



Plant Breeder's Rights Act 1994

No. 110 of 1994

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SCHEDULE

CONVENTION



Plant Breeder's Rights Act 1994

No. 110 of 1994

An Act to provide for the granting of proprietary rights to breeders of certain new varieties of plants and fungi, to repeal the *Plant Variety Rights Act 1987*, and for related purposes

[Assented to 5 September 1994]

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the *Plant Breeder's Rights Act 1994*.

Commencement

2.(1) Subject to subsection (2), the provisions of this Act commence on a day to be fixed by Proclamation.

(2) If a provision of this Act does not commence under subsection (1) within the period of 6 months commencing on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

Definitions

3.(1) In this Act, unless the contrary intention appears:

“**AAT**” means the Administrative Appeals Tribunal;

“**AAT Act**” means the *Administrative Appeals Tribunal Act 1975*;

“**Advisory Committee**” means the Plant Breeder's Rights Advisory Committee established by section 63;

“**applicant**”, in relation to an application, means the person currently shown in the application as the person making the application;

“**application**” means an application under section 24 for PBR in a plant variety to which this Act extends;

“**breeder**”, in relation to a new plant variety, means:

(a) subject to paragraph (c), if the variety was bred by one person only—the person; or

(b) subject to paragraph (c), if the variety was bred by 2 or more persons (whether jointly or independently and whether at the same time or different times)—each of those persons; or

(c) if the variety was bred:

(i) by a person in the course of performing duties or functions as a member or employee of a body (whether incorporate or unincorporate); or

(ii) by 2 or more persons in the course of performing duties as a member or employee of such a body;

the body of which that person or each of those persons is a member or employee;

and includes any person or body that is the successor in title to the person referred to in paragraph (a), to any of the persons referred to in paragraph (b) or the body referred to in paragraph (c);

“**conditioning**”, in relation to propagating material of a plant variety, means:

(a) cleaning, coating, sorting, packaging or grading of the material; or

(b) any other similar treatment;

undertaken for the purpose of preparing the material for propagation or sale;

“**contracting party**” means a State, or an intergovernmental organisation, that is a party to the Convention;

“**Convention**” means the International Convention for the Protection of New Varieties of Plants, a copy of the English text of which is set out in the Schedule;

“Court” means the Federal Court of Australia;

“dependent plant variety”, in relation to another plant variety in which a person holds PBR in Australia, means a plant variety over which PBR in the other plant variety extends under section 13;

“essential characteristics”, in relation to a plant variety, means heritable traits that are determined by the expression of one or more genes, or other heritable determinants, that contribute to the principal features, performance or value of the variety;

“genetic resource centre” means a place that the Secretary declares to be a genetic resource centre under subsection 70(1);

“grantee”:

- (a) in relation to PBR in a plant variety—means the person currently entered on the Register as the holder of that right in that variety; and
- (b) in relation to PBR in a plant variety declared to be an essentially derived variety of another plant variety—includes the person currently entered on the Register as the holder of that right in relation to that other plant variety;

“herbarium” means the organisation that the Secretary declares to be the herbarium under section 71;

“hybrid” means a plant that is a combination of 2 or more genotypes of the same or different taxa but excluding a combination comprising a scion grafted on to a root stock;

“member” means a member of the Advisory Committee and includes the Registrar;

“PBR”, in a plant variety, means the plant breeder's right specified in section 11;

“PBR”, in respect of a plant variety registered in another contracting party, means a plant breeder's right corresponding to the right specified in section 11 conferred under the law of that contracting party;

“plant” includes all fungi and algae but does not include bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages;

“plant variety” means a plant grouping (including a hybrid):

- (a) that is contained within a single botanical taxon of the lowest known rank; and
- (b) that can be defined by the expression of the characteristics resulting from the genotype of each individual within that plant grouping; and
- (c) that can be distinguished from any other plant grouping by the expression of at least one of those characteristics; and
- (d) that can be considered as a functional unit because of its suitability for being propagated unchanged;

Note: Plant groupings for the purposes of this definition include genetically modified plant groupings. See section 6.

“process”, in relation to the reproduction of propagating material, of a plant variety does not include:

- (a) the development of a cell or tissue or a plant part into a plant of that variety; or
- (b) the growth of a plant into a larger plant of that variety;

“propagating material”, in relation to a plant of a particular plant variety, means any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics can be produced;

“propagation”, in relation to a living organism or its components, means the growth, culture or multiplication of that organism or component, whether by sexual or asexual means;

“Register” means the Register of Plant Varieties kept under section 61;

“Registrar” means the Registrar of Plant Breeder's Rights;

“reproduction”, in relation to propagating material of a plant of a particular variety, means any process, whereby the number of units of that propagating material that have the capacity to grow into independent plants is multiplied;

“Secretary” means the Secretary of the Department;

“sell” includes letting on hire and exchanging by way of barter;

“successor” means:

- (a) in relation to a breeder of a plant variety—a person to whom the right of the breeder to make application for PBR in that variety has been assigned, or transmitted by will or by operation of law; and
- (b) in relation to a grantee of PBR—a person to whom that right has been assigned, or transmitted by will or by operation of law;

“synonym”, in relation to the name of a plant variety in which PBR has been granted in another contracting party, means a name, additional to the name of the variety, by which the variety will be known and sold in Australia;

“will” includes a codicil.

(2) If a provision of this Act requires or authorises the Secretary or the Registrar to give written notice of any matter to a particular person and does not specify the means of giving that notice, that provision is to be taken, for the purposes of section 29 of the *Acts Interpretation Act 1901* to authorise or require the Secretary or Registrar to serve the notice on the person personally or by post.

Definition of essentially derived varieties

4. A plant variety is taken to be an essentially derived variety of another plant variety if:

- (a) it is predominantly derived from that other plant variety; and

- (b) it retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and
- (c) it does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety.

Definition of breeding

5.(1) A reference in this Act to breeding, in relation to a new plant variety, includes a reference to the discovery of a plant together with its use in selective propagation so as to enable the development of the new plant variety.

(2) If a plant is discovered by one person but used in selective propagation by another so as to enable the development of a new plant variety, those persons are together taken to be the joint breeders of the new plant variety.

Genetic modification

6. For the purposes of this Act, an organism may be treated as constituting a plant grouping within a single botanical taxon despite the fact that the genome of the plants in that plant grouping has been altered by the introduction of genetic material that is not from plants.

Approved forms

7.(1) In this Act, a reference to an approved form is a reference to a form that is approved, by instrument in writing, by the Secretary.

(2) The instrument by which a form is approved under subsection (1) is a disallowable instrument for the purpose of section 46A of the *Acts Interpretation Act 1901*.

Approved persons

8.(1) In this Act, a reference to an approved person is a reference to a person who, on the basis of the person's qualifications and experience, the Secretary has designated, by instrument in writing, to be such a person in relation to one of more species of plant.

(2) The Registrar must, from time to time, cause lists of all persons who are approved persons in relation to particular species of plant to be published in the *Plant Varieties Journal*.

Act to bind Crown

9.(1) This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.

(2) Nothing in this Act renders the Crown, in any of its capacities, liable to be prosecuted for an offence.

Extent of Act

10. Nothing in this Act requires or permits the granting of PBR in a plant variety unless:

- (a) if Australia is a party to the Convention—the grant is appropriate to give effect to the obligations of Australia under the Convention; or
- (b) the breeding of the plant variety constitutes an invention for the purpose of paragraph 51(xviii) of the Constitution.

PART 2—PLANT BREEDER'S RIGHT

General nature of PBR

11. Subject to sections 16, 17, 18, 19 and 23, PBR in a plant variety is the exclusive right, subject to this Act, to do, or to license another person to do, the following acts in relation to propagating material of the variety:

- (a) produce or reproduce the material;
- (b) condition the material for the purpose of propagation;
- (c) offer the material for sale;
- (d) sell the material;
- (e) import the material;
- (f) export the material;
- (g) stock the material for the purposes described in paragraph (a), (b), (c), (d), (e) or (f).

Extension of PBR to cover essentially derived varieties

12. Subject to section 23, if:

- (a) PBR is granted to a person in a plant variety (the “**initial variety**”); and
- (b) PBR is granted to another person in another plant variety; and
- (c) the Secretary makes a declaration, on application by the first-mentioned person, that the other plant variety is an essentially derived variety from the initial variety;

the right granted in the initial variety extends, with effect from the date of the declaration, to that other plant variety.

Extension of PBR to cover certain dependent plant varieties

13. Subject to section 23, if PBR is granted in a plant variety (the “**initial variety**”), the right extends to:

- (a) any other plant variety that:
 - (i) is not clearly distinguishable from the initial variety; and
 - (ii) is clearly distinguishable from any plant variety that was a matter of common knowledge at the time of the grant of PBR in the initial variety; and

- (b) any other plant variety that cannot be reproduced except by the repeated use of the initial variety or of a variety referred to in paragraph (a);

whether or not that other plant variety was in existence at the time PBR was granted in the initial variety.

Extension of PBR to harvested material in certain circumstances

14.(1) If:

- (a) propagating material of a plant variety covered by PBR is produced or reproduced without the authorisation of the grantee; and
- (b) the grantee does not have a reasonable opportunity to exercise the grantee's right in relation to the propagating material; and
- (c) material is harvested from the propagating material;

section 11 operates as if the harvested material were propagating material.

(2) Subsection (1) applies to so much of the material harvested by a farmer from propagating material conditioned and reproduced in the circumstances set out in subsection 17(1) as is not itself required by the farmer, for the farmer's own use, for reproductive purposes.

Extension of PBR to products obtained from harvested material in certain circumstances

15. If:

- (a) propagating material of a plant variety covered by PBR is produced or reproduced without authorisation of the grantee; and
- (b) the grantee does not have a reasonable opportunity to exercise the grantee's rights in relation to the propagating material; and
- (c) material is harvested from plants grown from the propagating material but the grantee does not have, in the circumstances set out in section 14, a reasonable opportunity of exercising the grantee's rights in the harvested material; and
- (d) products are made from the harvested material;

section 11 operates as if those products were propagating material.

Certain acts done for private, experimental or breeding purposes do not infringe PBR

16. Any act done in relation to a plant variety covered by PBR that is done:

- (a) privately and for non-commercial purposes; or
- (b) for experimental purposes; or
- (c) for the purpose of breeding other plant varieties;

does not infringe the PBR.

Conditioning and use of farm saved seed does not infringe PBR

17.(1) If:

- (a) a person engaged in farming activities legitimately obtains propagating material of a plant variety covered by PBR either by purchase or by previous operation of this section, for use in such activities; and
- (b) the plant variety is not included within a taxon declared under subsection (2) to be a taxon to which this subsection does not apply; and
- (c) the person subsequently harvests further propagating material from plants grown from that first-mentioned propagating material;

the PBR is not infringed by:

- (d) the conditioning of so much of that further propagating material as is required for the person's use for reproductive purposes; or
- (e) the reproduction of that further propagating material.

(2) The regulations may declare a particular taxon to be a taxon to which subsection (1) does not apply.

Other acts that do not infringe PBR

18.(1) Despite the fact that a plant variety is covered by PBR, any act referred to in section 11:

- (a) that is done in relation to the propagating material of plants of that variety; and
- (b) that enables the use of that propagating material:
 - (i) as a food, food ingredient or fuel; or
 - (ii) for any other purpose that does not involve the production or reproduction of the propagating material;

does not infringe the PBR.

(2) Without limiting the generality of subsection (1), for the purpose of that subsection, the use of propagating material of a plant by way of allowing it to sprout and then eating it, or using it in the preparation of food, before it has developed further, is not taken to be a use that involves the production or reproduction of propagating material.

Reasonable public access to plant varieties covered by PBR

19.(1) Subject to subsection (11), the grantee of PBR in a plant variety must take all reasonable steps to ensure reasonable public access to that plant variety.

(2) Reasonable public access to a plant variety covered by PBR is taken to be satisfied if propagating material of reasonable quality is available to the public at reasonable prices, or as gifts to the public, in sufficient quantities to meet demand.

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(3) For the purpose of ensuring reasonable public access to a plant variety covered by PBR, the Secretary may, on behalf of the grantee, in accordance with subsections (4) to (10), license a person whom the Secretary considers appropriate:

- (a) to sell propagating material of plants of that variety; or
- (b) to produce propagating material of plants of that variety for sale; during such period as the Secretary considers appropriate and on such terms and conditions (including the provision of reasonable remuneration to the grantee) as the Secretary considers would be granted by the grantee in the normal course of business.

