



Australian Government

IP Australia



# A guide to applying for your Plant Breeder's Right

PLANT BREEDER'S RIGHTS



## Privacy Notice

As explained in our Privacy Policy, IP Australia is authorised to collect information provided in applications for plant breeder's rights and other requests for service under the *Plant Breeder's Rights Act 1994* (the PBR Act). The information provided to us (the information), including personal information about any person, will be used for the purposes of the PBR Act including, as appropriate:

- to process your, or another person's, plant breeder's right (PBR) application;
- to process a request or notice in relation to a PBR or PBR application;
- to enable third parties and IP Australia to contact you about your PBR or PBR application or about a request or notice that you have filed in relation to a PBR or PBR application; or
- to perform other functions under the PBR Act.

The PBR Act requires or authorises the Registrar of Plant Breeder's Rights to disclose and publish the information provided to us in specified circumstances, as explained in IP Australia's Privacy Policy. The information may be published in Official Journals, Registers and data bases in Australia and elsewhere which may be accessed over the internet and/or as paper copy. Periodically, IP Australia (or a company under contract to us) will use your personal information to contact you to conduct market research about our products and services.

IP Australia is committed to complying with the *Privacy Act 1988*, which contains information on privacy principles that IP Australia must observe when collecting, using and disclosing personal information. The personal information handling practices of IP Australia are detailed in IP Australia's Privacy Policy, which contains information about accessing and amending records held by IP Australia containing personal information.

To make a complaint about IP Australia's collection or handling of your personal information, contact IP Australia's Privacy Contact Officer:

Telephone      1300 65 10 10  
Email            assist@ipaaustralia.gov.au  
Post              Privacy Contact Officer  
                     IP Australia  
                     PO Box 200  
                     Woden ACT 2606

To read IP Australia's Privacy Policy visit our website: [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

# Contents

Australia's Plant Breeder's Rights scheme	3
Securing Plant Breeder's Rights protection	4
Understanding the basics	4
PBR and other forms of IP	5
What are the benefits of owning a PBR protected variety?	6
Are there limitations?	7
Protecting improvements	7
Where can I get help?	8
Nuts and bolts	9
Qualified people	9
What varieties are eligible for PBR protection?	10
What criteria must be met so that a PBR can be granted?	11
Name of the variety	15
Provisional protection	16
How can you tell if something is protected?	16
Applying for PBR	18
Before applying	18
Stages in processing an average application for PBR in Australia	19

Part 1 Application form	20
What documents need to be filed?	20
How do I lodge my Part 1 Application form?	21
How much does it cost?	21
Lodging Part 2 of your application	22
When do I file Part 2 of my application?	22
What documents need to be filed?	23
How do I file Part 2 of the application?	24
How much does it cost?	24
Examination of your PBR application	26
Enforcing your Plant Breeder's Rights	29
Who enforces my right?	29
What are the penalties for infringement?	29
Contacting IP Australia	30
Glossary	32

This application guide is designed to help you prepare and file a Plant Breeder's Rights application. This guide does not cover every issue that may come up and you should not regard this guide as an authoritative statement on the relevant law and procedure. You should also note that the requirements may change from time to time and while we make every effort to ensure the information presented is accurate, you should check with IP Australia before relying on the information.

# Australia's Plant Breeder's Rights scheme

---

Australia's Plant Breeder's Rights (PBR) scheme is administered under the **Plant Breeder's Rights Act 1994** and conforms with the International Union for the Protection of New Varieties of Plants (UPOV 1991). All new varieties of plant, fungal, algal species and transgenic plants are potentially eligible for a PBR.

The PBR scheme uses breeder testing to establish the Distinctiveness, Uniformity and Stability (DUS) of new varieties. Using UPOV technical guidelines and procedures, breeders or their agents organise comparative trials to prove that each new variety meets the PBR criteria.

UPOV is the 'Union Internationale pour la Protection des Obtentions Vegetables' or the International Union for the Protection of New Varieties of Plants.

To ensure technical rigour the registration requires all breeders to use the services of an accredited qualified person. The qualified person accepts responsibility for all aspects of the comparative trial, including the choice of comparative varieties, experimental design, collection of data, statistical analysis and preparation of a description of the variety. IP Australia may provide some limited guidance to the qualified person.

IP Australia consults widely on all applications, including specialist advice on new varieties of Australian native species from the Australian Cultivar Registration Authority (ACRA).

This guide provides details on the application and examination procedures of the Australian PBR scheme.

The PBR scheme is part of IP Australia, a division of the Australian Government Department of Innovation, Industry, Science and Research.

# Securing Plant Breeder's Rights protection

---

## UNDERSTANDING THE BASICS

Plant Breeder's Rights are a form of Intellectual Property (IP). They grant a limited commercial monopoly to breeders of new plant varieties. PBR allows a breeder the right to **exclude** others from a range of activities including producing and reproducing a protected variety. PBR is personal property and can be assigned, sold and transferred to other parties.

**Propagating material** is any part of the variety which is capable of producing another plant of that variety with the same essential characteristics.

See section 3 of the PBR Act which is available on IP Australia's website at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

PBR registration (also referred to as a grant or certificate of PBR) gives plant breeders specific and exclusive commercial rights to a new variety. These rights prescribe both the extent and limitation of the monopoly provided. PBR gives plant breeders the right to prevent others from using their variety in particular ways without their permission.

There is no international system for filing PBR and generally applications need to be lodged in each country where protection is being sought. The European Community is an exception where a single application relates to protection in all participating countries. An application in Australia can usually form the basis of applications in other UPOV member countries.

If you want to seek PBR protection for your new variety, the first step is to lodge a Part 1 Application Form. In most cases, the date of lodgement establishes the priority date for your new variety. If your application is accepted, you are provided with provisional protection while you complete the remainder of the application process. Provisional protection is important if you want to bring your variety to market quickly.

Filing an application is the same as lodging an application.

Provisional protection gives you up to 12 months before committing any further expense to assess the commercial potential of your variety and decide whether you want to continue. If you do choose to pursue PBR protection, you must pay the examination fee within 12 months.

Be sure to take care before you start to commercialise your variety, so that you do not inadvertently prejudice a PBR application in Australia or overseas.

In any event, we suggest you explore all available options with the assistance of an accredited qualified person or other IP professional, such as a patent attorney with PBR experience.

## PBR AND OTHER FORMS OF IP

There are also other forms of IP potentially available to you. Different combinations can be used to add value to a single variety, so do your research to ensure you get the right mix of protection for your circumstances.

