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## GAZETTE

### MODIFICATION OF FEES

#### NETHERLANDS

The Office of the Union has been informed by the Secretary of the Board for Plant Breeders' Rights that a fee of 350 Swiss Francs has been agreed for the taking over of a report. Due to the present exchange rate, the Board for Plant Breeders' Rights

in the Netherlands will charge 240 Euros for each report taken over from the Netherlands. This fee will be applicable to requests received after April 6, 2003.

## NEWSLETTER

### WIPO-UPOV SYMPOSIUM ON INTELLECTUAL PROPERTY RIGHTS IN PLANT BIOTECHNOLOGY

Geneva, October 24, 2003

Following the success of last year's *WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments* which was held in Geneva, on October 25, 2002, a further Symposium is planned for October 2003.

The Symposium will provide a forum for discussion and analysis. It is expected that it will explore key issues of intellectual property in plant biotechnology.

The Symposium will be held in Geneva, at the headquarters of WIPO and UPOV, on October 24, 2003. Simultaneous interpretation in English, French and Spanish will be provided at the Symposium, which will commence at 9.30 a.m., in Room A.

All interested persons and organizations are invited to attend the Symposium, free of charge.

Further information on the Symposium, including the Program, registration form, information on the speakers and organizational arrangements, will be posted in the near future and regularly on the UPOV Website ([www.upov.int](http://www.upov.int)) under the "News and Events" section.

**www.upov.int**

## NEW UPOV WEBSITE

The new UPOV Website has been operational since December 2002. In order to facilitate your use of the new Website, a section of each edition of the Newsletter will provide information on a particular part of the UPOV Website.

In this edition, we will focus on “Publications.”



### UPOV Convention

Texts of the International Convention for the Protection of New Varieties of Plants (including the Convention of 1961 and the subsequent Acts of 1972, 1978 and 1991)

### Laws and Treaties

This section contains the laws of UPOV members and other relevant legal material, in particular, agreements concerning UPOV and links to other international treaties of relevance for plant variety protection matters. This section is updated regularly and links to the section “Legal Resources.”

### General Introduction to DUS

The purpose of this document and the associated series of documents specifying Test Guidelines’ Procedures is to set out the principles which are used in the examination of Distinctness, Uniformity and Stability (DUS). The identification of those principles ensures that examination of new plant varieties is conducted in a harmonized way throughout the members of the Union.

### Test Guidelines

UPOV has developed “Guidelines for the Conduct of Tests for Distinctness, Uniformity and Stability” or “Test Guidelines” for many individual species or other variety groupings. The purpose of these Test Guidelines is to elaborate certain of the principles contained in the General Introduction, and the associated TGP documents, into detailed practical guidance for the harmonized examination of DUS and, in particular, to identify appropriate characteristics for the examination of DUS and production of harmonized variety descriptions.

### Plant Variety Protection Statistics

Statistics concerning applications and grants of titles of protection for members of UPOV and those States and inter-governmental organizations that have initiated the procedure for acceding to the UPOV Convention and which have provided information.

### List of Taxa Protected

List of the taxa protected in the members of UPOV and those States and intergovernmental organizations that have initiated the procedure for acceding to UPOV and which have provided information.

### Cooperation in Examination

This contains a synopsis of offers for cooperation in examination made by members of UPOV, of cooperation already established between members and of any envisaged cooperation.

### Practical Technical Knowledge

List of species in which practical technical knowledge has been acquired or for which national guidelines have been established.

### Gazette and Newsletter

“Plant Variety Protection” is a publication that reports on national and international events and legal developments in its field of competence and related areas.

### List of Publications

List of UPOV publications.

## AUSTRALIA

### CLARIFICATION OF PLANT BREEDING ISSUES UNDER THE PLANT BREEDER'S RIGHTS ACT 1994\*

#### EXECUTIVE SUMMARY

This report focuses on clarifying issues relating to 'breeding' and 'essential derivation'[2] in the *Plant Breeder's Rights Act 1994* (PBRA), as proposed by the Standing Committee on Agriculture and Resource Management (SCARM).

The catalyst for the report was a perception that (i) applicants and objectors generally had a poor understanding of the threshold of eligible breeding required by the PBRA and (ii) the balance between first and subsequent breeder rights in relation to 'essentially derived varieties' (EDV) should be reviewed.

The report is set against the requirements of the PBRA and Australia's commitments under the Convention of the *International Union for the Protection of New Varieties of Plants 1991* (UPOV).

The Panel believes that, generally, breeders will welcome the report because it provides guidance, albeit at a general level, on how to satisfy the criteria for breeding required by the PBRA. The report concentrates on those situations where the eligibility of the breeding methodologies is most often questioned (for example bulk/pedigree selection within an existing population or the discovery of a natural variation/mutation).

The report provides guidance and clarification on 'breeding' by defining 'discovery', 'selective propagation', and 'eligible breeding' methodologies, as well as question and answer resolutions to common 'difficult' situations.

The Panel confirms that all varieties must meet the same minimum criteria regardless of the method of their origination. The Panel also notes that there are a number of misconceptions about what may automatically qualify or disqualify a variety from PBR registration.

The Panel acknowledges that in some exceptional cases the clarifications proposed might prove disadvantageous to the eligibility for protection of some varieties (for example, those varieties without information on their parents/origin).

The Panel confirms that Australia's current interpretation of breeding is consistent with international best practice and that no new, higher, or lower requirements for breeding are imposed.

EDV refers to the situation where the breeder of one variety (the 'first variety') claims that another breeder has developed another variety (the 'second variety') that is directly related to, and essentially the same, as the first variety.

The Panel agrees that breeding is an incremental process and the intent of the PBRA is to encourage the introduction of new varieties based on research and development.

The PBRA is not intended to facilitate or encourage 'copies'. In Australia, the second breeder's major defence against vexatious claims of EDV is to demonstrate '*important*' difference otherwise the challenger's case will succeed, all else being equal. This is consistent with the intent of the PBRA, which is to produce new varieties and not copies. Therefore, in the opinion of the Panel, the current legislation encourages innovation, while providing protection for all breeders against plagiarism and vexatious challenge.

On a separate issue, occasionally seen as related, some see the development of new plant varieties through gene insertion as a 'quick and easy' process. The Panel believes that successful gene insertion is generally *not* quick and easy[3]. Moreover, recognition is growing that 'traditional' and 'biotech' breeders share a mutual interest in working together. The Panel encourages the development of such mutually advantageous relationships.

