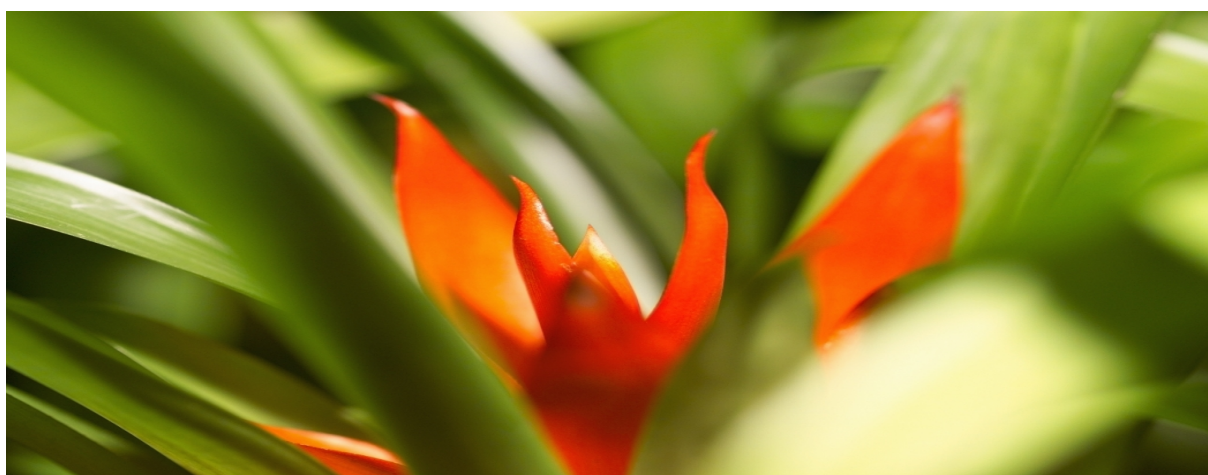


Applying for Intellectual Property Rights for Plant Innovations in Australia and Overseas

Handbook



Edition 1, Feedback Version
September 2009



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This Handbook was prepared independently by the Australian Centre for Intellectual Property in Agriculture with funding from Horticulture Australia Limited (Project HG07052 'The Potential Impact of Patents on Australian Horticulture' 2007-2009).

ACIPA 2009

Note:

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ACIPA is based at:

The University of Queensland

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ACKNOWLEDGEMENTS

Compiled by Kathryn Adams, Senior Research Fellow, ACIPA, with research assistance from Bill Adams, Eamon Carew, Zoë Miller and Tim Homel; editorial assistance from Carol Ballard.

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Abbreviations

ACIPA	Australian Centre for Intellectual Property in Agriculture
CPVO	Community Plant Variety Office
CPVR	Community Plant Variety Rights
DARDNI	Department of Agriculture and Rural Development for Northern Ireland
DUS	Distinctness, Uniformity and Stability
EC	European Community
FOAG	Federal Office for Agriculture
HAL	Horticulture Australia Limited
INASE	Instituto Nacional de Semillas
IPONZ	Intellectual Property Office of New Zealand
NCSS	National Centre for Seeds and Seedlings
NIAB	National Institute of Agricultural Botany
PBR	Plant Breeder's Rights
PVP	Plant Variety Protection
PVPO	Plant Variety Protection Office
PVR	Plant Variety Rights
PVRO	Plant Variety Rights Office
SAG	Servicio Agrícola y Ganadero
SASA	Scottish Agricultural Science Agency
SNPC	National Plant Varieties Protection Service
TQ	Technical Questionnaire
UPOV	International Convention for the Protection of New Varieties of Plants
USPTO	US Patent and Trademark Office
UTM	Monthly Tax Units

Executive Summary

Overview

This Handbook has been produced as a preliminary resource for people interested in protecting their plant innovations (new plant varieties) in Australia and overseas. It will be of particular interest to breeders, researchers and business managers who are looking to commercialise new plant varieties. It expands on the generic Information Sheet produced by IP Australia *Protecting Your Plant Variety Overseas*¹. The Handbook in no way replaces the need to seek specific information from the plant breeder's rights office in the country where protection is being sought. This resource should be used to give a quick snapshot of requirements and as a guide on where to find further information.

The Handbook concentrates on plant breeder's rights. It does not cover the use of patents to protect new plant varieties, other than the Plant Patent system for asexually propagated plants in the United States. Another report, produced by ACIPA for HAL, examines patent protection of new plant varieties in a general sense². Anyone wishing to explore patent protection further should contact their Patent Attorney and the patent office in the country where protection is sought.

The Handbook is for people who have a basic understanding of the rights available to protect new plant varieties and are interested in basic information about the operation of the system in Australia and 13 other UPOV member countries where they may wish to sell their new plant varieties. The Handbook does not cover the basic principles of intellectual property protection for plants or the nature of plant breeder's rights. These can be found on the IP Australia website³, the ACIPA⁴ website and the HAL⁵ website.

¹ <http://www.ipaustralia.gov.au/pdfs/plantbreed/Protecting%20your%20plant%20variety%20overseas.pdf>

² *Patents and the Australian Horticulture Industries* Report available for download at www.acipa.edu.au

³ www.ipaustralia.gov.au

⁴ www.acipa.edu.au/pbr

⁵ [http://www.horticulture.com.au/delivering_know-how/intellectual%20property%20\(ip\)%20and%20commercialisation/publications.asp?WebsiteSearch](http://www.horticulture.com.au/delivering_know-how/intellectual%20property%20(ip)%20and%20commercialisation/publications.asp?WebsiteSearch)

Issues Covered

The Handbook provides summaries of key elements of the systems in 14 countries (including Australia). Each of the country summaries includes information on the following topics:

- [1] Contact details for the PBR (or equivalent) office.
- [2] UPOV⁶ membership (UPOV administers the Convention which provides the template for internationally consistent laws for the protection of new plant varieties. In May 2009 there were 67 member countries).
- [3] Governing legislation (where available, English versions of the plant variety rights laws for each country have been referenced from their government website. If English versions are not available from the relevant country, the English version on the UPOV website has been used.).
- [4] Eligibility to apply.
- [5] Forms that need to be completed to apply.
- [6] Testing requirements to demonstrate distinctness, uniformity and stability.
- [7] Who can do/supervise the testing (eg an accredited person, the office itself, the applicant).
- [8] Requirement for an agent in the country of application.
- [9] Costs involved.
- [10] Website showing the costs and other information about making an application.
- [11] Availability of a database of protected varieties.
- [12] Availability of a journal in which it publishes applications; if so, is this on-line.
- [13] Provision for objection to the application and what is the process.

⁶ www.upov.int

[14] Comparison with the Australian system, including the following:

- Duration of grant
- Date from which duration commences (eg in Australia it is from date of grant; in some countries it is from date of lodgement of application and in others it is from date of acceptance of application)
- Availability of provisional protection
- Ability to commence legal action during provisional protection period
- Date from which UPOV priority commences
- Conditions relating to prior sale
- Who can apply?
- Nature of right
- Limitation on species covered
- Eligibility of discoveries
- Definition of essentially derived
- Exemptions
- Testing for distinctness, uniformity and stability
- Provision for objections prior to the grant
- Provision for compulsory licence

Country Comparison

The countries are all signatories to the UPOV Convention⁷ with consistent systems. However, there are some differences in detail which need to be recognised. Some of these are raised for each country in the section on 'Comparison with the Australian System'. This is by no means an exhaustive list of comparisons but highlights the need to seek specific advice from the authorities in each country where protection is sought. The following are just a few examples:

1. For applications to cover all European Community countries, a single application can be made to the Community Plant Variety Office (CPVO). Applications can be

⁷ <http://www.upov.int/en/publications/conventions/index.html>

forwarded to CPVO through any of the member country plant variety/breeder's rights offices.

If an applicant only wants to protect the variety in one or a small number of European Community countries, they can apply to each relevant country.

2. In the United States there are 2 systems specifically for protecting plant varieties as well as a utility (standard) patent system that can be used to protect new plant varieties. The two plant-specific systems are:
 - a. Plant variety protection for sexually reproduced plants (*the Plant Variety Protection Act*⁸), and
 - b. Plant patents for asexually reproduced plants. It is important that plant patents are not confused with the utility patent system for plant varieties as they are both available under the US Patent law; the plant patent system is a specific component of the US Patent Law, 35 USC 161-164.

When seeking plant patents in the United States, the application must be filed within one year of the first disclosure of the variety, to meet the plant patent 'novelty' requirements.

3. Definitions of similar words do not always have the same meanings between countries, eg 'date of grant' may not be the same as 'date of registration'; 'date of filing' may not be the same as 'date of acceptance'.
4. In some countries, rights holders are entitled to be paid equitable remuneration if a farmer (other than a defined small farmer) uses saved propagating material to grow another crop.

⁸ 7 U.S.C. 2321 *et seq*

Recommendations

Key recommendations from the research for the Handbook are that applicants should:

- Contact the relevant authority before making an application.
- Make sure that if they plan to apply for protection in more than one country for the same variety, they should contact the relevant authorities in each country (or the European Community) to ensure they understand the time limits applicable for the second and subsequent applications.
- Be particularly wary of all time limits, including for prior sale, making objections and lodging applications.
- Note differences in terminology between different countries. For example, 'date of grant' and 'date of registration' may not have the same meaning
- Note the different systems in the USA used to protect sexually (and tuber) reproduced plants and asexually reproduced plants.

Table 1: Summary of Information for Application

* See notes after Table 2

Country	*UPOV/ date	Website	English Website	English Guide	Enabling Legislation	Cost on web	*Forms on web	Testing by	
								authority	applicant
Argentina	Y 1978	http://www.inase.gov.ar	No	No	Plant Variety (Seeds and Phytogenetic Developments) Law, 30/03/1973, No. 20.247	Yes	Yes	x	
Australia	Y 1991	www.ipaustralia.gov.au	Yes	Yes	<i>Plant Breeder's Rights Act 1994</i>	Yes	Yes		x
Brazil	Y 1978	http://www.agricultura.gov.br	No	No	Plant Variety Protection Law (Law No 9,456 1997)			x	
Canada	Y 1978	http://www.inspection.gc.ca/english/plaveg/pbrpov/offbure.shtml	Yes	Yes	<i>Plant Breeders' Rights Act (1990, c. 20)</i>	Yes	Yes		x
Chile	Y 1978	http://www.sag.gob.cl	No	No	<i>Law No.19.342 (1994), Regulations on the Rights of Breeders of New Varieties of Plants</i>	Yes	Yes	x	
Europe	Y 1991	http://www.cpvo.europa.eu/main/en	Yes	Yes	Council Regulation (EC) No 2100/94 of 27 July 1994 Community Plant Variety Rights	Yes	Yes	x	
Germany	Y 1991	www.bundessortenamt.de/internet30/index.php?id=3&L=1	Yes	Yes	<i>Plant Variety Protection Law (1997)</i>	Yes	Yes	x	
Japan	Y 1991	http://www.hinsyu.maff.go.jp	Yes	Yes	<i>The Seeds and Seedling Act (Act 83 of May 29 1998)</i>	Yes	Yes	x	
Netherlands	Y 1991	http://www.plantenrassen.nl	No		<i>Seeds and Planting Material Act 2005</i>	Yes	Yes	x	
New Zealand	Y 1978	http://www.pvr.govt.nz	Yes	Yes	<i>Plant Variety Rights Act 1987</i>	Yes	Yes	x	x (with consent)
South Africa	Y 1978	http://www.daff.gov.za/ (under genetic resources/variety control)	Yes	Yes	<i>Plant Breeder's Rights Act 1976 (Act No. 15 of 1976)</i>		Unclear		
Switzerland	Y 1991	www.blw.admin.ch	Yes	Yes	Seed Ordinance, SR 916.151	Yes	Yes	x	
United Kingdom	Y 1991	http://www.fera.defra.gov.uk/plants/plantVarieties/plantbreedersRights/index.cfm	Yes	Yes	<i>Plant Varieties Act 1997</i>	Yes	Yes	x	
USA (Sexually)	Y 1991	http://www.ams.usda.gov/AMSV1.0/pvpo	Yes	Yes	<i>United States Plant Variety Protection Act</i>	Yes	Yes		x
USA (Asexually)	Y 1991*	http://www.uspto.gov/web/offices/pac/plant/index.html	Yes	Yes	35 United States Code 161-164	Yes	Yes	NA	NA

Table 2: Summary of Areas of Comparison

Country	*Duration (yrs)	Date duration commences	Provisional protection (Y/N)	*UPOV priority date	*Prior sale not allowed	Limitation on species	*Discovery allowed	*ED As for UPOV	*Exemptions	Provision for objections/ time from publication	Compulsory licence provisions
Argentina	20	Date of grant	N	Y some conditions	N	Must be prescribed	Y	No	PB; FS; F	30 days	Y
Australia	20/25; Ext	Date of grant	Y (from date of acceptance)	Y	1; 4; 6	All unless prescribed; no bacteria	Y+	differs	NCU; PB; Ex; FS	6 months	Y
Brazil	15/18	Date of publication of application (ie Provisional protection)	Y (from date of publication)	Y; 2 years for all data	1; 4; 6; SP	Higher plants useful in farming or forestry with minimum descriptors	Y+	differs	NCU (except sugar cane); F; PB; Ex; small producer exchange	90 days	Y
Canada	18	Date of registration	Seek a protective direction	Y; 4 years for all data	0; 4; 6	Must be prescribed; no algae, bacteria or fungi	Y	No	PB; FS	6 months	Y
Chile	15/18	Date of grant or of Provisional protection (if any)	If already protected abroad	Y	1; 4; 6	No	Y	No	PB; FS	60 days	Y
Europe	25/30; Ext	Date of grant	Y (from date of publication)	Y	1; 4; 6	No	Y+	similar	NCU; Ex; PB; FS (equitable remuneration)	3 months	Y
Germany	25/30 (hop, grape and tree)	Year of grant	Y (from date of publication)	Y	1; 4; 6	No	Y	similar	NCU; Ex; PB; FS (equitable remuneration)	3 months	Y
Japan	20/25 (prescribed perennials)	Date of grant	Y (from date of publication)	Y; 3 years for all data	1; 4; 6 (prescribed perennials)	Agricultural, forestry or aquatic plants covered	Y+	differs	PB; Ex; use of harvested material & products; FS (excluding prescribed asexual species)	Not clear	Y
Netherlands	At least 20	Date of registration	Y (from date of	Y; 2 years for full	1; 4; 6	Prescribed species	Y+	differs	NCU; Ex; PB; FS	8 weeks re naming	Y

Country	*Duration (yrs)	Date duration commences	Provisional protection (Y/N)	*UPOV priority date	*Prior sale not allowed	Limitation on species	*Discovery allowed	*ED As for UPOV	*Exemptions	Provision for objections/ time from publication	Compulsory licence provisions
			publication); 30 days after notice served	application							
New Zealand	20/23; Ext	From date of grant	Y (from date of lodging)	Y	1; 4; 6 (woody plants)	Excludes algae and bacteria	Y	No	NCU; PB; F	3 months re name; other before grant	Y
South Africa	20/25	Date certificate issued	Seek protective direction	Y; 3 years for all data	1; 4; 6	Prescribed species	Y+	similar	NCU; Ex; PB; FS; F	6 months	Y
Switzerland	25/30	From date of grant	Y (from date of publication)	Y	1; 4; 6	All species	New and DUS	similar	NCU; Ex; PB; FS (prescribed species); can't contract out	3 months	Y
United Kingdom	25/30 (trees, vines & potato); Ext	From date of grant	Y (from date of publication)	Y; 2 years for all data	1; 4; 6	No	Y+	similar	NCU; Ex; PB; FS (equitable remuneration)	3 months re naming; other periods notified at time of publication	Y
USA (Sexually)	20/25	Date certificate issued	No	Y; 2 years for all data	1; 4; 6	Sexually or tuber propagated varieties	Y+	same	NCU; PB; Ex; FS; F; trans	From filing to 5 yrs after grant	Y
USA (Asexually)	20	Date of filing	From filing	No	1	Vegetatively propagated; excludes tubers and bacteria	Y, from cultivated areas	No	No		N

* See notes below

***Notes to Tables 1 & 2** (notes and tables are generic and may not cover country specifics – applicants **must** check with authorities):

Definitions: do not assume that similar words in one country mean the same in another, eg ‘date of grant may not be the same as ‘date of registration’

UPOV/date (Table 1): ‘Y’ indicates that the country is a Party to the UPOV Convention and therefore a UPOV member country. The date indicates the latest version of the Convention to which the country is a Party. Article 35(2) of the 1991⁹ UPOV Convention provides that if a country, Party to the 1978¹⁰ Convention, provides industrial property protection other than breeder’s rights in relation to asexually reproduced plants, it can continue to do so without the need to apply the 1991 Convention to those varieties.

Forms on the Web (Table 1): may not be in English.

Duration: 20/25 means 20 years for most things and 25 years for trees and vines; the 1991 Convention provides for a Minimum of 20 years and 25 years respectively from date of grant. The 1978 Convention had a minimum period of 15 years and 18 years for vines and fruit, forest and ornamental trees. Countries with the lower period of protection are Parties to the 1978 Convention. **Ext** = there is some provision to seek extensions for classes of plants.

UPOV priority date: unless noted otherwise, if the earliest application for the same variety has been lodged in a UPOV country within 12 months of the date of application in the subject country, that earliest lodgement date is the priority date for the current application; this is usually subject to condition of providing the certified lodgement date from the UPOV member country within 3 months and providing a completed application within a given time; most countries have similar provisions relating to countries with which they have a reciprocal agreement on plant variety protection. In many countries, this priority is not automatic and applicants must apply when lodging their application.

Prior sale not allowed: unless noted otherwise this is 1; 4; 6, ie the plant variety is not ‘new’ if it has been sold, with the consent or knowledge of the breeder, in the country of application more than one year before the lodgement date, or more than 4 years overseas, unless it is a fruit or vine, when it is more than 6 years overseas (plants in this 6 year category **may vary**). ‘Sale’ is usually defined in the legislation and usually excludes trials if the material is then returned to the breeder or destroyed. **SP** = special provisions apply to varieties which are newly prescribed as being eligible for protection.

Discoveries allowed: the definition of breeder usually includes someone who has bred or discovered the new plant variety. Sometimes it is ‘discovered and developed’ or ‘discovery together with selective propagation’ or ‘discovered in a cultivated area’. ‘Y’ = discoveries are allowed. ‘Y+’ means that discoveries are allowed, but additional work or conditions apply

⁹ <http://www.upov.int/en/publications/conventions/1991/content.htm>

¹⁰ http://www.upov.int/en/publications/conventions/1978/w_up780_.htm#_8

ED = essentially derived; 'Y' = the definition is the same as in the UPOV Convention:

- *it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;*
- *it is clearly distinguishable from the initial variety; and*
- *except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.*

Exemptions: NCU = Non-commercial use; Ex = experimental or scientific research purposes; PB = plant breeding; FS = farmed saved propagating material; F = sale as food or other non-propagation use; Trans = transport, delivery, advertising; in some countries the holder of the right is entitled to equitable remuneration is paid for use of farm-saved material, from all but defined small farmers.