The two most common additional options are trade marks and patents.

- **Trade marks and plants:** trade marks are used to distinguish the goods and services of one trader from those of another. While a trade mark cannot be used as a variety name, it can be used as a banner or brand under which to sell a range or series of varieties.
- **Patents and plants:** sometimes new plants can also be patented. For example, it is possible to have a patent on a unique plant gene for disease resistance. The gene may be incorporated into plants of a variety which can then also be protected by PBR.

Qualified people and IP professionals can advise you further on these options.

## WHAT ARE THE BENEFITS OF OWNING A PBR PROTECTED VARIETY?

Plant breeders who successfully register their new variety with IP Australia gain the right to exclude others from performing the following acts in relation to propagating material of the new variety:

- producing or reproducing the material;
- conditioning the material for the purpose of propagation (conditioning includes cleaning, coating, sorting, packaging and grading);
- offering the material for sale;
- selling the material;
- importing the material;
- exporting the material; and
- stocking the material for any of the purposes described above.

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

PBR protection can also extend beyond the new variety to certain other varieties. For example, PBR can extend to varieties that can only be reproduced by the repeated use of the PBR protected variety (dependant varieties), or to essentially derived varieties, which are predominately derived from the protected variety, retain its essential features and do not exhibit any important features that differentiate it from the protected variety.

For grapevines and trees, PBR continues for 25 years from the date of granting and for 20 years in all other species.

PBR also protects the registered name and synonym of the variety from use in relation to other similar plants.

PBR is personal property and can be assigned, sold and transferred to other parties. There have also been instances where even the right to apply for PBR has been sold.



## ARE THERE LIMITATIONS?

There are exceptions to the extent of the monopoly offered by PBR. For example, it does not prevent others using your variety for:

- private and non-commercial purposes;
- experimental purposes; or
- breeding other plant varieties.

Furthermore, once farmers have legitimately acquired seed, they can save part of one harvest and sow subsequent crops without infringing the PBR. However, this is limited, as the harvest arising from the use of farm saved seed may come within the scope of PBR protection in certain circumstances for example, when the harvest is marketed.

Compulsory licensing arrangements may also apply where:

- propagating material of the new variety is not made available to the public at reasonable quantities, quality and prices within two years; or
- a person is authorised by another law to do one or more of the acts that would normally require the breeder's authorisation.

Again these are limited, as in both cases the breeder should receive appropriate remuneration.

## PROTECTING IMPROVEMENTS

If you make improvements to your new variety after lodging a Part 1 Application, the following options are generally relevant:

- If your improved variety is clearly distinct from the filed variety:
  - continue with the existing application and file a new application to cover the improved variety.
  - provided the new variety meets the eligibility criteria, withdraw the first application and file a new application to cover the improved variety.
- If your improved variety is not clearly distinct from the filed variety, but you wish to continue with it:
  - provided the new variety meets the eligibility criteria, withdraw the first application and file a new application to cover the improved variety.

If you are not sure which way to proceed, you may want to consider filing a new application that describes the improved variety. This will establish a priority date for the improved variety (in case another breeder makes the same improvement) and allow you to undertake market testing with clear PBR protection.

## WHERE CAN I GET HELP?

The process of obtaining PBR is reasonably straight forward, but it is important to get it right at the start. Qualified people and IP professionals can help you along your PBR journey. Applicants are required to engage the services of a qualified person who accepts responsibility for overseeing the comparative growing trial and preparing the variety's detailed description.

IP Australia is the Australian Government agency responsible for receiving, examining and granting Plant Breeder's Rights. IP Australia is committed to providing customers with excellent customer service and high quality products. We cannot provide legal or commercial advice, nor can we draft your PBR application or other correspondence for you. You need to source these services independently.

IP Australia is also a good source of information about your rights. If after reading this application guide you need more information, IP Australia staff are available to talk about your application and explain the PBR process. Simply call 1300 651 010.

# Nuts and bolts

---

## QUALIFIED PEOPLE

Qualified people act as an applicant's technical consultant. They oversee the comparative trial and provide evidence that a variety meets DUS testing requirements. The qualified person may need to consult on choice of comparative varieties, experimental design, management regime, collection of data, statistical analysis, photography and preparation of the description of the variety.

The work of the qualified person supplements the activities of the examiners from IP Australia and helps ensure that a PBR application is technically rigorous and that a PBR grant is legally sustainable in the event of infringement and subsequent litigation.

There are about 280 qualified people in Australia and New Zealand, each of whom is accredited to consult on one (or a limited range) of plant species in which they have expertise. A list of consultant qualified people appears in each issue of the Plant Varieties Journal (PVJ) which is available from [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

Qualified people must apply to IP Australia for accreditation before they can assist breeders. This involves a written application outlining qualifications, experience and names of referees. Information on how to apply to become a qualified person is available from [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au). Breeders and agents may apply to become a qualified person and once accredited are able to progress their own applications. Each qualified person must also attend training workshops given by IP Australia to retain accreditation. These measures aim to ensure that PBR grants are technically rigorous and legally sustainable in the event of infringement.

When applying for PBR, you must nominate a qualified person for each application. This is done using the Nomination of a Qualified Person form, which guides you and helps determine what functions the qualified person will play in preparing the application. The qualified person must certify the completed application by submitting the Certification by the Qualified Person form, which outlines exactly which functions the qualified person undertook or supervised in relation to the application.

There are two categories of qualified person:

- consultant qualified person – accredited to act as consultants to PBR applicants. The applicant retains the qualified person on a mutually agreed basis; and
- non consultant qualified person – accredited to certify applications for which they are the breeder, owner or authorised agent, or an employee of the breeder, owner or authorised agent.

## WHAT VARIETIES ARE ELIGIBLE FOR PBR PROTECTION?

A new or recently exploited plant variety can be granted a PBR. At the date of lodgement, the new variety cannot have been sold with the breeder's consent, and a recently exploited variety is one where propagating or harvested material has been sold with the breeder's consent for up to 12 months in Australia (this grace period allows for commercial evaluation). Where propagating or harvested material of the variety has only been sold overseas, the grace period extends to six years for trees and grapevines, and four years for all other species.