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\* Report provided by the Australian Authorities in December 2002.

Full information: [www.anbg.gov.au/breeders/index.html](http://www.anbg.gov.au/breeders/index.html)

[2] Essentially derived variety refers to the situation where the breeder of one variety (the 'first variety') claims that another breeder has developed another new variety (the 'second variety') that is distinct from, but closely resembles and is directly related to, the first variety in all important respects.

[3] Acknowledging that advanced technologies are being developed and refined to speed the process of gene insertion.

# LEGISLATION

## AUSTRALIA

### PLANT BREEDER'S RIGHTS ACT 1994

#### (Act No. 110 of 1994 as amended in 2002\*)

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\* Text provided by Australian Authorities on February 5, 2003.

This consolidated text was prepared on January 6, 2003, taking into account amendments up to Act No. 148 of 2002.

Act No.148 was assented on December 19, 2002. The text of any of those amendments not in force on that date is appended in the Notes section. The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section. Prepared by the Office of Legislative Drafting, Attorney-General's Department, Canberra.

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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.

## PART 1

## PRELIMINARY

## 1

Short title [see Note 1, page 47]

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

## 2

Commencement [see Note 1, page 47]

(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.

## 3

## Definitions

(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.

**indigenous** means:

- (a) a member of the Aboriginal race of Australia; or

- (b) a descendant of the indigenous inhabitants of the Torres Strait Islands.

**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 class**, for the purpose of variety denomination, means a class consisting of all plants:

- (a) that belong to a single botanical genus; or  
 (b) that belong to a group of closely related genera;

that is specified from time to time as a plant class in the Registrar's List of Plant Classes maintained under subsection 61(1A).

**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, means a name that:

- (a) is included in an application in addition to the name of the variety; and  
 (b) is a name by which the variety will be known or sold in Australia.

**test growing** includes a comparative test growing.

**Union** means the Union for the Protection of New Varieties of Plants as defined in Article 1 of the Convention.

**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.

#### 4

#### Definition of essentially derived varieties

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.

## 5

## Definition of breeding

- (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.

## 6

## Genetic modification

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.

## 7

## Approved forms

- (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*.

## 8

## Approved persons

- (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*.

## 9

## Act to bind Crown

- (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.

## 9A

Application of the *Criminal Code*

Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

## 10

## Extent of Act

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

## 11

## General nature of PBR

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).

Note: In certain circumstances, the right conferred by this section extends to essentially derived varieties (see section 12), certain dependent plant varieties (see section 13), harvested material (see section 14) and products obtained from harvested material (see section 15).

## 12

Extension of PBR to cover essentially derived varieties

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.

## 13

Extension of PBR to cover certain dependent plant varieties

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.

## 14

Extension of PBR to harvested material in certain circumstances

(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.

## 15

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

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.

## 16

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

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.

## 17

Conditioning and use of farm saved seed does not infringe PBR

(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.

#### 18

Restriction on grantee's rights in certain circumstances

(1) If:

- (a) a person is authorised by or under a law of the Commonwealth or of a State or Territory to do an act referred to in a paragraph of section 11 in relation to propagating material of a plant variety; and
- (b) the act is one which (apart from this provision) would require authorisation from the grantee of PBR in the plant variety; and
- (c) before the person does the act, the person either pays equitable remuneration to the grantee in respect of the act or arranges for the payment of such remuneration; and
- (d) the person does the act;

then the grantee is not entitled to exercise PBR in the plant variety against the person in respect of that act.

(2) To avoid doubt, subsection (1) does not limit the operation of section 17 in relation to the conditioning or reproduction of propagating material in the circumstances referred to in that section.

(3) In this section:

**equitable remuneration**, in relation to an act done in relation to propagating material of a plant variety, means an amount:

- (a) that is agreed between the person proposing to undertake the act and the grantee of PBR in the plant variety; or
- (b) if agreement cannot be reached under paragraph (a)—determined by a court of competent jurisdiction to constitute equitable remuneration in relation to the act.

#### 19

Reasonable public access to plant varieties covered by PBR

(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.

(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.

## 20

### PBR is personal property

(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.

## 21

### Registrar must be notified of an assignment of PBR

(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 30 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 30 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.

## 22 Duration of PBR

(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.

## 23 Exhaustion of PBR

(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).

(3) If, under subsection 18(1), equitable remuneration is paid, or arranged to be paid, to the grantee of PBR in a plant variety in respect of an act (the *first act*) in relation to propagating material of that variety before the person does the act, PBR in that variety does not extend to any later act (the *later act*) referred to in section 11 in relation to that propagating material unless the later act:

(a) involves the further production or reproduction of that propagating material; or

(b) 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.

(4) To avoid doubt, nothing in subsection (1) or (3) prevents the exercise of the rights of the grantee of PBR in a plant variety in relation to any propagating material of that variety that is obtained by reproduction of the propagating material to which that subsection applies.

## PART 3

## APPLICATION FOR PLANT BREEDER'S RIGHT

## Division 1

## The making of the application

## 24

## Right to apply for PBR

- (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.

## 25

## Right to apply for PBR is personal property

- (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.

## 26

## Form of application for PBR

- (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) the name of the location at which the variety was bred; and
- (ga) the name of each variety (the *parent variety*) used in the breeding program including, in respect of each parent variety:
  - (i) particulars of the names (including synonyms) by which the parent variety is known or sold in Australia; and
  - (ii) particulars of any PBR granted in Australia or in any other contracting party; and
- (gb) a brief description of the manner in which the variety was bred; 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.

Note: The information given under paragraph (ga) is not available to the public under section 36.

- (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.

## 27

## Names of new plant varieties

(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.

(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.

(3A) If, before making an application in Australia for PBR in a plant variety, PBR has not been granted in that variety in another contracting party, a synonym may also be included in the application.

(4) A name (including a synonym), 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 (including a synonym), 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 of the same plant class; 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 1995*, in respect of live plants, plant cells and plant tissues.

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

(7) A name (including a synonym), 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.

## 28

## Applications to be given priority dates

(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.