(4) If, at any time more than 2 years after the grant of PBR in a plant variety, a person considers:

- (a) that the grantee is failing to comply with subsection (1) in relation to the variety; and
 - (b) that the failure affects the person's interests;
- the person may make a written request to the Secretary to exercise a power under subsection (3) in relation to the variety.

(5) A request must:

- (a) set out the reasons why the person considers that the grantee is failing to comply with subsection (1); and
- (b) give particulars of the way in which the person considers that the failure affects the person's interests; and
- (c) give an address of the person for the purposes of notifications under this section.

(6) The Secretary must give the grantee:

- (a) a copy of the request; and
- (b) a written invitation to give the Secretary, within 30 days after giving the request, a written statement of the reasons the Secretary should be satisfied that the grantee:
 - (i) is complying with subsection (1) in relation to the variety; or
 - (ii) will so comply within a reasonable time.

(7) The Secretary must, after considering the request and any statement given by the grantee in response to the invitation under paragraph (6)(b):

- (a) decide whether or not to exercise the power concerned; and
- (b) within 30 days after so deciding, give written notice of the decision to the grantee and to the person making the request.

Note: A decision under this subsection is reviewable by the AAT under section 77.

(8) If the Secretary proposes to exercise a power under subsection (3) in relation to a plant variety, the Secretary must give public notice:

- (a) identifying the variety; and

- (b) setting out particulars of any licence the Secretary proposes to grant; and
 - (c) inviting persons to apply in writing to the Secretary, within 30 days of the publication of the notice, to be granted that licence.
- (9) The Secretary must not grant any such licence unless:
- (a) the Secretary has considered all applications made in response to the invitation; and
 - (b) at least one month before granting any such licence, the Secretary has:
 - (i) given written notice to each such applicant of the name of the proposed licensee; and
 - (ii) given public notice of the name of the proposed licensee.
- (10) If the Secretary:
- (a) has granted a person a licence to produce propagating material of plants of a particular variety; and
 - (b) is satisfied that the person will be unable to obtain such propagating material at a reasonable price or without charge;

the Secretary may, on behalf of the grantee, make that propagating material available to the person from material stored at a genetic resource centre.

Note: A decision under this subsection to make propagating material available is reviewable by the AAT under section 77.

(11) This section does not apply in relation to a plant variety in respect of which the Secretary certifies, in writing, at the time of the grant of PBR, that he or she is satisfied that plants of that variety have no direct use as a consumer product.

Note: A decision under this subsection is reviewable by the AAT under section 77.

PBR is personal property

20.(1) PBR is personal property and, subject to any conditions imposed under section 49, is capable of assignment, or of transmission by will or by operation of law.

(2) An assignment of PBR (otherwise than because of the order of a court) does not have effect unless it is in writing signed by, or on behalf of, the assignor and assignee.

(3) If a grantee of PBR in a plant variety gives another person a licence in that right, the licence binds every successor in title to the interest of that grantee to the same extent as it was binding on that grantee of the PBR.

Registrar must be notified of an assignment of PBR

21.(1) If a person (the “claimant”) claims that PBR was assigned or transmitted to the claimant, the claimant must inform the Registrar in writing that the claimant has acquired that right, giving particulars of the manner in which that right was acquired, within 7 days after acquiring that right.

(2) If the Registrar is satisfied that the right has been so assigned or transmitted, the Registrar must amend the Register by entering the name of the claimant as the holder of that right.

(3) If the Registrar enters the name of the claimant on the Register as the holder of PBR, the Registrar must, within 7 days after entering the name, give written notice to the claimant and to the person who was the holder before the entry was made, stating that the entry has been made.

(4) If the Registrar is not satisfied that PBR has been assigned or transmitted to the claimant, the Registrar must, as soon as possible:

- (a) give written notice to the claimant:
 - (i) telling the claimant that the Registrar is not so satisfied; and
 - (ii) setting out the reasons why the Registrar is not so satisfied; and
- (b) give written notice to the person entered on the Register as the holder of the right:
 - (i) setting out particulars of the information given by the claimant; and
 - (ii) telling the claimant that the Registrar is not so satisfied; and
 - (iii) setting out the reasons why the Registrar is not so satisfied.

(5) A claimant must include, in the notice to the Registrar informing of the assignment or transmission, an address in Australia for the service of documents in accordance with this Act.

Note: A decision under this section to amend or to refuse to amend the Register is reviewable by the AAT under section 77.

Duration of PBR

22.(1) Subject to subsections (4) and (5), PBR in a plant variety begins on the day that the grant of PBR in the variety is made.

- (2) Subject to subsections (3), (4) and (5), PBR in a plant variety lasts for:
- (a) in the case of trees and vines—25 years; and
 - (b) for any other variety—20 years.

(3) The regulations may provide that PBR in a plant variety included within a specified taxon lasts for a longer period than is specified in subsection (2).

(4) PBR in a plant variety that is a dependent plant variety of another plant variety begins on:

- (a) the day that the grant of PBR in the other plant variety is made; or
- (b) the day that dependent variety comes into existence;

whichever occurs last, and ends when PBR in the other variety ceases.

(5) If:

- (a) PBR is held in a plant variety (the “**initial variety**”); and
- (b) another plant variety is declared under section 40 to be an essentially derived variety of the initial variety;

PBR in the initial variety extends to the essentially derived variety from the day on which that declaration is made until the day on which PBR in the initial variety ends.

Exhaustion of PBR

23.(1) PBR granted in a plant variety does not extend to any act referred to in section 11:

- (a) in relation to propagating material of the variety; or
- (b) in relation to propagating material of any essentially derived variety or dependent plant variety;

that takes place after the propagating material has been sold by the grantee or with the grantee's consent unless that act:

- (c) involves further production or reproduction of the material; or
- (d) involves the export of the material:
 - (i) to a country that does not provide PBR in relation to the variety; and
 - (ii) for a purpose other than final consumption.

(2) If:

- (a) a plant variety is declared to be an essentially derived variety of another plant variety (the "**initial variety**"); and
- (b) PBR in the essentially derived variety is held both by the grantee of PBR in the essentially derived variety and by the grantee of PBR in the initial variety;

the reference in subsection (1) to propagating material sold by the grantee or with the grantee's consent is a reference to propagating material sold by, or with the consent of, both of the grantees referred to in paragraph (b).

PART 3—APPLICATION FOR PLANT BREEDER'S RIGHT

Division 1—The making of the application

Right to apply for PBR

24.(1) A breeder of a plant variety may make application to the Secretary for the grant of a PBR in the variety.

(2) The breeder can make the application whether or not:

- (a) the breeder is an Australian citizen; and
- (b) the breeder is resident in Australia; and
- (c) the variety was bred in Australia.

(3) Subject to subsection (4), if 2 or more persons bred a plant variety jointly, those persons or some of them may make a joint application for that right.

(4) If 2 or more persons bred a plant variety jointly, one of those persons is not entitled to apply for PBR in the variety otherwise than jointly with, or with the consent in writing of, each other of those persons.

Right to apply for PBR is personal property

25.(1) The right of a breeder of a plant variety to apply for PBR is personal property and is capable of assignment and of transmission by will or by operation of law.

(2) An assignment of a right to apply for PBR must be in writing signed by or on behalf of the assignor.

Form of application for PBR

26.(1) An application for PBR in a plant variety must:

- (a) be in writing; and
 - (b) be in an approved form; and
 - (c) be lodged in a manner set out in the approved form.
- (2)** The application must contain:
- (a) the name and address of the applicant; and
 - (b) if the applicant is using an agent to make the application on the applicant's behalf—the name and address of the agent; and
 - (c) if the applicant is the breeder of the variety—a statement of that effect; and
 - (d) if the applicant is not the breeder of the variety—the name and address of the breeder and particulars of the assignment, or transmission by will or by operation of law, of the right to make the application; and
 - (e) a brief description, or a brief description and photograph, of a plant of the variety sufficient to establish a *prima facie* case that the variety is distinct from other varieties of common knowledge; and
 - (f) the name of the variety, having regard to the requirements of section 27, and any proposed synonym for that name; and
 - (g) particulars of the location at which, and the manner by which, the variety was bred including, in respect of each variety used in the breeding program:
 - (i) particulars of the names (including synonyms) by which that variety is known and sold in Australia; and
 - (ii) particulars of any PBR granted in Australia or in a contracting party other than Australia; and
 - (h) particulars of any application for, or grant of, rights of any kind in the variety in any other country; and
 - (i) the name of an approved person who:
 - (i) will verify the particulars in the application; and
 - (ii) will supervise any test growing or further test growing of the variety required under section 37; and
 - (iii) will verify a detailed description of the variety when such a description is supplied to the Secretary;
 - (j) such other particulars (if any) as are required by the approved form.

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(3) If an applicant is resident overseas, the applicant must, unless the applicant has appointed an agent resident in Australia to act on the applicant's behalf in the application, specify, in addition to any address overseas, a postal address in Australia for the service of notices on the applicant.

(4) An applicant must, before, or at the time of, lodging an application under this section, pay to the Commonwealth such application fee (if any) as is prescribed.

Names of new plant varieties

27.(1) If PBR has not been granted in another contracting party in a plant variety before an application for that right in that variety is made in Australia, the name set out in the application must comply with subsections (4), (5), (6) and (7).

(2) If, before making an application in Australia for PBR in a plant variety, PBR has been granted in that variety in another contracting party:

- (a) the name of the variety set out in the Australian application must be the name under which PBR was first granted in another contracting party; but
- (b) there may, and, if the name referred to in paragraph (a) does not comply with subsections (4), (5), (6) and (7) there must, also be included in the application a synonym, additional to the name of the variety, by which the variety will also be known and sold in Australia.

(3) The synonym must be a name determined in accordance with subsections (4), (5), (6) and (7) as if the variety had not been the subject of a grant of PBR in another contracting party.

(4) A name under subsection (1), or a synonym under subsection (3), in respect of a plant variety, must be a word or words (whether invented or not) with or without the addition of either or both of the following:

- (a) a letter or letters that do not constitute a word;
- (b) a figure or figures.

(5) A name under subsection (1), or a synonym under subsection (3), in respect of a plant variety must not:

- (a) be likely to deceive or cause confusion, including confusion with the name of another plant variety; or
- (b) be contrary to law; or
- (c) contain scandalous or offensive matter; or
- (d) be prohibited by regulations in force at the time of the application; or
- (e) be or include a trade mark that is registered, or whose registration is being sought, under the *Trade Marks Act 1955*, in respect of live plants, plant cells and plant tissues.

(6) A name under subsection (1), or a synonym under subsection (3), in respect of a plant variety must comply with the International Code of Botanical Nomenclature and subsidiary codes.

(7) A name under subsection (1), or a synonym under subsection (3), in respect of a plant variety must not consist of, or include:

- (a) the name of a natural person living at the time of the application unless the person has given written consent to the name of the variety; or
- (b) the name of a natural person who died within the period of 10 years before the application unless the legal personal representative of the person has given written consent to the name of the variety; or
- (c) the name of a corporation or other organisation, unless the corporation or other organisation has given its written consent to the name of the variety.

Applications to be given priority dates

28.(1) The Secretary must ensure that each application for PBR is given a priority date.

(2) The priority date is, unless section 29 applies in relation to the application, the date on which the application was lodged with the Secretary.

(3) If 2 or more applications are made for PBR in the same plant variety, the Secretary must first consider the application having the earlier priority date.

Priority dates arising from foreign application

29.(1) A person who lodges an application (the “**foreign application**”) for PBR in a plant variety in a contracting party other than Australia may, in accordance with this section, claim the date of that foreign application as the priority date for the purposes of a subsequent application in Australia for those rights in that variety.

(2) If:

- (a) during that period of 12 months after the date of the foreign application, the person lodges an application in Australia (the “**local application**”) for PBR in the variety; and
- (b) the person accompanies the local application with a claim to have the date of the foreign application treated as the priority date for the purposes of the local application;

the person is, if the local application is accepted and subject to subsections (3) and (4), entitled to have the date referred to in paragraph (b) treated as the priority date for the purposes of the local application.

(3) The entitlement of the person to the priority date referred to in subsection (2) is conditional on the person lodging with the Secretary, within 3 months of making the local application, a copy of the documents that constituted the foreign application, certified by the Authority that received the foreign application to be a true copy of the documents.