These restrictions do not apply to sales made without the consent of the breeder. Generally the supply of propagating or harvested material in exchange for money, goods by way of let or barter (including services) constitutes a sale under the PBR Act. However, in certain circumstances, some specific activities relating to the exchange or disposal of materials derived from multiplying and evaluating the variety are excluded from consideration as a sale. Further detail on what constitutes a sale under the PBR Act is available on the PBR pages at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

For PBR, a plant also includes all fungi, algae and genetically modified plants, but does not include bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages. A plant also includes a hybrid that is a combination of two or more genotypes of the same or different taxa, but excludes a combination comprising a scion grafted onto root stock.

## WHAT CRITERIA MUST BE MET SO THAT A PBR CAN BE GRANTED?

PBR registration requirements are divided between eligibility of the breeder and the eligibility of the variety.

### Eligibility of the breeder

Only the breeder of the new variety or their successor in title may apply for PBR registration.

For PBR, successor means a person to whom the right to make a PBR application has been assigned, transmitted by will or by operation of law.

### What constitutes breeding?

While anticipating many other valid breeding methodologies (including deliberate cross pollination, induced/natural mutation, bulk or pedigree selection within existing variability and genetic manipulation by way of gene insertion), the PBR Act also accepts new plant varieties that arise from the discovery of a plant together with its use in selective propagation to enable the new variety to be developed. Detailed information regarding the breeding of eligible varieties is available at [www.anbg.gov.au](http://www.anbg.gov.au)

In the Part 1 Application Form you will be asked how your variety was bred (the breeding methodology) and how it differs from its parents (particularly the maternal parent), its progenitors, or the population from which it was selected – whichever is relevant to the breeding methodology used.

If the new variety was bred in the course of performing duties or functions as an employee, the employer is taken to be the person having done the breeding.

Where two or more people bred the new variety (either jointly or independently and whether at the same or different times) the Part 1 Application Form must be in joint names.

### Eligibility of the variety

For your variety to be eligible for PBR protection, you must also show that it meets the DUS criteria. The Australian PBR scheme follows well-established international DUS protocols called UPOV technical guidelines, which prescribe the registration requirements for various genera and species. Where a technical guideline is not available for a particular species, equivalent documentation is developed by IP Australia in conjunction with the relevant qualified person. Technical guidelines are available from [www.upov.int](http://www.upov.int)

## Distinct

To be distinct (that is, to uniquely identify the new variety), clear differences must be present between the new variety and all varieties whose existence is a matter of common knowledge at the priority date.

Generally distinctiveness is established by an objective comparison between the new variety and the most similar varieties of common knowledge. While this is usually accomplished through side-by-side comparative growing trials, systematic individual comparison with all varieties of common knowledge may not be required or practical.

For example, where the new variety is sufficiently different in the expression of its characteristics, to ensure that it is distinct from a particular group (or groups) of varieties of common knowledge, it would not be necessary to make a systematic individual comparison against varieties in those groups. Once a new variety is clearly distinguished from the most similar varieties, logic dictates that it is also clearly distinct from all other varieties of common knowledge.

Most similar is a relative term. In some species varieties may be very similar, only varying in the expression of one characteristic, such as flower colour in roses. In other species, varieties may not closely resemble each other.

When seeking to describe differences between varieties, morphological, phenological or those characteristics least affected by environmental factors are preferred. However, in certain circumstances, tests, such as comparative protein profiles may be acceptable provided they meet the definitional requirements of a characteristic.

Performance attributes can also be included as distinguishing characteristics, provided they are clear and consistent.

As a minimum, your new variety must be clearly distinct from the most similar varieties of common knowledge (also called comparator varieties when they are included in the comparative growing trial) by at least one characteristic. Usually however, there are differences in several characteristics. UPOV technical guidelines, or their equivalent, provide lists of characteristics that may be added to as the circumstances of each new variety dictates.

While clear, repeatable differences between the variety and varieties of common knowledge must be demonstrated, it is recognised that as a result of the interaction between genotype and environment, the claimed difference will not necessarily be observed in all environments.

Comparative growing trials are usually conducted in Australia by your qualified person, however in some cases and subject to conditions, applicants can draw on data and official overseas test reports obtained from another UPOV member country. Conditions apply and you should seek advice from your qualified person.

A comparative trial in Australia may not be necessary if the variety has been test grown in a UPOV member country using official UPOV guidelines and test procedures, and all similar varieties of common knowledge have been included in the trial. IP Australia still requires breeders to submit a detailed description of the variety for publication in the PVJ.

### **Additional requirement for Australian native species**

Before PBR is granted on varieties of Australian species, IP Australia seeks advice from specialists at the Australian National Botanic Gardens on the distinctiveness of the new variety. To facilitate this process, applicants (usually through their qualified person) must provide a herbarium specimen to the Australian Cultivar Registration Authority.

A fresh, flowering specimen about 40cm long and wrapped in damp newspaper must be forwarded to:

**The Registrar**  
**Australian Cultivar Registration Authority**  
**Australian National Botanic Gardens**  
**Clunies Ross Street**  
**Acton ACT 2601**

Be sure to send the specimen so that it arrives at the Registrar early in the week.

A fee of \$50 applies to each variety and must accompany the specimen, together with a completed copy of ACRA Herbarium Specimen form (PBR00007). More detailed instructions on how to submit your specimen are available from the PBR forms page at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

PBR examination will only be finalised if the Registrar determines that the specimen is distinctive and once any unfavourable comments have been resolved.

## Uniform

Each candidate variety must be uniform.

The uniformity test ensures that individuals representing the new variety form an identifiable group based on phenotype (that is, variation between individuals within the variety must not be significantly greater than in comparable varieties and in some respects, uniformity is allied to the other tests for distinctness and stability).

A new variety is deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its distinctive characteristics.

When completing the Part 1 Application Form, applicants need to nominate the type of propagation they will use to maintain their new variety. Applicants can choose a method of propagation that is different from the norm for the species or other varieties. For example in tomatoes, an applicant may choose to maintain their new variety by vegetative propagation, instead of the more usual method of seed propagation. In addition to the method of propagation, the way in which each characteristic is assessed (eg observed or measured) will influence the way in which uniformity of the variety is examined and reported.

Unless the technical guidelines on the genus or species recommends otherwise, the required standards of uniformity for types of propagation and methods of assessment are set out in the Part 2 Form and on the IP Australia website at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

## Stable

A variety is stable if its distinctive characteristics remain unchanged after repeated propagation. The purpose of the stability test is to ensure from generation to generation, that the variety remains substantially identical with its description, subject to the proviso of the genotype by environment interactions mentioned above.