## 29

## Priority dates arising from foreign application

(1) If:

- (a) a person has lodged an application for PBR in a plant variety in one or more contracting parties other than Australia; and
- (b) within a period of 12 months after the date that the earliest of those applications (the *foreign application*) was lodged, the person lodges an application in Australia (the *local application*) for PBR in the variety; and
- (c) the local application is accompanied with a claim to have the date of lodgment of the foreign application treated as the priority date for the purposes of the local application; and
- (d) the local application is accepted;

the person is entitled to have the date of lodgment of the foreign application treated as the priority date for the purposes of the local application, subject to subsections (3) and (4).

(3) The entitlement of the person to have the date of lodgment of the foreign application treated as the priority date for the purposes of the local application 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 have the date of lodgment of the foreign application treated as the priority date for the purposes of the local application 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.

## 30

## Acceptance or rejection of applications

(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 applicant—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.

## 31

## Requests for variation of application

(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, 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.

## 32

## Notification of decisions on requests to vary application

(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.

(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.

## 33

## Withdrawal of application

(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

## 34

Detailed description in support of application  
to be given to Secretary

(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, com-

pleted 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.

(7) Subsection (6) does not apply to an applicant if the plant variety to which the application relates is in quarantine under the *Quarantine Act 1908* when the examination fee becomes payable. Instead, the applicant must pay the prescribed examination fee within 12 months after the plant variety is released from quarantine.

### 35

#### Objection to application for PBR

(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).

(2A) An objection is of no effect unless it is accompanied by the prescribed fee.

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

### 36

#### Inspection of applications and objections

(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.

(3) However, this section does not entitle a person to inspect the part of the application that contains the information referred to in paragraph 26(2)(ga) or to have a copy of the part of the application containing that information, unless the person is:

- (a) the applicant; or
- (b) the applicant's authorised agent; or
- (c) the Minister; or
- (d) the Secretary; or
- (e) a person who is required to inspect the part of the application in the course of performing his or her duties in accordance with this Act; or
- (f) a person prescribed for the purposes of this subsection.

### 37

#### Test growing of plant varieties

(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:

- (d) must give written notice of that decision:
  - (i) to the person who made the application, objection or request; and
  - (ii) in the case of an objection to an application for PBR—also to the applicant; and
  - (iii) in the case of a request for revocation of PBR—also to the grantee; and

- (e) may also give written notice of that decision to any other person whom the Secretary considers appropriate if the test growing or further test growing is a comparative test growing.

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.

(2A) A person to whom a notice is sent under this section must comply with the requirements of the notice:

- (a) in the case of trees and vines, or propagating materials of trees and vines—within 2 years from the date of service of the notice; and
- (b) in the case of other species of plant or propagating materials of other species of plant—within 12 months from that date.

(2B) If a person, without reasonable excuse, fails to comply with the requirements of a notice issued under this section, the Secretary may:

- (a) if the person is the grantee—revoke PBR, in the plant variety to which the notice relates, under section 50; or
- (b) if the person made an application, objection or request—decide not to further proceed with the application, objection or request for revocation.

Note: A decision not to further proceed with the application, objection or request for revocation is reviewable by the AAT under section 77.

(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:
- (i) by the applicant for PBR, where the test growing shows that there are valid reasons for the objection; or
- (ii) by the objector, in any other case; or
- (c) if it is conducted to deal with a request for revocation of PBR:
- (i) by the grantee, where the test growing shows that there are valid reasons for the request; or
- (ii) by the person making the request, in any other case.

(6) If a contracting party, or a national or an organisation of a contracting party, requests the Secretary to conduct in Australia a test growing of a plant variety, the Secretary may decide to conduct the test growing as so requested.

(7) If the Secretary decides to conduct a test growing under subsection (6), subsections (1), (2), (3), (4) and (5) apply to such test growing as if:

- (a) the person or organisation requesting the test growing under subsection (6) was an applicant for PBR; and
- (b) the test growing had been decided on in relation to that application.

38

Characteristics of plant varieties bred or test grown outside Australia

(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

39

#### Provisional protection

(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
- (aa) a decision has been taken under paragraph 37(2B)(b) not to proceed with the application; or
- (ab) the application has been withdrawn; 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; or
- (c) at least 12 months have elapsed since the publication of the detailed description that was given to the Secretary under subsection 34(1);

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.

(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

40

## Applications for declarations of essential derivation

- (1) If:
- (a) a person is the grantee of PBR in a particular plant variety—the *initial variety*); and
  - (b) another person is the grantee of, or has applied for, PBR in another plant variety (the *second variety*); and
  - (c) the grantee of PBR in the initial variety is satisfied that the second variety is, within the meaning of section 4, an essentially derived variety of the initial variety; and
  - (d) the initial variety has not itself been declared to be an essentially derived variety of another variety in which PBR has been granted;

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

(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
- (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.

41

Test growing associated with applications for declarations of essential derivation

- (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

## 42

## PBR not to be granted in excluded varieties

(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.

## 43

## Registrable plant varieties

(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, plant 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, plant material of the variety has not been sold to another person by, or with the consent of, the breeder, either:

- (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.

Note: For the definition of *sell* see subsection 3(1).

(7) Subsection (6) does not apply to a sale by the breeder of a plant variety of plant 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.

(7A) Subsection (6) does not apply to a sale of plant material of a plant variety to a person by, or with the consent of, the breeder if:

- (a) the sole purpose of the sale is for the person to multiply plant material of that plant variety on behalf of the breeder; and
- (b) under the agreement for the sale, immediately after the plant material is multiplied, property in the new plant material vests in the breeder.

(7B) Subsection (6) does not apply to a sale of plant material of a plant variety to a person by, or with the consent of, the breeder if the sale is part of an agreement under which the person agrees to use plant material of that variety for the sole purpose of evaluating the variety in one or more of the following tests or trials:

- (a) field tests;
- (b) laboratory trials;
- (c) small-scale processing trials;
- (d) tests or trials prescribed for the purposes of this subsection.

(7C) Subsection (6) does not apply to a sale of plant material of a plant variety to a person by, or with the consent of, the breeder if:

- (a) the sale only involves plant material that is a by-product or surplus product of one or more of the following:
  - (i) the creation of the variety;
  - (ii) a multiplication of the variety;
  - (iii) tests or trials covered by subsection (7B); and
- (b) the plant material is sold:
  - (i) without identification of the plant variety of the plant material; and
  - (ii) for the sole purpose of final consumption.

(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 proceeding, or has led, to the grant of PBR.

(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.

