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10 January 2013

AD McLean Investments Pty Ltd
Allan McLean



Dear Mr McLean

Thank you for your correspondence of 26 November 2012 (received by IP Australia on 5 December 2012) relating to an application for a declaration of essential derivation for the apple called ML 51.

Please accept our apologies for not replying earlier.

I think perhaps there is a misunderstanding of the purpose of the essential derivation declaration provisions in the *Plant Breeder's Rights Act 1994* (the PBR Act).

For convenience the relevant section of the PBR Act is reproduced below:

“Division 4—Essential derivation

40 Applications for declarations of essential derivation

- (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*); and
 - (c) the grantee of PBR in the initial variety is satisfied that the second variety is, within the meaning of section 4, an essentially derived variety of the initial variety; and
 - (d) the initial variety has not itself been declared to be an essentially derived variety of another variety in which PBR has been granted;

the grantee of PBR in the initial variety may make written application to the Secretary for a declaration that the second variety is so derived.” [emphasis added]

Two issues seem to preclude your application for a declaration of essential derivation. First, the information provided does not indicate that there is “another person” involved. On its face it appears that both ‘MC 38’ and MC 51 are currently under the control of AD McLean Investments Pty Ltd.



Second, we are not aware of either an Australian application for, or a grant of, PBR for MC 51. Thus the statutory requirements of section 40(1)(b) have not been fulfilled. It is also noted that the required fee (\$800) did not accompany your application.

Accordingly on the submission before me, I cannot accept your application for a declaration of essential derivation on MC 51.

More broadly, it may be useful to briefly recall that the essential derivation provisions in the PBR Act are primarily focussed on ensuring that other breeders do not unfairly benefit from making small, cosmetic (as opposed to important) changes to the initial variety . Some use the analogy that declarations of essential derivation are used against “plagiarism” or “photocopying” of the initial variety by other breeders.

It is open to you to seek registration of MC 51 by filing and progressing a PBR application. Information on this process, including the option to file on-line using our eServices channel is available from our website (<http://www.ipaustralia.gov.au/>). In addition, if you need any further information please contact 1300 65 1010. Alternatively, you may contact us by email at assist@ipaustralia.gov.au.

Provision for Appeal

Your attention is drawn to the provision of the *Plant Breeder’s Rights Act 1994* (Section 77) concerning your right to request the Administrative Appeals Tribunal (AAT) to review decisions by the Plant Breeder’s Rights Office. You are advised to consult a solicitor as soon as possible on AAT procedures as there are time limits and specific procedures with which you must comply.

Yours sincerely

Doug Waterhouse

Chief, PBR

Plant Breeder’s Rights

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