process to determine whether the variety complies with the requirements for protection. Once PBR are granted, the rights are recognised throughout Australia. When granted, PBR protection lasts for:

- 25 years for trees and vines; or
- 20 years for all other plants.

The scope of PBR protection

It is important to understand the scope (or level) of protection given to the owner of PBR protected varieties as this governs what you can (and can't) do with a protected variety. This knowledge may help to maximise your commercial advantages and minimise any detriments associated with remaining ignorant about the issues.

Under the PBR scheme there are two primary factors to consider when you use a protected plant variety:

(1) What is the plant material you are dealing with? and

(2) What activities are you involved in?



Figure 3. Bulbs may be protected under PBR as 'propagating material'.

Criteria for protection

While some people believe that PBR is a form of guarantee over the protected variety, none of the requirements for PBR protection are linked to merit or quality. To be protected a variety must:

- Have a breeder;
- Be new; and
- Be distinct, uniform, and stable.

It is important to understand the scope of protection given to the owner of PBR protected varieties as this governs what you can do with a protected variety.

MATERIAL: Which part of the plant does the PBR apply to?

The protection offered by PBR applies to the 'propagating material' and in some cases, to 'harvested material' and 'products derived from the harvested material'.

Propagating material	Any part or product of a plant variety that enables a plant with the same essential characteristics to be reproduced. This includes seedlings, seeds, seed potatoes, bulbs, grafts and cut blooms, tissue used for tissue culture reproduction. You will infringe PBR if, for example, you sell propagating materials, produce cuttings or import bulbs of a protected variety without the consent of the PBR owner.
Harvested material	In some limited situations, PBR protection also includes the 'harvested material' derived from the protected plant variety. This includes the entire plant, parts of the plant and plant material such as cut flower blooms. This allows the owner of the PBR to protect their PBR when he or she is unaware that a protected variety has been reproduced without permission. In these circumstances, the harvested material is treated like propagating material.
Products obtained from harvested material	In some limited situations similar to those for harvested material, the scope of protection extends to products that are made from the harvested material (for example, canned fruit).

ACTIVITIES: What can (or can't) I do with PBR protected varieties?

The owner of a PBR variety can prevent others from engaging in certain activities in relation to the variety. The major exclusive right is to offer the variety for sale. Importantly, the PBR rights do not cover all uses of the protected variety, but instead include the exclusive right to:

- Produce or reproduce the material
- Condition (e.g. clean, coat, sort, package) the material for the purpose of propagation
- Offer the material for sale
- Sell the material
- Import or export the material, and
- Stock the material for any of the purposes described above.

PBR Labelling

Importantly, PBR protected varieties are usually labelled to indicate that they are protected under the PBR scheme.

Standardised versions of the PBR logo and wording are used to limit confusion (see Figure 1) and a full list of protected varieties is available from the Plant Breeder's Rights Office website www.ipaaustralia.gov.au/pbr.



Figure 1: PBR Logo

Unauthorised commercial propagation or any sale of propagating material of this variety is an infringement under the Plant Breeder's Rights Act 1994.

Exceptions and limitations to protection

An important feature of the PBR scheme is the way that it attempts to balance the interests of breeders, growers and researchers. Key to this balance is a range of exceptions built into the PBR system.

In this way, the PBR Act provides that certain things will not infringe the PBR of a registered owner. These are acts done for:

- Private and non-commercial purposes (e.g. home gardening)
- Experimental purposes
- Plant breeding, and
- Farm saved propagating material (For example; cuttings, tissue culture and seed) that are to be used on your own farm.

Commercialising a PBR variety

As we have seen, the PBR system provides an exclusive right for the owner of the variety to exclude others from commercialising it. If the owner of the variety wants others to be able to do these things, (s)he generally does it by way of a contract or licence; setting out the terms and conditions under which another person can use the variety.

Users of protected varieties should be aware that by purchasing a PBR protected variety, they are agreeing to abide by the rights granted in the PBR Act, and any additional contractual terms that attach to the purchase of the variety. The terms of your contract may be more stringent than the provisions of the PBR Act and users may be

'contracting out' of the restrictions on the PBR rights, such as the right to propagate for non-commercial or plant breeding purposes.

These terms and conditions address issues such as royalty payments, restrictions relating to propagation (e.g., non-propagation), management systems, access to property for inspection and auditing purposes.

In some cases the owner of the variety also requires the user to agree to provide the harvested material to nominated distributors, packers or resellers.



Figure 4. Contracts or licences will generally set out the terms and conditions under which another person can use the PBR protected variety, although you don't have to sign a written document to be bound by a contract – you may simply open a bag of seed or click 'I Agree' on your computer.

What if you cannot access PBR protected varieties?

There is an obligation on the owner of PBR to make reasonable quantities of the protected variety available at a reasonable price to meet public demand. Where this does not occur, you may seek a compulsory licence over the variety directly from the PBR Office.

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PBR legislation under review

Two reviews of the PBR legislation currently underway. These are:

1. Review of enforcement – this is being undertaken by the Advisory Council for Intellectual Property (ACIP)
2. Review of the duration of the rights – this is being undertaken by the Plant Breeder's Rights Advisory Committee.

Some of the key concerns for the nursery and garden industry in relation to these reviews include:

- Changes to the farm saved propagating material provisions;
- Strengthening compliance and enforcement measures to enable the owner of the PBR right to gather sufficient evidence to enforce their rights;
- Extension of the term of the PBR right; and
- Standardisation of the end point royalty regime and/or other collection strategies.

The bottom line

As we have seen, the nursery and garden industry is the most frequent user of the PBR system in Australia. This is why it is essential for businesses in the industry to have at least a working knowledge of the PBR scheme and to know whether a variety is protected by PBR or not. Once you have determined that the variety is protected, you should consider the limits placed on your dealings with that variety by asking:

(1) What is the plant material you are dealing with? and

(2) What activities are you involved in?

If you are still unsure, you can check with the PBR owner or licensee.

It is essential for businesses in the industry to have at least a working knowledge of the PBR scheme

Acknowledgements

Kathryn Adams is in the role of senior research fellow at ACIPA and is an agricultural scientist as well as a lawyer. She was the first Registrar of Plant Breeder's Rights in Australia and has been on a number of boards for research and development corporations. Jay Sanderson is a research fellow and co-ordinates ACIPA's public information program. Jay is completing a PhD in plant intellectual property.

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