(10) In this section:

**plant material**, in relation to a plant variety, means one or more of the following:

- (a) propagating material of the plant variety;
- (b) harvested material of the plant variety;
- (c) products obtained from harvested material of the plant variety.

#### 44

#### Grant of PBR

(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.

(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.

## 45

## Grant of PBR to be exclusive

- (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.

## 46

## Grant of PBR to be entered on Register

- (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.

## 47

## Notice of grant of PBR

- (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*.

## 48

## Effect of grant of PBR

- (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 40 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.

#### 49

PBR may be subject to conditions

(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, whether proposed or made, 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

### REVOCAION OF PLANT BREEDER'S RIGHT OR DECLARATION OF ESSENTIAL DERIVATION

#### 50

#### Revocation of PBR

(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

(aa) the Secretary is satisfied that the grantee, without reasonable excuse, has failed to comply with the requirements of a notice under section 37; 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 is essentially derived from another plant variety (the *initial 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
- (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.
- (9A) An application under subsection (8) or (9) is of no effect unless it is accompanied by the prescribed fee.
- (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.

## 51

## Entry of particulars of revocation

- (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.

## 52

## Surrender of PBR

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

## 53

## Infringement of PBR

- (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 of the same plant class; or
- (ii) a plant of any other variety of the same plant class.
- (1A) To avoid doubt, an infringement of PBR in a plant variety under paragraph (1)(c) can include using a synonym in relation to the name of a plant variety, if that synonym is entered in the Register under paragraph 46(1)(b).

(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.

## 54

## Actions for infringement

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

(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.

## 55

## Declarations as to non-infringement

(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.

## 56

## Jurisdiction of Court

(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.

## 57

## Innocent infringement

(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

#### 58

##### Registrar of Plant Breeder's Rights

- (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.

#### 59

##### Delegation

- (1) The Minister may, by signed instrument, delegate to the Registrar, or to an SES employee, or acting SES employee, in the Department, 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 an SES employee, or acting SES employee, in the Department, any of the powers or functions of the Secretary under this Act.

#### 60

##### Certain persons not to acquire PBR

- (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.

#### 61

##### Register of Plant Varieties

- (1) The Registrar must keep a register, to be known as the Register of Plant Varieties, at a place approved by the Secretary.
- (1A) The Registrar must maintain, for the purposes of this Act, a list of all plant classes to be known as the Registrar's List of Plant Classes.
- (1B) In maintaining that list the Registrar must, for so long as the Union maintains the document presently known as the List of Classes for Variety Denomination Purposes, have regard to that list and to any variations to that list as so maintained.
- (1C) The list maintained by the Registrar must be kept as a part of the Register.
- (2) In order to foster public access to the information contained in the Register, the Registrar may disseminate that information on the Internet or in such other manner as the Registrar considers most likely to enhance its accessibility.

#### 62

##### Inspection of Register

- (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.
- (3) For the purposes of subsection (2), a reference to an entry in the Register does not include a reference to the Registrar's List of Plant Classes or to any part of that list.

## PART 7

### PLANT BREEDER'S RIGHTS ADVISORY COMMITTEE

#### 63

##### Establishment of Advisory Committee

- (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
- (aa) at the request of the Minister, to advise the Minister on the question of whether an existing, or proposed, grant of PBR should be subject to conditions; 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.

## 64

## Membership of Advisory Committee

- (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) one member who will represent the conservation interests in relation to new plant varieties and the potential impacts of new plant varieties; and
  - (f) one member who will represent indigenous Australian interests in relation to new plant varieties and the source, use and impacts of new plant varieties; and
  - (g) 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 3 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.

## 65

## Remuneration and allowances

- (1) The members referred to in paragraphs 64(1)(b), (c), (d), (e), (f) and (g) 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*.

## 66

## Disclosure of interests

- (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.

67  
Meetings

- (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, 5 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

68  
Public notices

- (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.
- (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.

69  
Notices inviting submissions in respect  
of certain regulations

- (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.

70  
Genetic resource centres

- (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.

71  
The herbarium

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.

72  
Agents may act in matters relating to PBR

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.

73  
Service of documents

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.

## 74

## Infringement offences

(1) A person must not, in relation to propagating material of a plant variety in which PBR has been granted, 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.

(1A) In subsection (1), strict liability applies to the physical element of circumstance, that the infringement of the PBR would be under section 53.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

(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.

## 75

## Offences other than infringement offences

(1) A person must not 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 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 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 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.

## 76

## Conduct by directors, servants and agents

(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.

(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.

## 77

## Applications for review

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

- (a) a decision by the Minister under subsection 49(2); 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
  - (viiia) under paragraph 37(2B)(b) not to proceed further with an application, objection or request for revocation; 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).

(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.

78  
Repeal

The *Plant Variety Rights Act 1987* is repealed.

## 79

## Compensation for acquisition of property

(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.

#### 80 Regulations

(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
  - (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, if the matter is not dealt with by another provision of this Act, specifying the time at which, or the circumstances in which, such fees are to be paid and the manner of payment of such fees; 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

#### 81 Definitions

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*.

#### 82

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

- (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.

## 83

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

- (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.

## 84

Other applications and proceedings under old Act

- (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.

## 85

Transitional arrangements for membership and functions of Advisory Committee

- (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.

## 86

Register of Plant Varieties

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 1  
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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## 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);

(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 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.

(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.

### 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 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 grow-

ing 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:

- (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 (vi), 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,
- (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,

- (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.

### 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 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.
- (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.
- (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.
- (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 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.

(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.

(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 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
- (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.

## 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.

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

NOTES TO THE *PLANT BREEDER'S RIGHTS ACT 1994*

## Note 1

The *Plant Breeder's Rights Act 1994* as shown in this compilation comprises Act No. 110, 1994 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions see Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Plant Breeder's Rights Act 1994	110, 1994	5 Sept 1994	10 No 1994: (see Gazette 1994, No. S392)	
Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 1) 1999	4, 1999	31 Mar 1999	31 Mar 1999	--
Public Employment (Consequential and Transitional) Amendment Act 1999	146, 1999	11 Nov 1999	Schedule 1 (item 733): 5 Dec 1999 (see Gazette 1999, No. S584) (a)	--
Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 2)	170, 1999	10 Dec 1999	Schedule 1: Royal Assent: (b)	Sch. 1 (item 7)
Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001	115, 2001	18 Sept 2001	16 Oct 2001	S. 4
Plant Breeder's Rights Amendment Act 2002	148, 2002	19 Dec 2002	20 Dec 2002	Sch. 1 (items 39-45)

(a) The *Plant Breeder's Rights Act 1994* was amended by Schedule 1 (item 733) only of the *Public Employment (Consequential and Transitional) Amendment Act 1999*, subsections 2(1) and (2) of which provide as follows:

(1) In this Act, **commencing time** means the time when the *Public Service Act 1999* commences.