(4) The entitlement of the person to the priority date referred to in subsection (2) is conditional on the person providing to the Secretary, within a period of 3 years after the making of the foreign application, such further particulars in relation to the plant variety as are required to complete the consideration of the local application.

Acceptance or rejection of applications

30.(1) The Secretary must, as soon as practicable after an application for PBR is lodged in a plant variety, decide whether to accept or reject the application.

(2) If the Secretary is satisfied that:

- (a) no other application has, or, if the application were to meet the requirements of paragraphs (b) and (c), would have, an earlier priority date in the variety; and
- (b) the application complies with the requirements of section 26; and
- (c) the application establishes a *prima facie* case for treating the plant variety as distinct from other varieties;

the Secretary must accept the application.

(3) If the Secretary is not satisfied of all of the matters referred to in subsection (2), the Secretary must reject the application.

(4) If the Secretary decides to accept the application, the Secretary must:

- (a) give written notice to the applicant telling the applicant that the application has been accepted; and
- (b) as soon as possible after notifying the applicant—give public notice of the acceptance of the application.

(5) If the Secretary decides to reject an application, the Secretary must:

- (a) give written notice to the applicant telling the applicant of the rejection and setting out the reasons for the rejection; and
- (b) as soon as possible after notifying the application—give public notice of the rejection of the application.

Note: A decision under this section to accept or reject an application is reviewable by the AAT under section 77.

Requests for variation of application

31.(1) If:

- (a) after an application for PBR in a plant variety has been accepted; but
- (b) before concluding the examination of that application (including the subsequent detailed description of that variety) and of any objection to the application;

the right of the applicant to apply for PBR in a particular plant variety is assigned to, or has been transmitted by will or operation of law to, another person, that other person may request the Secretary, in writing, to vary the application so that that other person is shown as the applicant.

(2) If the Secretary is satisfied that the right to apply for PBR in a particular plant variety has been assigned to, or has been transmitted by will or operation of law to, to a particular person, the Secretary must vary the application so that that person is shown as the applicant.

(3) A request by a person under subsection (1) must give an address in Australia for the service of notices on the person for the purposes of this Act.

(4) If the Secretary complies with a request under subsection (1) and the address for the service of notices that is given in connection with that request is different from the address contained in the application as the address for service of documents on the applicant, the Secretary must vary the application so that the address so given is shown as the address for service of documents on the applicant.

(5) If:

- (a) after an application for PBR in a plant variety has been accepted; but
- (b) before concluding the examination of that application (including the subsequent detailed description of that variety) and of any objection to the application;

the applicant requests the Secretary, in writing, to vary the application in any other respect other than that referred to in subsection (1), the Secretary may, in his or her discretion, vary the application in accordance with the request.

(6) Despite the previous provisions of this section, the Secretary is not obliged or permitted to vary an application in response to a request under this section unless the person making the application for the variation has paid to the Commonwealth the application variation fee that is prescribed for the purposes of this section.

Note: A decision under this section to vary or to refuse to vary an application is reviewable by the AAT under section 77.

Notification of decisions on requests to vary application

32.(1) If the Secretary varies an application in accordance with a request under subsection 31(1) or (5), the Secretary must, as soon as practicable, give written notice to the person making the request telling the person that the application has been so varied.

(2) If the Secretary rejects a request under subsection 31(1) or (5), the Secretary must, as soon as practicable, give written notice to the person making the request:

- (a) telling the person that the request has been rejected; and
- (b) setting out the reasons for the rejection.

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(3) If the Secretary rejects a request under subsection 31(1), the Secretary must, as soon as practicable, also give written notice to the applicant:

- (a) setting out particulars of the request; and
- (b) telling the applicant that the request has been rejected; and
- (c) setting out the reasons for the rejection.

(4) If the Secretary varies an application in accordance with a request under subsection 31(1), the Secretary must, as soon as practicable, also give written notice of particulars of the variation to the person who was the applicant before the variation was made.

(5) If an application:

- (a) is varied because of a request under subsection 31(1); or
- (b) is varied because of a request under subsection 31(5) in a significant respect;

the Secretary must, as soon as practicable, give public notice of particulars of the variation.

Withdrawal of application

33.(1) An application may be withdrawn by the applicant at any time.

(2) If an application is withdrawn after public notice of acceptance of the application is given, the Secretary must, as soon as practicable, give public notice of the withdrawal.

Division 2—Dealing with the application after its acceptance

Detailed description in support of application to be given to Secretary

34.(1) As soon as practicable after, but not later than 12 months after, an application has been accepted, or within such further period as the Secretary allows for the purpose, the applicant must, if the applicant has not already done so, give the Secretary a detailed description of the plant variety to which the application relates.

Note: A decision under this subsection to refuse to extend the 12 months period is reviewable by the AAT under section 77.

(2) If the applicant fails to give the Secretary the detailed description required under this section within the required period, the application is taken to have been withdrawn.

(3) The detailed description must:

- (a) be in writing; and
- (b) be in an approved form; and
- (c) be lodged with the Secretary in a manner set out in the approved form.

(4) The detailed description must contain:

(a) particulars of the characteristics that distinguish the variety from other plant varieties the existence of which is a matter of common knowledge; and

(b) particulars of:

(i) any test growing carried out, including a test growing carried out as required under section 37, to establish that the variety is distinct, uniform and stable; and

(ii) any test growing carried out as required under section 41; and

(c) if the variety was bred outside Australia—particulars of any test growing outside Australia that tend to establish that the variety will, if grown in Australia, be distinct, uniform and stable; and

(d) such other particulars (if any) as are required by the approved form; and must be accompanied by a certificate, in the approved form, verifying the particulars of the detailed description, completed by the approved person nominated in the application as the approved person in relation to that application.

(5) The Secretary must, as soon as practicable after receiving a detailed description of a plant variety to which an application for PBR relates, give public notice of that description.

(6) The applicant must:

(a) unless paragraph (b) applies—within 12 months after the application has been accepted; and

(b) if the detailed description has been given to the Secretary before the end of that period—at the time when the description was given;

pay to the Commonwealth such examination fee as is prescribed.

Objection to application for PBR

35.(1) Any person who considers, in relation to an application for PBR in a plant variety that has been accepted:

(a) that his or her commercial interests would be affected by the grant of that PBR to the applicant; and

(b) that the Secretary cannot be satisfied, in relation to that application, of a matter referred to in a paragraph of subsection 26(2) or in subparagraph 44(1)(b)(i), (ii), (iii), (iv), (v), (vi), (vii) or (viii);

may lodge a written objection to the grant of PBR with the Secretary at any time after the giving of that public notice of acceptance of the application and before the end of the period of 6 months starting with the public notice of that detailed description.

(2) An objection must set out:

(a) particulars of the manner in which the person considers his or her commercial interests would be affected; and

(b) the reasons why the person considers that the Secretary cannot be satisfied of a matter referred to in paragraph (1)(b).

(3) The Registrar must give a copy of the objection to the applicant.

Inspection of applications and objections

36.(1) A person may, at any reasonable time, inspect an application for PBR in a plant variety (including any detailed description of the plant variety given in support of the application) or an objection lodged in respect of that application (including that detailed description).

(2) A person is entitled, on payment of such fee as is prescribed, to be given a copy of an application for PBR in a plant variety, of an objection to such an application, or of a detailed description of the plant variety.

Test growing of plant varieties

37.(1) If, in dealing with:

- (a) an application for PBR that has been accepted; or
- (b) an objection to such an application for PBR; or
- (c) a request for revocation of PBR;

the Secretary decides that there should be a test growing or a further test growing of the variety to which the application, objection or request relates, the Secretary must give written notice of that decision:

- (d) to the person who made the application, objection or request; and
- (e) in the case of an objection to an application for PBR—also to the applicant; and
- (f) in the case of a request for revocation of PBR—also to the grantee.

Note: A decision under this subsection to require a test growing is reviewable by the AAT under section 77.

(2) The notice, in addition to telling the person of the Secretary's decision:

- (a) must specify the purpose of the test growing; and
- (b) may require the person:
 - (i) to supply the Secretary with sufficient plants or sufficient propagating material of plants of the variety, and with any necessary information, to enable the Secretary to arrange a test growing; or
 - (ii) to make arrangements for an approved person to supervise the test growing, to supply the approved person with sufficient plants or propagating material to enable the test growing, to give the Secretary a copy of the records of observations made during the test growing and to certify the records of observations so provided;

whichever the Secretary considers appropriate.

(3) If a notice under this section contains the requirement referred to in subparagraph (2)(b)(i) and the applicant complies with the request, the Secretary must arrange to have the variety concerned test grown.

(4) After completion of a test growing arranged by the Secretary, any propagating material of the variety used in, or resulting from, the test growing, that is capable of being transported must be delivered to the person by whom propagating material of that variety was supplied for the purposes of the test growing.

- (5) All of the costs associated with a test growing must be paid:
- (a) if it is conducted to deal with an application for PBR—by the applicant for PBR; or
 - (b) if it is conducted to deal with an objection to an application for PBR—by the objector; or
 - (c) if it is conducted to deal with a request for a revocation of PBR—by the person making the request.

Characteristics of plant varieties bred or test grown outside Australia

38.(1) If:

- (a) a plant variety (the “**subject variety**”):
- (i) was bred outside Australia; or
 - (ii) was bred in Australia but, before an application for PBR was made in Australia, an application for PBR was made in a contracting party other than Australia; and
- (b) an application under this Act for PBR in the variety has been accepted;

the variety is not to be taken to have a particular characteristic unless subsection (2), (3), (4) or (5) applies to the variety.

(2) This subsection applies to the subject variety if a test growing in Australia has demonstrated that the variety has the particular characteristic.

- (3) This subsection applies to the subject variety if:
- (a) a test growing of the variety has been carried out outside Australia; and
 - (b) that test growing has demonstrated that the variety has the particular characteristic; and
 - (c) under an agreement between Australia and the country in which the test growing was carried out, Australia is required to accept that the variety has that particular characteristic.

(4) This subsection applies to the subject variety if the Secretary is satisfied that:

- (a) a test growing of the variety carried out outside Australia has demonstrated that the variety has the particular characteristic; and

(b) that test growing of the variety is equivalent to a test growing of the variety in Australia.

(5) This subsection applies to the subject variety if the Secretary is satisfied that:

- (a) a test growing of the variety carried out outside Australia has demonstrated that the variety has the particular characteristic; and
- (b) any test growing of the variety carried out in Australia would probably demonstrate that the variety has that characteristic; and
- (c) if a test growing of the variety in Australia sufficient to demonstrate whether the variety has that characteristic were to be carried out, it would take longer than 2 years.

Note: A decision to the effect that the Secretary is, or is not, satisfied of the matters referred to in subsection (4) or (5) is reviewable by the AAT under section 77.

Division 3—Provisional protection

Provisional protection

39.(1) When an application for PBR in a plant variety is accepted, the applicant is taken to be the grantee of that right for the purposes of Part 5 from the day the application is accepted until:

- (a) the application is disposed of; or
- (b) if the Secretary gives the applicant a notice under subsection (2)—the notice is disposed of;

whichever occurs first.

(2) If the Secretary is satisfied in relation to an application for PBR in a plant variety, that:

- (a) PBR will not be granted or is unlikely to be granted to the applicant; or
- (b) the applicant has given an undertaking to a person (whether or not for consideration) not to commence proceedings for infringement of the right of which the applicant is deemed to be the grantee;

the Secretary may notify the applicant, in writing, that this section will cease to apply to that variety on a day specified in the notice unless, before that time the applicant has made a submission to the Secretary providing reasons why this section should not cease to apply.

Note: A decision under this subsection to notify an applicant is reviewable by the AAT under section 77.

(3) For the purposes of paragraph (1)(b) a notice referred to in that paragraph is not taken to be disposed of until:

- (a) the end of the period within which application may be made to the AAT for a review of the giving of the notice; or
- (b) if such an application is made to the AAT—the application is withdrawn or finally determined, whether by the AAT or a court.

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(4) As soon as practicable after a person ceases to be taken to be the grantee of PBR under this section, the Secretary must give public notice that the person has ceased to be so taken.

(5) Nothing in this section affects the powers of the Federal Court under subsection 44A(2) of the AAT Act where an appeal is begun in that Court from a decision of the AAT.

(6) A person who is taken to be the grantee of PBR in a plant variety is not entitled to begin an action or proceeding for an infringement of that right occurring during the period when the person is so taken unless and until that right is finally granted to the person under section 44.