Australia¹¹

In Australia a person seeking to apply for Plant Breeder's Rights (PBR) may lodge an application with the Plant Breeder's Rights Office, a part of IP Australia. IP Australia publishes an Application Kit containing comprehensive information on the process. The kit is available online¹² to download or to order in hardcopy. Alternatively, it may be obtained by contacting IP Australia.

[1] Contact details

A person wishing to make an application for PBR protection in Australia should contact IP Australia before making an application. This Handbook provides background material only and is not a substitute for direct contact. The contact details are:

Postal Address:

IP Australia
PO Box 200
Woden ACT 2606

Phone: 1300 651 010 (General Enquiries)

Fax: (02) 6283 7999

Email: assist@ipaaustralia.gov.au

Website: <http://www.ipaustralia.gov.au/pbr/index.shtml>

[2] UPOV membership

Yes, since 1989 (1991 Convention).

¹¹ Note that for comparison purposes, Australia is the first country described, even though it is out of alphabetical order.

¹² Available at <http://www.ipaustralia.gov.au/pdfs/plantbreed/pbrkit.pdf>

[3] Governing legislation

The legislation governing the Plant Breeder's Rights (PBR) scheme in Australia is the *Plant Breeder's Rights Act 1994*¹³ and the associated Regulations.

[4] Eligibility to apply

Eligibility to apply is covered in section 24 of the *Plant Breeder's Rights Act 1994*. Generally, the person who has bred a new variety (including discovered together with its use in selective propagation to develop the new variety), or their successor in title, may apply¹⁴. There is also provision for:

- Joint applications by two or more breeders.
- Applications by an employer where the person who has developed the new variety is an employee of that organisation.

In a situation where a variety is jointly developed but only one, or some, of the breeders are applying for PBR protection then written consent authorising the application must be provided by those not applying.

[5] Forms required

A number of forms must be completed when applying for Plant Breeder's Rights. These forms are available online¹⁵ or in hardcopy by contacting IP Australia. The Forms include information about¹⁶:

- The name and address of the applicant or, if an agent is making the application on another's behalf, the name and address of the agent.
- A statement confirming that the applicant is the breeder of the variety or, if that is not the case, the name and address of the breeder and the details of the applicant's right to make the application¹⁷.

¹³ <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/08ADEA0ABD6B38A6CA2572A900835F5E?OpenDocument&mostrecent=1>

¹⁴ The definition of "breeding" is found in s5 of the *Plant Breeder's Rights Act 1994*

¹⁵ <http://www.ipaustralia.gov.au/pbr/forms.shtml>

¹⁶ This information is contained in s26 of the *Plant Breeder's Rights Act 1994*.

¹⁷ Whether that right comes about through assignment, transmission by will, or by operation of law

- A brief description, including a photograph of the new plant variety. This description must initially establish, pending closer examination, that the variety is distinct from other known varieties.
- The name of the variety¹⁸ and the location where it was bred. Also required are the particulars of the parent variety's names, including synonyms, by which they are known or sold in Australia and details of any plant variety protection rights on those varieties anywhere in the world.
- A brief description of the manner in which the variety was bred.
- The details of any existing application for, or grant of, rights of any kind in any other country.
- The name of a 'qualified' person¹⁹ who will verify the particulars in the application, supervise any test growing or further test growing of the variety²⁰, and verify a detailed description of the variety (see below 'Who can do the testing').

[6] Testing requirements

Australia's Plant Breeder's Rights scheme uses breeder testing to establish the distinctness, uniformity and stability (DUS) of new varieties. The breeder or their agent carries out comparative trials, using UPOV technical guidelines²¹, to establish that each new variety satisfies DUS criteria²². To ensure technical rigour, the PBR Office requires all applicants to engage the services of a 'qualified' person.

[7] Who can do the testing?

As mentioned above testing under the distinctness, uniformity, and stability guidelines must be supervised by a qualified person. Qualified persons are approved by the Plant Breeder's Right's office and attend annual workshops to maintain their accreditation. A list of qualified persons is available online²³ and in the *Plant Varieties Journal*.

¹⁸Note that s27 of the *Plant Breeder's Rights Act 1994* includes specific naming requirements

¹⁹<http://www.ipaustralia.gov.au/pbr/qualpers.shtml>

²⁰Note the requirements set out in s37 of the *Plant Breeder's Rights Act 1994* in relation to test growing

²¹http://www.upov.org/en/publications/tg_rom/

²²<http://www.ipaustralia.gov.au/pbr/dus.shtml>

²³<http://www.ipaustralia.gov.au/pbr/qualpers.shtml>

[8] Requirement for an agent

If an overseas breeder or owner wishes to apply for Plant Breeder's Rights in Australia they must appoint a local agent resident in Australia, or at the minimum provide an address in Australia for the service of notices on the applicant²⁴.

[9] Costs involved

Costs of protecting new plant varieties include both the statutory government charges, some examples of which are given below, and non-statutory charges such as the cost of undertaking the DUS trials, the cost of the qualified person, the cost of an agent and other related costs.

Fee* Type (July 2009)	\$AUD
Application	300.00
Examination - single application	1400.00
Examination - application based on overseas test data	1400.00
Examination - multiple application rate applicable only to 2 or more varieties of the same species tested at the same site and when applications and descriptions are lodged simultaneously by the same applicant and qualified person, and examined simultaneously	1200.00
Examination- at an authorised Centralised Testing Centre when 5 or more candidate varieties of the same genus are tested simultaneously	800.00
Certificate - (application received prior to 1 January 1995 under PVR)	250.00
Certificate - (application received after 1 January 1995 under PBR)	300.00
Annual	300.00

* Note: these fees can be changed by Regulation

[10] Website showing the current cost

Current statutory fees are contained in the Schedule to the *Plant Breeder's Rights Regulations 1994*²⁵.

[11] Database of protected varieties

A database of protected varieties is maintained by IP Australia and available online²⁶.

²⁴Section 26(3) of the *Plant Breeder's Rights Act 1994*

²⁵ *Plant Breeder's Rights Regulations 1994*,

[http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/652769268A2F55DACA2572AB00FF963/\\$file/PlantBreedersRights1994.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/652769268A2F55DACA2572AB00FF963/$file/PlantBreedersRights1994.pdf)

²⁶<http://pbr.ipaustralia.plantbreeders.gov.au/>

[12] Journal which publishes applications

The *Plant Varieties Journal* is maintained by IP Australia and published quarterly. Once DUS test data have been submitted, the description is published in the journal which is available online²⁷.

[13] Objection to the application

A person may make objections to applications for PBR if (i) their commercial interests would be affected adversely, and (ii) the application will not fulfil all the conditions required by the *Plant Breeder's Rights Act 1994*. These conditions are summarised above in the section on forms and are contained in s26(2) of the Act.

Objections to applications must be lodged with the Registrar no later than six months after the date the description of the variety is published in the *Plant Varieties Journal*. The objector must provide evidence of adverse affect on their commercial interests and that the application should not be granted.

The Registrar of Plant Breeder's Rights is required to give a copy of the objection to the applicant. The objection is also available to the general public on request. The applicant has the opportunity to respond to the evidence presented. The Registrar then decides whether or not the objection will be upheld and, subsequently, whether the application will be granted. The Registrar is under no obligation to enter into further dialogue regarding an objection or to communicate reasons why an objection is not upheld. If an objection is upheld it will be notified in the *Plant Varieties Journal*.

A payment is required on lodgement of the objection. The objector may also be charged an additional hourly rate for work undertaken in relation to the objection.

A person may also, when their interests are affected adversely, apply (with the appropriate fee) for the revocation of:

- a grant of PBR; or
- a declaration that a plant variety is essentially derived from another plant variety.

²⁷http://www.ipaustralia.gov.au/pbr/journal_download.shtml

The person seeking revocation of a grant or declaration that a plant variety is essentially derived from another plant, must provide conclusive evidence of adverse affect on their interests and that the grant should be revoked.

The Registrar also accepts information regarding revocation of grants and declarations of essentially derived plant varieties. Such information must demonstrate conclusively that a grant or declaration should not have been made. All written information will be acknowledged but there is no obligation to enter into further communication regarding such information.

[14] Key features of the Australian system

Topic	Australia
Duration of grant	20 years, except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).
Date from which duration commences	From date of grant of Plant Breeder's Rights.
Provisional protection	From date of acceptance of application.
Commencement of legal action during provisional protection period	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacterioids, mycoplasmas, viruses, viroids and bacteriophages.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; and • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and

Australia

	<ul style="list-style-type: none">• It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety.
Exemptions	<ul style="list-style-type: none">• Non-commercial use;• Experimental use;• Plant breeding; and• Farm saved propagating material.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department

Argentina

The rights of plant breeders in Argentina are protected on the basis of registration in the National Cultivar Property Register (Registro Nacional de Propiedad de Cultivares), established under Article 19 of the *Seeds and Phytogenic Developments Act*. This register is administered by the National Institute of Seeds (Instituto Nacional de Semillas – INASE). To register a new variety in Argentina, the breeder must submit to INASE an application for registration, accompanied by supporting documentation.

[1] Contact details

Before applying for PBR protection in Argentina, contact the relevant authority listed below. This Handbook provides background material only and is not a substitute for direct contact:

Postal Address:

Instituto Nacional de Semillas (INASE)
Secretaría de Agricultura, Ganadería y Pesca
Ministerio de Economía y Obras y Servicios Públicos
Avda. Paseo Colón 922 - 3. Piso, Of. No. 347
1063 Ciudad de Buenos Aires

Phone: (54-11) 4349 24 97

Fax: (54-11) 4349 24 17

Email: inase@sagyp.mecon.ar

Website: <http://www.inase.gov.ar>

[2] UPOV membership

Yes, since 1994 (1978 Convention).

[3] Governing legislation

The governing legislation is the Plant Variety (Seeds and Phytogetic Developments) Act No. 20.247²⁸, associated with regulations governing the registration of varieties in Resolution No. 631/92 of the Ministry of Agriculture, Livestock and Fisheries – Approving Rules for the Procedure of Registering Varieties in the National Cultivar Property Register²⁹

[4] Eligibility to apply

The person who has created or discovered the new variety or their authorised representative may apply for registration in the RNCP. Upon registration, the breeder is entitled to right of ownership in the variety for a period 10 - 20 years, depending on the species (in practice this is mostly 20 years).

[5] Forms required

- **Application Form**

Applicants for registration must complete a general application form (Formulario General de Inscripción), available on the INASE website³⁰. This form requires the applicant to provide personal information, nominate a name for the variety, and list details of registration in other countries. This application form is to be accompanied by the following supporting information:

- **Certificate of Ownership**

Applicants for registration of varieties already registered abroad should include in their application a Certificate of Ownership of the variety, translated into Spanish, and certified and authenticated by the Argentinean Consulate in the country of origin (2 copies).

- **Morphological Description Form**

Morphological Description Forms for major species are available in Spanish on the INASE website, divided into the following categories:

²⁸ <http://www.wipo.int/clea/en/details.jsp?id=74>

²⁹ <http://www.wipo.int/clea/en/details.jsp?id=79> (regulations available in Spanish only)

³⁰ <http://www.inase.gov.ar/tikiwiki/tiki-index.php?page=inscRNPC> (Application Form available in Spanish only)

- Foraging species (Forrajeras)
- Fruit species (Fruteras)
- Cereals (Cereales)
- Industrially Cultivated Plants (Cultivos Industriales)
- Forest plants (Forestales)
- Ornamental Species (Ornamentales)

If applicants require a form for a species not listed on the website, they should contact INASE using the contact details listed above. The Morphological Description Form should be accompanied by photographs/pictures to illustrate pertinent features (2 copies).

- Additional Information

The following additional information is required to support the application³¹:

- Form outlining the procedure for maintaining the purity of the variety (2 copies)
- Form outlining information about the genetic origins of the variety; method of obtaining/selecting the variety; and an account of the development of the variety (2 copies)
- Report about the transgenic condition of the new variety (2 copies)

- Payment

Payment of the fees and charges associated with registration is required at the time of application.

Applications may be submitted by post to the INASE Head Office in Buenos Aires (address as listed above).

³¹<http://www.sagpya.gov.ar/17/pdf/variedades/anexos.pdf>

[6] Testing requirements

If the application is accepted by INASE, the institute will arrange for testing of a representative sample of the nominated variety, as specified by the Institute.

[7] Who can do the testing?

The breeder must to the initial trials under the supervision of a person with a recognised agricultural degree; INASE is responsible for ordering and arranging the required verification inspections, tests and trials.

[8] Requirement for an agent

If the applicant is not a resident of Argentina, they must nominate a resident as an authorised representative to act on their behalf.

[9] Costs involved

The costs of registration can vary but examples of some of the government fees in February 2009 were:

Fee Type	Argentinean pesos (ARS)
Study/analysis	380.00
Registration on National Cultivar Property Registry	1387.00
Annual registration fee (to be paid by July 31 of each year)	475.00

Note that there will be additional costs for testing, engaging an agent etc.

[10] Website showing the current cost

The current statutory fees for registration may be found on the INASE website³².

[11] Database of protected varieties

A link to the National Cultivar Property Register is available on the website of the Secretary of Agriculture, Livestock and Fisheries³³.

³² <http://www.inase.gov.ar/tikiwiki/tiki-index.php?page=inscRNPC> (Costos del trámite)

³³ <http://www.sagpya.mecon.gov.ar/17/paq%20web/ins%20reg%20de%20variedades.htm> (Registro Nacional de la Propiedad de Cultivares y Catálogo de Variedades)

[12] Journal which publishes applications

Applicants must publish a notice of their application in the Official Bulletin (Boletín Oficial de la República Argentina), and also in two daily newspapers with national circulation. The text of the notice must have received prior approval from the Registry. The Official Bulletin is available online, however, subscription is required³⁴.

[13] Objection to the application

Objections by a third party to an application for registration may be lodged with INASE within 30 days of a notice of application appearing in the Official Bulletin. Upon making an objection, the third party must pay a deposit of an amount determined by INASE. The applicant has 15 days to submit evidence in support of their claim; this period may be extended by 60 days at the discretion of INASE.

[14] Comparison with the Australian system

Both Argentina and Australia are members of UPOV and their systems are consistent with the Convention to which they are a Party. Most of the Argentinean documentation is in Spanish and a person wishing to pursue protections must contact the Argentinean authority and ensure they have a competent Spanish professional to assist them with their application. Some other areas to take note of are listed in the table below.

Table of examples of some requirements for PBR in Australia and Argentina

Area of Comparison	Australia	Argentina
Duration of grant	20 years, except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	20 years
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant of rights
Provisional protection	From date of acceptance of application.	No
Commencement of legal action during provisional protection period	No	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest	If a variety is protected in another country which gives same rights to Argentina, rights shall be granted in Argentina for remainder of

³⁴ <http://www.boletinoficial.gov.ar/>

Argentina

	lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.	term left in other country.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines)	No Prior sale in Argentina.
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Originator or authorised representative living in Argentina.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to propagating material, exclusive right to use or sell except as per the exemptions.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Must be prescribed; if not, check with INASE.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety	Allowed
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; and • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	No
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Breeding a new variety; • Farmer saved propagating material; and • Sale as raw material or food.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Breeder, supervised by person with recognised agricultural

Argentina

		degree; authority may supervise further testing.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	Within 30 days of notice in the official publication.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Declaration of 'Limited Public Use' for max 2 years (a further 2 years if good argument) if variety not being made adequately available; allows authority to organise distribution at a price agreed by the parties, or if not, fixed by the authority.

Brazil

Plant Breeder's Rights are available in Brazil for the protection of new plant varieties. The website is not in English, but an English version of the relevant law is available from the UPOV website – see details below.

[1] Contact details

Before applying for PBR protection in Brazil, contact the relevant authority listed below. This Handbook provides background material only and is not a substitute for direct contact:

Postal address:

Serviço Nacional de Proteção de Cultivares – SNPC (National Plant Varieties Protection Service),

Secretaria de Desenvolvimento Agropecuário e Cooperativismo - SDC

Ministério da Agricultura, Pecuária e Abastecimento

Espanada dos Ministérios, Bloco D, Anexo A, Sala 251

CEP 70043-900, Brasilia, DF, Brazil

Phone: (55-61) 3218 2547 / 2549

Fax: (55-61) 3224 28 42

Email: snpc@agricultura.gov.br

Website: <http://www.agricultura.gov.br> Serviços>Cultivares>Proteção

[2] UPOV membership

Yes, since 1999 (1978 Convention).

[3] Governing legislation

Plant Variety Protection Law (Law No 9,456)³⁵,

³⁵<http://www.upov.int/export/sites/upov/en/publications/npvlaws/brazil/9456.pdf>

Decree no. 2,366 of November 5, 1997, enacts regulations under Law No. 9,456 of April 25, 1997, on plant variety protection and rules on the National Plant Varieties Protection Service (SNPC), and introduces other measures³⁶.

In addition, the *Prevention of Abuse Law*, 11/06/1994, NO. 8.884³⁷, (the text is not yet available in electronic format), "provides for the prevention of infringements against the economic order, including those related to the exploitation of intellectual property rights and technology."

[4] Eligibility to apply

To be eligible to apply a person must be: the breeder of a plant variety bred in Brazil; the breeder of a variety from another country can also apply if that country is a signatory to a treaty or where Brazil has a reciprocal protection agreement. The application must be made by a person (breeder, successor or agent) residing in Brazil.

Requirements for applying for Protection

The cultivar must:

- Be the product of genetic improvement
- Not have been marketed abroad for more than 4 years, or more than 6 years in the case of trees or vines
- Not have been marketed in Brazil for more than a year
- Be different
- Be homogeneous (uniform)
- Be stable.

[5] Forms required

Online Applications:

³⁶ <http://www.upov.int/export/sites/upov/en/publications/npvlaws/brazil/Decree2366.pdf>

³⁷ <http://www.wipo.int/clea/en/details.jsp?id=531>

Applications for protection of a variety may be completed at CultivarWeb on the Brazil Ministry of Agriculture website³⁸.

To register to use the CultivarWeb you must reside in Brazil and may be the applicant or the authorised legal representative. Once logged into CultivarWeb, applicants can access copies of the application forms in English, and complete and submit applications online.

Manual Applications:

The following forms are required to make a manual application:

- Anexo I – Formulário para Requerimento de Proteção de Cultivar

(Application Form for the Protection of a Cultivar)³⁹. This should be fully completed, initialled and signed by the Legal Representative

The form includes:

- Details of the Applicant and the Legal Representative
- Details of previous protection and marketing of the variety abroad
- *Declaração de Amostra Viva* - Declaration of Living Sample
- *Declaração Juramentada* – Sworn Declaration
- Anexo II – Formulário para Relatório Técnico Descritivo de Obtenção de Cultivar e Testes de DHE⁴⁰. (Technical Report Describing the Obtainment of the Cultivar and Tests for DUS).

This should be fully completed, initialled and signed by the Legal Representative.