A demonstration of stability is usually not required for vegetatively propagated varieties if they have been proven uniform. In this case, breeders are responsible for ensuring that the variety remains true to its description and does not drift genetically.

Where new varieties are maintained by seed, a minimum of two seed generations must be included in a side-by-side comparison. Plants of each generation should be so alike that they could not be declared distinct from each other for any of the distinctive characteristics of the variety.

Contact IP Australia for further detailed information regarding the DUS criteria.



## NAME OF THE VARIETY

Each new variety must have a unique name (also called the variety denomination) that identifies it from other varieties of the same plant class.

You can view a list of plant classes at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

A variety name must be a word or words (which can be invented words) and may include in addition, a letter or letters and a figure or figures. The name must also comply with the International Code of Botanical Nomenclature and subsidiary codes (particularly the International Code of Nomenclature for Cultivated Plants).

The variety name must not:

- be likely to deceive or cause confusion, including confusion with the name of another plant variety of the same plant class;
- be contrary to law;
- contain scandalous or offensive matter;
- be prohibited by regulations in force at the time of the application; or
- be or include a trade mark that is registered, or whose registration is being sought, under the Trade Marks Act 1995, in respect of live plants, plant cells and plant tissues.

### The variety name must also not consist of or include:

- the name of a person living at the time of the application unless the person has given written consent;
- the name of a person who died within 10 years unless the legal personal representative of the person has given written consent; or
- the name of a corporation or other organisation unless the corporation or organisation has given written consent.

If an application for the new variety has been previously filed in a UPOV member country the name used in the first filing **must** be the **name proposed** in the Part 1 Application Form and is likely to become the official registered name in Australia. This requirement ensures that the variety, in all but rare cases, is known by the same name worldwide. However, if the proposed name is already in common use in Australia for another variety in the same class, or prohibited by any of the restrictions mentioned above, the applicant will have to propose an alternative name. If the first filed name does not suit your Australian marketing purposes, an additional commercial name may be proposed. The commercial name is accepted as a synonym. A synonym must also satisfy all the criteria used for accepting a variety name. Both the registered name and the commercial synonym name are protected.

## PROVISIONAL PROTECTION

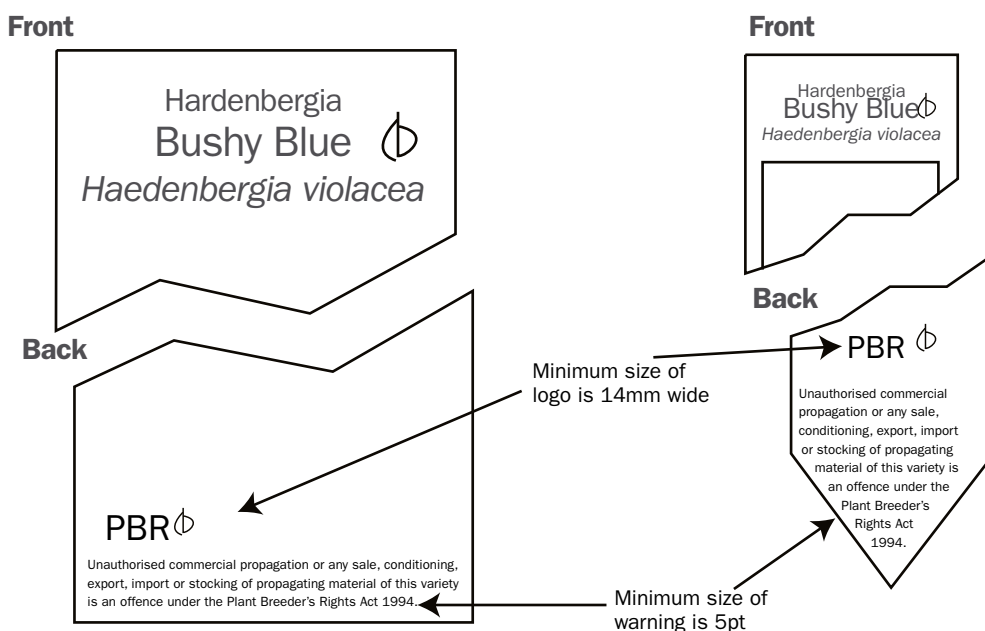
Provisional protection is given if reasonable evidence is provided in the Part 1 Application Form that your new variety is distinct from all other varieties of common knowledge. It gives protection from the time an application for PBR is formally accepted to when it is finalised. Each applicant is notified of the date on which provisional protection is established.

An applicant can only take legal action on any infringements once full protection is granted (that is, the final grant of PBR is made and a certificate is issued) though they can back-date the claim to the date of the infringement if the infringement occurred within the period of provisional protection.

## HOW CAN YOU TELL IF SOMETHING IS PROTECTED?

Varieties with provisional or full protection should be advertised as such to purchasers. This is usually done with a label. To avoid confusion in the marketplace, IP Australia suggests that recommended versions of the logo and standardised wording be used as set out in the industry guidelines for labelling found on the IP Australia website.

Use of the PBR logo on 'tie-on' or 'push-in' labels



Inadequate labelling of plants could reduce the effectiveness of future rights. A court may refuse to award damages against a person for infringement of your right if the person was not aware of, and had no reasonable grounds for suspecting, the existence of that right.

Plant material sold for 'test marketing' **before** the lodgement of an application should be labelled to establish an intention and time frame for an application for PBR. For example the following words could be used:

**Eligibility of this plant as a registrable plant variety under Section 43(6) of the Plant Breeder's Rights Act 1994 will expire on .....\***

*\*(Date nominated must not exceed 12 months from the date of first sale in Australia and not more than four years from the date of first sale overseas, or six years in the case of overseas sales of tree and vine varieties).*

You can also search the online PBR databases for descriptions of current and past PBR varieties at **[www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)**

It is permissible to include a trademark, trade name or similar indication on a plant label. However the PBR variety name (or synonym) **must** also appear and be **easily recognisable**.

**Tip**

A trademark can never function as a variety name. Any attempt to use a trademark as the name for a single variety will call the validity of the trade mark into question.

# Applying for PBR

---

## BEFORE APPLYING

### Undertake some basic research

To save time and money when applying for PBR, do some basic research to make sure your variety is new and distinctive.

Searching the PBR online database and register of plant varieties at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au) will help and may tell you if someone else has already bred your variety.

As a plant breeder, protecting your new plant varieties with PBR is an integral part of your business strategy. It goes hand-in-hand with profit potential, finance, production and marketing. The PBR system is structured to enable you to make some of the key business decisions before incurring any registration costs.