(2) Subject to this section, this Act commences at the commencing time.

(b) The *Plant Breeder's Rights Act 1994* was amended by Schedule 1 only of the *Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 2) 1999*, subsection 2(1) of which provides as follows:

(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

## Table of Amendments

ad. = added or inserted    am. = amended    rep. = repealed  
rs. = repealed and substituted

Provision affected	How affected
S. 3	am. No. 4, 1999; No. 148, 2002
S. 9A	ad. No. 115, 2001
S. 11	am. No. 148, 2002
S. 18	rs. No. 148, 2002
S. 21	am. No. 170, 1999
S. 23	am. No. 148, 2002
S. 26	am. No. 148, 2002
S. 27	am. No. 4, 1999; No. 148, 2002
S. 29	am. No. 148, 2002
S. 30	am. No. 148, 2002
S. 34	am. No. 148, 2002
S. 35	am. No. 170, 1999
S. 36	am. No. 148, 2002
S. 37	am. No. 170, 1999; No. 148, 2002
S. 39	am. No. 148, 2002
S. 43	am. No. 170, 1999; No. 148, 2002
S. 48	am. No. 148, 2002
S. 49	am. No. 148, 2002
S. 50	am. No. 170, 1999; No. 148, 2002
S. 53	am. No. 4, 1999
S. 54	am. No. 148, 2002
S. 59	am. No. 146, 1999
S. 61	am. Nos. 4 and 170, 1999
S. 62	am. No. 4, 1999
S. 63	am. No. 148, 2002
S. 64	am. No. 148, 2002
S. 65	am. No. 148, 2002
S. 67	am. No. 148, 2002
Ss. 74, 75	am. No. 115, 2001
S. 77	am. No. 148, 2002
S. 80	am. No. 170, 1999
Schedule 1	am. No. 148, 2002

## Table A

## Application, saving or transitional provisions

Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 2) 1999 (*No. 170, 1999*)

## Schedule 1

## 7 Transitional provision

- (1) If:
- (a) a person first sold a plant variety in the territory of a contracting party other than Australia after 9 November 1988 and before 10 November 1990; and
  - (b) the person lodged an application for PBR under the *Plant Breeder's Rights Act 1994* more than 4 years but less than 6 years after the date of that first sale; and
  - (c) the application was rejected only because of the operation of subsection 43(6) of that Act;

then, despite the terms of that subsection and subject to subitem (2), the Registrar may further consider that application as if the sales of that plant variety occurring after 9 November 1988 but more than 4 years before the application had not taken place.

- (2) Subitem (1) does not apply in relation to an application referred to in that subitem unless the applicant in relation to that application, or any successor in title to that applicant, notifies the Registrar, in writing, to take action under this item in relation to that application within 6 months after the commencement of this item.

*Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001* (No. 115, 2001)

## 4 Application of amendments

- (1) Each amendment made by this Act applies to acts and omissions that take place after the amendment commences.
- (2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.

*Plant Breeder's Rights Amendment Act 2002* (No. 148, 2002)

## Schedule 1

## 39 Application of item 4

The amendment made by item 4 applies in relation to an act done on or after the commencement of that item.



**40 Application of item 16**

The amendment made by item 16 applies in relation to:

- (a) an application made before the commencement of that item, if the applicant has not paid the examination fee in respect of the application; and
- (b) an application made on or after the commencement of that item.

**41 Application of items 18, 19 and 31**

The amendments made by items 18, 19 and 31 apply in relation to a decision that there should be a test growing or further test growing that is made on or after the commencement of those items.

**42 Application of item 20**

The amendment made by item 20 applies in relation to a test growing begun on or after the commencement of that item.

**43 Application of items 21 and 22**

The amendments made by items 21 and 22 apply in relation to:

- (a) an application made, but not disposed of, before the commencement of those items; and
- (b) an application made on or after the commencement of those items.

**44 Application of items 23, 25, 26 and 28**

The amendments made by items 23, 25, 26 and 28 apply in relation to a sale that occurs on or after the commencement of those items.

**45 Application of item 27**

The amendment made by item 27 applies in relation to an application made before, on or after the commencement of that item.



## BOLIVIA

### REGULATIONS ON PROTECTION OF PLANT VARIETIES\*

<p style="text-align: center;">CHAPTER I</p> <p style="text-align: center;">GENERAL</p> <p style="text-align: center;">Article 1</p> <p style="text-align: center;">Object</p> <p>I. Pursuant to:</p> <p style="margin-left: 20px;">(a) The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), signed by Bolivia, which requires each of the signatory countries to recognize the intellectual property rights of plant varieties;</p> <p style="margin-left: 20px;">(b) Decision 345 of the Andean Community of Nations, former Board of the Cartagena Agreement (JUNAC), which establishes the protection of the rights of the breeders of varieties, regulated by Supreme Decree No. 23069;</p> <p style="margin-left: 20px;">(c) National Law No.1968 of March 24, 1999, through which our country requests accession to the International Union for the Protection of New Varieties of Plants (UPOV);</p> <p>These regulations are established and govern the above Decision of the Andean Community of Nations.</p> <p>II. The aim of this Resolution is to:</p> <p style="margin-left: 20px;">(a) recognize and guarantee the intellectual right known as a “breeder’s right” for the breeder of a plant variety, by granting an Ownership Title of the variety;</p> <p style="margin-left: 20px;">(b) promote agricultural research activities; and</p> <p style="margin-left: 20px;">(c) promote technology transfer activities.</p> <p style="text-align: center;">Article 2</p> <p style="text-align: center;">Additional objective</p> <p>To incorporate into domestic legislation the provisions contained in the international agreements to which the country has acceded and has ratified in that regard.</p>	<p style="text-align: center;">Article 3</p> <p style="text-align: center;">Sphere of application</p> <p>This Resolution shall apply to all plant genuses and species, apart from those specified by express resolution of the Competent National Authority or those whose cultivation, possession or use are prohibited for reasons of human, animal or plant health.</p> <p style="text-align: center;">Article 4</p> <p style="text-align: center;">Beneficiaries of rights</p> <p>Beneficiaries of the rights granted to the breeder shall be:</p> <p>I. Domestic individual and collective persons.</p> <p>II. Foreign individual and collective persons which have indicated that they are domiciled or have legal representation in the national territory, provided that rights similar to those established in our country be granted in their own country.</p> <p style="text-align: center;">Article 5</p> <p style="text-align: center;">Competent National Authority</p> <p>The National Seeds Program shall be designated as the Competent National Authority, and shall administer and apply, in operative terms, the protection of plant varieties, through its corresponding bodies.</p> <p style="text-align: center;">Article 6</p> <p style="text-align: center;">[Request]</p> <p>The application for the protection of a variety shall be filed, using the appropriate special form, by the breeder of the variety or his legal representative domiciled in the country, with the relevant documentation and the individual confirmation of payment for services being attached.</p> <p style="text-align: center;">Article 7</p> <p style="text-align: center;">[Plant Material]</p> <p>When filing his application, the applicant shall file a sample of the plant material (seeds, tubers, rhizomes, runners and so</p>
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\* Text provided in Spanish by the Authorities of Bolivia and translated by the Office of the Union, with their approval.  
These Regulations entered into force on April 2, 2001.

