Australian Seed Federation

# IP Australia Discussion Paper – Essentially Derived Varieties

29 October 2026

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Sent via: consultation@ipaustralia.gov.au

Dear Isabel,

## Re: IP Australia Discussion Paper – Essentially Derived Varieties

The Australian Seed Federation (ASF) welcomes the opportunity to respond to IP Australia's review of Australia's Essentially Derived Varieties (EDV) framework.

**The time for reform is long overdue.**

Australia's uniquely narrow EDV provisions are out of step with international standards and risk undermining the long-term investment in plant breeding that supports Australian agricultural productivity, innovation and competitiveness.

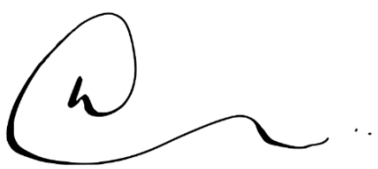
ASF's position is clear. Australia must harmonise its EDV framework with UPOV 1991 and its Explanatory Notes, including removing or amending the additional test under section 4(c) of the Plant Breeder's Rights Act 1994. Replacing that provision with another uniquely Australian threshold would simply perpetuate the problem.

This issue has been raised repeatedly over many years. With plant breeding technologies advancing rapidly and international approaches continuing to evolve, Australia cannot afford another round of consultation without meaningful legislative reform.

Our attached submission sets out ASF's recommendations for a clearer, internationally consistent and effective EDV framework that recognises investment in initial varieties while supporting continued innovation.

We urge IP Australia to progress these reforms as a priority.

Yours sincerely,



Katherine Delbridge
**Chief Executive Officer**
Australian Seed Federation

# ABOUT US

**The Australian Seed Federation is the peak industry body for the Australian seed industry at the local, state, national and international level. The members of the Australian Seed Federation are at the foundation of Australia's $100 billion agriculture industry. Our membership covers the entire seed supply chain and includes plant breeders, seed growers, seed processors and seed marketers. We exist to ensure a seed industry that is productive and sustainable.**

The Australian Seed Industry is worth over $1.3 billion annually to the Australian economy. It is an important part of rural and regional Australia and a vital contributor to food and feed security. Put simply, without seed there is no food or feed.

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ASF welcomes IP Australia's review of Australia's approach to Essentially Derived Varieties (EDVs).

**The time for reform is long overdue.**

Australia's plant breeding sector cannot afford for reform of essentially derived varieties to be deferred again.

## Recommendations

ASF recommends that the Australian Government:

1. **harmonise Australia's EDV framework with UPOV 1991 and the current UPOV Explanatory Notes on Essentially Derived Varieties;**
2. **remove or amend section 4(c) of the PBR Act so that an EDV is not excluded merely because it exhibits an "important (as distinct from cosmetic)" feature differentiating it from the initial variety;**
3. **avoid replacing section 4(c) with another uniquely Australian threshold that materially departs from the UPOV framework;**
4. **ensure that the EDV framework appropriately recognises predominant derivation, including the UPOV principle that mono-parental varieties resulting from mutation, genetic modification or genome editing are *per se* predominantly derived from their initial variety, and does not automatically exclude a variety from EDV status merely because the act of derivation introduces an additional important or essential characteristic;**
5. **provide clear guidance on the operation of the EDV provisions that is consistent with UPOV terminology and guidance, avoiding selective adoption of UPOV concepts that could result in a uniquely Australian interpretation;**
6. **increase transparency by publishing appropriately redacted or de-identified information about EDV determinations; and**
7. **recognise EDV principally as a matter between rights holders, supported by negotiation, licensing and appropriate alternative dispute resolution mechanisms, with access to judicial determination where a dispute cannot otherwise be resolved.**

## Introduction

Plant breeding is a long-term investment. Breeders commit significant resources over many years to develop the elite varieties that underpin productive, resilient and competitive Australian agriculture. Those investments ultimately deliver better solutions and safeguards for Australian growers – higher-performing varieties, improved disease resistance, adaptation to changing growing conditions and other advances that support farm productivity.

