

# Experience on essentially derived varieties in Australia

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## Outline

- Development of Australian PBR law and EDV provisions
  - And why we did what we did
  - The 3 essential elaborations
  - Examples of EDV applications in Australia

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## Development of Australia's EDV provisions in conformity with UPOV 91

- AU first country to draft its PBR law in conformity with UPOV 91
- EDV wording follows Convention BUT has 3 important elaborations
  - defines "essential characteristics"
  - specifies what is not an EDV and how the "EDV chain" is broken
  - stipulates that the national authority administers EDV
- Purpose of these elaborations is to provide a "bright line" so as to provide clarity and certainty for all stakeholders.
- Membership of UPOV obliges Australia to meet minimum requirements but does not set upper limits, provided there is consistency with the minimum standards. These elaborations meet this test.

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## Essential characteristics

The PBR Act establishes that:

- "Essential characteristics are heritable traits ... that contribute to the principal features, performance or value of the variety"

[emphasis added]

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## PBR Act defines what is NOT an EDV

- Requires that important differences (more than cosmetic) must be demonstrated if the second variety is not to be declared as an EDV.

–“cosmetic” is interpreted in the context of the second variety and the specific characteristic in question.

- Example: “colour of anthers”



Example: Anther colour

Wheat



Calla Lily





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## Role of national authority

- is responsible for declarations of EDV (ie court action is not required in the first instance).
- PBR Act defines a process where onus is placed on the breeder of the second variety to rebut the claims of the first breeder

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## Australia's experiences using our “bright line”

### ex 1. ‘Sir Walter’ vs ‘B12’ (2005)

- Claim: Characteristics claimed as distinct (eg shorter internodes) are not important but only cosmetic ...



- Second breeder rebutted that shorter internodes are important (as distinct from cosmetic) because it increases “thatch” and “wear tolerance”
  - Academic literature
    - “cultivars with shorter internodes have higher wear tolerance”
    - “shorter internode length of this grass may make it more prone to thatching”
  - Data: Internode length: ‘Sir Walter’ 57.1mm vs ‘B12’ 50.4mm ( $P < 0.01$ )

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### 'Sir Walter' vs 'B12'

- Office concluded that there was sufficient evidence that 'B12' had **shorter** internodes and it was an important (as distinct from cosmetic) feature which differentiates it from 'Sir Walter'.



**EDV Rejected**

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### Australia's experiences using our "bright line"

#### ex 2. MC38' vs MC51 (2012)

- Claims:
  - Variety MC51 was found growing in a uniform block of variety 'MC38' in our own orchard
  - It is a full tree sport of 'MC38' that has a full block red colour unlike the striped skin colour of 'MC38'.



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## 'MC38' vs MC51

- The EDV application was first assessed against the administrative provisions outlined in section 40(1) of the PBR Act
- s.40(1) If: (a) a person is the grantee of PBR in a particular plant variety—(the initial variety); and  
(b) another person is the grantee of, or has applied for, PBR in another plant variety (the second variety); [...]  
the grantee of PBR in the initial variety may make written application [...] for a declaration that the second variety is so derived.

## 'MC38' vs MC51

- The Office noted that the grantee of 'MC38' was, by their own admission, also the breeder of MC51
  - First, the information provided did not indicate that “another person” was involved as is required by section 40(1)(b).
  - Second, there was no information or evidence of an Australian application for, or a grant of, PBR for MC51.



**EDV Rejected**

# Thank You

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