on) to be protected. The quantity thereof shall be indicated by the Competent National Authority. The applicant shall be obliged to submit samples of plant material, as many times as required.

#### Article 8

##### [Documentation]

As a general rule, the application for protection shall include at least the information contained in the special form for this purpose. In cases where part of the documentation is issued abroad, the documentation shall be legalized by the corresponding authority of the country of origin. The documents for the varieties of national origin shall be similarly authenticated.

#### Article 9

##### [Sworn statement]

The applicant shall file a sworn statement indicating the features of the variety and specifying that it is novel, different, uniform and stable.

#### Article 10

##### Definitions

For the purposes of this Resolution, the following terms mean:

- I. Protection: The right of exclusivity granted to the breeder over a variety, subject to the regulations established in this Resolution.
- II. New Plant Variety: A variety which can be the subject of the breeder's right.
- III. Variety: A group of plants which belong to a single botanical taxon, of the lowest known range, which may be:
  - (a) defined by the expression of the resulting features of a particular genotype or of a particular combination of genotypes;
  - (b) distinguished from any other group of plants by the expression of at least one of the relevant features;
  - (c) considered to be a unit, taking into account its capacity to be propagated without change, and;
  - (d) in short, defined as a distinct, uniform and stable group.
- IV. Breeder: The individual or collective person which has created or discovered and developed a plant variety.

V. Discovery: This shall be the application of the human intellect to any activity, the aim of which is to make known features or properties of the new variety, insofar as this complies with the requirements of novelty, distinctness, uniformity and stability provided for in this Resolution. A simple find shall not be covered by the previous definition.

VI. Ownership Title: The document granted by the Competent National Authority, which recognizes the right of the breeder to a variety.

VII. Owner: This shall be the individual or collective person who owns the right to a variety;

VIII. Plant Material: The living sample of the variety supplied by the breeder applicant, which may be whole plants or parts thereof, and which will be used to carry out the tests of novelty, distinctness, uniformity and stability.

IX. Essentially Derived Variety: A variety shall be deemed to be essentially derived from another variety, hereinafter an initial variety, when it is predominantly derived from the initial variety that is itself predominantly derived from the initial variety, while retaining the expressions of the essential characteristics resulting from the genotype or the combination of genotypes of the initial variety; it is clearly distinguishable from the initial variety and, except from the differences which result from the act of derivation, it conforms with the initial variety in the expression of the essential characteristics resulting from the genotype or the combination of its genotypes.

## CHAPTER II

### BREEDER'S RIGHT

#### CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT

##### Article 11

##### Conditions

The breeder's right shall be granted where the variety is:

- I. novel,
- II. distinct,
- III. uniform,
- IV. stable, and
- V. has received a denomination established in accordance with the provisions of articles 18 to 29 of this Resolution.

## Article 12

## Novelty

A variety is considered novel if the reproduction or propagation material, or a product of its harvest, has not been sold or otherwise lawfully disposed of to third parties by the breeder or his rightful successors, or with his consent, for purposes of commercial exploitation of the variety.

## Article 13

## Loss of Novelty

Novelty is lost, where:

- I. The exploitation referred to in the previous article has begun at least one (1) year prior to the filing date of the application for the grant of an Ownership Title or of the claimed priority; if the sale or dispose has been made within the national territory or,
- II. The exploitation established in the previous article has begun at least four (4) years or, in the case of trees and vines, at least six (6) years prior to the filing date of the application for the grant of an Ownership Title or of the claimed priority, if the sale or disposal has been made in a territory other than the national territory.

## Article 14

## Novelty is not lost

The condition of novelty is not lost through sale or disposal to third parties, where such acts:

- I. are the result of an infringement to the detriment of the breeder or his successor in title;
- II. are part of an agreement to transfer the right to the variety, provided that this has not been transferred physically to a third party;
- III. are part of an agreement in accordance with which a third party increased, on behalf of the owner, the existing reproduction or propagation material;
- IV. are part of an agreement in accordance with which a third party carried out field or laboratory tests, or small-scale processing tests in order to assess the variety;
- V. relate to the harvest material which had been obtained as a secondary product or surplus of the variety or the activities mentioned in parts III and IV of this article, or,
- VI. are produced in any unlawful form.

## Article 15

## Distinction

I. A variety shall be considered distinct, if it is clearly distinguishable from any other variety whose existence was commonly known at the time of the filing of the application or of the claimed priority.

II. The filing in any country of an application for the grant of the Ownership Title, or for the entry of the variety in an official register of varieties, will have made commonly known said variety from that date, if such an act were to lead to the grant of rights or the registration of the variety, as the case may be.

## Article 16

## Uniformity

A variety is considered to be uniform if its relevant characteristics are sufficiently uniform, taking into account the variations that may be expected from its form of reproduction, multiplication or propagation.

## Article 17

## Stability

A variety is considered to be stable if its relevant characteristics remain unchanged from generation to generation and, in the case of a particular cycle of reproductions or multiplications, at the end of each cycle.

## Article 18

## Denomination

The variety will be known by a denomination intended to serve as a generic designation.