For example, exploitation of your variety before lodging a Part 1 Application Form is possible within the strict time limits outlined above.

Filing a Part 1 Application is quite inexpensive and provides a preliminary assessment of whether your variety meets the registration criteria.

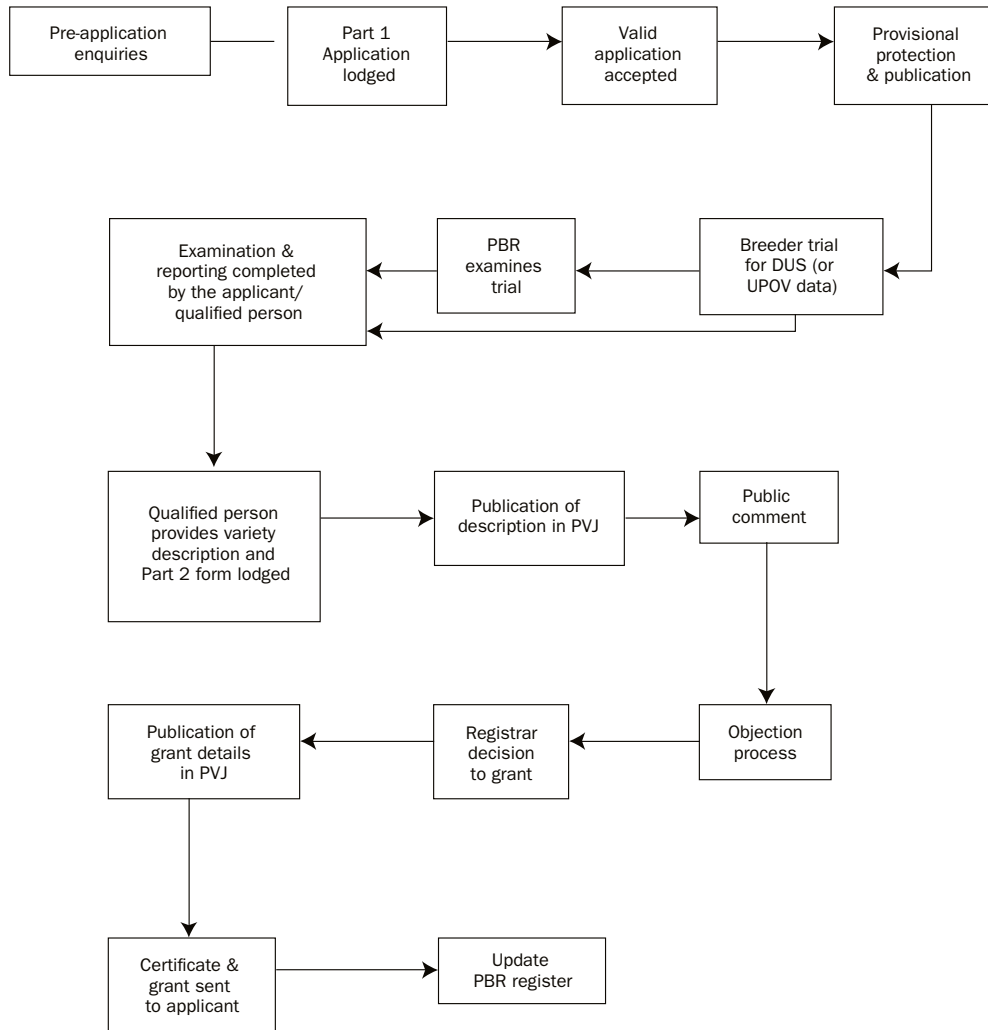
If it is your first application for PBR, it may be useful to contact a qualified person or IP professional. Lists of both can be found at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

### The application process

The PBR application process is in two major parts – represented by the Part 1 Application Form and the Part 2 Application Form.

The Part 1 Application Form is lodged first. There is usually a delay in lodging the Part 2 Form while a comparative growing trial is conducted in Australia or an overseas DUS report is sourced from another UPOV authority that has completed the test.

## STAGES IN PROCESSING AN AVERAGE APPLICATION FOR PBR IN AUSTRALIA



# Part 1 Application Form

---

Your Part 1 Application Form includes general information and claims about your new variety. This establishes an initial case that the variety exists, is distinct and meets the requirements of a Plant Breeder's Right.

If the variety is already commercialised in Australia or overseas, you need to take the time limits into account. If the Part 1 Application Form is not received before the eligible sales period expires, your variety will not be eligible for PBR protection.

## WHAT DOCUMENTS NEED TO BE FILED?

- Application Part 1 – General Information Form – PBR00001.
- If joint applicants, a Supplementary Page to the Part 1 Application Form PBR00003 for each applicant. If one or more of the joint applicants is not the breeder, documentation outlining how the right to apply for PBR was assigned, sold or transferred must be provided.
- Nomination of a Qualified Person form – PBR00005.
- A photograph of the new variety.
- The application fee.
- If using an agent, Authorisation of Agent form – PBR00004.
- If claiming priority, priority documents must also be filed within 3 months of filing the Part 1 Application.

Overseas breeders seeking PBR in Australia must provide an Australian address for the service of documents. This usually involves the appointment of an agent. The duties of the agent may involve only the PBR application or may involve wider responsibilities of a commercial nature. If an agent is appointed, the breeder must sign the Authorisation of Agent form, so the agent can progress the PBR application on their behalf.

## HOW DO I LODGE MY PART 1 APPLICATION FORM?

You can lodge an application the following ways:

- use the services of a qualified person, IP professional or an agent (their professional fees will be in addition to IP Australia fees); or
- lodge the application yourself.

Your completed Part 1 Application Form can be posted to IP Australia, or sent by email or fax provided the minimum requirements are met. Online filing is currently unavailable.

If the variety is an Australian species, you will also need to send a plant specimen to the Australian Cultivar Registration Authority. Timing will largely be dependant on the species and the time that it is in flower.

## HOW MUCH DOES IT COST?

To file the Part 1 Application Form costs \$300 (GST-free) and the fee must accompany the form at the time of lodgment. It covers a preliminary examination for acceptance, the issue of a letter of acceptance and if appropriate, establishment of provisional protection.