**In order for Australian growers to realise the benefits of plant breeding investment, the intellectual property framework must keep pace with innovation, and international agreed norms and best practice. This review is long overdue.**

Plant breeding innovations, sometimes referred to as new breeding technologies, enable the continuation of valuable characteristics to be introduced into elite varieties with greater speed and precision. That is why an effective EDV framework is becoming even more critical. Breeders must have confidence that the substantial investment embodied in an initial variety cannot simply be appropriated through predominantly deriving a new variety and introducing a characteristic that takes it outside Australia's unusually narrow EDV test.

Australia's current approach puts Australian agriculture at a severe disadvantage. Breeders may not receive an appropriate return for the germplasm and varieties they have invested in developing, investment in Australian breeding may be discouraged and Australian growers ultimately risk missing out on the improved varieties that investment delivers and risk becoming uncompetitive against other agricultural exporting countries.

This is not an argument against follow-on innovation. ASF strongly supports plant breeding innovations, including genome editing, and continued access to protected varieties under the breeder's exemption. It is an argument for ensuring that innovation is appropriately recognised.

The issue has been considered repeatedly since the PBR Act commenced, and ASF has previously called for reform. The current consultation provides the opportunity to resolve it. The time is now to bring Australia's EDV framework into line with UPOV 1991, provide breeders with greater certainty that their investment will be recognised, and ensure Australian growers continue to benefit from sustained investment in plant breeding and varietal innovation.

**ASF's position is clear: Australia should not maintain a uniquely Australian test for essentially derived varieties where an internationally agreed framework already exists under the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 1991). There is no justification as to why Australia should maintain a materially different EDV threshold from the international framework.**

The Plant Breeder's Rights Act 1994 (PBR Act) must be reformed to better harmonise Australia's EDV provisions with those of UPOV 1991 and the internationally accepted understanding of the EDV concept.

In particular, ASF does not support retention of the requirement in section 4(c) that an EDV must not exhibit any "important (as distinct from cosmetic) features" that differentiate it from the initial variety. This requirement is unique to Australia and establishes a narrower threshold than the approach applied internationally. IP Australia itself acknowledges both the uniqueness of this provision and longstanding stakeholder concerns about its effect.

ASF has consistently raised this issue over many years. In its 2021 submission on the proposed revisions to the UPOV Explanatory Notes on EDVs, ASF supported alignment of Australia's framework with UPOV and raised concerns that the narrow Australian interpretation undermined the effective operation of the EDV principle.

The present review provides a critical opportunity to address that longstanding inconsistency. Australian breeders cannot afford to wait for another five years. With the current pace of technical, regulatory and policy developments in this field, Australia is already behind.

## The purpose of the EDV principle

The EDV principle was a significant addition to the international PBR framework under UPOV 1991.

The breeder's exemption appropriately allows protected varieties to be used for further breeding without the authorisation of the rights holder. This access to germplasm is fundamental to continued varietal improvement and innovation.

However, UPOV 1991 also recognised the need to protect the legitimate interests of the breeder of an initial variety where another variety is predominantly derived from it.

**The EDV principle is critical within the PBR system. It allows breeders to continue to freely access protected varieties for breeding while extending the scope of the initial breeder's right where a subsequently developed variety is essentially derived from that protected variety.**

This distinction has become increasingly evident as plant breeding innovations have advanced.

Developing an elite variety requires years of investment in germplasm, crossing, selection, evaluation and commercial development. Where another breeder deliberately uses that protected variety as the basis from which to predominantly derive a new variety, they benefit from that accumulated investment. The EDV framework exists to recognise both contributions: the innovation in the derived variety and the investment embodied in the initial variety.

An EDV may itself represent valuable innovation and qualify independently for PBR protection. The issue is not whether follow-on innovation should occur. The issue is whether a variety that meets the test for essential derivation should be capable of commercial exploitation entirely independently of the rights associated with the protected initial variety.

## Australia must harmonise with UPOV

Australia is a member of UPOV and a party to UPOV 1991. Australian plant breeding is inherently international, with breeding programs, germplasm, varieties and PBR portfolios frequently operating across multiple jurisdictions.