This form includes:

- Details of a Registered Technical Advisor residing in Brazil

³⁸ <http://masrv103.agricultura.gov.br/proton/cultivarweb/>

³⁹ www.agricultura.gov.br > *Serviços* > *Proteção de Cultivares* > *Formulários para Proteção de Cultivares* > *Formulário de Requerimento de Proteção de Cultivares*

⁴⁰ www.agricultura.gov.br > *Serviços* > *Proteção de Cultivares* > *Formulários para Proteção de Cultivares* > *Formulário para Relatório Técnico Descritivo de Obtenção de Cultivar e Testes de DHE*

- Details of prior testing for DUS abroad
- Formulários dos Descritores (Description Form)

Specific forms are available for different species on the Ministry website⁴¹. These should be fully completed, initialled and signed by the Legal Representative and Technical Advisor:

- Procuração do titular da cultivar para o Representante Legal (Authorisation of Legal Representative to act on behalf of the Breeder of the Variety)
- Comprovante de pagamento da taxa de solicitação de proteção (Proof of payment of the application fee). Payment may be made by following links from the Ministry website⁴²

[6] Testing requirements

Tests for Distinctness, Homogeneity and Stability (DHS) must be carried out by a licensed examiner with knowledge of the species, its behaviour, groups and varieties.

[7] Who can do the testing?

Cultivars protected in other countries may be protected in Brazil if the results of tests conducted in the country of origin are available. SNPC obtains the results directly from the institution which undertook the tests. The applicant is responsible for the cost of obtaining the reports. Information to be supplied by the applicant includes:

- Testing country
- Examining authority
- Location of testing – institution, city, country
- Start year and duration of testing
- Full address details of person to be invoiced.

⁴¹ www.agricultura.gov.br > *Servicios* > *Proteção de Cultivares* > *Formularios para Proteção de Cultivares*

⁴² www.agricultura.gov.br > *Servicios* > *Proteção de Cultivares* > *G.R.U. para Proteção de Cultivares*

[8] Requirement for an agent

A representative residing in Brazil must be authorised to act on the applicant's behalf.

[9] Costs involved

Costs can vary, but in November, 2008, examples of some of the government fees associated with protection of a variety were as follows:

Fee Type	Brazilian Reais (BRL)
Application for Protection	200.00
Provisional Certificate of Protection	600.00
Transfer of title	600.00
Changes to the Details (name, company name etc.) on the Certificate	200.00
Annual Maintenance Fee	400.00
Additional Copies of Certificate of Protection	50.00

Prices are in Brazilian Reais (R\$/BRL). In March 2009, 1.00 AUD was equivalent to approximately 1.50 BRL.

[10] Website showing the current cost

Government fees are listed in the SNPC User Information Guide, updated annually. They may be found under the heading *Taxas de Proteção de Cultivares*. The guide (*Informações aos Usuários do SNPC*) can be downloaded from the Ministry website⁴³.

[11] Database of protected varieties

A database of protected cultivars is available on the web⁴⁴.

[12] Journal which publishes applications

There is an Official Gazette and publication is also required in a specialised periodical (Decree 2366, 3 (vii)).

[13] Objection to the application

There is a period of 90 days after publication of the application for filing of objections; the applicant must receive notice and full details of the objection from the SNPC within

⁴³ www.agricultura.gov.br > *Serviços* > *Proteção de Cultivares* > *Informações aos Usuários*

⁴⁴ http://masrv103.agricultura.gov.br/cultivares_rnc.htm

30 days, and has 30 days in which to respond. The SNPC's decision can be appealed within 60 days of its publication. The Minister issues a decision based on proceedings of the appeal submitted by the SNPC.

[14] Comparison with the Australian system

As in Australia, protection of plant breeder's rights in Brazil commences from the date of grant of certificate of protection. However there are some differences worth noting, including:

- The duration of protection is shorter, being 18 year for vines, fruit trees, forest trees and ornamental trees, and 15 years for other varieties (reflecting provisions of the older 1978 UPOV Convention).
- Duration of the right is 15 years for all but vines, and fruit, ornamental and forest trees; the period begins from the date of Provisional Protection (date of publication of the application)
- As in Australia, acts done for private non-commercial purposes and experimental purposes do not constitute an infringement of plant breeder's rights. However, in Brazil, using or selling the variety as food or raw material and the multiplication of seeds for donation or exchange between small rural producers under certain financial schemes are not considered infringements.

Some of the key areas of comparison with Australia are listed in the table below.

Table of examples of some requirements for PBR in Australia and Brazil

Area of Comparison	Australia	Brazil
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	15 years, except fruit, vines, ornamental and forest trees 18 yrs.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant of Provisional Certificate , which is on publication of the application.
Provisional protection	From date of acceptance of application.	On publication of application a Provisional Certificate is issued.
Commencement of legal action during provisional protection period	No	Not clear
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest	Application in Brazil received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 2 years for all data.

Brazil

	date; 3 months to certify earliest lodgement; 3 years for all data.	
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	Same but Article 6 makes provision for varieties already in the market for a period up to 10 years from first commercialisation if application is submitted within 12 months of species being brought under the legislation.
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder or agent resident in Brazil.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	Exclusive right to produce for commercial purposes, offer for sale, market.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Higher plant genus or species. Must be useful in farming or forestry.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Must be genetic improvement.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	<ul style="list-style-type: none"> • Predominantly derived from the initial plant variety or from another essentially derived plant variety, without ceasing to display the essential characteristics resulting from the genotype or of the combination of genotypes of the plant variety from which it derives, subject to differences resulting from the derivation; • Is clearly distinct from the plant variety from which it derives by a minimum margin of descriptors, according to criteria established by the SNPC.
Exemption	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and 	<ul style="list-style-type: none"> • Restricted public use for renewable 3 year periods; • Own use (except for some

Brazil

	<ul style="list-style-type: none"> • Farm saved propagating material. 	<ul style="list-style-type: none"> • sugar cane); • Sale for food; • Genetic improvement and scientific research; • Small rural producer exchange programs; and • Additional provisions for sugar cane.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Arranged by the authority.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	Within 90 days from publication in official journal.
Provision for Compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Reasonable quantities at reasonable price if regular supply unduly hindered by holder of rights after 3 years of grant of provisional certificate . Renewable 3 year periods (article 21); evidence required about ability to exploit; decision by Administrative Board for Economic Defense (CADE).

Canada

In Canada a person seeking to apply for plant breeder's rights (PBR) may lodge an application with the Plant Breeders' Rights Office. The Office is a division of the Canadian Food Inspection Agency.

[1] Contact Details

Before applying for PBR protection in Canada, contact the Plant Breeders' Rights Office as the guidelines available online provide background material only and are not a substitute for direct contact. The contact details are:

Postal Address:

Plant Breeders' Rights Office
Canadian Food Inspection Agency
59 Camelot Drive
Ottawa, Ontario, Canada K1A 0Y9.

Email: see website⁴⁵

Website: <http://www.inspection.gc.ca/english/plaveg/pbrpov/offbure.shtml>

[2] UPOV Membership

Yes, since 1991 (1978 Convention).

[3] Governing Legislation

The legislation governing the Plant Breeders' Rights scheme in Canada is *Plant Breeders' Rights Act* (1990, c. 20)⁴⁶.

[4] Eligibility to apply

Eligibility to apply is covered by section 7 of the Canadian *Plant Breeders' Rights Act* 1990. Generally, the person who has bred, originated or discovered the new variety, or their legal representative, is entitled to apply. Such an entitlement is provisional on the

⁴⁵<http://www.inspection.gc.ca/english/plaveg/pbrpov/offbure.shtml>

⁴⁶<http://laws.justice.gc.ca/> or <http://www.canlii.org/en/ca/laws/stat/sc-1990-c-20/latest/sc-1990-c-20.html>

breeder not having sold, or concurred in the sale of the variety, in Canada prior to the application (with some exceptions for recently prescribed species), or overseas more than four years before the application is received. An application by only one, or some, of the breeders or a jointly bred variety is permitted without the permission of other joint breeders where those other breeders refuse to apply or cannot be located. Under section 8 of the Act, a person is only entitled to apply if that person is a citizen, a resident, has a registered office in Canada, is from a UPOV member country (which would include Australia) or a reciprocal agreement country.

A “breeder” in the case of a variety being bred by an officer, employee or servant acting within his or her duties is defined as being the employer of such a person.⁴⁷

[5] Forms required

A number of forms must be completed when applying for Plant Breeder’s Rights. These forms are available online⁴⁸.

To complete the forms, certain information is needed including:

- The name and address of the applicant or, if an agent or legal representative is making the application on another’s behalf, the name and address of that person.
- A statement confirming that the applicant is the breeder of the variety or, if that is not the case, the name and address of the breeder and the details of the applicant’s right to make the application, including documentation to support the claimed right. Such a statement must include the name and address of the breeder, the crop kind and denomination of the plant variety, and in the case of a legal representative, a letter of assignment signed by the breeder and the assignee, or an agent, an authorisation of agent form. Forms for this purpose are available online.
- A proposed denomination (variety name). This may be changed prior to publication of the variety description in the *Plant Varieties Journal*. When the variety is protected in another UPOV member country, it should be designated with the same variety denomination in Canada.

⁴⁷s2 *Plant Breeder’s Rights Act* (1990, c. 20).

⁴⁸<http://www.inspection.gc.ca/english/plaveg/pbrpov/appdeme.shtml> and <http://www.inspection.gc.ca/english/plaveg/pbrpov/appguidee.shtml>

- A description of the original and breeding history of the variety. Where applicable this description should include information on the pedigree or genealogy of the crop; the method of origination, breeding technique or propagation method; the location where breeding was conducted and where/when the initial cross and final cross(es) were conducted or the variety discovered.
- A statement that the variety is uniform and stable. This should include a description of any off-types, variants of mutations and their frequency. Variation may be considered as part of the variety if it is predictable, capable of being described and commercially acceptable.
- A brief description of the characteristics that distinguish the candidate variety from other varieties. Such a description should include the names of reference varieties that the candidate variety is most similar to; and comparisons between the candidate and reference varieties using the major distinguishing characteristics. See the document *Guidelines for Conducting PBR Comparative Tests and Trials* for more information (available online)
- A statement describing how the propagating material will be maintained for the duration of the application process and the complete address where the variety will be maintained.
- For crops propagated by seed, an applicant is required to supply a seed sample at the time of filing an application. Vegetatively propagated crops are exempt from this requirement.

Forms are also available if the applicant wishes to claim priority over other applicants or protect the candidate variety between the date of filing the application and the date when rights are granted. Priority can be claimed where the application is accepted for filing in Canada within twelve months of the filing date of the first application being made in another UPOV member country. A fee must accompany either of these claims.

[6] Testing requirements

Canada's Plant Breeders' Rights scheme uses breeder testing to establish the distinctness, uniformity and stability (DUS) of new varieties. The breeder or their agent

carries out comparative trials, using UPOV technical guidelines, to establish that each new variety satisfies DUS criteria.⁴⁹

[7] Who can do the testing?

In Canada trials are conducted and/or organised by the applicant. The results of such trials are reviewed by the PBR office and an independent trial examination may be conducted to verify results of the breeder's trials. There is also opportunity for public/peer review of published detailed descriptions and photographs of each variety before rights are granted.

[8] Requirement for an agent

Applicants that are not resident or registered in Canada must submit an application through an agent resident or registered in Canada.⁵⁰

[9] Costs involved

While costs may vary an example of some of the government fees in February 2009 were:

Fee Type	\$CAD
Application fee	250.00
Examination fee	750.00
Protective Direction: Granting the applicant provision rights from when application is filed and the variety right is granted.	50.00
Claim for priority (Priority is able to be claimed where an application is made within 12 months of the first application being made in another UPOV member state)	50.00
PBR Certificate	750.00

[10] Website showing the current cost

Current government fees are contained in schedule 2 of the *Plant Breeders' Rights Regulations* (SOR/91-594).⁵¹

⁴⁹ More information available at <http://www.inspection.gc.ca/english/plaveq/pbrpov/testsessaise.shtml>

⁵⁰ s9(2) *Plant Breeder's Rights Act* (1990, c. 20).

⁵¹ http://laws.justice.gc.ca/en/showdoc/cr/SOR-91-594/bo-ga:s_26::bo-ga:s_27/20090716?command=home&caller=SI&search_type=exact&shorttitle=plant%20breeders&day=16&month=7&year=2009&search_domain=cr&showall=L&statuteyear=all&lengthannual=50&length=50&page=6

[11] Database of protected varieties

A list of protected varieties is available online. These lists are organised by crop category, denomination and botanical name.⁵²

[12] Journal which publishes applications

Applications are published quarterly in the *Plant Varieties Journal*. Only post-2006 issues are available online.⁵³

[13] Objection to the application

Under section 22 of the *Plant Breeders' Rights Act 1991*, once the particulars of an application for PBR have been published, a person may make an objection to an application for PBR for any of the reasons that entitle the Commissioner to reject an application under section 17 of the Act. Such an objection is usually lodged on the basis that the variety in respect of which the application is made is not a new variety or that the person making the application is not entitled to apply. An objection may also be lodged where the party applying for PBR has requested certain exemptions under section 75 of the Act.⁵⁴

An objection should be in the form of a written statement and must be filed, including the appropriate fee, with the Commissioner within 6 months after the date of publication of the application. The statement should specify the reasons the objecting party considers the application ought to be refused.

The Commissioner may reject the objection, in which case, the objecting party will be given a reasonable opportunity to show cause as to why the objection should not be rejected. If the objection is not rejected, the Commissioner will send a copy of the objection to the PBR applicant. The Commissioner will not make a decision until both parties have had a reasonable opportunity to be heard on the matter.

⁵²<http://www.inspection.gc.ca/english/plaveg/pbrpov/pbrpove.shtml>

⁵³<http://www.inspection.gc.ca/english/plaveg/pbrpov/joubule.shtml>

⁵⁴See s75(1)(k)(i)

[14] Comparison with the Australian system

As with most UPOV member countries, some of the detail of the legislation differs between Australia and Canada. For example, in Canada the rights last for 18 years whereas in Australia it is 20 years except for trees and vines which are 25 years. The table below compares some of the elements of PBR in Australia and Canada.

Table of examples of some requirements for PBR in Australia and Canada

Area of Comparison	Australia	Canada
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	18 years
Date from which duration commences	From date of grant of Plant Breeders' Rights.	From date certificate of registration is issued (ie date of grant).
Provisional protection	From date of acceptance of application.	Must apply for a protective direction and can only sell variety for scientific purposes or bulking up during that time but can bring infringement action against others once right granted.
Commencement of legal action during provisional protection period	No	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in Canada, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 4 years for all data after end of year of lodgement. Plant must be in a prescribed category in Canada at time the earliest application was made.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	No prior sale in Canada; sale outside Canada not more than four years before receipt of the application; no more than six years for woody plants.
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Must be a citizen, resident, have a registered office in Canada, be from a UPOV member country or from an agreement country; must have an agent resident in Canada.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; 	In relation to the propagating material, exclusive right to: <ul style="list-style-type: none"> • sell, and produce in Canada for the purpose of selling; • make repeated use to

	<ul style="list-style-type: none"> offer the material for sale; sell the material; import the material; export the material; and stock the material for the above purposes. <p>In some circumstances extended to:</p> <ul style="list-style-type: none"> harvested material; and products of variety. 	<p>produce commercially another plant variety;</p> <ul style="list-style-type: none"> for ornamental plants, marketed for other purposes, for reproduction of those plants; authorise, conditionally or unconditionally, the doing of above; and owner may charge royalties for right to use variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Prescribes categories that are covered. No algae, bacteria or fungi.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Discoveries included under definition of breeder 'originates or discovers'.
Definition of essentially derived	<ul style="list-style-type: none"> It is predominantly derived from that other plant variety; It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	Not found.
Exemptions	<ul style="list-style-type: none"> Non-commercial use; Experimental use; Plant breeding; and Farm saved propagating material. 	Rights cover commercial use of the propagating material; the Act is not clear in relation to exemptions, although the PBRO Guidelines state: 'Protected varieties may be used for breeding and developing new plant varieties; Farmers may save and use their own seed of protected varieties without infringing on the holder's rights'.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Overseas results may be used; commissioner will obtain from overseas authority; but breeder needs at least one year trials in Canada against common varieties grown in Canada.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	Within 6 months after date of official publication.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Purpose of licence is to ensure reasonable quantities, price and quality. Commissioner issues licence.

Chile

The recognition of Plant Breeder's Rights (PBR) in Chile is dependent on registration in the Registry of Protected Varieties (Registro de Variedades Protegidas), administered by the Seeds Department of the National Agriculture and Livestock Service (Servicio Agrícola y Ganadero – SAG). In order for a variety to be registered, the breeder must submit an application for registration accompanied by supporting evidence to the SAG.

It should be noted that much of the documentation in relation to Chile is in Spanish, so applicants should ensure that they seek professional advice from the administering authority in Chile and also a person who can help with the necessary translations.

[1] Contact details

A person wishing to make an application for PBR in Chile should contact the Seeds Department of the SAG before making application. This Handbook provides background material only and is not a substitute for direct contact. The contact details are:

Postal Address:

Ministerio de Agricultura
Servicio Agrícola y Ganadero (SAG)
Departamento de Semillas
Avda Bulnes 140
Casilla 1167-21
Santiago de Chile

Email: <mailto:semillas@sag.gob.cl>

Website: <http://www.sag.gob.cl>

[2] UPOV Membership

Yes, since 1996 (1978 Convention).

[3] Governing Legislation

The legislation governing the Chilean Plant Variety Rights system is: *Law No.19.342 (1994), Regulations on the Rights of Breeders of New Varieties of Plants*⁵⁵, ('the Law') together with: *Decree Approving Regulations under Law No. 19.342 on the Rights of Breeders of New Plant Varieties*.

[4] Eligibility to apply

A person or legal entity who has discovered and bred a new plant variety can apply for protection. In the case of the owner of a variety registered abroad, some time limits apply. If an application has already been made in another country, for the breeder to have that application date as a priority date, the application must be made in Chile within one year of lodging the original application. Registration of the variety grants the owner the exclusive right to produce, market, and sell the variety. Upon registration, the breeder is entitled to exclusive rights over the variety for 18 years for trees and vines and 15 years for other species.

[5] Forms required

Application Form

(Solicitud de inscripción en el Registro de Variedades Protegidas⁵⁶).

This form and additional documentation must be submitted in original with one copy to the SAG Offices. It requires the applicant to provide a name for the new variety, and to list its differentiating characteristics. This Application Form must be accompanied by supporting documentation:

- Certificate of Ownership of the variety, authenticated at the Chilean Consulate in the country of origin
- Morphological Description of the Variety

⁵⁵<http://www.upov.int/en/publications/npvlaws/>; <http://www.wipo.int/clea/en/details.jsp?id=807>

⁵⁶[http://www.sag.gob.cl/opendocs/asp/pagDefault.asp?boton=Doc56&argInstanciaId=56&argCarpetalId=1179&argTreeNodosAbiertos=\(1179\)\(-56\)&argTreeNodoActual=1179&argTreeNodoSel=573](http://www.sag.gob.cl/opendocs/asp/pagDefault.asp?boton=Doc56&argInstanciaId=56&argCarpetalId=1179&argTreeNodosAbiertos=(1179)(-56)&argTreeNodoActual=1179&argTreeNodoSel=573)

- Certificate of Registration of the variety in the country of origin or other country, which must be translated and authenticated at the Chilean Consulate in the country of origin.