### **Payments can be made:**

- by post with a cheque made payable to IP Australia, money-order, or use the payment options form for credit cards;
- by fax – use the payment options form for credit cards and fax our secure business transaction on (02) 6283 7999; or
- by electronic funds transfer – N.B. A remittance advice is required. To arrange payment please contact 1300 651 010, download the form from [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

# Lodging Part 2 of your application

---

While the applicant can complete some or all of the Part 2 application, in the majority of cases it is the qualified person who completes this step. The purpose of the Part 2 Application Form is to present the results of the comparative growing trial – in particular to present evidence of distinctness, uniformity and stability. The evidence for distinctness is provided by a detailed description of the variety in tabular format, which includes the differences between your variety, and the other most similar varieties of common knowledge. The detailed description will be published in the PVJ and must be submitted by your qualified person through the online Interactive Variety Description System.

## **WHEN DO I FILE PART 2 OF MY APPLICATION?**

Once an application is accepted, it is covered by provisional protection against infringement. You then have a minimum of 12 months to further consider its commercial worth and resolve issues, such as finance and licensing before deciding whether full PBR protection is worthwhile. Timing of submission of the Part 2 Application Form is variable and is largely determined by the time it takes to complete and examine the comparative growing trial. Where the growing trial cannot be completed within 12 months of the lodgement of the application, it is usual for a suitable time extension to be granted on the basis of the examination date nominated in the Part 1 Application Form. However, if additional delays occur that could cause the examination to be rescheduled, it is the responsibility of your qualified person to contact IP Australia and discuss whether an additional extension is appropriate. In any event, you should lodge your Part 2 Application Form as soon as possible after examination of the local comparative growing trial or the receipt of the overseas data.



## WHAT DOCUMENTS NEED TO BE FILED?

- Part 2 Application Form – Description of New Variety form PBR00002;
- Your qualified person must lodge the detailed description of the variety through the online Interactive Variety Description System;
- Photograph or photographs showing the distinctive characteristics of the new variety. Preferably the photographs should be comparative, ie including both the new variety and the comparator varieties. Captions to the photographs should also be included;
- Certification by a Qualified Person form PBR00006;
- Confirmation of Submission of Propagating Material to a Genetic Resources Centre form PBR00009; and
- A certified copy of the overseas test report if it forms the basis of detailed description.

## HOW DO I FILE PART 2 OF THE APPLICATION?

Your completed Part 2 form can be posted to IP Australia, or transmitted electronically by email or fax, provided the minimum requirements are met. The detailed description of your variety can only be lodged using the online Interactive Variety Description System. Information on, and access to, the system is available via the PBR page of the IP Australia website.

As well as completing the Confirmation of Submission of Propagating Material form, a quantity of propagating material of the plant variety must be deposited for storage at a genetic resource centre. Usually you can nominate a centre of your choice. Seed propagated varieties are normally deposited in one of the Australian Plant Genetic Resource Centres. Many applicants with vegetatively propagated varieties choose to nominate their own address, but in doing so, accept the responsibilities associated with maintaining the variety.

## HOW MUCH DOES IT COST?

You have 12 months from the date of acceptance to pay the examination fee. The time limit to pay examination fees on imported varieties can be deferred for a maximum of 12 months after the variety has been released from quarantine. Contact IP Australia for further details.

The examination fee covers the substantive assessment of the detailed description, the publication of a description and photograph in the PVJ, the field examination if required, and any other enquiries needed to determine eligibility for a plant breeder's right. This process does not start until the examination fee has been received.

After the description has been published, successful applicants will be asked to pay the certificate fee. This covers the final examination of all details, the production of a certificate and a copy of the variety description in the PBR Register.

An annual registration renewal fee of \$300 is also payable on the anniversary of the granting of the right. The annual fee must be paid to maintain the grant.

## IP AUSTRALIA PLANT BREEDER'S RIGHTS APPLICATION GUIDE

Summary of IP Australia's PBR fees	
Lodging Part 1 Application Form	\$300
Examination – single application	\$1,400 **
Certificate	\$300
Annual Renewal Fee	\$300

\*\* Subject to conditions, discounts may be available of up to 40% for bulk examination of applications. Contact IP Australia for more details.

In most cases, the total registration fee is \$2,000 plus the annual renewal fee of \$300. These fees are GST free and are subject to change.

## EXAMINATION OF YOUR PBR APPLICATION

The examination process checks both the formalities of your application, the eligibility of the applicant to apply and the details of the variety itself.

The examination is conducted in four steps. First, the Part 1 Application Form is examined to establish whether an initial case has been established and that the application meets the minimum standards for a valid application. If so, the application is “accepted” and is then covered by provisional protection.

Second – substantive examination. Once an application is accepted, the claims made in the Part 1 Application Form will be tested in a comparative growing trial. Australia uses a breeder testing system where the onus of proof rests with the applicant to provide the necessary evidence, and accordingly it is the applicant (through their qualified person) who conducts the trial. IP Australia has no facilities for comparative growing trials or for storing germplasm. However there are approved Centralised Testing Centres (CTC's) for some crop genera where varieties can be entered into trials with discounted examination fee payments. A list of Centralised Testing Centres appears in each issue of the Plant Varieties Journal available from the IP Australia website at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

A physical examination of the comparative growing trial will be conducted by the PBR Office (unless notified otherwise) at a time when the trial displays the major differences between the candidate variety and the most similar varieties of common knowledge.

You will be asked to nominate the place and approximate time of the examination in the Part 1 Application Form. However, it is ultimately the responsibility of the qualified person to organise the final details of the examination including advising IP Australia of the details, such as timing, comparator varieties and trial design.

The PBR examiner makes an independent assessment of the trial to ensure it has been conducted in a scientifically rigorous manner and where necessary, confirms the key distinctive characteristics of the variety.

### Use of overseas test reports

In some circumstances, a comparative growing trial in Australia may not be necessary. The PBR Act allows DUS data produced in other UPOV countries (overseas data) to be used in lieu of conducting a local comparative growing trial provided certain conditions are met relating to the filing of applications, sufficiency of the data and the likelihood that your variety will express the distinctive characteristics in the same way had it been grown in Australia. The use of overseas data could be considered where:

- the first PBR application relating to the candidate variety has been lodged overseas;
- the variety has previously been test grown in a UPOV member country using official UPOV test guidelines and test procedures (that is, testing that is equivalent to a comparative trial in Australia);
- either all the most similar varieties of common knowledge (including those in Australia) have been included in the overseas DUS trial or the new overseas variety is so clearly distinct from all the Australian varieties of common knowledge that further DUS test growing is not warranted; or
- sufficient data and descriptive information is available to publish a detailed description of the variety in the accepted format in the PVJ and to satisfy other requirements of the PBR Act particularly uniformity and stability.