**Consistency with the international framework is therefore not a nice to have, it is a must.**

Alignment should be approached holistically. Selective adoption of individual elements of the UPOV guidance risks creating a uniquely Australian interpretation of the EDV concept, undermining the greater certainty and international consistency that reform should seek to achieve.

Article 14(5)(b) of UPOV 1991 provides that a variety is essentially derived when 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 resulting from the genotype or combination of genotypes of the initial variety;
- is clearly distinguishable from the initial variety; and
- except for differences resulting from the act of derivation, conforms to the initial variety in the expression of those essential characteristics.

The UPOV Explanatory Notes provide particular clarity in relation to mono-parental varieties, stating that varieties with a single parent resulting, for example, from mutation, genetic modification or genome editing are *per se* predominantly derived from their initial variety. ASF considers that this principle should be clearly reflected in the Australian application of the predominant derivation test. This appropriately recognises that the introduction of a new

characteristic does not, of itself, displace the breeding contribution embodied in the genetic background of the initial variety.

This is particularly relevant to varieties arising through mutation, which fall within the UPOV examples of mono-parental varieties that are *per se* predominantly derived. Varieties resulting from repeated backcrossing may also be predominantly derived where the breeding process substantially retains the genetic background of the initial variety while introducing a limited difference.

Australia has supplemented this framework with its own requirement that an EDV must not exhibit any "important (as distinct from cosmetic) features" differentiating it from the initial variety.

**ASF considers this additional test unnecessary and problematic.**

As ASF submitted in 2021, Article 14(5)(b) expressly recognises that differences may result from the act of derivation. It does not establish a separate test based upon whether those differences are "important" or "cosmetic".

The Australian approach consequently creates an additional hurdle to establishing essential derivation, with no gain. **There is no justification as to why Australia should maintain a materially different EDV threshold from the international framework**. Accordingly, reform should begin with the objective of harmonisation, rather than attempting to further refine a uniquely Australian approach.

Recent international developments further demonstrate the importance of clear and consistent interpretation of the EDV framework.

In March 2026, the UK High Court considered the application of EDV provisions in *Nador Cott Protection SAS v Asda Stores Ltd*. Despite the subsequent mandarin variety arising through mono-parental mutation, the Court determined that it was not an EDV because it did not retain certain essential characteristics of the initial variety. This decision highlights the potential for uncertainty in interpreting the relationship between predominant derivation, retention of essential characteristics and differences resulting from the act of derivation, even where national legislation closely reflects UPOV 1991.

Clear guidance is needed to ensure that differences directly attributable to an act of derivation are appropriately considered and do not automatically preclude EDV recognition.

## Section 4(c) should not be retained

The problem with section 4(c) is not simply that the meaning of "important" is uncertain. Its inclusion directs the EDV assessment toward the nature or commercial significance of differences between varieties, rather than whether those differences arose through the act of derivation within the framework established by UPOV.

It is not an appropriate response to develop more detailed definitions of "important features" or "cosmetic". **The underlying problem is the additional requirement itself.**

Whether a characteristic is "important" can depend upon the crop, the intended use of the variety, the market and changes in commercial or agronomic circumstances over time. Similarly, a characteristic that appears cosmetic in one crop or market may be fundamental to the commercial value of another.

The discussion paper itself illustrates this difficulty: colour may have relatively little commercial significance in one variety but be fundamental to the value of an ornamental or fruit variety.

Attempting to draw a statutory distinction between "important" and "cosmetic" features therefore introduces uncertainty without addressing the central question of whether the later variety is essentially derived from the initial variety.

ASF recommends that section 4(c) be removed or amended so that the Australian statutory test aligns with UPOV 1991.

ASF cautions against replacing section 4(c) with another Australian-specific formulation that produces substantially the same outcome. The objective should be to align the Australian framework with the internationally recognised EDV concept, not to find a different way of expressing an Australian EDV threshold.

## The threshold for essential derivation

The discussion paper presents two possible alternative approaches to the current threshold.