The breeder must also submit to the Seeds Department of SAG a representative sample of the variety for which registration is sought. To do this, applicants may have to complete appropriate customs form:

- Form No 2 –Required Information to Begin Pest Risk Analysis for the Import to Chile of Plant Products⁵⁷.

Technical Questionnaire

Article 2(b) of the *Decree Approving Regulations under Law No. 19.342* requires that a completed technical questionnaire accompany an application for registration.

Payment

Payment of fees and costs associated with registration is required upon submission of the application.

[6] Testing requirements

In cases where the new variety has been accepted outside of Chile, a provisional title may be granted to the breeder, provided the requirements and standards for acceptance and protection of the rights of the breeder in that country are similar or superior to those set out under Chilean law. This provisional title is subject to time limits and other conditions set by the Certifying Committee, and applies during the examination and analysis of the application for registration in Chile.

[7] Who can do the testing?

The Variety Certifying Committee is responsible for ordering inspections, tests and trials as appropriate. The tests will be carried out by an examination authority nominated by the Committee – usually within SAG.

⁵⁷[http://www.sag.gob.cl/opensdocs/asp/pagDefault.asp?boton=Doc51&argInstanciaId=51&argCarpetalId=1080&argTreeNodosAbiertos=\(1080\)\(-51\)&argTreeNodoActual=1080&argTreeNodoSel=324](http://www.sag.gob.cl/opensdocs/asp/pagDefault.asp?boton=Doc51&argInstanciaId=51&argCarpetalId=1080&argTreeNodosAbiertos=(1080)(-51)&argTreeNodoActual=1080&argTreeNodoSel=324)

[8] Is an agent required in the country of application?

An applicant who does not have residence in Chile must nominate an authorised representative residing in Chile to act on their behalf.

[9] Costs involved

Government costs are set out in UTM (Monthly Tax Units), an inflation adjusted unit of account used in Chile; examples of some of the costs are listed below⁵⁸.

	Agricultural and Ornamental	Fruits
Registration	5	44
Annual Right	0,5	1,5
Annual Maintenance		
First Agricultural Year	3,5	1,5
Second Agricultural Year	5,0	1,5
Third Agricultural Year	5,0	1,5
Fourth Agricultural Year	6,0	1,5
Subsequent Years	6,0	1,5

Fees and charges for maintenance of registration are to be paid before the first of May of each year.

[10] Website showing the current cost

The above government costs (in UTM) are generally held constant. In February, 2009, 1 UTM was the equivalent of 37,163.00 Chilean pesos (CLP). The current value of the UTM in Chilean pesos is available on the website of the Central Bank of Chile⁵⁹.

[11] Database of protected varieties

There are links to lists of current protected varieties available on the SAG website⁶⁰. These contain information including the registration date, country of origin of the species, and identities of the owner and representative. The lists are divided into four categories:

- Agricultural Varieties (Registro de Variedades Protegidas de Especies Agrícolas)

⁵⁸ <http://www.sag.gob.cl/OpenDocs/asp/pagDefaultGabineteSuperior.asp?argRegistroId=1049&argInstanciaId=43>

⁵⁹ <http://www.bcentral.cl/>

⁶⁰ [http://www.sag.gob.cl/openDocs/asp/pagDefault.asp?boton=Doc56&argInstanciaId=56&argCarpetalId=615&argTreeNodosAbiertos=\(615\)\(-56\)&argTreeNodoActual=615&argTreeNodoSel=573](http://www.sag.gob.cl/openDocs/asp/pagDefault.asp?boton=Doc56&argInstanciaId=56&argCarpetalId=615&argTreeNodosAbiertos=(615)(-56)&argTreeNodoActual=615&argTreeNodoSel=573)

- Fruit Varieties (Registro de Variedades Protegidas de Especies Frutales)
- Ornamental Varieties (Registro de Variedades Protegidas de Especies Ornamentales)
- Forest Varieties (Registro de Variedades Protegidas de Especies Forestales)

[12] Journal which publishes applications

Applicants are required to publish an extract from their application in the Official Gazette (El Diario Oficial de la Republica de Chile). This extract must contain: the identity of the breeder and his or her representative (if any); the name of the variety, and species to which it belongs; the number and date of the application; and the basic characteristics of the variety. The Official Gazette is a daily publication (excluding Sunday), however extracts from applications are to be published on the first or fifteenth day of the month, or on the following day, if that date is a Sunday, or a public holiday. The Official Gazette may be accessed online⁶¹, however, subscription is required. Alternatively, it may be accessed at, or ordered from the National Library of Australia⁶².

[13] Objection to the application

An objection may be lodged within 60 days of an extract of an application appearing in the Official Gazette. If there are substantial, relevant and controversial facts in dispute, the applicant is given 60 days to submit evidence to support their right to registration. In cases where the applicant resides abroad, this time period may be extended by another 60 days.

[14] Comparison with the Australian system

As already noted, there are some differences in detail between the PBR laws in most UPOV member countries. One area of difference between the Chilean and Australian systems is in Article 6 of the Chilean law which states that the holder of rights cannot enter into an agreement allowing others to use the variety unless those terms are consistent with the rights of the breeder; any clauses beyond that is null and void. Most

⁶¹<http://www.diariooficial.cl/>

⁶²<http://catalogue.nla.gov.au/Record/67881>

countries do not have such a clause and the holder of PBR is able to set terms as long as they are acceptable under the laws of contract.

The table below is not exhaustive but provides just some comparative examples of the Australian and Chilean systems.

Table of examples of some requirements for PBR in Australia and Chile

Area of Comparison	Australia	Chile
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	15 years except for trees and vines, 18 years.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	Date of registration of rights; if Provisional protection has been granted, from the date of that provisional protection.
Provisional protection	From date of acceptance of application.	If already protected overseas and that country's requirements are deemed to be equivalent or better than Chile, provisional certificate can be issued.
Commencement of legal proceedings during provisional protection period	No	Not clear, but may be possible as the clause giving provisional protection states that it applies as if the right has been granted for a nominated period.
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.	One year from the filing date in another country to file in Chile.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	No more than a year in Chile before date of lodgement; no more than 6 years overseas for vines, fruit, forestry and ornamental trees; no more than 4 years overseas for everything else.
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	The breeder; if not living in Chile then needs an authorised representative in Chile.
Nature of right	In relation to the propagating material, exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and 	In relation to the variety, the exclusive right to: <ul style="list-style-type: none"> • production; • sale; • marketing; • repeated use for reproduction of another variety; and • use of parts of ornamentals, usually marketed for other

Chile

	<ul style="list-style-type: none"> • stock the material for the above purposes. <p>In some circumstances extended to:</p> <ul style="list-style-type: none"> • harvested material; and • products of variety. 	purposes, for propagating the variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Covers all botanical genera and species.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Included in definition of 'breeder'.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	Not included
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Farmer's own use; and • Breeding a new variety.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Seeds department of agriculture and livestock service.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	60 days from publication of the application in the official journal.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Can be granted in situations of monopolistic abuse by grantee; determined by the Settlement Commission.

European Community

In the European Community (EC), Community Plant Variety Rights (CPVR) are similar to Australia's Plant Breeder's Rights (PBR). If a breeder is seeking CPVR protection for a variety throughout the European Community, a single application can be lodged with the Community Plant Variety Office. An application can also be lodged at the office of any member country and it will be forwarded to the CPVO. The CPVO has published comprehensive 'Notes for Applicants'.⁶³

If a person only wants to apply for Plant Variety Rights in one or a small number of the European Community member countries, they can still apply separately in each of those countries. This Handbook deals separately with Germany, The Netherlands and the United Kingdom as examples.

[1] Contact details

A person wishing to make an application for PBR in the European Community should contact the Community Plant Variety Office before making application. This Handbook provides background material only and is not a substitute for direct contact. The contact details are:

Postal address:

Community Plant Variety Office -
3, Boulevard Maréchal Foch
BP 10121
FR - 49101 Angers Cedex 02

Email: cpvo@cpvo.europa.eu

Website: <http://www.cpvo.europa.eu/main/en>

[2] UPOV membership

Yes, since 2005 (1991 Convention).

⁶³http://www.cpvo.europa.eu/documents/infodd/Notes_for_applicants_EN_2008.pdf

[3] Governing Legislation

The legislation governing the European Community Plant Variety Rights system is:

Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety Rights (OJ L 227 of 01.09.94 p.1)⁶⁴ ('the Council Regulation').

[4] Eligibility to apply

Eligibility to apply is governed by Articles 11 and 12 of the Council Regulation which specifies that the applicant should be the person who has bred, discovered or developed the new variety, or their successor in title. There is also provision for:

- Joint applications by breeders or by the breeder(s) and another person, where they have agreed in writing to joint entitlement.
- Where there is entitlement to a joint application, one or more persons authorise the other(s) in writing to claim entitlement.
- Where the breeder is an employee, entitlement to the rights will be determined by the national law in the country where the new variety was bred.

[5] Forms required

A number of forms must be completed when applying for Community Plant Variety Rights⁶⁵:

Application Form⁶⁶

Before completing the Application it is important that Applicants read the Notes⁶⁷

Technical questionnaire

The Technical Questionnaire requires basic information necessary for carrying out the technical examination and must be lodged as part of the application. Test protocols are available for the most important species and have been divided into:

⁶⁴An unofficial consolidated version of this Regulation (including all subsequent amendments) :

<http://www.cpvo.europa.eu/documents/lex/consolidated/EN2100consolide.pdf>

⁶⁵<http://www.cpvo.europa.eu/main/en/home/filing-an-application/online-forms>

⁶⁶<http://www.cpvo.europa.eu/documents/forms/demande/demanden.pdf>

⁶⁷<http://www.cpvo.europa.eu/documents/forms/note/noteen.pdf>

- agricultural species,
- fruit species,
- ornamental species, and
- vegetable species.

Technical questionnaires for each of these are available to download⁶⁸.

Where test protocols for certain genera and species have not yet been adopted, the 'General CPVO TQ' technical questionnaire should be used. This can be found at the top of the list for each species grouping listed above.

- Technical questionnaire (Confidential Part)⁶⁹

This Form is only for use in relation to parent lines of hybrid varieties. The applicant can request that these parent lines be treated confidentially⁷⁰.

- Proposal for a variety name (denomination)

There is a specific form to be completed when proposing the variety name (denomination)⁷¹. A proposal for a variety name does not have to be made when filing the application, but it should be made as soon as possible to avoid delays in granting a CPVR as the proposed name has to be published in the Official Gazette⁷² allowing 3 months for objections. Under the Council Regulation 2100/94 and the implementing rules found in Regulation 1239/95, the Office must reject an application where no proposal for a variety denomination has been received even if all other procedures, eg completion of the technical examination, have been completed.

- Details of Payment

For the Application to be accepted and priority date determined, the CPVO must have received the relevant application fee⁷³. To ensure that the CPVO has a record of the

⁶⁸ <http://www.cpvo.europa.eu/main/en/home/filing-an-application/online-forms/technical-questionnaires>

⁶⁹ <http://www.cpvo.europa.eu/documents/forms/QT/qten.pdf>

⁷⁰ Article 88.3 <http://www.cpvo.europa.eu/documents/lex/consolidated/EN2100consolide.pdf>

⁷¹ <http://www.cpvo.europa.eu/documents/forms/denomination/vden2.pdf>

⁷² <http://www.cpvo.europa.eu/default.php?res=1&w=1050&h=574&lang=en&page=document/gazette.html>

⁷³ <http://www.cpvo.europa.eu/documents/forms/note/noteen.pdf> Note 13

payment details, it is recommended that the Payment Form⁷⁴ be used. The application fee may vary but in October 2008 it was 900 euro.

[6] Testing requirements

If the Application is accepted by the CPVO, it will arrange for testing. Depending on the species, this can take from one (eg some ornamental species) to six (or more – eg fruit trees) years. Once a testing authority has been nominated by the CPVO, the Applicant will be asked to submit plant material. Testing and deposit requirements are outlined in the Technical Protocols - they differ according to the botanical taxon⁷⁵.

[7] Who can do the testing?

Testing is arranged by the CPVO and is conducted by approved examination authorities to test allocated species. The selection of an examination authority is undertaken exclusively by the CPVO and all correspondence relating to the technical examination must be conducted with the Office and not the examination authority⁷⁶. (See Notes for Applicants).

[8] Is an agent required in the country of application?

An applicant who does not have an address in the EC must appoint a representative residing within the EC to receive communication from the CPVO. This representative cannot be an employee of the applicant⁷⁷.

[9] Costs involved

Costs may vary but in July 2009, some examples of the government fees were:

Fee type	Euro
Application fee	900
Examination fee (depending on variety)	1160 - 2500 ⁷⁸
Using test reports from UPOV member countries or other official reports	240
Annual fee	300

⁷⁴<http://www.cpvo.europa.eu/documents/forms/paiement/payen.pdf>

⁷⁵<http://www.cpvo.europa.eu/default.php?res=1&w=959&h=564&lang=en&page=Technical%20protocols/Ts.htm>

⁷⁶http://www.cpvo.europa.eu/documents/infodd/Notes_for_applicants_EN_2008.pdf, Note 9.3

⁷⁷http://www.cpvo.europa.eu/documents/infodd/Notes_for_applicants_EN_2008.pdf, Note 5.3

⁷⁸Unofficial consolidation of Fees Regulation: Annex 1 has a table of fees in each crop cost group (Agricultural, Ornamental, Vegetable and Fruit):
<http://www.cpvo.europa.eu/documents/lex/consolidated/EN1238consolide.pdf>

[10] Website showing the current cost

The government fees can be found on the web⁷⁹.

[11] Database of protected varieties

A (unofficial) database of applications and titles is available on the CPVO website⁸⁰. This database can be searched using a number of fields such as file or grant number; Breeder's reference; client name; application date; file status; variety denomination, and botanical taxon. Publication in the Gazette can also be searched as can any appeals that have been lodged.

[12] Journal which publishes applications

All valid applications, accepted by the CPVO, are published in the Official Journal of the Community Plant Variety Office (the Official Gazette)⁸¹. There are 6 Issues each year. Applications, denomination proposals and other information about varieties for which PVR is being sought, can be searched in the unofficial database⁸².

[13] Objection to the application

The legislation provides that anyone can object to the grant of PBR or to the proposed denomination if the criteria are not met.⁸³ Objections to the grant can be lodged any time after application and before the grant is made and objections to the proposed variety denomination must be made within 3 months of the publication in the Official Gazette. Objectors then have access to all documents, including the results of the technical examination.

[14] Comparison with the Australian system

As with the laws of most UPOV member countries, there are variations in detail of the laws between Australia and the European Community. One of the key differences is the provision for payment of equitable remuneration by a farmer (other than a small

⁷⁹<http://www.cpvo.europa.eu/main/en/home/methods-of-payment/applicable-fees>

⁸⁰<http://www.cpvo.europa.eu/main/en/home/databases/applications-and-titles-in-force>

⁸¹<http://www.cpvo.europa.eu/main/en/home/documents-and-publications/official-gazette>

⁸²<http://www.cpvo.europa.eu/main/en/home/databases/applications-and-titles-in-force>

⁸³<http://www.cpvo.europa.eu/documents/lex/consolidated/EN2100consolide.pdf> Articles 59 and 60

farmer) to holders of rights where the former saves seed and replants using that seed. In addition the farm-saved seed exemption only applies to prescribed agricultural species and not to all species covered by PBR, as occurs in Australia.

The table below compares some other areas of PBR between Australia and the EC.

Table of examples of some requirements for PBR in Australia and the EC

Area of Comparison	Australia	EC
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	End of 25 th calendar year, except trees and vines end of 30 th calendar year (possible extension up to 5 yrs).
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant .
Provisional protection	From date of acceptance of application.	From date of publication to date of grant can seek reasonable compensation for infringement.
Commencement of legal action during provisional protection period	No	From time of publication to grant, holder can seek reasonable compensation for infringement.
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in EC, date of receipt of application. Application in EC received within 12 months of date of earliest lodgement of application in UPOV member country; 3 months to certify earliest lodgement.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	More than one year within the community before date of application and 4 years outside the EC (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	The breeder is entitled to the right and can be any legal or natural person; needs an authorised agent residing in EC.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the variety constituents, the exclusive right to: <ul style="list-style-type: none"> • production or reproduction (multiplication); • conditioning for the purpose of propagation; • offering for sale; • selling or other marketing; • exporting from the Community; • importing to the Community; • stocking for any of above In some circumstances extended to: <ul style="list-style-type: none"> • harvested material: and

European Community

		<ul style="list-style-type: none"> • products of variety. <p>Allowing others to use can be subject to conditions and limitations.</p>
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	All botanical genera and species are covered.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Breeder must 'discover and develop'.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; and • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	<ul style="list-style-type: none"> • It is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety; • It is distinct from the initial variety; and • Except for the differences which result from the act of derivation, it conforms essentially to the initial variety in the expression of the characteristics that results from the genotype or combination of genotypes of the initial variety.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding (including 'discover and develop'); and • Farm saved seed of specified agricultural crops – farmers (except small ones) to pay equitable remuneration to rights holder.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Commission arranges in the EC country specified for that species.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	Within 3 months of publication.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	On public interest grounds; can be granted by Commission after consultation with Administrative Council.

Germany

Germany was one of the key members in the formation of UPOV and much of the early UPOV Convention was based on the German Plant Breeder's Rights legislation.

Protection in Germany can be via a grant of Plant Breeder's Rights under the European Community law or, if the applicant only wants protection in one or two EC member countries, including Germany, an application can be made under the law of each country. It should be noted that separate protection is not available under the German law if the variety is subject to protection under the EC law.

[1] Contact details

A person wishing to make an application for PBR in Germany should contact the Bundessortenamt before making application. This Handbook provides background material only and is not a substitute for direct contact. The contact details are:

Postal Address

Bundessortenamt
Postfach 61 04 40
D-30604 Hannover

Street Address

Bundessortenamt
Osterfelddamm 80
D-30627 Hannover

Phone: (49-511) 9566-5

Fax: (49-511) 563362

Email: bsa@bundessortenamt.de

Website: <http://www.bundessortenamt.de>;
<http://www.bundessortenamt.de/internet30/index.php?id=3&L=1> (English version)

[2] UPOV Membership

Yes, since 1968 (1991 Convention).

[3] Governing legislation

The system is governed by the *Plant Variety Protection Law* (1997)⁸⁴.

[4] Eligibility to apply

Every breeder of a new variety (or their successor in title) can apply for plant breeder's rights at the Bundessortenamt under the German Variety Protection Law.

[5] Forms required

Application forms in Word/PDF format (German language only) may be downloaded from the Bundessortenamt website⁸⁵. This application form also includes a technical questionnaire.