If the requirements for the use of overseas data are satisfied, the qualified person prepares and submits the detailed description in the normal way, including distinguishing the variety from the most similar varieties of common knowledge.

Some applicants choose to combine the use of overseas data and a limited growing trial in Australia (a verification trial). These verification trials are used to remove doubt that distinctive features of the variety are expressed as described in the overseas data. Verification trials may not always include comparators, though depending on the method used to assess uniformity, including the most similar varieties of common knowledge, may be useful.

### Varieties that must be trialled in Australia

IP Australia does not accept overseas data for the following species due to the wide genotype and environment interactions that have been previously experienced. Varietal descriptions from overseas trials have been consistently different from those obtained from trials grown under Australian conditions. Consequently, for the following, a full comparative growing trial must be conducted in Australia: *Solanum tuberosum* (Potato).

Once the trial is completed, the qualified person produces the description and submits it through the Interactive Variety Description System for publication in the PVJ.

### **Acceptance, opposition, grant and revocation**

IP Australia will accept your application when it is considered that the application meets the minimum requirements for Plant Breeder's Rights. Usually applications are examined for acceptance within two months of lodgement. You will be contacted if additional information or clarification is required.

For most species, it takes about 24 months from lodgement to complete the examination of the comparative growing trial and for the qualified person to draft the variety's detailed description. The description will be examined to ensure that it accords with the PBR examiner's observations and the harmonised way descriptions are presented. The qualified person will be contacted if amendment is required.

Once finalised, the variety's detailed description and photograph are published online in the PVJ. Third parties then have six months to formally oppose or comment on your application.

IP Australia publishes a description and photograph of each variety on its website. Publication allows a breeder's peers to object to the granting of PBR, informs industry and gives the public an opportunity to comment on individual applications. IP Australia assesses all objections it receives.

Very few accepted PBR applications are opposed, but if yours is, you should consider consulting your qualified person or IP professional.

Once all the requirements have been completed successfully, any objections are resolved and the certificate fee paid, you will receive a Certificate of Plant Breeder's Rights.

Full registration takes an average of two and a half years for most species. Slow growing species, such as fruit trees may take longer in-line with the time taken to complete the comparative growing trial.

In addition to pre-grant opposition, the PBR Act allows for revocation of an existing PBR. For example PBR can be revoked when the Registrar becomes satisfied that facts existed that had they been known before grant, would have resulted in a refusal to grant PBR.

# Enforcing your Plant Breeder's Rights

---

## WHO ENFORCES MY RIGHT?

The owner of the right, either directly or through an agent/licensee, is the only person who can initiate a civil action for infringement of a PBR. Beyond granting your right, IP Australia is not involved in any further enforcement on your behalf.

As the owner of the right, you can seek an injunction, damages or an account of profits for infringement of your rights through civil action.

The Director of Public Prosecutions may also take criminal action against infringement, but this is only in exceptional circumstances where sufficient weight of public interest is at stake and the evidence of infringement is conclusive.

## WHAT ARE THE PENALTIES FOR INFRINGEMENT?

The PBR Act provides for both civil and criminal proceedings for infringement. The grantee may initiate civil action seeking an injunction, damages or an account of profits.

The Act provides for criminal penalties of up to \$55,000 for individuals and \$275,000 for companies if a successful infringement action is brought by the Director of Public Prosecutions.

There are also penalties for other offences, such as misrepresentation by: claiming a variety to be PBR protected when in fact it is not; claiming a variety isn't PBR protected when it is; or providing false information in relation to an application. Many carry fines of \$6,600 for each offence. Providing false statements in relation to an application attracts six months imprisonment. See section 75 of the PBR Act.

# Contacting IP Australia

---

IP Australia staff are happy to help you and answer your queries. However, we cannot assist clients on legal matters or provide business advice. You may wish to consult a qualified person, an IP professional experienced in PBR matters, or your business advisor.

IP Australia subscribes to the **Telephone Interpreter Service**. If you need help communicating in English, you can phone the interpreter service on 131 450 for the cost of a local call anywhere in Australia.

All written correspondence regarding PBR should be directed to:

**Post: Registrar of Plant Breeder's Rights**  
**PO Box 200**  
**WODEN ACT 2606**

**Phone: 1300 651 010**

**General enquiries** – Contact our Customer Service Centre for general information relating to patents, trade marks, designs or plant breeder's rights and for assistance with subscriptions, sale of publications and electronic communication.

**Fax: (02) 6283 7999**

**Business Transactions Fax** – For lodgement, filings and business related correspondence, such as financial and confidential material. Faxes received at this secure number are receipted at Australian Eastern Standard/Daylight Saving Time.

**Email: [assist@ipaustralia.gov.au](mailto:assist@ipaustralia.gov.au)** – for general enquiries and lodgement, payment of fees is not available through this address.

**Website: [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)** – for information relating to intellectual property and to download forms and other documents.



## CUSTOMER SERVICE CHARTER

IP Australia is committed to being a customer-focused organisation. Our customer service charter outlines our service level commitments to customers and we measure our compliance each quarter. For more information or to read our charter online, go to [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au), or phone 1300 651 010 for a copy.

## COMMUNICATING ELECTRONICALLY WITH IP AUSTRALIA

The date which you provide information to IP Australia can be critical to the certainty of your intellectual property rights. IP Australia has implemented a set of business rules which establish that when you communicate with us electronically by email or fax using our preferred contact numbers and methods, the date and time of communication will be Australian Eastern Standard/Daylight Saving Time.

Our preferred means of electronic communication are:

- our business transactions fax number – (02) 6283 7999
- email – [assist@ipaustralia.gov.au](mailto:assist@ipaustralia.gov.au)
- the IP Australia website – [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au) for the submission of detailed descriptions

Communications sent to other contact points electronically, will be processed in accordance with the date and time at the place of receipt. These communications will not gain the benefits provided by the Electronic Transactions Act, such as security and certainty of receipt.

The Electronic Transactions Act business rules address a range of issues including:

- identifying the appropriate form of electronic communication to use for different types of correspondence;
- choosing electronic payment options;
- receiving notifications; and
- utilising supported electronic formats.