**ASF does not consider it necessary to select between bespoke Australian formulations where UPOV 1991 already provides the appropriate foundation.**

The threshold should reflect the elements of Article 14(5)(b), supported where appropriate by the UPOV Explanatory Notes.

The starting point for an EDV assessment should be the act of derivation and, in particular, whether the new variety was predominantly derived from the initial variety. This requires consideration of how the new variety was developed, including its pedigree, source material and breeding process. Breeding records should therefore be an important source of evidence in determining predominant derivation. Phenotypic and genotypic evidence may also assist that assessment, but should not displace the fundamental question of how the variety was derived.

Of particular importance is avoiding an interpretation under which the introduction of an additional important or essential characteristic automatically prevents a predominantly derived variety from being considered an EDV.

Such an outcome risks confusing two separate questions: whether a new variety is sufficiently distinct to qualify for protection in its own right, and whether that variety is essentially derived from an initial protected variety.

Distinctness and essential derivation perform different functions. Distinctness is relevant to whether a variety qualifies for a right; essential derivation concerns the scope of the right associated with the initial variety.

A derived variety can therefore contain a valuable new characteristic, qualify for PBR in its own right and nevertheless remain an EDV.

That balance recognises both contributions: the innovation represented by the derived variety and the breeding investment embodied in the initial variety from which it was predominantly derived.

## Genetic similarity as an evidentiary tool

**ASF does not support the incorporation of a fixed numerical genetic similarity threshold into the PBR Act.**

Genetic similarity can, however, provide an important evidentiary tool in assessing essential derivation. Internationally recognised, crop-specific thresholds, such as those developed through the International Seed Federation, may assist in identifying circumstances that warrant further examination and, where appropriate, support a shift in the burden of proof to the breeder of the putative EDV.

Importantly, exceeding a genetic similarity threshold should not automatically determine that a variety is an EDV. The assessment must still consider the requirements for essential derivation, including how the variety was developed and whether it was predominantly derived from the initial variety.

This reflects the approach used within the international seed industry, where crop-specific genetic similarity thresholds have been developed for some species as a procedural tool rather than as a definitive legal test.

## Plant breeding innovations

Advances in breeding technologies reinforce the need for an effective and future-proof EDV framework in Australia.

UPOV 1991 was developed at a time when technological developments were already raising questions about the ability to make targeted changes to existing varieties. The EDV concept was intended to ensure that the scope of PBR remained effective in those circumstances.

The same principle remains relevant as technologies continue to advance.

Genome editing, targeted mutagenesis and other precision breeding methods can enable changes to be made to elite germplasm with increasing precision. ASF strongly supports continued innovation and access to plant breeding innovations. **However, innovation in breeding technologies should not come at the expense of the investment required to develop the elite varieties upon which those technologies may operate**.

This is particularly important as technologies such as genome editing make it increasingly possible to introduce valuable new characteristics into established elite germplasm while relying substantially on the breeding investment embodied in the initial variety. The introduction of a valuable new characteristic should not, of itself, obscure that underlying derivational relationship or remove an otherwise predominantly derived variety from the scope of EDV protection.

In this context, the breeder's exemption remains critically important. Protected varieties should continue to be available for breeding and research in accordance with the PBR framework.

However, the breeder's exemption and EDV principle are complementary rather than competing concepts. Access for breeding does not necessarily provide an unrestricted right to commercially exploit a resulting variety where that variety is essentially derived from the protected initial variety.

A properly functioning EDV framework therefore supports continued innovation while preserving incentives for sustained investment in germplasm development plant breeding.

## The small number of EDV applications does not demonstrate that the system is working

IP Australia notes that only three applications for essential derivation have been made since the introduction of the Australian EDV provisions in 1994, and that all three were unsuccessful.

The effectiveness of the EDV framework should not be measured by the number of formal disputes or applications.

A clear EDV framework should enable breeders to understand when a variety is likely to be essentially derived and manage that relationship appropriately, including through licensing or other commercial arrangements. **ASF members have reported over many years that Australia's uniquely narrow statutory test has discouraged initial variety owners from pursuing matters where they considered the Australian threshold unlikely to be met**.