Division 4—Essential derivation

Applications for declarations of essential derivation

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**”); 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.

(2) Nothing in this section implies that a person who is the grantee of PBR in the initial variety may not, in relation to an application by another person for PBR in the second variety that has been accepted but not finally determined:

- (a) make an objection, under section 35, to the granting of PBR in the second variety; and
 - (b) in the alternative, if PBR is granted to another person in the second variety—apply under subsection (1) for a declaration that the second variety is essentially derived from the initial variety.
- (3) If the second variety:
- (a) is the subject of an application for PBR; and
 - (b) is also the subject of an application for a declaration of essential derivation;

then, unless and until the Secretary decides to grant the application for PBR:

- (c) the Secretary must not make the declaration of essential derivation; but

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- (d) the Secretary may, in his or her discretion:
- (i) examine both the application for PBR and the application for a declaration of essential derivation at the same time; and
 - (ii) for the purpose only of examining the application for a declaration of essential derivation—treat the applicant for PBR as the grantee of PBR in the variety.

- (4) An application for a declaration of essential derivation must:
- (a) be in writing; and
 - (b) be in an approved form; and
 - (c) be lodged with the Secretary in a manner set out in the approved form; and
 - (d) be accompanied by the prescribed fee in respect of the application.

(5) An application must contain such information relevant to establishing a *prima facie* case that the second variety is an essentially derived variety of the initial variety as is required by the form.

(6) If the initial variety has itself been declared to be essentially derived from another variety, the Secretary must refuse to declare the second variety essentially derived from:

- (a) the initial variety; and
- (b) inform the applicant for the declaration in writing, to that effect, and give the applicant reasons for the decision.

(7) If the initial variety has not been so declared, the Secretary must determine, on the basis of the application, whether the Secretary is satisfied that there is a *prima facie* case that the second variety is an essentially derived variety of the initial variety.

(8) If the Secretary is satisfied of that *prima facie* case, the Secretary must:

- (a) inform the applicant and the grantee of PBR in the second variety that the Secretary is so satisfied; and
- (b) inform the grantee of PBR in the second variety that, unless the grantee establishes, within 30 days after being so informed or such longer period as the Secretary allows, that the second variety is not an essentially derived variety of the initial variety, the Secretary will, at the end of that period, declare the second variety to be such an essentially derived variety.

Note: A decision under this subsection to refuse to extend the period of 30 days is reviewable by the AAT under section 77.

(9) If the Secretary is not satisfied of that *prima facie* case, the Secretary must inform the applicant, in writing, to that effect, and give the applicant reasons for the decision.

(10) If, after considering:

- (a) the information presented by the grantee of PBR in the second variety; and
- (b) any information obtained from a test growing conducted in accordance with section 41; and
- (c) any other relevant information obtained by the Secretary;

the Secretary is not satisfied that the grantee of PBR in the second variety has rebutted the *prima facie* case, the Secretary must:

- (d) declare, in writing, that the second variety is an essentially derived variety of the initial variety; and
- (e) by notice in writing given to the grantee of PBR in the initial variety, tell that grantee of the declaration; and
- (f) by notice in writing given to the grantee of PBR in the second variety, tell that grantee of the declaration and set out the reasons for not being satisfied that the *prima facie* case has been rebutted.

(11) If, after considering the information referred to in paragraph (10)(a), (b) or (c), the Secretary is satisfied that the grantee of PBR in the second variety has rebutted the *prima facie* case, the Secretary must:

- (a) by notice in writing given to the grantee of PBR in the initial variety, tell that grantee that he or she is so satisfied and set out the reasons for being so satisfied; and
- (b) by notice in writing given to the grantee of PBR in the second variety, tell that grantee that he or she is so satisfied.

(12) While a declaration that the second variety is essentially derived from the initial variety remains in force, section 19 applies in relation to the second variety as if:

- (a) the references in that section to the grantee, in relation to that variety were references both to the person holding PBR in that variety and to the person holding PBR in the initial variety; and
- (b) the reference in subsection 19(4) to 2 years after the grant of PBR were a reference to 2 years after the grant of PBR in the second variety whether or not the declaration of essential derivation was made at the same time or a later time; and
- (c) a failure by the other person holding PBR in the initial variety or the person holding PBR in the second variety to co-operate in making the second variety available to the public in accordance with the requirements of subsection 19(1) was a failure of the grantee to comply with the requirements of that subsection.

Note: A decision under this section to declare, or not to declare, a plant variety essentially derived is reviewable by the AAT under section 77.

Test growing associated with applications for declarations of essential derivation

41.(1) If:

- (a) the grantee of PBR in a plant variety (the “**initial variety**”) applies for a declaration that another variety (the “**second variety**”) is an essentially derived variety of the initial variety; and
- (b) in the course of that application the grantee of PBR in the initial variety establishes a *prima facie* case that the second variety is essentially derived; and
- (c) on the basis of information supplied by the grantees of PBR in the initial variety and in the second variety, the Secretary comes to the view that a test growing or further test growing is necessary to determine whether the *prima facie* case has been rebutted;

the Secretary must give notice of that decision both to the grantee of PBR in the initial variety and in the second variety.

Note: A decision under this subsection to require a test growing is reviewable by the AAT under section 77.

- (2) The notice must require:
 - (a) the grantee of PBR in the initial variety to supply the Secretary with sufficient plants or sufficient propagating material of plants of that variety and with any necessary information; and
 - (b) the grantee of PBR in the second variety to supply the Secretary with sufficient plants or sufficient propagating material of plants of that second variety and with any necessary information;

to enable the Secretary to arrange a test growing.

(3) After completion of the test growing, any propagating material of a variety used in, or resulting from, the test growing that is capable of being transported must be delivered to the person by whom propagating material of that variety was supplied for the purpose of the test growing.

(4) All costs associated with the test growing must be paid by the person who, without the test growing, failed to rebut the *prima facie* case of essential derivation, whether or not the test growing led to rebuttal of that case.

(5) If the Secretary requires a test growing or further test growing, subsection 40(8) has effect as if the reference in that subsection to 30 days after being so informed were a reference to 30 days after being informed of the results of the test growing.

PART 4—THE GRANT AND REVOCATION OF PLANT BREEDER'S RIGHT

Division 1—Grant of Plant Breeder's Right

PBR not to be granted in excluded varieties

42.(1) PBR must not be granted in any variety of plant in a taxon that the regulations declare to be a taxon to which this Act does not apply.

(2) The Governor-General must not make a regulation for the purposes of subsection (1) unless the Governor-General has been informed by the Minister that the Minister has considered advice given by the Advisory Committee in relation to the desirability of making the regulation.

(3) If:

(a) a plant variety is a hybrid; and

(b) each of the plant varieties from which it is derived is a plant variety included in a taxon to which this Act does not apply;

PBR must not be granted in the hybrid.

Registrable plant varieties

43.(1) For the purposes of this Act, a plant variety in which an application for PBR is made is registrable if:

(a) the variety has a breeder; and

(b) the variety is distinct; and

(c) the variety is uniform; and

(d) the variety is stable; and

(e) the variety has not been exploited or has been only recently exploited.

(2) For the purposes of this section, a plant variety is distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge.

(3) For the purposes of this section, a plant variety is uniform if, subject to the variation that may be expected from the particular features of its propagation, it is uniform in its relevant characteristics on propagation.

(4) For the purposes of this section, a plant variety is stable if its relevant characteristics remain unchanged after repeated propagation.

(5) For the purposes of this section, a plant variety is taken not to have been exploited if, at the date of lodging the application for PBR in the variety, propagating or harvested material of the variety has not been sold to another person by, or with the consent of, the breeder.

(6) For the purposes of this section, a plant variety is taken to have been only recently exploited if, at the date of lodging the application for PBR in the variety, propagating or harvested material of the variety has not been sold to another person by, or with the consent of, the breeder:

(a) in Australia—more than one year before that date; or

(b) in the territory of another contracting party:

(i) in the case of trees or vines—more than 6 years before that date; or

(ii) in any other case—more than 4 years before that date.

(7) Subsection (6) does not apply to a sale by the breeder of a plant variety of propagating or harvested material of the variety to another person if that sale is a part of, or related to, another transaction under which the right of the breeder to make application for PBR in that plant variety is sold to that other person.

(8) In addition to any other reason for treating a plant variety as a variety of common knowledge, a variety is to be treated as a variety of common knowledge if:

- (a) an application for PBR in the variety has been lodged in a contracting party; and
- (b) the application is not subsequently refused.

(9) A plant variety that is to be treated as a variety of common knowledge under subsection (8) because of an application for PBR in the variety is to be so treated from the time of the application.

Grant of PBR

44.(1) If:

- (a) an application for PBR in a plant variety is accepted; and
- (b) after examining the application (including the subsequent detailed description) and any objection to the application, the Secretary is, or continues to be, satisfied that:
 - (i) there is such a variety; and
 - (ii) the variety is a registrable plant variety within the meaning of section 43; and
 - (iii) the applicant is entitled to make the application; and
 - (iv) the grant of that right is not prohibited by this Act; and
 - (v) that right has not been granted to another person; and
 - (vi) the name of the variety complies with section 27; and
 - (vii) propagating material of that variety has been deposited for storage, at the expense of the applicant, in a genetic resource centre approved by the Secretary; and
 - (viii) if the Secretary so requires, a satisfactory specimen plant of the variety has been supplied to the herbarium; and
 - (ix) all fees payable under this Act in respect of the application, examination and grant have been paid;

the Secretary must grant that right to the applicant.

(2) If:

- (a) an application for PBR in a plant variety is accepted; and
 - (b) the plant variety is a variety of a species indigenous to Australia;
- the Secretary must require supply of a satisfactory specimen plant of the variety to the herbarium.

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(3) If:

- (a) an application for PBR in a plant variety is accepted; and
- (b) the Secretary is not satisfied of all of the matters referred to in paragraph (1)(b);

the Secretary must refuse to grant that right to the applicant.

(4) The Secretary must not grant or refuse to grant PBR in a plant variety until at least 6 months after the giving of public notice of the detailed description of the variety.

(5) If:

- (a) an application for PBR in a plant variety has been varied under section 31; and
- (b) the variation relates to the detailed description of the variety that has been given to the Secretary; and
- (c) the Secretary has given public notice of the variation;

the Secretary must not grant, or refuse to grant, PBR in the variety until 6 months after giving public notice of the variation or of the last such variation.

(6) If an objection to an application for PBR is made under section 35, the Secretary must give the applicant 30 days, starting when a copy of the objection is given to the applicant, or such longer period as the Secretary considers to be reasonable in the circumstances, to provide an answer to the objection.

(7) A quantity of propagating material of a plant variety that is lodged with a genetic resource centre must be sufficient to enable that variety to be kept in existence if there were no other propagating material of plants of that variety.

(8) The delivery and storage of propagating material of a plant variety does not affect the ownership of the material but the material must not be dealt with otherwise than for the purposes of this Act.

(9) The propagating material of a plant stored at a genetic resource centre may be used by the Secretary for the purposes of this Act, including the purposes of section 19.

(10) PBR is granted to a person by the issue to that person by the Secretary of a certificate in an approved form, signed by the Secretary or the Registrar, containing such particulars of the plant variety concerned as the Secretary considers appropriate.

(11) If the PBR is granted to persons who make a joint application for the right, the right is to be granted to those persons jointly.

(12) If the Secretary refuses to grant PBR in a plant variety, the Secretary must, within 30 days of so refusing, give written notice to the applicant:

- (a) telling the applicant of the refusal; and
- (b) setting out the reasons for the refusal.

Note: A decision under this section to grant, or refuse to grant, PBR in a plant variety is reviewable by the AAT under section 77.

Grant of PBR to be exclusive

45.(1) Subject to subsections (2) and (3), only one grant of PBR may be made under this Act in relation to a plant variety.

(2) If 2 breeders lodge a joint application for PBR, the Registrar may grant PBR to them jointly.

(3) If:

- (a) a person is the grantee of PBR in a plant variety (the “**initial variety**”); and
- (b) another person is the grantee of PBR in another plant variety; and
- (c) the Secretary declares the other variety to be an essentially derived variety of the initial variety;

subsection (1) does not prevent PBR in the initial variety extending to the other variety.