Further details on IP Australia's electronic communication business rules can be found at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

# Glossary

Term	Meaning
Algal species (Algae)	A collective term for several groups of relatively simple photosynthetic plants with unicellular reproductive structures.
ACRA	Australian Cultivar Registration Authority
Bacteria	A unicellular or (rarely) multicellular prokaryote organism without essential parts of its protoplast differentiated into organelles.
Bacteroids	A genus of anaerobic, gram negative bacteria.
Bacteriophages	A virus that attacks bacteria.
Bulk selection (also called mass selection)	Is a breeding methodology in which seed of selected individuals is composited and used to grow the next generation.
Characteristic	Any feature or attribute of a plant which is capable of precise definition and results from the expression of a given genotype or combination of genotypes.
Comparative growing trial	A scientifically designed growing trial that includes the candidate variety and the most similar variety(ies) of common knowledge.
Comparator variety	A variety against which the candidate variety is compared for distinctness.
Conditioning plant material	Is a broad term that includes, but is not restricted to such activities as the cleaning, coating, sorting, packaging, grading of seed, or any such treatment that prepares the material for propagation or sale.
Cross pollination	The transfer of pollen from the anthers of one flower to the stigma of another with the subsequent formation of pollen tubes.
Dependant varieties	A dependant plant variety cannot be reproduced except by the repeated use of another variety.

Term	Meaning
Distinct	A plant variety is distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge.
DUS	Abbreviation of Distinct, Uniform and Stable.
Essentially Derived Variety	A plant variety is taken to be an essentially derived variety from another plant variety if: <ul style="list-style-type: none"> <li>(a) it is predominantly derived from that other plant variety; and</li> <li>(b) it retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and</li> <li>(c) it does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety.</li> </ul>
Farm Saved Seed	Farm Saved Seed generally refers to the practice of retaining part of a harvest to use as sowing seed for subsequent crops.
Fungal species (Fungus)	A unicellular or filamentous, saprophytic or parasitic organism that lacks chlorophyll. Cell walls usually contain chitin.
Gene insertion	The deliberate transfer of genetic material from one organism to another where it is not normally found.
Genetic manipulation	A broad term for all those processes that result in the directed modification of the genetic complement of an organism.
Genotype	The genetic constitution of an individual.
Growing trial	The growing of a variety in a way which ensures the expression of the relevant characteristics of the variety.
Harvested material	A broad term which includes the gathering of entire plants and parts of plants.

Term	Meaning
Herbarium specimen	A representative specimen of the variety sent to an official repository. Normally it will then be pressed and dried to become the 'official' specimen of the variety.
Induced mutation (also see mutation breeding)	A mutation deliberately introduced into genetic material by treatment of a mutagen in vivo or in vitro.
International Code of Botanical Nomenclature and subsidiary codes	An authoritative text which sets out the rules and recommendations for dealing with the formal botanical names that are given to plants.
IP	Intellectual Property
IP professionals	This is a broad term used to refer to lawyers, patent and trademark attorneys, Accredited Persons (so called Qualified Persons) under the <i>Plant Breeder's Rights Act 1994</i> , etc.
IVDS	Interactive Variety Description System
Measured characteristic	The assessment of a characteristic using a quantitative scale. For example assessing plant height with a ruler.
Morphological characteristic	A feature or attribute of a plant that relates to its external form or structure.
Mutation breeding	A breeding technique in which mutagens are used to produce new genetic forms of useful species.
Mycoplasma	A group of minute obligate, intracellular parasites that are typically classified with bacteria but do not possess a cell wall and thus have a variable morphology.
Natural mutation (also called spontaneous mutation)	A mutation occurring in the absence of a known mutagen.
Observed characteristic	The assessment of a characteristic without use of a quantitative measurement. For example the visual observation of colour.
PBR	Plant Breeder's Rights. The legal rights that may be issued to a plant breeder who has developed a new variety.

Term	Meaning
Pedigree selection	Is a breeding methodology in which the progenies of selected plants are isolated and reselected in successive generations until the desired level of genetic purity is achieved.
Phenological characteristic	A feature or attribute of a plant that changes over time.
Phenotype	The observable features of an organism which result from the interaction between its genotype and the environment in which it develops.
Plant	In the Linnaen system, living things are divided into the Kingdoms Vegetabilia (later Plantae) and Animalia. Fungi and several groups of algae have sometimes been classified as new kingdoms. However, for the purposes of plant breeders' rights, these are still considered to be plants.
Plant gene	The fundamental physical unit of heredity that transmits information from one generation of plants to another.
Progenitor	The original, ancestral or parental cell or individual plant.
Propagating material	Propagating material, in relation to a plant of a particular plant variety, means any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics can be produced.
Protected variety	A variety that is registered under the <i>Plant Breeder's Rights Act 1994</i> .
PVJ	Plant Varieties Journal
Root stock	A rooted stem into which a scion is inserted for grafting.
Scion	The part of a plant, usually a piece of young stem that is inserted into the rooted stock to produce a graft.
Seed propagated material	Plant material that is multiplied through the production of seed.

Term	Meaning
Selection	Any process which permits the increase in the proportion of certain genotypes or groups of genotypes in successive generations, usually at the expense of other genotypes.
Selective propagation	The propagation of a selected genotype in preference to other genotypes.
Stable (sometimes referred to as stability)	For the purposes of PBR, a variety is stable if its relevant characteristics remain unchanged after each repeated propagation.
Systematic individual comparison	Side-by-side comparisons of two varieties conducted in a rigorous scientific manner.
Taxa (singular taxon)	Any grouping within the classification of organisms such as species, sub-species etc.
Transgenic	An organism carrying genetic material that it would not normally contain.
Uniform (sometimes referred to as uniformity)	For the purposes of PBR, a plant variety is uniform, if subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.
Unique plant gene	A gene in a plant that was hitherto unknown in that species.
UPOV	Union Internationale pour la Protection des Obtentions Vegetables [International Union for the Protection of New Varieties of Plants].

Term	Meaning
Variety of common knowledge	An abbreviation of “variety whose existence is a matter of common knowledge at the time of the filing of the application”.
Vegetatively propagated material	Plant material that is multiplied without sexual reproduction, such as multiplication by “cuttings”.
Verification trial	A growing trial (whether comparative or not) that is conducted to confirm that a variety has a particular characteristic(s).
Viroids	A virus like pathogenic structure consisting of an RNA molecule, but with no protein coat.
Viruses	A sub-microscopic intracellular parasite which has a protein coat.

This glossary provides a brief description of terms and is not intended to provide comprehensive definitions or definitive legal interpretation.

[ipaaustralia.gov.au](http://ipaaustralia.gov.au)

January 2012