

EXPLANATORY STATEMENT

Select Legislative Instrument No. , 2017

Territories Legislation (Plant Breeder's Rights) Transitional Rules 2017

Issued by the Authority of the Minister for Local Government and Territories

Territories Legislation Amendment Act 2016

Territories Legislation (Plant Breeder's Rights) Transitional Rules 2017

Legislative Authority

Item 5 of Schedule 5 to the *Territories Legislation Amendment Act 2016* (the Act) provides the Minister for Local Government and Territories with the power to make the *Territories Legislation (Plant Breeder's Rights) Transitional Rules 2017* (the Rules).

The Rules

The Rules set out the transitional requirements for the application of the *Plant Breeder's Rights Act 1994* (PBR Act) to Norfolk Island from 1 July 2017. The PBR Act was extended by amendment to the *Plant Breeder's Rights Regulations 1994* (PBR Regulations), commencing 1 July 2017. The rules will ensure an effective extension of the Plant Breeder's Rights (PBR) system to Norfolk Island to balance the rights of people on Norfolk Island as well as on mainland Australia.

Purpose of the Rules

The Rules set out the transition requirements for the following:

- registration of plant varieties under the PBR Act (rule 5); and
- infringement of a PBR (rule 6).

Consultation

The public was consulted on the transitional arrangements extending the PBR Act to Norfolk Island. The changes were advertised on the IP Australia website and in the Plant Varieties Journal, interested parties were contacted directly on Norfolk Island, and the PBR Consultation Group was informed. No submissions were received.

No Regulation Impact Statement required

The Office of Best Practice Regulation ('OBPR') advised that the Rules do not require a Regulation Impact Statement as they are of a minor regulatory impact (OBPR Reference Number 21247).

Commencement of the Rules

The Rules will commence on 1 July 2017.

Details of the Territories Legislation (Plant Breeder's Rights) Transitional Rules 2017

Rule 1 – Name of Rule

This rule outlines the name of the instrument. The name of the instrument is the *Territories Legislation (Plant Breeder's Rights) Transitional Rules 2017*.

Rule 2 – Commencement

This rule specifies the commencement date of the instrument will be 1 July 2017.

Rule 3 – Authority

This rule identifies that the authority for making this instrument derives from item 5 of Schedule 5 to the *Territories Legislation Amendment Act 2016*.

Rule 4 – Definitions

This rule lists the definitions of terms referred to in the Rules, with definitions taken from the *Plant Breeder's Right's Act 1994* (PBR Act).

Rule 5 – Section 43 (registrable plant varieties)

This rule sets out the application of section 43 of the PBR Act following the extension of the definition of Australia to Norfolk Island from 1 July 2016 by the *Acts Interpretation Act 1901*.

Section 43 of the PBR Act defines the term 'registrable plant variety'. A variety must be a 'registrable plant variety' for an application for PBR to be granted under section 44 of the PBR Act. Under section 43, the variety is registrable if the variety; (a) has a breeder, (b) is distinct, (c) is uniform, (d) is stable, and (e) has not been exploited or has only been recently exploited. Per paragraph 43(6)(a), a plant variety is taken to have been only recently exploited if, at the date of lodging the application for PBR in the variety, plant material of the variety has not been sold to another person by, or with the consent of, the breeder in Australia for more than one year from that date.

As the definition of Australia in the *Acts Interpretation Act 1901* was extended to include Norfolk Island from 1 July 2016, currently, applications for PBR will still be able to be registered even if there are previous sales on Norfolk Island prior to 1 July 2016. Therefore, if an application for PBR is lodged between 1 July 2016 and 30 June 2017, prior sales on Norfolk Island, that extended beyond one year, are not included and therefore the variety would not be considered exploited.

This rule remedies this problem in future applications for PBR and applications lodged but not granted before 1 July 2017, by clarifying the definition of Australia as taken always to have included Norfolk Island. For example, an application for PBR is lodged on 5 June 2017. The variety has been sold only on Norfolk Island since 2012. Prior to the rules

being implemented, the application for PBR would be granted because the prior use on Norfolk Island would not be included. However with the implementation of this rule, the application for PBR would not be granted due to the previous sales on Norfolk Island. This is because the rule specifies that the reference to Australia in paragraph 43(6)(a) is taken to have always been included.

The intent of this rule is to avoid disadvantaging third parties who would reasonably expect that the sale of plant material of a variety on Norfolk Island for more than 12 months before lodging an application for PBR should render the variety ineligible for PBR protection.

Rule 6 – Section 53 (infringement of PBR)

This rule outlines the protection against infringement of PBR, per subsection 53(1) of the PBR Act. The protection will apply to persons who are already using a variety on Norfolk Island prior to commencement.

Paragraph 53(1)(a) outlines that a person who does an act referred to in section 11 of the PBR Act without the authorisation of, or in accordance with the grantee of the right will infringe the PBR in a plant variety. The infringement provision, as outlined in section 53, will extend to Norfolk Island from 1 July 2017.

Due to the extension of the PBR Act, a person on Norfolk Island will infringe paragraph 53(1)(a) of the PBR Act if the person undertakes a section 11 act without authorisation from the right holder. As a result, the situation may arise where a person who had done a section 11 act, or had taken definitive steps to do a section 11 act, solely on Norfolk Island and before 1 July 2017 and continues these actions after 1 July 2017, would infringe the PBR Act. Such a person might have done the section 11 act prior to 1 July 2017 under the reasonable understanding that PBR does not apply on Norfolk Island, and could have made significant investment in a plant variety that would be lost.

To remedy this situation this rule provides an exception whereby a person will not infringe subsection 53(1) if the person undertakes a section 11 act, or takes definite steps, before 1 July 2017 and then continues the section 11 act after 1 July 2017. This action may be of the same or different kind as mentioned in section 11. For example, in December 2016 a person on Norfolk Island was legally using a plant variety. The plant variety is currently protected in Australia but not on Norfolk Island. Under this proposed arrangement, that person can continue to use the variety on Norfolk Island after 1 July 2017 without infringing the protected PBR.

The intent of this rule is to avoid disadvantaging people on Norfolk Island who are currently legally using (or have invested in) a plant variety that is protected in Australia but not in Norfolk Island.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Territories Legislation (Plant Breeder's Rights) Transitional Rules 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument sets out the transitional requirements involved in extending the *Plant Breeder's Rights Act 1994* (PBR Act) to Norfolk Island. The PBR Act was extended to Norfolk Island by amendment to the *Plant Breeder's Rights Regulations 1994* (PBR Regulations) and will commence from 1 July 2017.

The Rules set out the following procedural requirements for the extension to Norfolk Island:

- registration of plant varieties under the PBR Act (rule 5); and
- infringement of a PBR (rule 6).

Rule 5: The meaning of the term 'Australia' was extended to Norfolk Island by the *Acts Interpretation Act 1901* from 1 July 2016. This rule clarifies the effects of this change on section 43 of the PBR Act.

Rule 6: A protection against infringement of a PBR is created by this rule. This ensures that a person on Norfolk Island, who uses or takes definite steps to use a plant variety prior to 1 July 2017 and continues to use the plant variety after 1 July 2017, will not infringe the PBR Act.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Senator the Hon Fiona Nash, Minister for Local Government and Territories