
Proposed changes to Plant Breeder’s Rights in the draft Intellectual Property Laws Amendment.

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13 December 2017

I wish to make comment on the key PBR changes proposed.

Essentially derived varieties
The proposal to include new varieties that are possibly EDV’s that are outside of the protection of the second variety being included under PBR is a desirable reform. However it is still my belief that the criteria as to what constitutes an EDV by IP Australia are still too narrow to effectively protect a holder of a PBR grant. Part of the problem within the current parameters are that the cost to lodge an objection has been made sufficiently high enough to act as a chilling effect to a “would be” litigant from attempting to submit the objection and that arbitration can appear to be a subjective judgement from the Registrar without sufficient guidelines to understand what constitutes an EDV without proceeding down the litigation track. This in my view requires further reform.

I am aware of an action that could have taken place of a variety declared as an EDV that I would have considered a legitimate claim. Only in this case the licence holder decided that it was not commercially viable to take such an action mainly due to the cost to register such a claim. In this specific case, a “breakthrough” variety was manipulated via in vitro propagation, where a “breeder” specifically used this technique to create a forced mutation for the purpose of taking advantage of the popularity of the initial variety. This prodigy was firstly applied for in New Zealand, in which it took two years of trialling to finally come down to a measurement whereas the leaf width would satisfy a statistically significant difference even when one could not discern this difference to the naked eye, this is after the first year of trialling in which the examiners could not identify a significant characteristic difference. As this new “variety” was accepted by the NZ office, the Australian PBR office followed suit based on the NZ data. This example was for an ornamental plant variety where the intrinsic value of a plant variety is the aesthetic differences between different plant varieties and should indicate a clear identification as to what is an EDV.

Unjustified threats of infringement
This proposal would have the result of strengthening the integrity of PBR, however as with other laws associated with enforcement, it would only work if there is a desire to enforce it.

I understand that it is not the position of IP Australia to actively enforce issues arising from PBR, however it is my experience that industry members would also not be prepared to go through the expense themselves to bring forth a case against another industry member to uphold the integrity of the PBR system itself. Therefore unless the PBR office is prepared to take some type of action to maintain compliance of the system they administer for the good of all stakeholders, I would foresee this as just another statute in the act that is ignored by industry.
Further power to award damages under the PBR Act
The proposal to introduce exemplary damages was accepted by Government in the January 2010 report by ACIP to review enforcement of PBR. I thought at the time that this would further encourage a PBR applicant to actively enforce their right as currently the ACT does not sufficiently compensate for a Court action or sufficiently act as a deterrent against infringers. I still hold to this view.

Exclusive licensees in the PBR Act
This proposal would elevate an issue that was expressed to Andrew Christie and me whilst carrying out our research into the EPR collection in the Nursery & Garden Industry paper for the PBRAC that was completed in October 2015 (Section 5 Related Observations, Who may sue for infringement) One of the interviewees did express frustration regarding the ability for their business to take an action against an infringement of a plant variety that they had exclusive rights to in Australia on behalf of an overseas breeder. The issue was that although it was in the Australian agent’s best interest to pursue an action against a proposed infringer, it was not always a priority of the overseas applicant to initiate such an action.