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Intellectual Property for Plants and Plant Material

Information for Applicants for Class 31 Trade Mark Registrations

In Australia there are three types of intellectual property protection available in relation to plants and plant material:

- Standard patents for plants in general and for specific cultivars;
- Plant breeder's rights (PBR) for plant cultivars only; and
- Trade marks.

Specific information about plant patents and PBR protection can be obtained from IP Australia by phoning 1300 651 010 or visiting www.ipaustralia.gov.au. The publication 'Australian Patents for Plants', under 'Patent Information for Specific Circumstances' on the website, describes the range of subject matter and the requirements for standard patents for plants.

This information sheet is designed for applicants seeking registration under Class 31 of the *Trade Marks Act 1995*. Class 31 protects agricultural, horticultural and forestry products and grains; living animals;

fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals; and malt.

Plant names

In the plant industry, plant names are used to name and identify particular plants, and differentiate them from other plants.

Plant names are subject to scientific and plant industry naming conventions¹ and fall into a number of different categories:

- Scientific nomenclature (particularly genus and species, which identify every plant by a unique binomial);
- Invented names to further differentiate plants within the same genus and species, often referred to as varieties or cultivars (cultivated varieties);
- Alternative invented names, often called synonyms; and
- Common names, which often reflect a characteristic of the plant.

¹ International Code of Botanical Nomenclature (Saint Louis Code) 1999 and International Code of Nomenclature for Cultivated Plants 2004



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The table below shows examples of these different naming conventions applied to two particular plants:

Genus	Species	Variety/cultivar	Synonym	Common Name
<i>Acacia</i>	<i>cardiophylla</i>	'Gold Lace'	Kuranga Gold Lace'	Wyalong Wattle
<i>Acacia</i>	<i>baileyana</i>	'Purplea'	n/a	Purple Leaf Cootamundra Wattle

Note: These plant names cannot perform the function of a trade mark.

Some invented plant names appear as varieties or synonyms on the PBR register, and these are precluded by trade mark legislation from being registered as trade marks. In the same way, some plant names which do not appear on the PBR register will be difficult to register as trade marks.

Trade marks protection available for plants and plant material

The purpose of a trade mark is to distinguish the goods or services of one trader from those of another. To achieve this, a proposed trade mark should be used in the following ways:

- Applied to a number of different plants; or
- If applied to a single plant, always applied in conjunction with the accepted scientific, common and variety/cultivar names for that plant.

Words that serve only to describe, define, or name a particular plant do not fulfil the requirements of registrability under the *Trade Marks Act 1995*. This principle applies to any plant material or produce that needs to be identified by type or kind, including live plants, seedlings, seeds, grains, fruits and vegetables, flowers, and reproductive material.

Examples

The following examples use hypothetical trade marks and both real and hypothetical plant names to illustrate the difference between plant names and words operating as trade marks.

A trader known as Crazy Elephant Nurseries sells a plant which is known by the common name 'Wyalong Wattle'. This plant has the cultivar name 'Gold Lace', which is registered with the Australian Cultivar Registration Authority and is in the public domain. Crazy Elephant attach a label to the plants displaying the following information:

WYALONG WATTLE
Acacia cardiophylla 'Gold Lace'

However, they realise none of these words act as a trade mark when they visit a competitor and find the same plants labelled exactly the same way, as they are entitled to.

Crazy Elephant Nurseries realise they need to apply different words or images to the label to distinguish their plants from the same plants of their competitor. They attach the following label:

CRAZY ELEPHANT
WYALONG WATTLE
Acacia cardiophylla 'Gold Lace'

The words CRAZY ELEPHANT are successfully operating as a trade mark. No other traders need to use those words on the same plants, and buyers know they are buying an *Acacia* of the type 'Gold Lace' provided by CRAZY ELEPHANT.



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The trade mark is strengthened when Crazy Elephant Nurseries apply it to a second plant, also of the genus *Acacia*, in the following way:

**CRAZY ELEPHANT
PURPLE LEAF COOTAMUNDRA WATTLE**
Acacia baileyana 'Purpurea'

Buyers know they are purchasing either an *Acacia cardiophylla* 'Gold Lace' or an *Acacia baileyana* 'Purpurea', and that in both cases they have been provided by CRAZY ELEPHANT.

Crazy Elephant Nurseries cultivate a new *Acacia cardiophylla* and use the name 'Baggy Pants' to differentiate it from the cultivar known as 'Gold Lace'.

They consider applying for 'Baggy Pants' as a trade mark, but realise this name is being applied as the name of the cultivar and so should be available for use by others who market the same cultivar.

As they have already established a trade mark (CRAZY ELEPHANT) which can distinguish their goods from the goods of others, they decide on the following label:

**CRAZY ELEPHANT
WYALONG WATTLE**
Acacia Cardiophylla
'Baggy Pants'

Frequently Asked Questions

If I am the breeder of a new plant and have made up a name for it, why can't I protect the name as a trade mark?

Even though you have invented or contrived the words you are applying to the plant, the issue is the way those words relate to the plant. If the words are applied to the plant

for the purpose of naming or describing that particular plant, it cannot act as a trade mark because it will not distinguish the goods of one particular trader.

I have registered my plant variety under PBR, and have given it a PBR name. I want to register some different words as a trade mark. Can I do this?

It is possible for different words to operate as a trade mark, even if they are applied to a single plant (your registered PBR variety). This will depend on how you use and protect it. The words should be used to indicate the plants of one trader, rather than name the plant (which may be obtained by that name from a number of traders). However, if the words are simply replacing the PBR registered name, they will be acting as an alternate name or synonym, and will be difficult to register as a trade mark.

Why was my trade mark application rejected on the basis that it is a plant name when another one that I know is in use as a plant name was accepted?

All applications undergo the same examination process. If there is no clear evidence of use as a plant name available at the time of examination, an application may be accepted. However, if the owner of that trade mark subsequently uses it to name or describe a single plant, not only will their registration not function as a trade mark, but their trade mark rights could be open to challenge.

Does IP Australia police the correct use of trade marks?

IP Australia does not police the market place, but has an arbitration role in some disputes occurring in the period between acceptance and registration. Any challenge



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after registration would have to be instigated by an aggrieved party in the market place, and pursued through the courts. Enforcement is the responsibility of the trade mark owner.

I saw a plant trade mark registration with an endorsement saying it wasn't to be used as the name of a plant variety. I know the trader is using it in this way. Does this trader have trade mark rights?

This endorsement is called a 'condition of registration'. If the trader is not complying with the condition of registration, not only will their registration not function as a trade mark, but their trade mark rights could be open to challenge.

Further information

For more information on trade mark registration in general, call 1300 651 010 or visit www.ipaustralia.gov.au.

Seek Professional Advice

This information sheet provides only basic information. These matters can involve complex legal issues and it may be in your best interests to consult an attorney, solicitor experienced in intellectual property matters, or your business adviser.

For a list of IP professionals, visit the IP Australia website www.ipaustralia.gov.au or search your local telephone directory.

Disclaimer

This information is intended to help the reader gain a basic understanding of some IP principles. It is not designed to provide legal, business or other relevant professional advice. IP Australia recommends that you seek independent legal, business or other relevant specialist advice.

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Visit IP Australia on the internet at www.ipaustralia.gov.au
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