The small number of Australian applications therefore neither demonstrates that the current framework is working effectively nor, by itself, establishes that the threshold is too high. The relevant question is whether Australia's law provides a clear and internationally consistent framework within which breeders can understand and exercise their rights.

Greater transparency in the administration of the EDV framework would also improve certainty for breeders. Where EDV determinations are made administratively, published decisions or appropriately de-identified summaries could provide greater clarity as to how concepts such as predominant derivation are being applied in practice. Greater transparency around the decision-making process and the expertise involved would also assist, while appropriately protecting commercially sensitive information.

## Greater certainty and transparency

Full adoption of UPOV 1991 framework and its Explanatory Notes should be accompanied by clearer guidance about the operation of the EDV framework, which should be developed in partnership with industry.

ASF supports IP Australia providing practical guidance on concepts including predominant derivation and essential characteristics, provided that guidance is consistent with UPOV 1991 and its Explanatory Notes rather than creating additional Australian-specific tests.

ASF supports greater transparency regarding EDV determinations.

The absence of published decisions makes it difficult for breeders and PBR owners to understand how the existing statutory concepts have been interpreted and what evidence has been considered relevant. IP Australia acknowledges this limitation in the discussion paper.

Publishing appropriately redacted or de-identified decisions or decision summaries would assist users of the PBR system while recognising that EDV disputes may involve commercially sensitive genetic, technical and market information.

## Determination of EDV disputes

ASF supports reconsideration of the role of the PBR Registrar in determining EDV matters.

Australia's approach is unusual internationally. As the discussion paper notes, Australia is the only UPOV member where the PBR Registrar has a role in determining whether a variety is essentially derived; in other jurisdictions EDV status is generally a matter between the relevant rights holders, with courts determining unresolved disputes.

ASF supports consideration of the international approach under which the holder of rights in the initial variety determines whether and how to assert those rights, with unresolved matters ultimately capable of judicial determination.

EDV disputes can involve contested questions of derivation, genetics, varietal characteristics and commercial significance. Courts have established mechanisms for considering expert evidence and protecting confidential commercial information.

Moving EDV determinations to the courts may also simplify the dispute resolution process by removing the potential for successive administrative review and judicial appeal. It would allow contested matters to be determined through established judicial processes while recognising that EDV disputes principally concern the exercise of rights between commercial parties.

Given that court proceedings can be expensive and may present a significant barrier for smaller breeders, any reform should preserve opportunities for parties to resolve EDV matters through negotiation and appropriate alternative dispute resolution mechanisms before litigation becomes necessary.

## Conclusion

Plant breeding requires substantial, sustained and long-term investment. An effective PBR system must provide sufficient confidence for that investment to continue while maintaining the ability of breeders to access germplasm and develop improved varieties.

The EDV principle is an important part of that balance. It recognises that a derived variety may itself represent valuable innovation, while ensuring appropriate recognition of the investment embodied in the protected initial variety from which it was predominantly derived.

ASF is convinced that Australia's current, uniquely narrow approach does not achieve the balance intended by UPOV 1991. In particular, section 4(c) introduces an additional Australian test that places undue emphasis on the nature of differences between varieties rather than the fundamental question of derivation.

A clear and effective EDV framework should provide sufficient certainty for breeders to understand their rights and obligations and manage EDV relationships appropriately, including through commercial arrangements where necessary. Australia's current narrow interpretation has instead discouraged rights holders from pursuing matters where they considered the statutory threshold unlikely to be met.

This is the moment for Australia to simplify the framework, improve certainty and bring its approach into alignment with the international system within which Australian plant breeders operate. This will better recognise the essential and ongoing investment in initial varieties, embrace continued innovation and enable Australian growers to access the improved and resilient varieties that adequately protected and significant investment makes possible.

**ASF insists upon legislative reform centred on a clear objective: harmonisation of Australia's EDV framework with UPOV 1991 and its Explanatory Notes.**