Grant of PBR to be entered on Register

46.(1) When the Secretary grants PBR in a plant variety, the Registrar must enter in the Register:

- (a) a description, or description and photograph, of a plant of that variety; and
- (b) the name of the variety and any proposed synonym; and
- (c) the name of the grantee; and
- (d) the name and address of the breeder; and
- (e) the address for the service of documents on the grantee for the purposes of this Act as shown on the application for the right; and
- (f) the day on which the right is granted; and
- (g) such other particulars relating to the granting as the Registrar considers appropriate.

(2) When the Secretary makes a declaration that a variety (the “**derived variety**”) is essentially derived from another variety (the “**initial variety**”), the Registrar must enter in the Register both in respect of the derived variety and the initial variety:

- (a) the fact that the declaration has been made; and
- (b) the day on which the declaration was made.

Notice of grant of PBR

47.(1) The Secretary must, as soon as possible after granting PBR to a person, give public notice of the grant in the *Plant Varieties Journal*.

(2) The Secretary must, as soon as possible after the making of a declaration that a plant variety is an essentially derived variety of another plant variety, give public notice of the making of the declaration in the *Plant Varieties Journal*.

Effect of grant of PBR

48.(1) If a person is granted PBR in a plant variety:

- (a) any other person who was entitled to make, but had not made, application for the right in the variety:
 - (i) ceases to be entitled to make such application; and
 - (ii) is not entitled to any interest in the right; and
- (b) any other person who had made application for the right in the variety:
 - (i) ceases to be entitled to have his or her application considered or further considered; and
 - (ii) is not entitled to any interest in the right.

(2) Subsection (1) does not prevent a person:

- (a) from applying for a revocation of the rights under section 50; or
- (b) from instituting proceedings before a court or the AAT in relation to the right; or
- (c) from requesting the Secretary to make a declaration under section 39 that the plant variety in which the right was granted is essentially derived from another plant variety in which the person holds PBR.

(3) If:

- (a) PBR in a particular plant variety is granted to a person; and
- (b) another person (the “**eligible person**”) was entitled, at law or equity, to an assignment of the right to make an application for the PBR;

the eligible person is entitled to an assignment of the PBR.

PBR may be subject to conditions

49.(1) The Minister may, if the Minister thinks it necessary, in the public interest, refer to the Plant Breeder's Rights Advisory Committee the question whether a grant of PBR that the Minister proposes to make, or an existing grant of PBR, should be subject to conditions.

(2) The Minister may, having regard to the views of the Plant Breeder's Rights Advisory Committee on a matter referred under subsection (1), impose such conditions on PBR that is to be granted or that has been granted as the Minister considers appropriate.

(3) If the Minister imposes conditions on PBR:

- (a) the Secretary must give public notice of those conditions and give the grantee a copy of the instrument setting them out; and

- (b) the Registrar must enter details of those conditions in the Register.

Note: A decision under this section by the Minister to make a grant subject to conditions is reviewable by the AAT under section 77.

Division 2—Revocation of Plant Breeder's Right or declaration of essential derivation

Revocation of PBR

50.(1) The Secretary must revoke PBR in a plant variety or a declaration that a plant variety is essentially derived from another plant variety if:

- (a) the Secretary becomes satisfied that facts existed that, if known before the grant of that right or the making of that declaration, would have resulted in the refusal to grant that right or make that declaration; or
- (b) the grantee has failed to pay a fee payable in respect of that right or of that declaration within 30 days after having been given notice that the fee has become payable.

(2) The Secretary may revoke PBR in a plant variety if:

- (a) the Secretary is satisfied that a person to whom that right has been assigned or transmitted has failed to comply with section 21; or
- (b) the Secretary is satisfied that the grantee has failed to comply with a condition imposed under section 49.

(3) If the Secretary revokes PBR in a plant variety or a declaration that a plant variety is essentially derived from another plant variety, the Secretary must, within 7 days after the decision to revoke was taken, by notice given to the grantee of the right that has been revoked or of the right that is affected by the giving of the declaration of essential derivation, tell that grantee of the decision and set out the reasons for the revocation.

(4) The Secretary must not revoke PBR under this section unless:

- (a) the Secretary has given the grantee, or any person to whom the Secretary believes that right has been assigned or transmitted, particulars of the grounds of the proposed revocation; and
- (b) the grantee or that other person has had 30 days after being given those particulars to make a written statement to the Secretary in relation to the proposed revocation.

(5) The Secretary must not under this section, revoke a declaration that a plant variety (the “**initial variety**”) is essentially derived from another plant variety unless:

- (a) the Secretary has given the grantee of PBR in the initial variety, or any person to whom the Secretary believes that that PBR has been assigned or transmitted, particulars of the grounds of the proposed revocation of that declaration of essential derivation; and

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(b) the grantee or that other person has had 30 days after being given those particulars to make a written statement to the Secretary in relation to the proposed revocation.

(6) The revocation of PBR in a plant variety or of a declaration that a plant variety is essentially derived from another plant variety takes effect:

(a) if no application for review of the revocation is made to the AAT—at the end of the period within which such an application might be made; or

(b) if such an application is made—at the time when the application is withdrawn, or finally determined, whether by the Tribunal or by a court.

(7) Nothing in this section affects the power of the Court under subsection 44A(2) of the AAT Act.

(8) A person whose interests are affected by the grant of PBR in a plant variety may apply to the Secretary, in writing, for the revocation of the right.

(9) A person whose interests are affected by the making of a declaration that a plant variety is essentially derived from another plant variety may apply to the Secretary, in writing, for a revocation of that declaration.

(10) If the Secretary decides not to revoke PBR in a plant variety in accordance with an application under subsection (8) or not to revoke a declaration of essential derivation in accordance with subsection (9), the Secretary must, within 7 days of making that decision, by notice in writing to the person who applied for the revocation, tell the person of the decision and set out the reasons for the decision.

Note: A decision under this section to revoke, or refuse to revoke, PBR or a declaration of essential derivation is reviewable by the AAT under section 77.

Entry of particulars of revocation

51.(1) If:

(a) PBR in a plant variety is revoked in accordance with section 50; or

(b) the Secretary is served with a copy of an order of a court given under section 55 revoking that right;

the Secretary must:

(c) enter particulars of the revocation in the Register; and

(d) give public notice of the revocation.

(2) If the holder of PBR in a plant variety fails to pay the prescribed annual fee for the renewal of the right by the last day for payment of that fee, the holder is taken to have surrendered the right.

(3) The Secretary must:

(a) enter particulars of the surrender in the Register; and

(b) give public notice of the surrender.

Surrender of PBR

52. The holder of PBR in a plant variety may, at any time, by written notice to the Secretary, offer to surrender that right.

PART 5—ENFORCEMENT OF PLANT BREEDER'S RIGHT

Infringement of PBR

53.(1) Subject to sections 16, 17, 18, 19 and 23, PBR in a plant variety is infringed by:

- (a) a person doing, without, or otherwise than in accordance with, authorisation from the grantee of the right, an act referred to in a paragraph of section 11 in respect of the variety or of a dependent variety; or
- (b) a person claiming, without, or otherwise than in accordance with, authorisation from the grantee of that right, the right to do an act referred to in a paragraph of section 11 in respect of that variety or of a dependent variety; or
- (c) a person using a name of the variety that is entered in the Register in relation to:
 - (i) any other plant variety; or
 - (ii) a plant of any other plant variety.

(2) If a plant variety (the “**derived variety**”) has been declared to be an essentially derived variety of another plant variety (the “**initial variety**”), the reference in paragraphs (1)(a) and (b) to authorisation from the grantee of the right means, in relation to the derived variety, authorisation from both the grantee of PBR in the derived variety and from the grantee of PBR in the initial variety.

(3) In this section, a reference to the grantee of PBR in a plant variety includes a reference to a person who has, by assignment or transmission, become the holder of that right.

Actions for infringement

54.(1) An action for infringement of PBR in a plant variety may be begun in the Court.

(2) A defendant in an action for infringement of PBR in a plant variety may apply, by way of counterclaim, for revocation of that right on the ground that:

- (a) the variety was not a new plant variety; or
- (b) facts exist that would have resulted in the refusal of the grant of that right if they had been known to the Secretary before the grant of that right.

- (3) If, in an action for infringement of PBR in a plant variety:
- (a) the defendant applies, by way of counterclaim, for the revocation of that right; and
 - (b) the Court is satisfied that a ground for revocation of that right exists; the Court may make an order revoking that right.
- (4) If the Court revoked PBR in a plant variety on the counterclaim of a defendant, the Court may order the defendant to serve on the Registrar a copy of the order revoking that right.

Declarations as to non-infringement

55.(1) A person who proposes to perform an act described in a paragraph of section 11 in relation to the propagating material of a plant variety may, by an action in the Court against the grantee of PBR in a plant variety, apply for a declaration that the performance of that act would not constitute an infringement of that right.

(2) A person may apply for a declaration whether or not there has been an assertion of an infringement of PBR by the grantee of that right.

(3) The Court must not make such a declaration unless:

(a) the person proposing to perform the act:

- (i) has applied in writing to the grantee of the PBR concerned for an admission that the proposed performance of the act would not infringe that right; and
- (ii) has given the grantee full written particulars of the propagating material concerned; and
- (iii) has undertaken to repay all expenses reasonably incurred by the grantee in obtaining advice in the declaration; and

(b) the grantee has refused or failed to make such an admission.

(4) The costs of all parties in proceedings for a declaration under this section are to be paid by the person seeking the declaration unless the Court otherwise orders.

(5) The validity of a grant of PBR in a plant variety is not to be called in question in proceedings for a declaration under this section.

(6) The making of, or the refusal to make, a declaration under this section does not imply that a grant of PBR in a plant variety is, or is not, valid.

Jurisdiction of Court

56.(1) The Court has jurisdiction with respect to matters in which actions may, under this Part, be begun in the Court.

(2) That jurisdiction is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75 of the Constitution.

(3) The relief that the Court may grant in an action or proceeding for infringement of PBR includes an injunction (subject to such terms, if any, as the Court thinks fit) and, at the option of the plaintiff, either damages or an account of profits.

(4) The regulations may make provision in relation to the practice and procedure of the Court in actions under this Act, including provision prescribing the time within which any action may be begun, or any other act or thing may be done, and providing for the extension of any such time.

(5) Subsection (4) does not limit the power of the Judges of the Court or a majority of them to make rules of Court under section 59 of the *Federal Court of Australia Act 1976* that are consistent with the regulations referred to in that subsection.

Innocent infringement

57.(1) The Court may refuse to award damages, or to make an order for an account of profits, against a person in an action for infringement of PBR in a plant variety, if the person satisfies the Court that, at the time of the infringement, the person was not aware of, and had no reasonable grounds for suspecting, the existence of that right.

(2) If the propagating material of plants of the plant variety, labelled so as to indicate that PBR is held in the variety in Australia, has been sold to a substantial extent before the date of the infringement, the person against whom the action for infringement is brought is taken to have been aware of the existence of PBR in the variety, unless the contrary is established.

PART 6—ADMINISTRATION

Registrar of Plant Breeder's Rights

58.(1) There is established by this section a Registrar of Plant Breeder's Rights.

(2) The office of the Registrar of Plant Breeder's Rights is an office in the Department.

(3) The Registrar has the functions and powers:

(a) that are conferred on the Registrar by this Act or by the regulations;
or

(b) that are delegated to the Registrar by the Secretary under section 59.

Delegation

59.(1) The Minister may, by signed instrument, delegate to the Registrar, or to another officer of the Department within the Senior Executive Service, any of the powers or functions of the Minister under this Act.

(2) The Secretary may, by signed instrument, delegate to the Registrar, or to another officer of the Department within the Senior Executive Service, any of the powers or functions of the Secretary under this Act.

Certain persons not to acquire PBR

60.(1) A person must not apply for, or otherwise acquire, except than by will or by operation of law, PBR in a plant variety or an interest in such right if the person has during the 12 months before the application, held, or performed the duties of:

- (a) the office of Secretary; or
- (b) the office of Registrar of Plant Breeder's Rights; or
- (c) an office in the Department the duties of which involve providing assistance to the Registrar.

Penalty: 60 penalty units.

(2) A grant of PBR applied for in contravention of subsection (1) or an acquisition of PBR in contravention of that subsection is void.

Register of Plant Varieties

61.(1) The Registrar must keep a register, to be known as the Register of Plant Varieties, at a place approved by the Secretary.

(2) The Registrar must cause a copy of the Register to be maintained in each State or Territory (other than the State or Territory where the Register is required to be kept) at the principal office of the Department in that State or Territory and at such other place (if any) in that State or Territory as the Secretary directs.