Applications may also be completed online on the Bundessortenamt website⁸⁶, however, they are only in German. To access these forms, a password must first be obtained from the Bundessortenamt.

Power of Attorney Forms (Vollmachtsvordrak) must be completed by Applicants using an agent.⁸⁷

If the applicant is making a claim of priority on the basis of prior registration in a UPOV member state, proof of registration in that country, certified by the relevant registration authority should be submitted to the Bundessortenamt within three months of application in Germany.

[6] Testing requirements

Trials to demonstrate distinctness, uniformity and stability (DUS) are organised by the authority using national and international test guidelines⁸⁸.

⁸⁴ <http://www.upov.int/export/sites/upov/en/publications/npvlaws/germany/germany1997.pdf> (English language)

⁸⁵ <http://www.bundessortenamt.de/internet30/index.php?id=78>

⁸⁶ <http://www.bundessortenamt.de/internet30/index.php?id=63>

⁸⁷ <http://www.bundessortenamt.de/internet30/index.php?id=68&L=0>

⁸⁸ <http://www.bundessortenamt.de/internet30/index.php?id=48&L=1>

[7] Who can do the testing?

Testing for DUS is conducted by the Bundessortenamt, which has 13 testing stations across Germany. The Bundessortenamt also carries out testing on behalf of the CPVO.

[8] Requirement for an agent

If the applicant is not a resident of the European Community, a resident agent will be required.

[9] Costs involved

The cost may change, but in February 2009 examples of some of the government fees were as follows (all amounts in Euro)

Fee Type	Euro
Application and Decision	470
DUS Testing (according to plant species and period of testing required)	550-770
Acknowledgement of existing results	180-310
Annual Fee, according to the respective species group, and time	60-1010

[10] Website showing the current cost

The current schedule of government fees may be found under 'Gebührenverzeichnis' on the website⁸⁹.

[11] Database of protected varieties

Descriptive lists of registered varieties are published by the Bundessortenamt.⁹⁰

[12] Journal which publishes applications

The particulars of applications are published in the Official Gazette: Blatt für Sortenwesen. This journal also publishes information about plant breeder's rights and regulations concerning plant varieties. The current issue is available in German only on the Bundessortenamt website⁹¹.

⁸⁹ <http://www.bundessortenamt.de/internet30/index.php?id=69>

⁹⁰ <http://www.bundessortenamt.de/internet30/index.php?id=20&L=1>

⁹¹ <http://www.bundessortenamt.de/internet30/index.php?id=32>

[13] Objection to the application

Decisions concerning Plant Breeder's Rights are taken by an examining board which includes an expert from the Bundessortenamt. There are presently 12 examining boards for the various plant species. An appeal against the decisions of the examining boards can be given to a board of appeal at the Bundessortenamt. The board is made up of a chairperson, a legal specialist and an expert, all from the Bundessortenamt, as well as of two honorary members who are not members of the Bundessortenamt. A dispute against the decision of this appeal commission can be put to the Federal Patent Court. A final appeal against this decision can be brought to the Federal Supreme Court, if permitted by the Federal Patent Court

[14] Comparison with the Australian system

Under the German plant breeder's rights scheme, the nature of the right granted to plant breeders is fundamentally similar to the nature of plant breeder's rights in Australia. However there are some differences in detail. For example:

- The duration of grant of protection is longer than that in Australia, being 25 years, or 30 years in the case of grapevine, hop, potato and tree species, and commences from the date of grant.
- The German law specifically allows for the court to order destruction of material which has infringed the grantee's rights, including anything (eg equipment) used almost exclusively in its production. In Australia the courts have ordered such destruction of material without any specific provisions in the PBR Act (eg *Zee Sweet v Magnom Orchards*⁹²) but where it was a contractual term of use of the variety.
- Under the German law, if the variety denomination or propagating material has been trademarked, the date of registration will be the priority date for the variety rights application (subject to time restrictions); this implies that a variety name can be used if already subject to a trade mark, in contrast to Australia and a number of other jurisdictions.

⁹² (2003) VSC 48

The table below provides a comparison of some key areas of the German and Australian schemes.

Table of examples of some requirements for PBR in Australia and Germany

Area of Comparison	Australia	Germany
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	End of 25 th calendar year, except grapevine, hop, potato and tree species, end of 30 th calendar year.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From year of grant.
Provisional protection	From date of acceptance of application.	Can seek equitable remuneration for infringement between time of publication of the application and grant.
Commencement of legal action during provisional protection period	No	Can seek equitable remuneration for infringement between time of publication of the application and grant.
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of application; 3 months to certify earliest lodgement; 3 years for all data	If first lodgement is in Germany, date of receipt of application. Application in EC received within 12 months of date of earliest lodgement of application in UPOV member country; 3 months to certify earliest lodgement.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	More than a year before date of lodgement in EC and 4 years overseas (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Original breeder or discoverer (or successor); resident or registered office in EC, UPOV member country or reciprocal country; non residents must have a resident agent in Germany.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the propagating material, the exclusive right to: <ul style="list-style-type: none"> • produce; • condition for the purpose of propagation; • place on the market; • import or export; or • stock such material for above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material: and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria,	All plant genera and species are covered.

Germany

	bacteroids, mycoplasmas, viruses, viroids and bacteriophages	
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Allowed
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	<ul style="list-style-type: none"> • The initial variety or another variety that is itself derived from the initial variety has been predominantly used for its breeding or discovery; • It is clearly distinguishable; and, • Except for the differences that result from the method of derivation used, it conforms essentially to the initial variety in the expression of the characteristics that result from the genotype or combination of genotypes of the initial variety.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material – farmers (except small farmers) to pay equitable remuneration.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Done by authority; may accept results from authorities in other countries.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	3 months after publication if applicant not entitled or variety not registrable; after grant if variety not DUS.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	In public interest.

Japan

In Japan a person seeking to apply for Plant Breeder's Rights (PBR) may lodge an application with the Minister for Agriculture, Forestry and Fisheries. The Plant Breeder's Rights scheme is generally administered by the Seeds and Seedlings division of the Ministry, while the Plant Variety Protection Office handles the examination of new varieties and the establishment of test guidelines.

[1] Contact details

A person wishing to make an application for PBR protection in Japan should contact the Ministry before making an application and also seek language assistance as most documents are in Japanese:

Postal Address:

1-2-1

Kasumigaseki, Chiyoda-ku,

Tokyo 100–8950, Japan

Email: Contact can be made through the website (<http://www.maff.go.jp/e/>)

Website: <http://www.hinsyu.maff.go.jp>

[2] UPOV membership

Yes, since 1982 (1991 Convention).

[3] Governing legislation

The legislation governing the Plant Breeder's Rights scheme in Japan is *The Plant Variety Protection and Seed Act* (Act No. 83 of May 29, 1998)⁹³

⁹³Available at <http://www.hinsyu.maff.go.jp> - an English translation is provided ; http://www.upov.int/export/sites/upov/en/publications/npvlaws/japan/japan_act_49_2007.pdf

[4] Eligibility to apply

Eligibility to apply is covered in Article 3 of the *Plant Variety Protection and Seed Act*. Generally, the person who has bred, discovered, or developed the new variety, or their successor in title may apply.

A foreign national is entitled to apply where that person has domicile or residence, or in the case of a corporation, has its registered office, in a UPOV member country. This allows Australians, or Australian registered corporations to apply for breeder's rights in Japan under the Act. An agent resident in Japan is required.

[5] Forms required

A number of forms must be completed when applying for Plant Breeder's Rights. These forms are available online⁹⁴, however these are unofficial translations. Only the original Japanese forms and legislation are to be considered official. All forms, as well as supporting documentation, **must be completed in Japanese**.

In order to complete the forms certain information /documentation is needed including:

- The name and address of the applicant or, if an agent is making the application on another's behalf, the name and address of the agent.
- A written explanation describing the characteristics (including a table of characteristics) of the variety
- Photographs for the variety (three copies of each photograph are required)
- Seeds or spawn
- Where the applicant has obtained title by succession, documents verifying the succession
- In the case of a non-Japanese applicant, documents verifying nationality
- Where the applicant is claiming the right to priority, a document verifying the first application to a Member of UPOV

⁹⁴<http://www.hinsyu.maff.go.jp/english/index.htm>

- Where the application is made through an agent, documents regarding the agent's power of attorney
- When/where plant variety protection rights have previously been claimed
- Whether propagating material or products of the candidate variety have previously been marketed or offered for sale
- A brief description of the novel plant variety. This description must initially establish, pending closer examination, that the variety is distinct from other known varieties.
- The name of the variety, the name of the location where it was bred, as well as the name of each parent variety used in the breeding program. Also required are the particulars of the parent variety's names, including synonyms, by which they are known or sold in countries party to the UPOV agreement
- A brief description of the manner in which the variety was bred.
- The details of any existing application for, or grant of, rights of any kind in any other country.

[6] Requirement for an agent

An agent, resident in Japan, is required if the Applicant is from a UPOV member country or another country that has reciprocal protection arrangements with Japan.

[7] Testing requirements

Japan's Plant Breeder's Rights scheme uses three methods to evaluate the distinctness, uniformity and stability (DUS) of new varieties – documentary examination, growing tests and on-site inspections. The Office will decide how the DUS test should be conducted in each individual case.

[8] Who can do the testing?

Growing tests are conducted by the National Centre for Seeds and Seedlings (NCSS). On-site inspections are conducted by government officials

[9] Costs Involved

While costs may vary, examples of some of the government fees in February 2009 were:

Years after registration	Annual registration fee
1 - 3	6000 yen/year
4 - 6	9000 yen/year
7 - 9	18000 yen/year
10 - 30	36000 yen/year

Fee Type	Yen
Application	47200
Certification of the application for variety registration and the registered variety	1,500 (per certification)
Issue of an exemplified copy or abstract of the Register of Plant Varieties	350 (per issue)
Inspection or copying of the Register of Plant Varieties	220 (per inspection)
Inspection or copying of application and other documents pertaining to the variety registration 1,100 yen: for each inspection or copying	1,100 (per inspection)

[10] Website showing the current cost

Current government costs are outlined at <http://www.hinsyu.maff.go.jp>.

[11] Database of protected varieties

There does not appear to be an English language database of protected varieties.

[12] Journal which publishes applications

Details of the Application are published in the Official Gazette. The information published includes:

- The date of the publication of application
- The genus or species to which the variety belongs
- The denomination of the variety
- The name of applicant
- The domicile or residence of applicant
- The application number and date of for variety registration.

[13] Objection to the application

A party can object to a variety registration pursuant to the Administrative Appeal Act. The subsequent proceedings will be held upon giving sufficient notice to the rights holder. Any person who receives notice of this kind is entitled to participate in the proceedings.⁹⁵

[14] Comparison with the Australian system

Although the Australian and Japanese schemes are similar, there are some differences of detail. For example:

- The Japanese law specifically allows holders of rights to grant an exclusive or non-exclusive licence to someone to exploit the rights, under whatever contractual terms are agreed.
- An employee who is a breeder may claim against profits made by the employer in exploiting the new variety.
- The Japanese law provides specifically that if someone has infringed the right, the holder or the exclusive licensee, may demand the destruction of the propagating material, the harvested material or the processed products of the variety, or the objects used, or other measures necessary for the prevention of infringement. In Australia, only the rights holder can initiate civil legal action and the court will order restitution if it sees fit, even though there is not a specific clause in the Act.

A comparison of some key elements of PBR in Australia and Japan are given in the table below.

Table of examples of some requirements for PBR in Australia and Japan

Area of Comparison	Australia	Japan
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	25 years, except prescribed perennials 30 years.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant.
Provisional protection	From date of acceptance of application.	Yes, from date of publication.

⁹⁵Article 51 of the Plant Variety Protection and Seed Act
http://www.upov.int/export/sites/upov/en/publications/npvlaws/japan/japan_act_49_2007.pdf

Japan

Commencement of legal action during provisional protection period	No	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in Japan, date of receipt of application. Application in Australia received within 12 months of the day following date of earliest lodgement of application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	More than a year before date of lodgement in Japan and 4 years overseas (6 for prescribed perennials).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	The breeder or employer if resident in Japan, a UPOV country or a country with reciprocal agreement with Japan.
Nature of right	In relation to the propagating material, exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the propagating material, the exclusive right to: <ul style="list-style-type: none"> • produce; • condition; • offer for transfer; • transfer; • export; • import; or • stock for the above purpose. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Agricultural forestry or aquatic plant, including spermatophyte, pteridophyte, bryophyte, multi-cellular algae.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Allowed if natural variation identified by the breeder.

Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	Varieties which are bred by changing parts of the expressions of the characteristics of the registered variety while retaining the expressions of its essential characteristics using such methods as selection of a mutant, backcrossing, transformation by genetic engineering or other methods prescribed.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Breeding; • Experimentation or research; • Use of harvested material and its products; and • Farm saved seed – does not include prescribed vegetatively propagated species.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Undertaken or arranged by the authority.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	There are provisions for objection under the Administrative Appeals Act but timeframes are not clear.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Only in public interest after person seeking the compulsory licence has tried to obtain a non-exclusive licence from rights holder or any exclusive rights holder. Granted by Minister having consulting with Agricultural Materials Council.

Netherlands

Plant Breeder's Rights in the Netherlands is closely aligned to the UPOV Convention. The Office maintains a website in Dutch, but with some English information as noted below.

As noted in the section on the EC, application under the law of the Netherlands should only be made if a person wants rights in one or two EC countries. If wider coverage is required, an application should be made under the EC law; such rights are then applicable throughout the EC.

[1] Contact details

A person wishing to make an application for PVR protection in the Netherlands should contact the Council for Plant Varieties before making an application. This Handbook provides background material only and is not a substitute for direct contact. The contact details are:

Postal address:

Raad voor Plantenrassen
(Council for Plant Varieties)
Postbus 27
NL-6710 BA Ede

Phone: (31-318) 82 25 80

Fax: (31-318) 82 25 89

Email: plantenrassen@minInv.nl

Website: <http://www.plantenrassen.nl>

[2] UPOV membership

Yes, since 1968 (1991 Convention).

[3] Governing legislation

The governing legislation is the *Seeds and Planting Material Act 2005*⁹⁶.

[4] Eligibility to apply

Any person or legal entity that has bred a new variety (or their successor in title) may apply to the Council of Plant Varieties for protection of the variety.

[5] Forms required

Applicants must submit (by post) to the Council the following documents, completed, and signed by the applicant:

- Application Form for Plant Breeder's Rights and/or Listing

This form must be filed in duplicate. If the applicant is a successor in title to the original breeder, documentation demonstrating the transfer of the claim must accompany the application. Available in English⁹⁷.

- Proposal for Variety Denomination Form

Available in English⁹⁸.

- Proxy

Applicants nominating an agent to act on their behalf must submit this form with their application. The particulars on this form must correspond to those on the application form. Available in English⁹⁹.

- Technical Questionnaire

A completed, variety specific technical questionnaire must be submitted with the application. These are available on-line¹⁰⁰ in alphabetical order by group (TQ), listed in the following categories:

⁹⁶ <http://www.upov.int/export/sites/upov/en/publications/npvlaws/netherlands/netherlands99.pdf>

⁹⁷ <http://www.plantenrassen.nl/documenten.htm>, under Aanvraagformulieren, Engelse versie

⁹⁸ <http://www.plantenrassen.nl/documenten.htm>, under Naamsvoorstellen, Engelse versie

⁹⁹ <http://www.plantenrassen.nl/documenten.htm> under Volmacht Engelse versie

¹⁰⁰ <http://www.plantenrassen.nl/documenten.htm> under Technische vragenlijsten

- Groentegewassen (Vegetable)
- Siergewassen en boomkwekerij (Ornamental and nursery)
- Landbouwgewassen (Agriculture)

An additional questionnaire must be completed for agricultural crops available under Technische vragenlijsten voor CGO Landbouwgewassen

The Council will notify applicants of the receipt of their application.

[6] Testing requirements

Field and laboratory testing is required to establish distinctness, uniformity and stability.

[7] Who can do the testing?

The designated testing authority in the Netherlands is Naktuinbouw.

For most varieties, DUS reports will also be accepted from the following organisations:

- Bundessortenamt (Germany) <http://www.bundessortenamt.de>
- CPVO
- Plant Variety Rights Office, Cambridge
- Plant Variety Rights Office, Canberra
- Plant Breeder's Rights Council, Israel

[8] Requirement for an agent

Applicants who are not residents of the Netherlands must appoint a representative residing in the Netherlands. All correspondence will be sent to the nominated address of the representative.

[9] Costs involved

As of 1 January, 2007, an application fee of €400 (this could be changed) is payable upon application. Details for payment are listed on the application form.

In addition, applicants are liable for the costs associated with DUS testing for the variety. If testing has already been conducted by an approved body, an adoption fee will be charged to the applicant. There is no annual fee payable.

[10] Website showing the current cost

The current government fees associated with application may be found at <http://www.plantenrassen.nl> > Algemeen > Mededelingen under 'Lijst met tarieven'

[11] Database of protected varieties

A searchable database of varieties is available online. This may be searched by variety denomination or breeder's name. It is available in Dutch only¹⁰¹.

[12] Journal which publishes applications

The particulars of applications for plant breeder's rights, along with details of grants, refusals and withdrawals of right and changes to the relevant legislation and regulations are published monthly in the Official Gazette of the Council (Afdeling van Beroep van de Raad)¹⁰². The Gazette is in Dutch only, however, the annual report of the Council is also produced in English.

[13] Objection to the application

Following the publication of the particulars of an application in the Official Gazette of the Council, objections may be made to the application.

An applicant may appeal a decision regarding their application, by making an application to the Appeals Division of the Council of Plant Varieties within 6 weeks of being notified of the decision.

[14] Comparison with the Australian system

The nature of the right granted by the plant breeder's rights scheme in the Netherlands is similar to that in Australia. The right holder has the exclusive right to propagation for the purposes of marketing, importing and exporting the variety. The right does not

¹⁰¹<http://www.plantenrassen.nl/> > Rassenregister > Zoek rasinformatie

¹⁰²<http://www.plantenrassen.nl/> > Algemeen > Publicaties

extend to acts done for private purposes, for the purposes of scientific research or acts carried out in the breeding of new varieties. Applicants may claim priority on the basis of prior registration in a UPOV member state, if the application is filed within 1 year of the application in that state.

In the Netherlands, if the breeder is an employee or contractor, they can claim fair remuneration from exploitation of the variety unless it is taken into consideration as part of their payment, salary or wages.

The table below provides a comparison of some of the key elements of PBR in Australia and the Netherlands.

Table of examples of some requirements for PBR in Australia and the Netherlands

Area of Comparison	Australia	Netherlands
Duration of grant	20 years, except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	At least 20 years (regulations provide duration for each species).
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of registration (day after entered in register).
Provisional protection	From date of acceptance of application.	From time of publication to time of grant applicant is entitled to fair remuneration for infringement from 30 days after service of notice of the applicant's rights.
Commencement of legal action during provisional protection period	No	Not clear
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in the Netherlands, date of receipt of application. Provisional application in the Netherlands received within 12 months (not including day of first application) of date of earliest lodgement of application; 3 months to certify earliest lodgement; 2 years to submit full application.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	Earlier than a year of date of application in the Netherlands and 4 years overseas (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder (or employer or contractor) if a citizen or a registered office in the Netherlands, unless covered by an international treaty (eg UPOV member) or the Minister approves. If don't live in EC, need an agent living in the Netherlands.

Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the propagating material, the exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • commercialise the material; • import the material; • export the material; or • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Agricultural or horticultural species prescribed in the Act or by regulation.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Breeder is required to 'discover and develop'.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	It is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material 	<ul style="list-style-type: none"> • Non-commercial use; • Scientific research; • Developing new varieties; and • Farm saved propagating material.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	The authority designates the testing organisation depending on species. Test results from some overseas authorities are also accepted.
Objections to grant	Within 6 months from date of publication of detailed description in official journal.	In relation to likeness to a trade mark or trade name, within 8 weeks of publication.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Can be granted in public interest by the Board after not being able to reach agreement with the holder. A licensee needs to have quantities of propagating material at a reasonable price to be able to make proper use of the licence.

New Zealand

In New Zealand a person seeking to apply for Plant Variety Rights (PVR) may lodge an application with the Plant Variety Rights Section of the Intellectual Property Office of New Zealand (IPONZ). The New Zealand PVR office maintains a website¹⁰³ with comprehensive practical information on the PVR process.

[1] Contact details

A person wishing to make an application for PVR protection in New Zealand should contact the Intellectual Property Office of New Zealand before making an application. This Handbook provides background material only and is not a substitute for direct contact. The contact details for IPONZ are:

Postal Address

Intellectual Property Office of New Zealand
PO Box 9241
Marion Square
Wellington 6141
New Zealand

Email: info@pvr.govt.nz

Website: <http://www.pvr.govt.nz>

[2] UPOV membership

Yes, since 1981 (1978 Convention).

[3] Governing legislation

The legislation governing the Plant Variety Rights scheme in New Zealand is the *Plant Variety Rights Act 1987* and the *Plant Variety Rights Regulation 1988*¹⁰⁴.

¹⁰³Online at <http://www.iponz.govt.nz/cms/pvr/>

¹⁰⁴<http://www.legislation.co.nz/default.aspx> the *Plant Variety Rights Act 1987* is available at this address: http://www.legislation.co.nz/act/public/1987/0005/latest/DLM100578.html?search=ts_act_Plant+variety+righ&sr=1 and the *Plant Variety Rights Regulation 1988* is available at:

[4] Eligibility to apply

The owner of a new plant variety, their agent, or their successor in title may apply for Plant Variety Rights in New Zealand. The owner of the variety may be an individual, a business, or another organisation. Where the owner of the new variety is the employee of an organisation then the application may be made by that person's employer.

[5] Forms required

A number of forms must be completed when applying for Plant Variety Protection in New Zealand. These forms are available online¹⁰⁵ from IPONZ. One general form must be completed: the "application for plant variety rights" and if the application made through an agent then the "authorisation of agent" form must also be completed. Additionally, a technical questionnaire for the specific crop is required. There are forty-four commonly used forms available on the IPONZ website¹⁰⁶; however, in the event that a required form is not listed applicants are advised to contact the IPONZ PVR office.

[6] Testing requirements

Specific details of testing vary from crop to crop but in general the variety must be distinct, homogenous (uniform), and stable to receive plant variety protection in New Zealand¹⁰⁷. A distinct variety is one that is distinguishable on one or more characteristics from a known variety, and a stable variety is one which remains true to its initial description throughout its reproduction cycle.

[7] Who can do the testing?

Growing trials in New Zealand are regulated by the *Plant Varieties Regulation 1988*¹⁰⁸. In some cases testing will be conducted by the Plant Variety Office in a centralised trial, or the office may commission a trial. The Plant Variety Office may also accept the results of trials conducted by the applicant, commissioned by the applicant, or

http://www.legislation.co.nz/regulation/public/1988/0101/latest/DLM124608.html?search=ts_regulation_Plant+Variety+Regulations&sr=1

¹⁰⁵ <http://www.iponz.govt.nz/cms/pvr/forms-and-fees>

¹⁰⁶ <http://www.iponz.govt.nz/cms/pvr/forms-and-fees/technical-questionnaires/>

¹⁰⁷ See s10 of the *Plant Variety Rights Act 1987* for further details

¹⁰⁸ http://www.legislation.co.nz/regulation/public/1988/0101/latest/DLM124608.html?search=ts_regulation_Plant+Variety+Regulations&sr=1

undertaken independently of the applicant as long as the trials are undertaken at places, under conditions, and over periods approved in writing by the Commissioner. Staff from the office must also be given any access to the property that they require while the trial is conducted.

[8] Requirement for an agent

It is not necessary for overseas breeders to apply through a local agent although a New Zealand postal address is required. However, it may be most practical for overseas breeders to use a local agent.

[9] Costs involved

While costs may vary, examples of some of the government fees in March 2009 were:

Fee type	Herbage, Agricultural Crops, Vegetables, Fungi		Fruit or Nut Plants		Other Plants	
	NZ\$ excl.GST	NZ\$ (incl.GST)	NZ\$ excl.GST	NZ\$ (incl.GST)	NZ\$ excl.GST	NZ\$ (incl.GST)
Application for grant	500.00	(562.50)	500.00	(562.50)	350.00	(393.75)
Examination of data (including any material) supplied by applicant	600.00	(675.00)	300.00	(337.50)	230.00	(258.75)
Test trial by PVR Office	-	-	500.00	(562.50)	450.00	(506.25)
Grasses, white clover (per year)	3200.00	(3600.00)	-	-	-	-
Wheat, barley, oats, forage brassicas, triticale, and peas (per year)	2300.00	(2587.50)	-	-	-	-
Grass endophytes (evaluation in culture)	1500.00	(1687.50)	-	-	-	-
Potatoes						
First year	1600.00	(1800)	-	-	-	-
Each later year	500.00	(562.50)	-	-	-	-
Annual grant fee (Renewal fees)	160.00	(180.00)	160.00	(180.00)	160.00	(180.00)
Request under section 21(1) of the Act (compulsory licences and sales)	600.00	(675.00)	600.00	(675.00)	600.00	(675.00)

Rate for information search and photocopying = NZ\$50.00 per hour (exclusive of GST).

[10] Website showing the current cost

The Intellectual Property Office of New Zealand maintains a website providing information about costs.¹⁰⁹

[11] Database of protected varieties

The Intellectual Property Office of New Zealand provides a searchable database of protected varieties online.¹¹⁰

[12] Journal which publishes applications

The Intellectual Property Office of New Zealand publishes a journal containing details of applications for and grants of Protected Variety Rights. The journal is available online or by annual subscription.¹¹¹

[13] Objection to the application

The *Plant Variety Rights Act 1987* provides for objection to the application for a Plant Variety Right as well as to the grant of a Plant Variety Right. The process differs based on whether the objection is made before or after the grant of the right. Where the objection occurs before the grant of the right and is in relation to the ownership or DUS provisions, it can be lodged at any time before the grant is made. If the objection is in relation to the denomination of the variety, it must be made within 3 months of the publication of the application in the official journal.

Where an objection is raised after the grant of a Plant Variety Right the process is similar but the concerned person may object to the continuation of the grant at any time, in writing to the Commissioner.

[14] Comparison with the Australian system

Although the New Zealand system is similar to that in Australia, there are a number of differences. Comparisons of some key items are listed in the table below. In addition, it is worth noting:

¹⁰⁹<http://www.iponz.govt.nz/cms/pvr/forms-and-fees/plant-variety-rights-fee-schedule/>

¹¹⁰<http://202.174.112.149/>

¹¹¹<http://www.iponz.govt.nz/cms/pvr/the-journal>

- In New Zealand a licensee can initiate civil infringement action whereas in Australia it is only the breeder/grantee;
- Infringement action can be commenced during provisional protection period whereas in Australia it can only occur once the grant is made. The New Zealand approach has to take into consideration the consequences if the rights are subsequently not granted, as any legal proceedings would then have no basis.
- In New Zealand the grantee is required to take all reasonable steps (eg label or by other means) to let a purchaser know that plant variety rights exist over the variety. In Australia there is no requirement to label, but it is a defence to damages if an infringing person claims they had no way of knowing that the variety was protected.

Table of examples of some requirements for PBR in Australia and New Zealand

Area of Comparison	Australia	New Zealand
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	20 years, except woody plants 23 years; regulations can change this.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant.
Provisional protection	From date of acceptance of application.	From date application lodged.
Commencement of legal action during provisional protection period	No	Yes, from day application lodged.
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date if requested at time of application; 3 months to certify earliest lodgement; 3 years for all data.	Eligible if first lodgement is in New Zealand, date of receipt of application. Application in New Zealand received within 12 months of date of earliest lodgement of overseas application then that earliest date if requested at time of application; 3 months to certify earliest lodgement.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	In New Zealand more than a year before date of lodgement and overseas more than 4 years (6 for woody plants).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Owner (or successor in title) (person who bred or discovered the variety (or employer). Need a New Zealand address.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; 	In relation to reproductive material, exclusive right to: <ul style="list-style-type: none"> • To produce for sale; • to sell; and • to propagate a prescribed variety for the purposes of the

	<ul style="list-style-type: none"> • sell the material; • import the material; • export the material; and • stock the material for the above purposes. <p>In some circumstances extended to:</p> <ul style="list-style-type: none"> • harvested material; and • products of variety. 	commercial production of fruit, flowers, or other products, of that variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages.	Includes fungi but not algae or bacteria.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Definition of 'owner' defines person who 'bred or discovered' the new variety.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	Not found
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Non-commercial purposes; • Breeding; and • Use of propagating material for human consumption or other non-reproductive purposes.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	By Authority unless approval in writing for applicant to do them.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	In relation to denomination, within 3 months of publication; in relation to the owner or DUS not being met, at any time before grant.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Commissioner decides on request if reasonable quantities of reasonable quality at reasonable price are available to public, after grant has been in place 3 years.

South Africa

Plant Variety Rights protection is available in South Africa under a system based on the UPOV Convention. However, it is important to note that testing for distinctness, uniformity and stability must be undertaken in South Africa.

[1] Contact details

A person wishing to make an application for Plant Variety Rights protection in South Africa should contact the Registrar before making an application. This Handbook provides background material only and is not a substitute for direct contact. The contact details are:

Postal Address:

The Registrar
National Department of Agriculture
Directorate: South African Agricultural Food, Quarantine and Inspection Services
Private Bag X 11
Gezina 0031

Phone: (27-12) 808 03 65, 808 50 80

Fax: (27-12) 808 03 65, 808 50 80

Email: variety.control@nda.agric.za

Website: <http://www.daff.gov.za/> under 'genetic resources; variety control'

[2] UPOV membership

Yes, since 1977 (1978 Convention).

[3] Governing legislation

The governing legislation is the *Plant Breeder's Rights Act 1976* (Act No. 15 of 1976)¹¹².

¹¹²<http://www.upov.int/en/publications/npvlaws/index.html>

[4] Eligibility to apply

Any person or institution may apply for plant breeder's rights in South Africa.

The requirements for protection under the legislation are that the variety must:

- Comply with DUS requirements
- Not have been sold in the South Africa for longer than 1 year
- Not been available to the public in another country for more than four years (6 years in the case of trees and vines)
- Be species recognised under the Act (a list is available from the Registrar upon application). If the species does not appear on this list, applicants may also make a written request to the Registrar for its addition)

[5] Forms required

Applicants for plant breeder's rights must submit:

- Application Form¹¹³

This form must be completed and signed by the applicant. It should be accompanied by:

- Technical Questionnaire of the appropriate species¹¹⁴
- Suggested Botanical and Common Names
- Prescribed application and examination fees
- Prescribed quantity of the seed or propagating material
- Documentary proof of the transfer of ownership in the variety to the applicant (if not the owner themselves)
- If the application is submitted by an agent, proof of the legal authority of the agent

¹¹³http://www.nda.agric.za/docs/geneticresources/variety_control.htm

¹¹⁴http://www.nda.agric.za/docs/geneticresources/technical_questionnaire.htm

- If priority is being claimed, certified copies of the earliest application lodged in a convention or agreement country
- If priority is being claimed, application fee payable for a priority claim

[6] Testing requirements

Testing is required to establish DUS to UPOV standards.

[7] Who can do the testing?

The Department of Agriculture arranges for all testing to be done in South Africa. Overseas varieties must be imported into South Africa for testing.

[8] Requirement for an agent

If an applicant is not a resident in South Africa, or have a registered office in South Africa, they must nominate an agent to act on their behalf through which all correspondence with the Department of Agriculture will be communicated.

[9] Costs involved

Costs can vary but examples of some of the government costs in February, 2009 were:

(All amounts in South African rand (ZAR). In March, 2009, 1.00 AUD was equivalent to 6.53 ZAR)

Fee type	Rand (ZAR)
Application Fee for the grant of plant breeder's rights	1,300
Examination Fee for Category A (agronomic, vegetable, pasture crops and annual ornamentals)	2,200
Examination Fee for Category B (fruit, vines, citrus and perennial ornamentals)	3,000
Examination Fee for Category C (white and yellow maize)	2,600
Claim of priority	700
Objection to the grant of a plant breeder's right	4,500
Annual Fee	250
Transfer of plant breeder's rights	650

[10] Website showing the current cost

The current government fees may be found online¹¹⁵.

[11] Database of protected varieties

A full list of protected varieties is published annually in the special edition of the *South African Plant Variety Journal*¹¹⁶.

[12] Journal which publishes applications

The particulars of all applications for plant breeder's rights are published in the *South African Plant Variety Journal* which is published quarterly¹¹⁷.

[13] Objection to the application

Any person may lodge an objection to an application with the registrar, within a period of six months from the publication of the particulars of the application. The applicant may lodge a counter statement against an objection within a prescribed period.

[14] Comparison with the Australian system

The protection granted to the holder of plant breeder's rights in South Africa is similar to that in Australia giving an exclusive right, or right to license the production, sale, import and export of propagating material of the variety. The duration of the grant is for a period of 25 years for trees and vines, and 20 years for other varieties. Some of the key comparisons are listed in the table below. In addition, some differences to note include:

- In South Africa the species covered are prescribed in the regulations; a list of which is available from the Registrar; however, applicants may submit a request for additional varieties to be added to this list. In Australia species **not covered** are prescribed (all species were covered at July 2009).

¹¹⁵ <http://www.services.gov.za/OrganisationServices/Permitsandlicences/plantproduction/Applyforplantbreedersrights.aspx?Language=en-ZA>

¹¹⁶ <http://www.nda.agric.za/docs/geneticresources/publications.htm>

¹¹⁷ <http://www.nda.agric.za/docs/geneticresources/publications.htm>

- The South African Act provides officers of the Department (including the PBR office) with powers to enter, inspect and seize with a warrant, or without if the authorised person on the premises agrees. Such powers are not available in Australia except to the police.
- The Act provides for the grantee to issue a licence to use the variety to anyone who asks on such conditions as the parties agree. If the licence is not granted by the holder, the potential licensee can seek a compulsory licence. In Australia the Act allows the breeder to authorise others to use the variety if they wish. The grantee chooses the licensees and compulsory licences would only be issued if the grantee (or licensees) was not making reasonable quantities available to meet public demand at a reasonable price.
- In South Africa, where the variety is sold with the consent of the grantee, it must be clearly labelled that it is subject to plant breeder' rights. This is not the case in Australia, where the law does not require labelling, but makes it a defence to damages if an infringer can show that they had no way of knowing that the plant material was subject to PBR.

Table of examples of some requirements for PBR in Australia and South Africa

Area of Comparison	Australia	South Africa
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	20 years, except trees and vines 25 years.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date certificate is issued.
Provisional protection	From date of acceptance of application.	Applicant may request a protective direction prior to publication of the application in return for agreement not to sell propagating material other than for multiplication for the applicant.
Commencement of legal action during provisional protection period	No	Not clear
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date if requested at time of Australian application; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in South Africa, date of receipt of application. If priority request made at time of application in South Africa and received within 12 months of date of earliest lodgement of overseas (in UPOV or agreement country) application, then that earliest date; 3 months to certify earliest lodgement; 3

		years (from the date of expiry of 12 months from first application) for all data
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	In South Africa more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder (employer or successor); must be citizen, resident or have registered office in South Africa, UPOV member country or an agreement country; need a resident South African agent if applicant not resident (or office) in South Africa.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the propagating material, exclusive right to: <ul style="list-style-type: none"> • produce or reproduce (multiplication); • condition for the purpose of propagation; • sell or any other form of marketing; • export; • import; or • stock for any of the above purposes In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages.	Prescribed species of plants.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	'Discovery and development' are required under definition of 'breeder'.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	<ul style="list-style-type: none"> • It is predominantly derived from that other variety, or from a variety that is itself predominantly derived from that other variety while retaining the essential characteristics of that other variety; • It is clearly distinguishable from that other variety; and • Except for the differences which result from the process of derivation it conforms to that other variety in respect of the essential characteristics.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and 	<ul style="list-style-type: none"> • Non-commercial use; • Research; • Plant breeding;

South Africa

	<ul style="list-style-type: none"> • Farm saved propagating material. 	<ul style="list-style-type: none"> • Farm saved propagating material; and • Sale for non-propagation purpose (except for ornamentals).
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Authority determines what is required and who will do it; overseas results from a UPOV country may be accepted.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	Within 6 months from date of publication of detailed description in official journal.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Person can request if they are unreasonably refused a voluntary licence or is placing unreasonable conditions on a licence; licensee must make variety available to public at reasonable prices.

Switzerland

The plant variety protection system in Switzerland is similar to that in other UPOV countries. However, most DUS trials are generally carried out by authorities outside Switzerland, but nominated by the Swiss Bundesamt für Landwirtschaft.

[1] Contact details

A person wishing to make an application for variety protection in Switzerland should contact the Bundesamt für Landwirtschaft before making an application. This Handbook provides background material only and is not a substitute for direct contact.

The contact details are:

Postal address:

Bundesamt für Landwirtschaft

Büro für Sortenschutz

Mattenhofstr. 5

CH-3003 Bern

Phone: (41-31) 322 25 24

Fax: (41-31) 322 26 34

Email: <http://www.blw.admin.ch/kontakt/index.html?lang=en>

Website: <http://www.blw.admin.ch/themen/00012/index.html?lang=en>

[2] UPOV membership

Yes, since 1977 (1991 Convention).

[3] Governing legislation

The governing legislation is the *Federal Law on the Protection of Plant Varieties* No. 232.16 of March 20, 1975¹¹⁸.

¹¹⁸http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=673

[4] Eligibility to apply

In Switzerland, any owner of a variety may apply for plant breeder's rights, if they are registered or resident in Switzerland, another UPOV member country or a country which has signed a reciprocal agreement with Switzerland.