## Article 19

## Identity

The denomination shall be different from any designation of an existing variety of the same species of plant or similar species, and shall allow it to be identified without confusion.

## Article 20

## Composition of the denomination

A variety may be denominated as an imaginary name or by means of a code.

## Article 21

## Impediments

- I. Use excluded by the previous right of a third party;
- II. Difficulties regarding recognition or reproduction;
- III. Denominations which are identical or may be confused with a denomination of another variety.
- IV. Denominations which are identical or may be confused with other designations.
- V. Risk of error or confusion as regards the features of the variety or other particularities.

## Article 22

## Reasons for the refusal of a denomination

A denomination shall serve as a reason for refusal, where it is considered that it causes difficulties for users, as regards recognition or reproduction, taking into account the following:

- I. A denomination which has an “imaginary name” consists of a single letter;
  - (a) consists of a series of letters which do not form a word that can be pronounced or contains a series of letters as a separate entity, except where this series is an established abbreviation;
  - (b) contains a number, except where this is an integral part of a number, or where it indicates that the variety forms, or will form, part of a numbered series of biologically related varieties;
  - (c) includes or consists of an excessively long word;
  - (d) contains a script, a blank space distinct from that which exists between the entities which form them, another type of sign, a mixture of capital and small letters within the entities, a subscript, superscript, symbol or drawing;
- II. A denomination, which is in the form of a “code:”
  - (a) consists only of a number or numbers, except in the case of pure lines or of a type of similarly specific varieties, where it consists of a single letter;
  - (b) contains more than ten letters, or letters and numbers;
  - (c) contains more than four alternative groups of a letter or letters and a number or numbers;
  - (d) contains a script, blank space distinct from that of the separation of a word that can be pronounced, another type of sign, subscript, superscript, symbol or drawing.

III. Similarly, it will be considered that a variety denomination leads to error or causes confusion, if it:

- (a) conveys the false impression that it possesses special features or values;
- (b) conveys the false impression that the variety is related to another specific variety, or is derived therefrom;
- (c) refers to a specific feature or value such that it gives the false impression that only that variety possesses it, when in reality other varieties of that same species can possess the same feature or value;
- (d) owing to its similarity with a well-known trade name which differs from a registered trademark or from the variety denomination, evokes the variety or conveys a false impression as to the identity of the applicant, person responsible for maintaining the variety, or the breeder.

IV. Consists of or contains:

- (a) comparatives or superlatives;
- (b) the botanical name or part thereof, a genus or species of the plant kingdom;
- (c) the common name of a genus or species within the plant kingdom belonging to the group of species of plants to which the variety belongs;
- (d) the name of a natural or legal person, or a reference thereto, such that it conveys a false impression as to the identity of the applicant, person responsible for maintaining the variety, or breeder.

When the proposal relating to the variety denomination is submitted, the applicant shall state whether the proposed denomination adopts the form of an “imaginary name” or a “code.”

If the applicant does not make a statement as to the form of the proposed denomination, this shall be regarded as an imaginary name.

The plant denominations which have been accepted in the form of a code shall be clearly identified as such in the official register of varieties with the explanation “variety denomination accepted in the form of a code.”

## Article 23

## Free use of a denomination

No right relating to the designation registered as a denomination of the variety shall hinder the free use thereof in relation to the variety, including after the breeder’s right has expired.

## Article 24

## Denomination proposed by the breeder

The denomination of the variety shall be proposed by the breeder to the Competent National Authority.

If it is verified that said denomination does not meet the requirements detailed above, the Authority shall decline registration and shall request the breeder to propose another denomination within a fixed period, contrary to which registration shall be permanently declined.

## Article 25

## Time of registration of the denomination

The denomination shall be registered by the Competent National Authority, at the time the breeder's right is granted.

## Article 26

## Preservation of the denomination of origin

A variety may only be the subject of applications for the grant of a breeder's right under the same denomination, registered in the territory where it originated. It shall be registered prior to verification.

## Article 27

## Prohibition of the use of an accepted denomination

Once the variety denomination has been accepted, it shall be forbidden to use an identical or similar designation. This prohibition shall remain in force after the variety has ceased to be used, since the denomination has acquired a particular meaning in relation to the variety.

## Article 28

## Obligation to use the denomination

Any person offering for sale, marketing or in any way transferring the plant reproduction or propagation material of a protected variety, shall be obliged to use the denomination of that variety, including after the breeder's right relating to that variety has expired.

## Article 29

## Combination of the denomination with a distinctive sign

When a variety is offered for sale, marketed or in any way transferred, the Competent National Authority may authorize the combination of a factory or trademark, trade name or other distinctive sign with the denomination of the registered variety.

If such an indication is combined in this way, the denomination shall, however, be easily recognizable.

## CHAPTER III

## OWNERS OF THE RIGHT TO PROTECTION AND RIGHTS OF THE OWNER

## Article 30

## Ownership

The owner of a breeder's right shall be the natural or legal person who has developed and perfected a variety, and to whom the Competent National Authority has granted the individual Ownership Title, subject to the requirements of this Resolution being met. The breeder or his successor in title shall have the right to apply for an Ownership Title.

## Article 31

## Joint ownership

In cases where a number of persons have created or discovered and jointly developed a variety, the right to protection shall accrue to them jointly and equally, unless otherwise specified.

## CHAPTER IV

OWNER'S RIGHTS  
SCOPE OF THE BREEDER'S RIGHT

## Article 32

## Acts requiring authorization.

- I. The grant of an Ownership Title shall confer on its owner the right to prevent third parties from carrying out, without the owner's consent, the following acts relating to the reproduction, propagation or multiplication material for the protected variety:
  - (a) Production, reproduction, multiplication or propagation;
  - (b) Conditioning for reproduction, multiplication or propagation purposes;
  - (c) Offer for sale;
  - (d) Sale or any other act which involves the introduction into the market of the reproduction, propagation or multiplication material for commercial purposes;
  - (e) Export;
  - (f) Import;

- (g) Possession for any of the purposes mentioned in the previous subparagraphs;
- (h) Commercial use of ornamental and fruit plants, or parts thereof, as multiplication material in order to produce ornamental and fruit plants, or parts of ornamental or fruit plants, or cut flowers;
- (i) The performance of acts indicated in the previous paragraphs in relation to the harvested material, including whole plants and parts thereof, obtained for the unauthorized use of the reproduction or multiplication material for the protected variety, unless the owner could reasonably have exercised his exclusive right in relation to said reproduction or multiplication material.