Inspection of Register

62.(1) A person may inspect the Register at any reasonable time.

(2) A person is entitled, on payment of such fee (if any) as is prescribed, to be given a copy of an entry in the Register.

PART 7—PLANT BREEDER'S RIGHTS ADVISORY COMMITTEE

Establishment of Advisory Committee

63.(1) There is established by this section a Committee by the name of the Plant Breeder's Rights Advisory Committee.

(2) The functions of the Advisory Committee are:

- (a) at the request of the Minister, to advise the Minister on the desirability of declaring:
 - (i) in regulations made for the purpose of subsection 17(2)—that subsection 17(1) does not apply to a particular taxon; or
 - (ii) in regulations made for the purpose of subsection 22(3)—that the duration of PBR in a particular taxon will be longer than provided in subsection 22(2); or
 - (iii) in regulations made for the purpose of subsection 42(1)—that a particular taxon is a taxon to which this Act does not apply; and

- (b) to advise the Registrar on such technical matters arising under this Act, and such other matters relating to the administration of this Act, as the Registrar refers to the Advisory Committee.

Membership of Advisory Committee

64.(1) The Advisory Committee consists of:

- (a) the Registrar; and
- (b) 2 members who, in the opinion of the Minister, are appropriate persons to represent breeders, and likely breeders, of new plant varieties; and
- (c) one member who, in the opinion of the Minister, is an appropriate person to represent users, and likely users, of new plant varieties; and
- (d) one member who, in the opinion of the Minister, is an appropriate person to represent the interests of consumers, and likely consumers, of new plant varieties or of the products of new plant varieties; and
- (e) 2 other members who, in the opinion of the Minister, possess qualifications or experience that are appropriate for a member of the Advisory Committee.

(2) The members, other than the Registrar, must be appointed by the Minister.

(3) The members, other than the Registrar, hold office as part-time members.

(4) Each member, other than the Registrar, holds office for the period, not exceeding 2 years, that is specified in the instrument of appointment, but is eligible for re-appointment.

(5) The Minister may terminate the appointment of a member, other than the Registrar, for misbehaviour or for physical or mental incapacity.

(6) The Minister must terminate the appointment of a member, other than the Registrar, if the member:

- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit; or
- (b) fails, without reasonable excuse, to disclose any interest in a matter required to be disclosed under section 66.

(7) If a person's appointment as a member is terminated under subsection (6), the Minister must give the person a written notice informing the person of the termination and setting out the reasons for the termination.

(8) A member, other than the Registrar, may resign his or her office by writing signed by the member and delivered to the Minister.

Remuneration and allowances

65.(1) The members referred to in paragraphs 64(1)(b), (c), (d) and (e) must be paid:

- (a) such remuneration as is determined by the Remuneration Tribunal; and
- (b) such allowances as are prescribed.

(2) Subsection (1) has effect subject to the *Remuneration Tribunal Act 1973*.

Disclosure of interests

66.(1) A member who has a direct or indirect pecuniary interest in a matter being considered at a meeting of the Advisory Committee must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at the meeting.

- (2) A disclosure must:
- (a) be recorded in the minutes of the meeting of the Advisory Committee; and
 - (b) be made known in any advice given by the Committee in relation to that matter.

Meetings

67.(1) The Registrar may convene such meetings of the Advisory Committee as are necessary for the purposes of the performance of the functions of the Advisory Committee.

(2) At a meeting of the Advisory Committee, 4 members constitute a quorum.

(3) The Registrar presides at a meeting of the Advisory Committee at which the Registrar is present.

(4) If the Registrar is not present, the members present must elect one of their number to preside at the meeting.

(5) Subject to subsection (2), the Advisory Committee may determine the procedure to be followed at a meeting of the Committee.

PART 8—MISCELLANEOUS

Public notices

68.(1) The Secretary must issue a journal, to be called the *Plant Varieties Journal*, at least 4 times each year.

(2) Any public notice that the Secretary is required to make under this Act must be published in the Journal.

(3) Public notice of any matter additional to the matters referred to in subsection (2) that the Secretary considers it necessary or desirable to publicise may also be published in the Journal.

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(4) If the Secretary considers it desirable to give additional public notice of matters by publishing notices of those matters in a periodical other than the Journal, the Secretary may arrange for, or consent to, the giving of additional public notice of those matters in the periodical.

Notices inviting submissions in respect of certain regulations

69.(1) Regulations must not be made for the purposes of subsection 17(2), 22(3) or 42(1) unless, before the making of the regulations and before the Minister seeks any advice from the Advisory Committee concerning those regulations:

- (a) the Minister has, in accordance with section 68, given public notice of the Minister's intention to make a regulation for the purposes of that subsection in relation to a particular taxon that is specified in the notice; and
- (b) the notice has given a broad indication of the objectives of the intended regulations and invited persons to make submissions to the Minister concerning it within a period of 30 days after the publication of the notice.

(2) If the Minister receives, in accordance with an invitation in a public notice under subsection (1), a submission concerning an intended regulation, the Minister must have regard to the submission so made.

(3) If the Minister seeks advice of the Advisory Committee concerning an intended regulation, the Minister may comply with subsection (2):

- (a) by providing to the Committee, at the time of requesting the advice of that Committee, a copy of all submissions received; and
- (b) requesting the Advisory Committee to have regard to those submissions in preparing its advice to the Minister.

Genetic resource centres

70.(1) If, in the opinion of the Secretary, a place is suitable for the storage and maintenance of germplasm material, the Secretary may, by notice in writing, declare that place to be a genetic resource centre for the purposes of this Act.

(2) The person in charge of a genetic resource centre may do all things necessary to maintain the viability of propagating material stored at that centre.

The herbarium

71. If, in the opinion of the Secretary, an organisation has facilities suitable for the storage of plant specimens, the Secretary may, by notice in writing, declare the organisation to be the herbarium for the purposes of this Act.

Agents may act in matters relating to PBR

72. Subject to any other law of the Commonwealth, including the High Court Rules and the Federal Court Rules, an application, a written submission or any other document may be prepared or lodged, and any business may be transacted, for the purposes of this Act, by one person on behalf of another person.

Service of documents

73. If the Secretary or the Registrar is required by this Act to give a written notice or other document to an applicant for, or a grantee of, PBR, that notice or other document may be given by being posted by pre-paid post as a letter addressed to the applicant or the grantee at the address for service shown on the application or entered in the Register, as the case requires.

Infringement offences

74.(1) A person must not, in relation to propagating material of a plant variety in which PBR has been granted, intentionally or recklessly do any of the acts referred to in a paragraph of section 11 if such an act would, under section 53, infringe the PBR in the variety.

Penalty: 500 penalty units.

(2) The fact that an action for infringement has been brought against a person under section 54 in respect of a particular act does not prevent a prosecution under this section in respect of the same act.

Offences other than infringement offences

75.(1) A person must not intentionally or recklessly make a false statement in an application or other document given to the Secretary or the Registrar for the purposes of this Act.

Penalty: 6 months imprisonment.

(2) A person who is not the grantee of PBR in a plant variety must not intentionally or recklessly represent to another person that he or she is the grantee of PBR in that variety.

Penalty: 60 penalty units.

(3) A person must not intentionally or recklessly represent to another person that PBR granted to that first-mentioned person in a plant variety extends to cover another plant variety that is not:

- (a) a dependent variety of the first-mentioned variety; or
- (b) a variety that has been declared to be an essentially derived variety of the first-mentioned variety.

Penalty: 60 penalty units.

(4) A person must not intentionally or recklessly represent to another person that a plant of a variety in which PBR has not been granted is a plant of a variety in which PBR has been granted.

Penalty: 60 penalty units.

Conduct by directors, servants and agents

76.(1) If, in proceedings for an offence against section 74 or 75, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate, within the scope of his or her actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is to be taken, for the purposes of a prosecution for an offence against section 74 or 75, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

(3) If, in proceedings for an offence against section 74 or 75, it is necessary to establish the state of mind of a person other than a body corporate in relation to a particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a servant or agent of the person, within the scope of his or her actual or apparent authority; and
- (b) that the servant or agent had the state of mind.

(4) Any conduct engaged in on behalf of a person other than a body corporate by a servant or agent of the person within the scope of his or her actual or apparent authority is to be taken, for the purposes of a prosecution for an offence against section 74 or 75, to have been engaged in also by the first-mentioned person unless the first-mentioned person establishes that the first-mentioned person took reasonable precautions and exercised due diligence to avoid the conduct.

(5) If:

- (a) a person other than a body corporate is convicted of an offence; and
- (b) the person would not have been convicted for the offence if subsections (3) and (4) had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
- (b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

(8) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

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(9) A reference in this section to an offence against section 74 or 75 includes a reference to an offence against section 5, 6, 7 or 7A, or subsection 86(1), of the *Crimes Act 1914*, that relates to section 74 or 75 of this Act.

Applications for review.

77.(1) Applications may be made to the AAT for review of:

- (a) a decision by the Minister under subsection 49(1); or
- (b) a decision by the Secretary:
 - (i) under subsection 19(7) to exercise a power under subsection 19(3); or
 - (ii) under subsection 19(3) to license, or refuse to license, a person who applied to be so licensed in response to an invitation under paragraph 19(8)(c); or
 - (iii) under subsection 19(10) to make propagating material available; or
 - (iv) under subsection 19(11) to certify, or to refuse to certify, a plant variety; or
 - (v) under section 30 to accept or reject an application; or
 - (vi) under section 31 to vary, or refuse to vary, an application; or
 - (vii) under subsection 34(1) refusing to extend the period for giving a detailed description; or
 - (viii) under section 37 to require a test growing; or
 - (ix) under subsection 38(4) to the effect that the Secretary is satisfied of the matters referred to in that subsection; or
 - (x) under subsection 38(5) to the effect that the Secretary is satisfied of the matters referred to in that subsection; or
 - (xi) under subsection 39(2) to issue a notice to an applicant; or
 - (xii) under paragraph 40(8)(b) refusing to extend the period for rebutting the *prima facie* case of essential derivation; or
 - (xiii) under section 40 in respect of an application for a declaration of essential derivation; or
 - (xiv) under section 41 to require a test growing; or
 - (xv) under section 44 to grant, or refuse to grant, PBR in a plant variety; or
 - (xvi) under section 50 to revoke, or not to revoke, PBR in a plant variety or a declaration that a plant variety is essentially derived from another plant variety; or
- (c) a decision of the Registrar under section 21 to amend, or refuse to amend, the Register.

(2) The AAT does not have power under subsection 29(7) of the AAT Act to extend the time for making an application to that Tribunal for a review of a decision referred to in subsection (1).

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- (3) The Secretary must give public notice of:
- (a) any application made under subsection (1); and
 - (b) any decision of the AAT on such an application; and
 - (c) any decision of a court in relation to, or arising out of:
 - (i) such an application; or
 - (ii) a decision of the AAT on such an application.
- (4) In this section:

“**decision**” has the same meaning as in the AAT Act.

Repeal

78. The *Plant Variety Rights Act 1987* is repealed.

Compensation for acquisition of property

79.(1) If, apart from this section, the operation of this Act would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is to pay the person such reasonable amount of compensation as is agreed on between the person and the Commonwealth, or failing agreement, as is determined by a court of competent jurisdiction.

(2) Any damages or compensation recovered, or other remedy given, in proceedings that are begun otherwise than under this section must be taken into account in assessing compensation payable in proceedings begun under this section and arising out of the same event or circumstance.

(3) In this section:

“**acquisition of property**” has the same meaning as in paragraph 51(xxxi) of the Constitution;

“**just terms**” has the same meaning as in paragraph 51(xxxi) of the Constitution.

Regulations

80.(1) The Governor-General may make regulations prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting subsection (1), that subsection includes the power to make regulations:

- (a) prescribing fees including:
 - (i) fees payable in respect of the making of applications for PBR, the examination of those applications and the issue of certificates in respect of the grant of PBR; and
 - (ii) fees payable in respect of the making of applications for declarations of essential derivation, the examination of those applications and the making of those declarations; and

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- (iii) fees payable by grantees of PBR at specified intervals or on specified dates; and
- (iv) fees payable in respect of costs incurred by the Secretary in respect of the conduct or supervision of the test growing of plants; and
- (b) making provision in relation to the refund, in specified circumstances, of the whole or part of a fee paid under this Act; and
- (c) making provision in relation to the remission of, or the exemption of specified classes of persons from the payment of, the whole or a part of a fee; and
- (d) making provision in relation to the amendment of an entry in the Register to correct a clerical error or an obvious mistake; and
- (e) making such transitional and saving provisions as are necessary or convenient as a result of the repeal of the *Plant Variety Rights Act 1987* and the enactment of this Act.