[5] Forms required

Applications must be submitted using the relevant official forms, which can be obtained from the Office or downloaded from the Federal Office for Agriculture (FOAG) website¹¹⁹. Forms A and B and the technical questionnaire must include the relevant date and an original signature; photocopies will not be accepted.

The following documents must be submitted to the Office:

- Application form (Form A)

This form¹²⁰ must be completed, dated and signed, and submitted to the FOAG in original. Photocopies will not be accepted. Any nominated representative of the applicant must also sign this form, unless they have already confirmed this through a general power of attorney.

- Proposed denomination of variety (Form B)

This form¹²¹ must be completed, dated and signed and submitted to the FOAG in original. Photocopies will not be accepted.

If Forms A and B are submitted together the applicant may use a provisional denomination for the variety or propose a definitive denomination. If Form B is not submitted at the same time as Form A or only a provisional denomination is used, a proposal for the definitive denomination should be submitted as quickly as possible in order to avoid a delay in the processing of the application

- Technical Questionnaire¹²²

¹¹⁹ <http://www.blw.admin.ch/themen/00011/00078/index.html?lang=en>

¹²⁰ <http://www.blw.admin.ch/themen/00011/00078/index.html?lang=en>

¹²¹ <http://www.blw.admin.ch/themen/00011/00078/index.html?lang=en>

¹²² <http://www.upov.int/en/publications/tqp/>

This questionnaire has been developed by UPOV. If no UPOV form is available for a species the general technical questionnaire¹²³ issued by the Community Plant Variety Office should be used.

- Colour photos for certain applications

Colour photos should be submitted in duplicate as enclosures with the technical questionnaire for all fruit and ornamental species. Since the inclusion of photos is considered necessary in order to carry out the technical evaluation, applicants are requested to submit a photo of the whole plant plus, if relevant, close-ups of the blossom, fruit or any other significant parts of the plant.

- Power of attorney

Where an applicant nominates a representative, a copy of the power of attorney must be submitted to the Office if a general power of attorney has not already been submitted.

- Proof of transfer of ownership

If the owner of the variety is not the original breeder a copy of a document proving the transfer of ownership from the original breeder to the present owner must be attached to the application. Such proof is not required if the original breeder is an employee of the present owner of the variety.

- Application fee

The application fee should accompany the application.

[6] Testing requirements

Testing is required to ensure proposed varieties are distinct, uniform and stable in accordance with international standards.

[7] Who can do the testing?

Generally, foreign institutions carry out the technical evaluation of a variety with regard to distinctness, uniformity and stability. The FOAG decides where this evaluation is to

¹²³ www.cpvo.europa.eu

be done. Once a foreign institution has been asked by the Office to evaluate the new variety, the former will ask the applicant to send them the corresponding plant material. If an evaluation report has already been completed in another UPOV member country, the FOAG will generally use that report.

[8] Requirement for an agent

Owners of plant varieties who are not resident or registered in Switzerland must appoint a representative to receive information and documentation. The nominated representative shall also be responsible for ensuring that all invoices are paid by the due date. Owners of plant varieties who are resident or registered in Switzerland may also nominate a representative if they so wish.

[9] Costs involved

The costs of applying for PVR may vary but examples of some of the government fees are listed below. All amounts are in Swiss Francs (CHR). In March, 2009, 1.00 CHR was equivalent to approximately 1.30 AUD.

Fee type	Swiss Francs (CHR)
Annual Fee	240
Fee for an application including a proposed definitive denomination	300
Fee for an application using a provisional denomination or later submission of a proposed definitive denomination	400

The Office will invoice the applicant once a year for the cost of the technical evaluation. The fee depends on the type of plant material that is to be evaluated.

The cost of using a report from a third party will also be charged to the applicant.

[10] Website showing the current cost

The current costs may be found under the link 'Information for Applicants'¹²⁴.

[11] Database of protected varieties

A database of varieties currently protected may be found under 'Current Swiss PVPR Register'¹²⁵.

¹²⁴ <http://www.blw.admin.ch/themen/00011/00078/index.html?lang=en>

¹²⁵ <http://www.blw.admin.ch/themen/00011/00078/index.html?lang=en>

[12] Journal which publishes applications

The particulars of applications are published in the *Swiss Plant Variety Rights Journal*¹²⁶.

[13] Objection to the application

Objections to proposed denominations may be submitted to the FOAG within three months of the publication of the particulars of the relevant application in the *Swiss Plant Variety Rights Journal*.

Appeals against the Office's decision may be lodged with the Appeal Committee for Intellectual Property.

[14] Comparison with the Australian system

In general, the system in Switzerland is similar to that in Australia. A comparison of some key issues is in the table below. In addition some differences of note are:

- DUS testing must be undertaken by an authority nominated by the Swiss Office
- Applications in English are acceptable.
- In Switzerland it is not permitted to contract out of the exemptions.
- There are provisions in the Swiss law for a person who has a dependent patent to seek a non-exclusive operating licence from the Court if the rights holder will not grant one voluntarily. Likewise the holder of the rights can seek an operating licence for the patent.

Table of examples of some requirements for PBR in Australia and Switzerland

Area of Comparison	Australia	Switzerland
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	End of 25th calendar year except trees and vines end of 30 th calendar years.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant.
Provisional protection	From date of acceptance of application.	From date of publication of application.

¹²⁶ <http://www.blw.admin.ch/themen/00011/00078/00301/index.html?lang=en>

Switzerland

Commencement of legal action during provisional protection period	No	Yes, to seek an injunction or otherwise stop infringement; must provide guarantees; action for damages cannot occur until rights granted, but can then include period prior to grant.
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date if requested at time of Australian application; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in Switzerland, date of receipt of application. Application in Switzerland received within 12 months of date of earliest lodgement of abroad, then that earliest date.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	In Switzerland more than a year before date of lodgement and abroad more than 4 years (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder or successor.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the propagating material the exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition; • offer; • sell or other marketing; • export or import; or • stock for any above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages.	No limitation.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Law does not specify; variety must be new and DUS.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that 	<ul style="list-style-type: none"> • It is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety; • It is clearly distinguishable from the initial variety except for the differences which result from the act of derivation; • It conforms to the initial

Switzerland

	differentiate it from that other variety.	variety; and <ul style="list-style-type: none"> • In the expression of the essential characteristics which result from the genotype or combination of genotypes of the initial variety
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material for prescribed species. <p>(can't contract out of these exemptions)</p>
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Organised by authority; can recognise results from authority abroad if examination methods are compatible.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	In 3 months following publication of application.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	If a person is refused a licence without sufficient grounds, person who wants a licence can petition court on grounds of public interest.

United Kingdom

The Plant Variety Rights system in the United Kingdom reflects the general UPOV principles. The UK is part of the EC and whilst an application can be lodged with the Plant Variety Rights Office (PVRO) for the UK only, it may be more appropriate to lodge with the Community Plant Variety Office (CPVO) for rights exercisable in the EC. EC rights and UK Plant Breeder's Rights cannot be exercised simultaneously. However, where a grant of Community Plant Variety Rights (CPVR) follows a grant of UK Plant Breeder's Rights, the UK Plant Breeder's Rights may be suspended while CPVR are exercised.

The UK has produced guidelines for prospective applicants¹²⁷.

[1] Contact details

A person wishing to make an application for PVR protection in the United Kingdom should contact the Plant Variety Rights Office before making an application. This Handbook provides background material only and is not a substitute for direct contact.

The contact details are:

Postal address:

Plant Variety Rights Office

Whitehouse Lane

Huntingdon Road

Cambridge CB3 0LF

Phone: 01223 342379 (general enquiries)

Website:

<http://www.fera.defra.gov.uk/plants/plantVarieties/plantbreedersRights/index.cfm>

[2] Membership of UPOV

Yes, since 1968 (1991 Convention).

¹²⁷<http://www.fera.defra.gov.uk/plants/plantVarieties/plantbreedersRights/documents/ukBreedersRightsGuide.pdf>

[3] Governing legislation

The *Plant Varieties Act 1997*¹²⁸ governs the operation of the system in the UK. This is supported by the *Plant Breeder's Rights Regulations 1998 (SI 1-27)*.¹²⁹

[4] Eligibility to apply

An application for Plant Breeder's Rights must be made by the person who bred or discovered and developed the variety, or the successor in title (referred to as the 'breeder').

For those who wish to apply for rights in the UK only, an applicant's guide can be obtained from the website¹³⁰.

If a person breeds a variety, or discovers and develops it in the course of their employment, then, unless there is agreement to the contrary, the employer (or the employer's successor in title) is the person entitled to the grant of rights.

The breeder may however assign, (ie transfer), the rights in the variety to another person or company forfeiting any future claim on the variety. If rights are assigned to another person or company, an 'Assignment of Rights' form must be completed. Once rights are assigned, the grant of rights certificate will be issued in the name of the person or company to whom rights have been assigned.

An applicant for Plant Breeder's Rights may make the application through an agent. An applicant from outside the EC must nominate an address for service or agent within the EC. If an agent is to be used an 'Authorisation of Agent' form should be completed. All correspondence and requests for fees are directed to the agent.

[5] Forms required

Applicants must submit the following forms¹³¹ to the PVRO:

- Application for Plant Breeder's Rights in the UK Form (PVS/07)

¹²⁸ http://www.opsi.gov.uk/acts/acts1997/ukpga_19970066_en_1

¹²⁹ <http://www.opsi.gov.uk/si/si1998/19981027.htm>

¹³⁰ <http://www.fera.defra.gov.uk/plants/plantVarieties/plantbreedersRights/documents/ukBreedersRightsGuide.pdf>

¹³¹ <http://www.fera.defra.gov.uk/plants/forms/breedersRightsForms.cfm>

- Technical Questionnaire for the relevant species (TQ)
- Remittance Advice Slip (RAS1) (Confirmation of payment).

The following additional forms may also be required, if applicable:

- Assignment of Rights Form (PVS/10)
- Authorisation of Agent Form (PVS/11)
- For ornamental varieties, colour photographs showing the representative features of the variety are also required.

All forms submitted to the PVRO must be original. Applicants are required to notify the PVRO if an application relates to a genetically modified plant.

[6] Testing requirements

Following receipt by the PVRO of an application, seed/plant material will be required from the applicant to enable Distinctness, Uniformity and Stability (DUS) tests to be carried out.

In most cases DUS tests for ornamentals will take one year, herbage varieties and trees a minimum of three years, and two years for other species. However, tests may take longer if there is difficulty in establishing distinctness and applicants will be notified in these circumstances. For hybrid varieties, DUS tests may need to be conducted on the parent lines. If this is the case then a test fee will be charged for each parent line as well as the hybrid. Copies of reports and botanical descriptions made as a result of these tests will be supplied to anyone who asks for them. Details of hereditary sources of a hybrid may not be made public.

Special DUS Tests

If applicants anticipate that there may be distinctness problems for a variety, the need for a special DUS test should be indicated on the technical questionnaire when submitting the application. If feasible, arrangements will be made for the test to be carried out by one of the testing authorities who will invoice applicants directly for the work carried out. Where possible such special tests will be carried out within the normal testing period.

[7] Who can do the testing?

DUS testing is carried out by organisations approved by the PVRO, including: the National Institute of Agricultural Botany (NIAB); the Scottish Agricultural Science Agency (SASA); and the Department of Agriculture and Rural Development for Northern Ireland (DARDNI).

For some species testing is carried out by testing authorities in other European Member States under bi-lateral agreements.

[8] Requirement for an agent

Any applicant for Plant Breeder's Rights may make their application through an agent. Applicants from outside the EC are required to nominate an address for service or an agent within the EC. If an agent is to be used written, applicants must submit the Authorisation of Agent Form with their application. All correspondence and requests for fees will be directed to the agent and the PVRO will have no direct contact with the applicant.

[9] Costs involved

The government fees payable in connection with Plant Breeder's Rights applications are shown on the PVRO website¹³². Changes to these fees are advertised in the Gazette. Applicants are required to pay:

- Administration Fee: payable upon application
- DUS Testing Fee: payable for each year of testing
- Annual Charge: payable for each year of protection

Applicants will also be invoiced for costs associated with obtaining reports from testing authorities in other countries.

[10] Website showing the current cost

Current government costs may be found at the website¹³³.

¹³²<http://www.fera.defra.gov.uk/plants/plantVarieties/plantbreedersRights/documents/feesNationalListings0409.pdf>

[11] Database of protected varieties

Online registers are currently limited to genetically modified varieties¹³⁴.

The PVRO keeps a record of applications and grants. This register is available for inspection by any member of the public on application to the PVRO. It includes the following details in respect of all protected varieties:

- The name and address of the holder of rights
- Description of characteristics of the plant variety
- Name of the variety as published in the Gazette
- Date on, and period for which the rights were granted

The register also contains information regarding current applications.

[12] Journal which publishes applications

The Plant Varieties and Seeds Gazette¹³⁵ is an electronic journal published on a monthly basis. It contains notices of the following:

- Information for applicants;
- Applications received (including applications for compulsory licenses);
- Withdrawal of applications;
- Proposed, approved and changes to names;
- Proposed grants and refusals;
- Grants and refusals;
- Proposed surrenders of rights;
- Terminations of rights;

¹³³ <http://www.fera.defra.gov.uk/plants/plantVarieties/plantbreedersRights/documents/feesNationalListings0409.pdf>

¹³⁴ <http://www.defra.gov.uk/environment/gm/regulation/registers/index.htm>

¹³⁵ <http://www.fera.defra.gov.uk/plants/publications/gazette.cfm>

- Amendments to the Register of Plant Variety Rights; and
- Appeals to the Plant Variety and Seeds Tribunal.

[13] Objection to the application

If it is recommended that a variety be refused a grant of rights, the PVRO will write to the applicant giving the reason for refusal and allowing a period in which to make written representations and/or apply for a hearing against the recommendation.

The PVRO will inform the applicant of any proposed decision relating to their variety. These proposed decisions will also be published in the Gazette. A representation period (notified in each Gazette), which allows any persons affected by the decision the opportunity to make comments or objections, will be allowed before any decision is finalised. Such representations may take the form of written representations and/or the opportunity of being heard in person by the Controller or a person appointed by the Controller. A fee must be paid when making representations or applying to be heard. The procedure for making representations is set out in the Gazette.

If no representations are received within the period allowed (usually 18 days) the decision will be finalised. The applicant will be informed directly and given reasons for the decision and will also be advised of the time within which an appeal against the decision can be made to the Plant Varieties and Seeds Tribunal. If no appeal is made the applicant is notified of the final decision, which will also be published in the Gazette.

Objections can also be made to the proposed name of the new variety. This must occur within 3 months of the publication of the application in the official journal.

[14] Comparison with the Australian system

As in Australia, all species can be protected under the UK scheme. The nature of plant breeder's right in the UK (under the *Plant Varieties Act 1997*) is essentially the same as in Australia (under the *Plant Breeder's Rights Act 1994*).

Examples of some specific areas of difference between the UK and Australian systems include:

- Duration in the UK is 25 years for all species except trees, vines and potatoes which have a period of 30 years.

- Farmers and seed processors can be required to provide information on farm-saved propagating material of prescribed species to enable equitable remuneration to be paid (small farmers are exempt) to the grantee
- Where a holder of rights suspects infringement and can prove he has served a notice on the suspected infringer requiring information as to how the protected variety came into his possession and the suspected infringer does not respond within the prescribed time, then it is assumed that:
 - the material was obtained through unauthorised use of propagating material, and
 - the holder did not have a reasonable opportunity before the material was obtained to exercise his rights in relation to the unauthorised use of the propagating material.
- Similar provisions apply where the holder has not had reasonable opportunity to exercise rights over propagating material and wishes to exercise them over propagating material.

The table below is a comparison between some key elements of the system in Australia and the UK.

Table of examples of some requirements for PBR in Australia and the United Kingdom

Area of Comparison	Australia	United Kingdom
Duration of grant	20 years, except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	25 years, except potatoes, trees and vines 30 years; could be extended by regulation up to 30 and 35 years respectively.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of grant of rights.
Provisional protection	From date of acceptance of application to date of grant.	Reasonable compensation for infringement from date of publication to date of grant.
Commencement of legal action during provisional protection period	No	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application, then that earliest date if requested at time of Australian application; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in UK, date of receipt of application. Application in UK received within 12 months of date of earliest lodgement of overseas application, that earlier date; 3 months to certify earliest lodgement; 2 years for all data (from the day after last day eligible to claim priority).

Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	In UK more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder (or employer) or successor.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to propagating material, the exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition; • offer for sale; • sell or other marketing; • export; • import; • stock for any of above purposes; or • any other act prescribed for the purposes of this provision. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages.	Covers all plant genera and species
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Discovery and development is required.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	<ul style="list-style-type: none"> • It is predominantly derived from: <ul style="list-style-type: none"> - the initial variety, or - a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics resulting from the genotype or combination of genotypes of the initial variety, • It is clearly distinguishable from the initial variety by one or more characteristics which are capable of a precise description; and • except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes

United Kingdom

		of the initial variety.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; • Farm saved propagating material, for prescribed species and on payment of equitable remuneration (small farmers exempt from payment).
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Authority organises.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	Within 3 months of publication for objections to the proposed name; other objections in relation to the application or proposal to refuse or reject the application can be made within the period notified in each Gazette.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	If holder has unreasonably refused a licence or has imposed unreasonable terms, if compulsory licence (non exclusive) is needed to ensure reasonable quantity of reasonable quality at reasonable price; applicant must be financially able to exercise the licence.

United States

In the United States, new plant varieties can be protected in 3 different ways:

1. If they are **sexually** reproduced (ie by seed or tuber) application can be made under the *Plant Variety Protection Act and Regulations and Rules of Practice 2005 (USA)*¹³⁶
2. If the new plant variety is **asexually** reproduced, application can be made for a plant patent under 35 USC 161-164¹³⁷
3. All new plant varieties could be protected by a United States utility patent if they meet the normal requirements for patenting¹³⁸.

This Handbook deals separately with points 1 and 2 above. It provides background material only and **is not** a substitute for direct contact with the relevant authorities in the USA.

United States: Sexually Propagated Plants

[1] Contact details

A person wishing to make an application for protection for a new sexually or tuber propagated plant variety in the USA should contact the Plant Variety Protection Office (PVPO), a part of the United States Department of Agriculture. The contact details are:

Plant Variety Protection Office
National Agricultural Library, Room 401
10301 Baltimore Avenue
Beltsville, MD 20705-2351

¹³⁶ <http://www.ams.usda.gov> in the “plant variety protection” subsection of the “science and laboratories” section

¹³⁷ http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=3929, sections 161-164

¹³⁸ http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=3929

Phone: 301-504-5518

Email: pvpomail@usda.gov

Website: <http://www.ams.usda.gov/AMSV1.0/pvpo>

[2] UPOV membership

Yes, since 1981 (1991 Convention).

[3] Governing legislation

The legislation governing the Plant Variety Protection (PVP) scheme for seed or tuber propagated plants in the United States is the *Plant Variety Protection Act and Regulations and Rules of Practice 2005 (USA)*¹³⁹.

