

Proposed changes to Explanatory Notes on Essentially Derived Varieties under the UPOV Convention

Consultation Paper

June 2021



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Why we are consulting

This paper seeks stakeholders' comments on how Australia's plant breeding industries could be affected by proposed changes to guidance on the UPOV Convention:

- The UPOV Convention is the *International Convention for the Protection of New Varieties of Plants*. It set up an international system for the protection of new plant varieties.
- The guidance is the *Explanatory Notes on Essentially Derived Varieties under the UPOV Convention* (Explanatory Notes).

This paper is also seeking your initial views on whether Australia should consider changing the Australian definition of an Essentially Derived Variety (EDV) to be closer to the proposed changes to the Explanatory Notes.¹

We invite interested parties to make written submissions in response to the questions presented in this paper by 30 July 2021. IP Australia will consider the submissions and consult further, as necessary.

How to make a submission

Written submissions should be sent to consultation@ipaaustralia.gov.au.

For accessibility reasons, please submit responses by email in Word, RTF, or PDF format.

Submissions should be received no later than **30 July 2021**.

The contact officer for this consultation is Dr Paul Gardner, who may be contacted on (02) 6283 2145, or via email to paul.gardner@ipaaustralia.gov.au.

What is an Essentially Derived Variety?

Under Australian law, an Essentially Derived Variety (EDV) is a plant variety that:

- is predominantly derived from an initial variety protected by an Australian plant breeder's right (PBR)²
- meets the normal requirements to be protected by a PBR, whether or not it is actually protected³
- retains the essential characteristics of the initial variety⁴
- does not exhibit important features that differentiate it from the initial variety⁵.

PBR owners and their exclusive licensees can apply to have IP Australia assess a plant variety against these criteria to determine if they are EDVs.

¹ Please note that any changes to the Explanatory Notes cannot change Australia's obligations under the UPOV Convention. Nor can they change the Australian plant breeder's rights legislation: the *Plant Breeder's Act 1994* (Cth).

² Plant Breeder's Rights Act ss 4(a), 40(1), 41A(1).

³ Plant Breeder's Rights Act ss 40(1A), 41D(2)(a)(ii).

⁴ Plant Breeder's Rights Act s 4(b).

⁵ Plant Breeder's Rights Act s 4(c).

Why do EDVs exist?

EDVs balance the interests of the breeder of an initial variety with the interests of the breeder of a new variety that is predominantly derived from the initial variety. They consider the contributions each breeder has made to developing the essential characteristics of the new variety.

The Australian approach considers whether a new variety differs from the initial variety only in unimportant ways but still retains the commercially useful characteristics of that initial variety. If so, the breeder of the initial variety can still get some reward for their effort in developing those useful features.

In Australia, to exploit an EDV *both* the PBR owner of the initial variety and the PBR owner of the EDV must agree. If the breeder of the EDV doesn't obtain PBR protection for the EDV, then the EDV is subject only to the PBR in the initial variety.

How do EDVs fit in the international plant variety right system?

Australia is a party to the UPOV Convention, linked [here](#). A system for defining EDVs is required under the UPOV Convention.

To help understand the criteria for EDVs, UPOV publishes the Explanatory Notes, linked [here](#).

What is the proposed change to the Explanatory Notes?

The balance between the rights of breeders of the new and initial varieties, and the criteria for EDVs, has been debated in Australia and internationally.

Australia is participating in an international working group established to consider changes to the current explanatory note. The meeting documents of the working group are published on the [UPOV website](#).

The [proposed changes](#) drafted by the UPOV Office at the request of the working group would change the guidance on the provisions of the UPOV Convention concerning EDVs. The new guidance may not be consistent with the current Australian practice for EDVs.

For inconsistency with current Australian practice, paras 5(a), 11 and 14(a) of the proposed changes are particularly relevant:

- 'Varieties with a single parent ("mono-parental" varieties) resulting, for example, from mutations, genetic modification or genome editing are *per se* predominantly derived from their initial variety.' (para 5(a))
- 'A predominantly derived variety typically retains the expression of essential characteristics of the variety from which it is derived, except for those differences resulting from act(s) of derivation, which may also include differences in essential characteristics.' (para 11)
- 'In the case of mono-parental varieties, all differences necessarily result from the act(s) of derivation, meaning that all differences are excluded from consideration of the EDV status.' (para 14(a))

As an example, it appears that following the guidance of these proposed changes, if a breeder bred a new variety of an apple that matured earlier by selection of a natural or induced mutation it could be considered an EDV despite the difference in a characteristic that could be considered important under the Australian definition of an EDV.

We want your views on the changes

IP Australia welcomes comments on all the [proposed changes](#) to the Explanatory Notes.

Consultation Questions:

1. What is your view on the proposed changes to the Explanatory Notes?
2. Do you view the Australian approach to EDVs as inconsistent with the approach set out in the proposed changes to the Explanatory Notes? Why/Why Not?
3. Do you support Australia adopting the approach set out in the proposed changes? Why/Why not?
4. Can you give examples of how the new approach would affect plant variety protection?

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