PART 9—TRANSITIONAL

Definitions

81. In this Part:

“**commencing day**” means the day on which, in accordance with section 2, this Act commences;

“**old Act**” means the *Plant Variety Rights Act 1987*.

Plant variety rights under old Act to be treated as PBR under this Act

82.(1) If:

- (a) a person was granted plant variety rights in respect of a plant variety under the old Act; and
- (b) those rights were still in force immediately before the commencing day;

then, subject to the regulations, those rights have effect, despite the repeal of the old Act, on and after that day, as if:

- (c) this Act had been in force at the time when those rights were granted; and
- (d) they had been granted at that time as PBR in that variety.

(2) Despite subsection (1), rights treated as if they had been granted as PBR under this Act continue in force for so long only as they would have continued in force if the old Act had not been repealed.

(3) Nothing in this section gives the holder of rights treated as PBR in a particular plant variety under this Act the right to claim PBR in respect of plant varieties that would, under this Act, be dependent plant varieties in relation to that particular plant variety.

(4) Nothing in this section gives the holder of rights treated as PBR in a particular plant variety under this Act the right to seek a declaration that another plant variety is an essentially derived variety of the particular plant variety unless PBR in that other plant variety was given only on or after the commencing day.

Applications for plant variety rights lodged and criminal proceedings begun before commencing day

83.(1) If, before the commencing day:

(a) a person has made application for plant variety rights under the old Act; but

(b) the application has not been finally disposed of under that Act; the provisions of the old Act are taken to continue in force, for the purpose of dealing with the application, and any objection that has been made before that day, or is made after that day, in relation to the application.

(2) If before the commencing day, criminal proceedings had been begun under the old Act but those proceedings had not been finally determined before that day, the provisions of the old Act are taken to continue in force, for the purposes of those proceedings.

Other applications and proceedings under old Act

84.(1) Subject to the regulations, this Act applies, on and after the commencing day, to any application, request, action or proceeding made or started under the old Act and not finally dealt with or determined under that Act before that day as if the application, request, action or proceeding had been made or started under a corresponding provision of this Act.

(2) Subsection (1) does not apply in relation to an application for plant variety rights, or to criminal proceedings, covered by section 83.

Transitional arrangements for membership and functions of Advisory Committee

85.(1) The persons who, under the old Act, were members of the Plant Variety Rights Advisory Committee established under section 44 of that Act are to be taken, with effect from the commencing day, to be members of the Plant Breeder's Rights Advisory Committee established by section 63 of this Act.

(2) Those members who were appointed by the Minister under section 45 of the old Act continue to hold office as if they had been appointed by the Minister under section 64 of the new Act on the same terms and conditions for the balance of the term of their respective appointments.

(3) Any advice given to the Minister or to the Secretary by the Plant Variety Rights Advisory Committee has effect, on and after the commencing day, as if it had been given by the Plant Breeder's Rights Advisory Committee.

Register of Plant Varieties

86. On and after the commencing day, the Register of Plant Varieties under the old Act is taken to form part of the Register of Plant Varieties under this Act.

SCHEDULE Subsection 3(1)
(definition of "Convention")
CONVENTION

**International Convention for the Protection
of New Varieties of Plants of December 2, 1961,
as revised at Geneva on November 10, 1972,
on October 23, 1978, and on March 19, 1991**

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SCHEDULE—continued

CHAPTER I

DEFINITIONS

Article 1

Definitions

For the purposes of this Act:

(i) “this Convention” means the present (1991) Act of the International Convention for the Protection of New Varieties of Plants;

(ii) “Act of 1961/1972” means the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as amended by the Additional Act of November 10, 1972;

(iii) “Act of 1978” means the Act of October 23, 1978, of the International Convention for the Protection of New Varieties of Plants;

(iv) “breeder” means

- the person who bred, or discovered and developed, a variety,
- the person who is the employer of the aforementioned person or who has commissioned the latter’s work, where the laws of the relevant Contracting Party so provide, or
- the successor in title of the first or second aforementioned person, as the case may be;

(v) “breeder’s right” means the right of the breeder provided for in this Convention;

(vi) “variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
- distinguished from any other plant grouping by the expression of at least one of the said characteristics and
- considered as a unit with regard to its suitability for being propagated unchanged;

(vii) “Contracting Party” means a State or an intergovernmental organization party to this Convention;

(viii) “territory,” in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies;

(ix) “authority” means the authority referred to in Article 30(1)(ii);

SCHEDULE—continued

(x) “Union” means the Union for the Protection of New Varieties of Plants founded by the Act of 1961 and further mentioned in the Act of 1972, the Act of 1978 and in this Convention;

(xi) “member of the Union” means a State party to the Act of 1961/1972 or the Act of 1978, or a Contracting Party.

CHAPTER II

GENERAL OBLIGATIONS OF THE CONTRACTING PARTIES

Article 2

Basic Obligation of the Contracting Parties

Each Contracting Party shall grant and protect breeders' rights.

Article 3

Genera and Species to be Protected

(1) [*States already members of the Union*] Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978 and,

(ii) at the latest by the expiration of a period of five years after the said date, to all plant genera and species.

(2) [*New members of the Union*] Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 15 plant genera or species and,

(ii) at the latest by the expiration of a period of 10 years from the said date, to all plant genera and species.

Article 4

National Treatment

(1) [*Treatment*] Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of each other Contracting

SCHEDULE—continued

Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party.

(2) [*“Nationals”*] For the purposes of the preceding paragraph, “nationals” means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States which are members of that organization.

CHAPTER III

CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT

Article 5

Conditions of Protection

(1) [*Criteria to be satisfied*] The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

(2) [*Other conditions*] The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 20, that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

Article 6

Novelty

(1) [*Criteria*] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

SCHEDULE—continued

(2) [*Varieties of recent creation*] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or disposal to others described in that paragraph took place earlier than the time limits defined in that paragraph.

(3) [*“Territory” in certain cases*] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Article 7

Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

Article 8

Uniformity

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Article 9

Stability

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

SCHEDULE—continued

CHAPTER IV

APPLICATION FOR THE GRANT OF THE BREEDER'S RIGHT

Article 10

Filing of Applications

(1) [*Place of first application*] The breeder may choose the Contracting Party with whose authority he wishes to file his first application for a breeder's right.

(2) [*Time of subsequent applications*] The breeder may apply to the authorities of other Contracting Parties for the grant of breeders' rights without waiting for the grant to him of a breeder's right by the authority of the Contracting Party with which the first application was filed.

(3) [*Independence of protection*] No Contracting Party shall refuse to grant a breeder's right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other State or intergovernmental organization.

Article 11

Right of Priority

(1) [*The right; its period*] Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.

(2) [*Claiming the right*] In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, within a period of not less than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

(3) [*Documents and material*] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection

SCHEDULE—continued

or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any necessary information, document or material required for the purpose of the examination under Article 12, as required by the laws of that Contracting Party.

(4) [*Events occurring during the period*] Events occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such events shall also not give rise to any third-party right.

Article 12

Examination of the Application

Any decision to grant a breeder's right shall require an examination for compliance with the conditions under Articles 5 to 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.

Article 13

Provisional Protection

Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application.

CHAPTER V

THE RIGHTS OF THE BREEDER

Article 14

Scope of the Breeder's Right

(1) [*Acts in respect of the propagating material*] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

SCHEDULE—continued

- (i) production or reproduction (multiplication),
- (ii) for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (iv) above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [*Acts in respect of the harvested material*] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) [*Acts in respect of certain products*] Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(4) [*Possible additional acts*] Each Contracting Party may provide that, subject to Articles 15 and 16, acts other than those referred to in items (i) to (vii) of paragraph (1)(a) shall also require the authorization of the breeder.

(5) [*Essentially derived and certain other varieties*] (a) The provisions of paragraphs (1) to (4) shall also apply in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety (“the initial variety”) when

(i) 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,

SCHEDULE—continued

- (ii) it is clearly distinguishable from the initial variety and
- (iii) 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.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Article 15

Exceptions to the Breeder's Right

- (1) [*Compulsory exceptions*] The breeder's right shall not extend to
- (i) acts done privately and for non-commercial purposes,
 - (ii) acts done for experimental purposes and
 - (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

(2) [*Optional exception*] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

Article 16

Exhaustion of the Breeder's Right

- (1) [*Exhaustion of right*] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

- (i) involve further propagation of the variety in question or
- (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of "material"*] For the purposes of paragraph (1), "material" means, in relation to a variety,

SCHEDULE—continued

- (i) propagating material of any kind,
- (ii) harvested material, including entire plants and parts of plants, and
- (iii) any product made directly from the harvested material.

(3) [*“Territory” in certain cases*] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Article 17

Restrictions on the Exercise of the Breeder's Right

(1) [*Public interest*] Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest.

(2) [*Equitable remuneration*] When any such restriction has the effect of authorizing a third party to perform any act for which the breeder's authorization is required, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Article 18

Measures Regulating Commerce

The breeder's right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.

Article 19

Duration of the Breeder's Right

(1) [*Period of protection*] The breeder's right shall be granted for a fixed period.

(2) [*Minimum period*] The said period shall not be shorter than 20 years from the date of the grant of the breeder's right. For trees and vines, the said period shall not be shorter than 25 years from the said date.

SCHEDULE—continued

CHAPTER VI

VARIETY DENOMINATION

Article 20

Variety Denomination

(1) [*Designation of varieties by denominations; use of the denomination*]

(a) The variety shall be designated by a denomination which will be its generic designation.

(b) Each Contracting Party shall ensure that, subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

(2) [*Characteristics of the denomination*] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any Contracting Party, an existing variety of the same plant species or of a closely related species.

(3) [*Registration of the denomination*] The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the authority at the same time as the breeder's right is granted.

(4) [*Prior rights of third persons*] Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

(5) [*Same denomination in all Contracting Parties*] A variety must be submitted to all Contracting Parties under the same denomination. The authority of each Contracting Party shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.

(6) [*Information among the authorities of Contracting Parties*] The authority of a Contracting Party shall ensure that the authorities of all the other Contracting Parties are informed of matters concerning variety

SCHEDULE—continued

denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) [*Obligation to use the denomination*] Any person who, within the territory of one of the Contracting Parties, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

(8) [*Indications used in association with denominations*] When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

CHAPTER VII

NULLITY AND CANCELLATION OF THE BREEDER'S RIGHT

Article 21

Nullity of the Breeder's Right

(1) [*Reasons of nullity*] Each Contracting Party shall declare a breeder's right granted by it null and void when it is established

(i) that the conditions laid down in Articles 6 or 7 were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 or 9 were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.

(2) [*Exclusion of other reasons*] No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).

Article 22

Cancellation of the Breeder's Right

(1) [*Reasons for cancellation*] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

SCHEDULE—continued

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force, or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) [*Exclusion of other reasons*] No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

CHAPTER VIII

THE UNION

Article 23

Members

The Contracting Parties shall be members of the Union.

Article 24

Legal Status and Seat

(1) [*Legal personality*] The Union has legal personality.

(2) [*Legal capacity*] The Union enjoys on the territory of each Contracting Party, in conformity with the laws applicable in the said territory, such legal capacity as may be necessary for the fulfillment of the objectives of the Union and for the exercise of its functions.

(3) [*Seat*] The seat of the Union and its permanent organs are at Geneva.

(4) [*Headquarters agreement*] The Union has a headquarters agreement with the Swiss Confederation.

Article 25

Organs

The permanent organs of the Union are the Council and the Office of the Union.

Article 26

The Council

(1) [*Composition*] The Council shall consist of the representatives of the members of the Union. Each member of the Union shall appoint one representative to the Council and one alternate. Representatives or alternates may be accompanied by assistants or advisers.

SCHEDULE—continued

(2) [*Officers*] The Council shall elect a President and a first Vice-President from among its members. It may elect other Vice-Presidents. The first Vice-President shall take the place of the President if the latter is unable to officiate. The President shall hold office for three years.

(3) [*Sessions*] The Council shall meet upon convocation by its President. An ordinary session of the Council shall be held annually. In addition, the President may convene the Council at his discretion; he shall convene it, within a period of three months, if one-third of the members of the Union so request.