[4] Eligibility to apply

Eligibility to apply for Plant Variety Protection is covered in section 42 of the *Plant Variety Protection Act and Regulations and Rules of Practice 2005 (USA)*¹⁴⁰. Generally, a person who is the breeder, of a unique sexually reproduced or tuber-propagated plant, or their successor in title, may apply¹⁴¹. An applicant may either be a citizen of the United States or of a country which is a member of UPOV such as Australia, or a country with reciprocal rights with the USA.

Where an application for Plant Variety Protection is made by one or more persons a single person may make the application on the behalf of the others by naming the persons involved.

[5] Forms required

Several forms must be completed to apply for Plant Variety Protection in the USA. These forms are available online¹⁴² from the Plant Variety Protection Office website mentioned above. The forms required are:

- A signed form st-470 Application for Plant Variety Protection Certificate

¹³⁹ <http://www.ams.usda.gov> in the "plant variety protection" subsection of the "science and laboratories" section

¹⁴⁰ See FN 1

¹⁴¹ Precise definitions of terms such as "breeder" are available in section 41 of the PVP Act

¹⁴² <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=PVPOForms&page=PVPOForms&description=PVPO%20Forms> or by navigating to the appropriate section from <http://www.ams.usda.gov>

- Exhibit A: Breeding History
- Exhibit B: Statement of Distinctness
- Exhibit C: Objective Description of Variety. These forms are crop specific but a general crop form is also available should the required crop be missing.
- Exhibit D: Additional Descriptive Information (optional)
- Exhibit E: Statement of the Basis of Ownership
- Exhibit F: Declaration of Deposit of Seed or Tuber Sample – For a seed reproduced variety, declaration that a voucher sample will be deposited and maintained in an approved repository. For a tuber propagated variety, verification that a viable cell culture will be deposited and maintained in an approved repository.
- Form for Payment by Credit Card (optional)
- Instructions for the Name or Temporary Designation of the New Variety.

[6] Requirement for an agent

An agent or attorney, while not required, may be used to apply for Plant Variety Protection in the USA. At the minimum, applicants should have a postal address in the USA.

[7] Testing requirements

The specific testing requirements vary according to the crop. Details of individual testing procedures for different crops are contained in the exhibit C “Objective Description of Variety” forms mentioned above. However, in general, the variety must be distinct in the sense that it is clearly distinguishable from any other well known variety. The variety must be uniform in the sense that variations are describable, predictable, and commercially acceptable. Finally, the variety must be stable in the sense that, when reproduced, it remains essentially unchanged insofar as is reasonable when compared with other members of the same variety which employ the same breeding techniques.

[8] Who can do the testing?

It is necessary to refer to the Exhibit C forms mentioned above to determine who may perform the testing for specific crops. While some tests can be conducted by the applicant other tests require a private organisation or approved testing station. Furthermore, many crops require at least one year of testing to be conducted within the United States.

[9] Costs involved

While costs may change, examples of some of the government fees payable in March 2009 were:

Fee type	\$US
Filing the application and notifying the public of filing	518.00
Search or examination	3,864.00
Submission of new application data, after notice of allowance, prior to issuance of certificate	432.00
Allowance and issuance of certificate and notifying public of issuance	768.00
Revive an abandoned application	518.00
Reproduction of records, drawings, certificates, exhibits, or printed material (copy per page of material)	1.80
Authentication (each page)	1.80
Correcting or re-issuance of a certificate	518.00
Recording assignments	41.00
Copies of 8" x 10" photographs in colour.	41.00
Additional fee for reconsideration	518.00
Additional fee for late payment	41.00
Fee for handling replenishment seed sample	38.00
Filing a petition for protest proceeding	4,118.00
Appeal to Secretary	4,942.00
Granting of extensions for responding to a request	89.00

[10] Website showing the current cost

Information about government costs is available online and kept up to date by the PVPO.¹⁴³

[11] Database of protected varieties

A database of protected varieties is maintained by the PVPO and available online.¹⁴⁴

¹⁴³<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateR&page=PlantVarietyProtectionOfficeItemizedFees>

¹⁴⁴<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELprdc5069210>

[12] Journal which publishes applications

The PVPO maintains a certificate status database¹⁴⁵ and a scanned certificate database¹⁴⁶ online.

[13] Objection to the application

A person opposing the grant of a Plant Variety Protection may lodge an objection while the application for protection is pending and for a period not exceeding five years after the protection is granted. Opposition must be submitted in the form of a written petition for 'protest proceedings', supported by affidavits and must also show why the application or grant of protection is opposed. These papers must be submitted in duplicate.

[14] Comparison with the Australian system

The Plant Variety Protection system in the USA, for sexually and tuber propagated plants, is similar to the Plant Breeder's Rights system in Australia. As with most countries there are some differences in the detail. For example:

- The PVP system covers sexual and tuber propagation (sees next section 'United States Asexual Propagation' for asexually propagated varieties).
- The PVP Certificate is taken to be valid and any person challenging the right has onus to prove invalidity (s122).
- Damages are not available for infringement more than 6 years (or known to owner more than 1 year) before initiating action.
- Owners can give notice of PVP rights by labelling in accordance with the Act. If the variety is distributed and received by the infringer without the notice, no damages can be claimed for infringement until after notice has been given

The table below provides some comparative examples of the PVP system in the USA (for sexually and tuber propagated plants) and the Plant Breeder's Rights system in Australia.

¹⁴⁵<http://www.ars-grin.gov/cgi-bin/npgs/html/pvplist.pl>

¹⁴⁶<http://apps.ams.usda.gov/PVPO/CertificateDatabase/pvplist2.asp>

Table of examples of some requirements for PBR in Australia and the USA

Area of Comparison	Australia	USA – seed propagation (Plant Variety Protection Act)
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	20 years except trees and vines 25 years; if certificate not issued within 3 years of filing date, can reduce term.
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date certificate is issued.
Provisional protection	From date of acceptance of application to date of grant.	No
Commencement of legal action during provisional protection period	No	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application; 3 months to certify earliest lodgement; 3 years for all data.	If first lodgement is in USA date of receipt of application. Application in USA received within 12 months of date of earliest lodgement of overseas application where country gives USA reciprocal rights; 3 months to certify earliest lodgement; 2 years of expiration of priority period for all data; must include request for priority in US application.
Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	In USA more than a year before date of filing and overseas more than 4 years (6 for trees and vines).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder or successor; must be a US national unless this would violate a treaty (eg UPOV) or from a country with reciprocal rights.
Nature of right	In relation to the propagating material exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	In relation to the propagating material, exclusive right to: <ul style="list-style-type: none"> • sell the variety; • offer it for sale; • reproduce it; • importing it; • exporting it; or • use it in producing (as distinguished from developing) a hybrid or different variety therefrom.

Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Includes sexually reproduced or tuber propagated variety; excludes vegetatively propagated varieties, fungi and bacteria.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Requires discovery and development.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	<ul style="list-style-type: none"> • It is predominantly derived from another variety (referred to in this paragraph as the 'initial variety') or from a variety that is predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety; • It is clearly distinguishable from the initial variety; and • Except for differences that result from the act of derivation, conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	<ul style="list-style-type: none"> • Private and non-commercial use; • Plant breeding; • Research; • Farm saved seed; • Sale for non-propagation purposes; and • Transport, delivery or advertising.
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Done by applicant and material examined by authority.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	From date of filing to within 5 years of issue of certificate, leading to re-examination.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Ensure adequate supply of fibre food or feed at reasonable price; max period of two years.

United States: Asexually Propagated Plants

In the United States there is a special section of the Patents Law that is specific for asexually reproduced plant varieties¹⁴⁷. It applies to cultivated plants fungi and algae. The application process is similar for a US utility patent (called a standard patent in Australia), but as long as the description of the new variety is as complete as possible, it does not have to strictly adhere to the more stringent specification and claim criteria¹⁴⁸ in the patent law.

[1] Contact details¹⁴⁹

A person wishing to make an application for protection of a new asexually reproduced plant variety in the USA should contact the US Patent and Trademark Office (USPTO) before making an application. This Handbook provides background material only and is not a substitute for direct contact. Due the significant differences between patent law and variety rights laws under the UPOV Convention, it is extremely important that applicants seek professional legal advice in the USA.

The contact details are:

Postal address:

Mail Stop

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Phone: 1 800-786-9199 (IN USA OR CANADA) or US 1 571-272-1000

Fax: US 1 571-273-8300

Website: <http://www.uspto.gov/web/offices/pac/plant/index.html>

[2] UPOV membership

Yes, since 1981 (1991 Convention with reservation under Clause 35(2) allowing a country which was a Party to the 1978 Convention to have industrial property protection for asexually reproduced plant varieties, different from the 1991 UPOV Convention provisions).

¹⁴⁷ <http://www.wipo.int/clea/en/details.jsp?id=3929>

¹⁴⁸ http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_112.htm

¹⁴⁹ <http://www.uspto.gov/web/menu/feedback.html#mail>

[3] Governing legislation

The patenting of new varieties of asexually propagated plants is incorporated in sections 161-164¹⁵⁰ of the US Patent Law 35 USC. Although these sections set out the types of plant varieties that are patentable and provide some flexibility in the form of the specification and claim as long as the description of the new variety to be as complete as reasonably possible, the remainder of the provisions of the US Patent Law, 35 USC are applicable unless otherwise stated.

[4] Eligibility to apply

The person who invents or discovers and asexually reproduces any distinct or new plant variety, including cultivated sports, mutants, hybrids and newly found seedlings, other than tuber propagated plants or a plant found in an uncultivated state, may apply for a plant patent. Details on applying for a plant patent can be found on the US Patent and Trade Mark Office website¹⁵¹.

[5] Forms required

Unlike the usual plant breeder's rights systems, the US plant patent system does not have the requirement for specific Forms describing the technical characteristics of the variety. However there are some other Forms to be completed¹⁵².

The application is in terms of a claim and specification in the same way as a standard patent in Australia or a utility patent in the US. However Clause 162 of the patent law makes special provision that the specification requirements are met if description of the new plant variety is as complete as reasonably possible.

[6] Testing requirements

There is no requirement for DUS testing. However, the applicant does have to fully describe the new plant variety as part of the specification and this would include a description of the plant variety and the differences from other plant varieties.

¹⁵⁰ http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_161.htm

¹⁵¹ <http://www.uspto.gov/web/offices/pac/plant/index.html>

¹⁵² <http://www.uspto.gov/web/forms/index.html>; <http://www.uspto.gov/web/forms/index.html#startforms>

The USPTO examines the application as it would examine a normal patent. It can seek help from the PVPO.

[7] Who can do the testing?

There is no specific testing required for a plant patent. The application must contain a description of the variety sufficient to demonstrate that it is different from other plant varieties. The plant patent application is examined by a Patents Examiner in the same way as other patents.

[8] Requirement for an agent

Applicants can submit their application through a registered patent attorney acceptable to the USPTO (see PTO directory of registered patent attorneys and agents)¹⁵³.

[9] Costs involved

There are a number of government fees that must be paid to the Patents Office. In addition, as with other patents, it is wise to have a registered patent attorney prepare the claim and specification and they will have their own fees, which can be quite high, depending on the variety.

Fee type	\$US
Plant Filing	200.00
Plant Search	300.00
Plant patent examination	160.00
Patent Maintenance fees:	
3.5 years	900.00
7.5 years	2300.00
11.5 years	3800.00

[10] Website showing the current cost

Yes, the USPTO maintains a comprehensive website¹⁵⁴.

[11] Database of protected varieties

A database of protected varieties is maintained by the USPTO¹⁵⁵.

¹⁵³<http://www.uspto.gov/web/offices/dcom/olia/oed/roster/index.html>.

¹⁵⁴<http://www.uspto.gov/web/offices/ac/qs/ope/fee2007february01.htm>

¹⁵⁵<http://www.uspto.gov/web/menu/patdata.html>

[12] Journal which publishes applications

The Official Gazette which has information about all patent applications, is published electronically every week¹⁵⁶.

[13] Objection to the application

There is provision for an applicant whose application has been rejected to appeal to the Board of Patent Appeals¹⁵⁷.

[14] Comparison with the Australian system

The main differences between the US plant patent for asexually reproduced plants and the PBR system in Australia is that the Australian system mirrors the UPOV provisions based on field testing to determine the distinctness, uniformity and stability of the new variety. In contrast, the plant patent system is part of the US Patents Act and is based on the normal patent approach requiring a written patent claim and specification. As most applicants for plant variety protection in Australia are used to the UPOV system and not to the patent system, it is essential that people obtain the assistance of a US patent attorney and fully understand the timing implications and prior disclosure.

A number of key points of difference are highlighted below, but these are only examples and are in no way exhaustive:

- There must be no prior disclosure including having being patented or described in a printed publication in the USA or abroad or in public use or on sale, more than one year before the filing of the US application¹⁵⁸; this is of **key importance** as most UPOV countries have provision for sale in another country for 4 (or 6 years for trees and vines) prior to the date of application. This does not apply to meet the 'novelty' criterion in the USA for a plant patent. For example, if a variety has been sold in Australia for more than 12 months, an application cannot be made for a plant patent in the USA. Similarly if an application has been made for PBR in Australia (or elsewhere) or a description of the variety has been published more than one year before the USA application, it will be rejected.

¹⁵⁶ <http://www.uspto.gov/web/offices/com/sol/og/index.html>

¹⁵⁷ <http://www.uspto.gov/web/offices/pac/doc/general/index.html#appeal>

¹⁵⁸ 35 USC 102: http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_102.htm

- The USPTO has published **Criteria for protection**¹⁵⁹ as follows:
 - *That the plant was invented or discovered and, if discovered, that the discovery was made in a cultivated area.*
 - *That the plant is not a plant which is excluded by statute, where the part of the plant used for asexual reproduction is not a tuber food part, as with potato or Jerusalem artichoke.*
 - *That the person or persons filing the application are those who actually invented the claimed plant; i.e., discovered or developed and identified or isolated the plant, and asexually reproduced the plant.*
 - *That the plant has not been sold or released in the United States of America more than one year prior to the date of the application.*
 - *That the plant has not been enabled to the public, i.e., by description in a printed publication in this country more than one year before the application for patent with an offer to sale; or by release or sale of the plant more than one year prior to application for patent.*
 - *That the plant be shown to differ from known, related plants by at least one distinguishing characteristic, which is more than a difference caused by growing conditions or fertility levels, etc.*
 - *The invention would not have been obvious to one skilled in the art at the time of invention by applicant (cases¹⁶⁰, ¹⁶¹ have held that if the description of a plant variety had been in a publication in USA or overseas and the variety had been commercially available in some part of the world more than 12 months prior to filing the application in the USA, then it does not meet the novelty test. It was determined that even if the publication itself did not describe the variety sufficiently for a person skilled in the art to reproduce the variety, when combined with available plant reproductive material obtained from anywhere in the world, a person skilled in the art would be considered able to reproduce the invention).*

- To satisfy the criteria it is important that the application establish the two stage process and that both steps are completed before the application is filed:

¹⁵⁹ <http://www.uspto.gov/web/offices/pac/plant/index.html#1>

¹⁶⁰ *Ex Parte Thomson* (1992) 24 USPQ 2d 1618

¹⁶¹ *Ex Parte Elsner* (2004) 318 F 3d 2004

- Discovering in a cultivated area, selecting from a cultivated population or developing plants with the desired characteristics through a breeding program
 - Establishing that when asexually propagated the variety is stable and faithfully reproduces the parent; this ensures that the variation is not due to disease, chemicals or other environmental factors.
- The specification must contain as full and complete a botanical description as reasonably possible of the plant and the characteristics which distinguish that plant over known, related plants. To assist applicants, the US Patent and Trade Mark Office has Guidelines on its website¹⁶² setting out the details required in the claim and specification. Probably the best advice on that page is to find an already granted plant patent for a similar type of plant and use it as a template; secondly to engage a US patent attorney to write the application and act as agent.
 - There are no exemptions for farm-saved propagating material, research or plant breeding. In addition the new variety cannot have been publicly disclosed anywhere in the world more than 12 months prior to lodging the application.

The table below provides a comparison of key elements of the Australian system and the USA plant patent system.

Table of examples of some requirements for PBR in Australia and the USA

Area of Comparison	Australia	USA – asexual reproduction (plant patent)
Duration of grant	20 years except trees and vines 25 years; can be extended by regulation for specific taxa (none at July 2009).	20 years
Date from which duration commences	From date of grant of Plant Breeder's Rights.	From date of filing application.
Provisional protection	From date of acceptance of application to date of grant.	From date of filing.
Commencement of legal action during provisional protection period	No	No
Date from which UPOV priority commences	If first lodgement is in Australia, date of receipt of application. Application in Australia received within 12 months of date of earliest lodgement of overseas application; 3 months to certify earliest lodgement; 3 years for all data.	No

¹⁶² <http://www.uspto.gov/web/offices/pac/plant/index.html>

United States

Prior sale not allowed	In Australia more than a year before date of lodgement and overseas more than 4 years (6 for trees and vines).	Has not been sold or released in the USA or overseas more than one year prior to the date of the application. Description cannot have been published more than 1 year before filing (eg if an application made overseas and description published).
Who can apply?	A breeder (or employer or successor), whether or not a citizen or resident, or the variety is bred in Australia; must have an Australian postal address.	Breeder – 2 steps: discover, select or breed new variety and asexually reproduce it to demonstrate stability.
Nature of right	In relation to the propagating material, exclusive right to: <ul style="list-style-type: none"> • produce or reproduce; • condition the material for the purpose of propagation; • offer the material for sale; • sell the material; • import the material; • export the material; and • stock the material for the above purposes. In some circumstances extended to: <ul style="list-style-type: none"> • harvested material; and • products of variety. 	<ul style="list-style-type: none"> • Asexually reproducing the plant; and • Using, offering for sale, or selling the plant so reproduced, or any of its parts, throughout the USA, or from importing the plant or any parts thereof, into the USA.
Limitation on species covered	Includes plants, fungi and algae; must prescribe species of these not covered; excludes bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages	Excludes tuber propagated plants and plants found in an uncultivated state; includes algae and fungi but not bacteria; natural mutants are eligible must have been found in a cultivated area.
Discoveries allowed or not	Allowed if used together with selective propagation, resulting in a new plant variety.	Yes, if found in a cultivated area.
Definition of essentially derived	<ul style="list-style-type: none"> • It is predominantly derived from that other plant variety; • It retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and • It does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety. 	Not specifically covered
Exemptions	<ul style="list-style-type: none"> • Non-commercial use; • Experimental use; • Plant breeding; and • Farm saved propagating material. 	No exemptions
Testing for distinctness, uniformity and stability	Breeder, certified by an approved 'Qualified Person'.	Patent specification must describe the new variety in comparison to closes varieties already known and described;

United States

		trials must be undertaken for at least one growing season to obtain sufficient information for the specification; it is up to the applicant to do this.
Objections to the grant	Within 6 months from date of publication of detailed description in official journal.	In accordance with the appeal system under the US patent law.
Provision for compulsory licence	Reasonable quantities at reasonable price within 2 years of grant of right ; decision by Secretary of administering department.	Not applicable