(4) [*Observers*] States not members of the Union may be invited as observers to meetings of the Council. Other observers, as well as experts, may also be invited to such meetings.

(5) [*Tasks*] The tasks of the Council shall be to:

(i) study appropriate measures to safeguard the interests and to encourage the development of the Union;

(ii) establish its rules of procedure;

(iii) appoint the Secretary-General and, if it finds it necessary, a Vice Secretary-General and determine the terms of appointment of each;

(iv) examine an annual report on the activities of the Union and lay down the program for its future work;

(v) give to the Secretary-General all necessary directions for the accomplishment of the tasks of the Union;

(vi) establish the administrative and financial regulations of the Union;

(vii) examine and approve the budget of the Union and fix the contribution of each member of the Union;

(viii) examine and approve the accounts presented by the Secretary-General;

(ix) fix the date and place of the conferences referred to in Article 38 and take the measures necessary for their preparation; and

(x) in general, take all necessary decisions to ensure the efficient functioning of the Union.

(6) [*Votes*] (a) Each member of the Union that is a State shall have one vote in the Council.

(b) Any Contracting Party that is an intergovernmental organization may, in matters within its competence, exercise the rights to vote of its member States that are members of the Union. Such an intergovernmental organization shall not exercise the rights to vote of its member States if its member States exercise their right to vote, and vice versa.

SCHEDULE—continued

(7) [*Majorities*] Any decision of the Council shall require a simple majority of the votes cast, provided that any decision of the Council under paragraphs (5)(ii), (vi) and (vii) and under Articles 28(3), 29(5)(b) and 38(1) shall require three fourths of the votes cast. Abstentions shall not be considered as votes.

Article 27

The Office of the Union

(1) [*Tasks and direction of the Office*] The Office of the Union shall carry out all the duties and tasks entrusted to it by the Council. It shall be under the direction of the Secretary-General.

(2) [*Duties of the Secretary-General*] The Secretary-General shall be responsible to the Council; he shall be responsible for carrying out the decisions of the Council. He shall submit the budget of the Union for the approval of the Council and shall be responsible for its implementation. He shall make reports to the Council on his administration and the activities and financial position of the Union.

(3) [*Staff*] Subject to the provisions of Article 26(5)(iii), the conditions of appointment and employment of the staff necessary for the efficient performance of the tasks of the Office of the Union shall be fixed in the administrative and financial regulations.

Article 28

Languages

(1) [*Languages of the Office*] The English, French, German and Spanish languages shall be used by the Office of the Union in carrying out its duties.

(2) [*Languages in certain meetings*] Meetings of the Council and of revision conferences shall be held in the four languages.

(3) [*Further languages*] The Council may decide that further languages shall be used.

Article 29

Finances

(1) [*Income*] The expenses of the Union shall be met from

- (i) the annual contributions of the States members of the Union,
- (ii) payments received for services rendered,
- (iii) miscellaneous receipts.

(2) [*Contributions: units*] (a) The share of each State member of the Union in the total amount of the annual contributions shall be determined by reference to the total expenditure to be met from the contributions of the

SCHEDULE—continued

States members of the Union and to the number of contribution units applicable to it under paragraph (3). The said share shall be computed according to paragraph (4).

(b) The number of contribution units shall be expressed in whole numbers or fractions thereof, provided that no fraction shall be smaller than one-fifth.

(3) [*Contributions: share of each member*] (a) The number of contribution units applicable to any member of the Union which is party to the Act of 1961/1972 or the Act of 1978 on the date on which it becomes bound by this Convention shall be the same as the number applicable to it immediately before the said date.

(b) Any other State member of the Union shall, on joining the Union, indicate, in a declaration addressed to the Secretary-General, the number of contribution units applicable to it.

(c) Any State member of the Union may, at any time, indicate, in a declaration addressed to the Secretary-General, a number of contribution units different from the number applicable to it under subparagraph (a) or (b). Such declaration, if made during the first six months of a calendar year, shall take effect from the beginning of the subsequent calendar year; otherwise, it shall take effect from the beginning of the second calendar year which follows the year in which the declaration was made.

(4) [*Contributions: computation of shares*] (a) For each budgetary period, the amount corresponding to one contribution unit shall be obtained by dividing the total amount of the expenditure to be met in that period from the contributions of the States members of the Union by the total number of units applicable to those States members of the Union.

(b) The amount of the contribution of each State member of the Union shall be obtained by multiplying the amount corresponding to one contribution unit by the number of contribution units applicable to that State member of the Union.

(5) [*Arrears in contributions*] (a) A State member of the Union which is in arrears in the payment of its contributions may not, subject to subparagraph (b), exercise its right to vote in the Council if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding full year. The suspension of the right to vote shall not relieve such State member of the Union of its obligations under this Convention and shall not deprive it of any other rights thereunder.

(b) The Council may allow the said State member of the Union to continue to exercise its right to vote if, and as long as, the Council is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

SCHEDULE—continued

(6) [*Auditing of the accounts*] The auditing of the accounts of the Union shall be effected by a State member of the Union as provided in the administrative and financial regulations. Such State member of the Union shall be designated, with its agreement, by the Council.

(7) [*Contributions of intergovernmental organizations*] Any Contracting Party which is an intergovernmental organization shall not be obliged to pay contributions. If, nevertheless, it chooses to pay contributions, the provisions of paragraphs (1) to (4) shall be applied accordingly.

CHAPTER IX

**IMPLEMENTATION OF THE CONVENTION;
OTHER AGREEMENTS**

Article 30

Implementation of the Convention

(1) [*Measures of implementation*] Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:

(i) provide for appropriate legal remedies for the effective enforcement of breeders' rights;

(ii) maintain an authority entrusted with the task of granting breeders' rights or entrust the said task to an authority maintained by another Contracting Party;

(iii) ensure that the public is informed through the regular publication of information concerning

— applications for and grants of breeders' rights, and

— proposed and approved denominations.

(2) [*Conformity of laws*] It shall be understood that, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organization must be in a position, under its laws, to give effect to the provisions of this Convention.

Article 31

**Relations Between Contracting Parties
and States Bound by Earlier Acts**

(1) [*Relations between States bound by this Convention*] Between States members of the Union which are bound both by this Convention and any earlier Act of the Convention, only this Convention shall apply.

SCHEDULE—continued

(2) [*Possible relations with States not bound by this Convention*] Any State member of the Union not bound by this Convention may declare, in a notification addressed to the Secretary-General, that, in its relations with each member of the Union bound only by this Convention, it will apply the latest Act by which it is bound. As from the expiration of one month after the date of such notification and until the State member of the Union making the declaration becomes bound by this Convention, the said member of the Union shall apply the latest Act by which it is bound in its relations with each of the members of the Union bound only by this Convention, whereas the latter shall apply this Convention in respect of the former.

Article 32

Special Agreements

Members of the Union reserve the right to conclude among themselves special agreements for the protection of varieties, insofar as such agreements do not contravene the provisions of this Convention.

CHAPTER X

FINAL PROVISIONS

Article 33

Signature

This Convention shall be open for signature by any State which is a member of the Union at the date of its adoption. It shall remain open for signature until March 31, 1992.

Article 34

Ratification, Acceptance or Approval; Accession

(1) [*States and certain intergovernmental organizations*] (a) Any State may, as provided in this Article, become party to this Convention.

(b) Any intergovernmental organization may, as provided in this Article, become party to this Convention if it

(i) has competence in respect of matters governed by this Convention,

(ii) has its own legislation providing for the grant and protection of breeders' rights binding on all its member States and

(iii) has been duly authorized, in accordance with its internal procedures, to accede to this Convention.

(2) [*Instrument of adherence*] Any State which has signed this Convention shall become party to this Convention by depositing an instrument of ratification, acceptance or approval of this Convention. Any

SCHEDULE—continued

State which has not signed this Convention and any intergovernmental organization shall become party to this Convention by depositing an instrument of accession to this Convention. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General.

(3) [*Advice Of the Council*] Any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.

Article 35
Reservations

(1) [*Principle*] Subject to paragraph (2), no reservations to this Convention are permitted.

(2) [*Possible exception*] (a) Notwithstanding the provisions of Article 3(1), any State which, at the time of becoming party to this Convention, is a party to the Act of 1978 and which, as far as varieties reproduced asexually are concerned, provides for protection by an industrial property title other than a breeder's right shall have the right to continue to do so without applying this Convention to those varieties.

(b) Any State making use of the said right shall, at the time of depositing its instrument of ratification, acceptance, approval or accession, as the case may be, notify the Secretary-General accordingly. The same State may, at any time, withdraw the said notification.

Article 36
Communications Concerning Legislation and the Genera and Species Protected; Information to be Published

(1) [*Initial notification*] When depositing its instrument of ratification, acceptance or approval of or accession to this Convention, as the case may be, any State or intergovernmental organization shall notify the Secretary-General of

(i) its legislation governing breeders' rights and
(ii) the list of plant genera and species to which, on the date on which it will become bound by this Convention, it will apply the provisions of this Convention.

(2) [*Notification of changes*] Each Contracting Party shall promptly notify the Secretary-General of

SCHEDULE—continued

- (i) any changes in its legislation governing breeders' rights and
- (ii) any extension of the application of this Convention to additional plant genera and species.

(3) [*Publication of the information*] The Secretary-General shall, on the basis of communications received from each Contracting Party concerned, publish information on

- (i) the legislation governing breeders' rights and any changes in that legislation, and
- (ii) the list of plant genera and species referred to in paragraph (1)(ii) and any extension referred to in paragraph (2)(ii).

Article 37

Entry into Force; Closing of Earlier Acts

(1) [*Initial entry into force*] This Convention shall enter into force one month after five States have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978.

(2) [*Subsequent entry into force*] Any State not covered by paragraph (1) or any intergovernmental organization shall become bound by this Convention one month after the date on which it has deposited its instrument of ratification, acceptance, approval or accession, as the case may be.

(3) [*Closing of the 1978 Act*] No instrument of accession to the Act of 1978 may be deposited after the entry into force of this Convention according to paragraph (1), except that any State that, in conformity with the established practice of the General Assembly of the United Nations, is regarded as a developing country may deposit such an instrument until December 31, 1995, and that any other State may deposit such an instrument until December 31, 1993, even if this Convention enters into force before that date.

Article 38

Revision of the Convention

(1) [*Conference*] This Convention may be revised by a conference of the members of the Union. The convocation of such conference shall be decided by the Council.

(2) [*Quorum and majority*] The proceedings of a conference shall be effective only if at least half of the States members of the Union are represented at it. A majority of three quarters of the States members of the Union present and voting at the conference shall be required for the adoption of any revision.

SCHEDULE—continued

Article 39

Denunciation

(1) [*Notifications*] Any Contracting Party may denounce this Convention by notification addressed to the Secretary-General. The Secretary-General shall promptly notify all members of the Union of the receipt of that notification.

(2) [*Earlier Acts*] Notification of the denunciation of this Convention shall be deemed also to constitute notification of the denunciation of any earlier Act by which the Contracting Party denouncing this Convention is bound.

(3) [*Effective date*] The denunciation shall take effect at the end of the calendar year following the year in which the notification was received by the Secretary-General.

(4) [*Acquired rights*] The denunciation shall not affect any rights acquired in a variety by reason of this Convention or any earlier Act prior to the date on which the denunciation becomes effective.

Article 40

Preservation of Existing Rights

This Convention shall not limit existing breeders' rights under the laws of Contracting Parties or by reason of any earlier Act or any agreement other than this Convention concluded between members of the Union.

Article 41

Original and Official Texts of the Convention

(1) [*Original*] This Convention shall be signed in a single original in the English, French and German languages, the French text prevailing in case of any discrepancy among the various texts. The original shall be deposited with the Secretary-General.

(2) [*Official texts*] The Secretary-General shall, after consultation with the interested Governments, establish official texts of this Convention in the Arabic, Dutch, Italian, Japanese and Spanish languages and such other languages as the Council may designate.

Article 42

Depositary Functions

(1) [*Transmittal of copies*] The Secretary-General shall transmit certified copies of this Convention to all States and intergovernmental organizations which were represented in the Diplomatic Conference that adopted this Convention and, on request, to any other State or intergovernmental organization.

SCHEDULE—continued

(2) [*Registration*] The Secretary-General shall register this Convention with the Secretariat of the United Nations.

[*Minister's second reading speech made in—
Senate on 24 March 1994
House of Representatives on 24 August 1994*]