II. Express authorization shall be required from the owner of the right to protection, in accordance with the provisions of Articles 43 to 47 of this Resolution.

#### Article 33

##### Relationship with non-distinguishable varieties

The Ownership Title for a variety shall also confer on its owner the exercise of the rights provided for in previous articles in relation to the varieties which are not clearly distinguished from the protected variety, pursuant to Article 15 and with respect to the varieties whose production requires the repeated use of the protected variety.

#### Article 34

##### Relationship with essentially derived varieties

The Ownership Title for a variety shall also confer on its owner the exercise of the rights provided for in relation to the varieties essentially derived from the protected variety.

### CHAPTER V

#### EXCEPTIONS TO THE BREEDER'S RIGHT

#### Article 35

##### Researcher's right

The breeder's right shall not confer on its owner the right to prevent third parties from using the protected variety, where such use is in the form of the following acts:

- I. in the private sector for non-commercial purposes;
- II. for experimental purposes, and;

- III. in order to create and use a new variety, except where this is a variety essentially derived from a protected variety. Said new variety may be registered on behalf of its breeder.

#### Article 36

##### Farmer's right and own use

- I. The right of the breeder shall not be infringed by those who reserve as seed or sow for their own use the product obtained on their own holdings. This exception shall be extended only to producers with an agricultural holding equal to or less than 200 hectares which may be cultivated, wherein the following maximum parameters are permissible: 100 hectares for soya, wheat, maize, sorghum, sunflower or cotton; 50 hectares for rice and 20 hectares for other species. Who sells as raw material or food the product obtained from the cultivation of the protected variety, irrespective of the cultivated extension, shall not infringe the right of the breeder.
- II. Those producers not covered by paragraph I of this article and who wish to reserve and sow, in their own holding for their own use, the product obtained from the cultivation of the protected variety may do so, provided that the breeder's right is exercised reasonably with respect to said product of the protected variety.
- III. In order to establish a transparent system, the owner of a variety shall deposit, on an annual basis, with the Competent National Authority, and up to July 31 of each year, the conditions subject to which it considers that its rights to the variety shall be reasonably exercised under paragraph II. Said information shall be published by the Competent Authority.
- IV. The owner of a breeder's right shall be obliged to grant a license for exploiting the protected variety to those producers who, under paragraph II of this article, wish to reserve and sow, in their own holding for their own use, the product obtained from the cultivation of said variety, for crops whose production shall be intended for industry or consumption purposes, provided that the producer has lawfully acquired the variety on at least one occasion and the owner of the breeder's right has reasonably exercised his rights over the material which gave rise to said product. The Competent National Authority shall act as an arbitration body in the case of dispute.
- V. In cases where the breeder refuses the exploitation license for contractual reasons, on the basis of the information deposited with the competent authority under paragraph III the applicant shall exercise the breeder's rights, by means of a judicial deposit.
- VI. This article shall not cover the commercial use of material, including whole plants and parts thereof, for the multiplication, reproduction or propagation of fruit, ornamental and forest species.



## CHAPTER VI

## EXTENSION OF THE BREEDER'S RIGHT

## Article 37

## Extension

The breeder's right shall be extended for the purposes of the following acts:

- I. A new reproduction, multiplication or propagation of the protected variety;
- II. Export of the material of the protected variety, allowing the variety to be reproduced, to a country which does not grant protection for the varieties of the plant species to which the exported variety belongs, apart from where said material is intended for human or animal consumption, or industry.
- III. The purchase, sale or use of grain, or any other harvested product, for sowing purposes shall be regarded as acts performed with reproduction or multiplication material under Article 24 of Decision No. 345 of the Andean Community of Nations (formerly JUNAC).

## CHAPTER VII

INDEPENDENCE AND RELATIONSHIP  
OF THE BREEDER'S RIGHT WITH  
CERTIFICATION AND INSPECTION

## Article 38

## Independence

The breeder's right shall be independent of the regulations adopted for certification and inspection of seeds, production, control, import, export and marketing of protected varieties. Said regulations may not repudiate the breeder's rights nor hinder their exercise.

## Article 39

## Relationship

Materials of varieties which have been protected may not be certified or supervised, without the authorization of the owner of the right to the protected variety being verified.

## CHAPTER VIII

DURATION OF THE BREEDER'S RIGHT;  
PROVISIONAL PROTECTION

## Article 40

## Duration

The period of duration of the "Ownership Title" shall be twenty-five (25) years in the case of vines, forest and fruit trees, including their graft-holders, and twenty (20) years for other species, starting from the application filing date.

## Article 41

## Provisional protection

- I. The breeder shall enjoy provisional protection during the period from the filing of the application to the grant of the Ownership Title.
- II. An action for damages may only be taken once the Ownership Title has been granted, but may cover the damage caused by the respondent after the filing date.

## CHAPTER IX

## SUCCESSION AND TRANSFERS

## Article 42

## Succession and transfer

- I. Since it is an intellectual property right, the "Ownership Title" shall be transferable between living persons or as the result of death, since it is the subject of any type of contract or license.
- II. In case of disputes, the parties may refer the matter to the ordinary courts.
- III. Amendments to ownership shall be registered with the Competent National Authority.

## Article 43

## Contractual licenses

The owner of the breeder's right may grant licenses for the exploitation of a variety.

## Article 44

## Registration of licenses

All license contracts shall be in writing and shall be registered with the Competent National Authority.

## Article 45

## Free availability

In order to ensure appropriate exploitation of the protected variety, in exceptional cases of national security or public interest, the State may declare a variety to be freely available, on the basis of equitable compensation for the breeder.

The Competent National Authority shall determine the amount of the compensation, subject to a hearing with the parties and an expert report, based on the scope of the exploitation of the variety which is the subject of the license.

## Article 46

## Accreditation of the beneficiaries of a compulsory license

During the validity of the declaration of free availability, the Competent National Authority shall allow the exploitation of the variety by the persons concerned who offer sufficient technical guarantees and are registered for this purpose by the Competent National Authority.

## Article 47

## Duration of the compulsory license

The declaration of free availability shall remain valid for a maximum period of two (2) years, extendable once only for an equal period, if the conditions of its declaration have not disappeared when the first term expires.

## CHAPTER X

## EXPIRY OF THE BREEDER'S RIGHT

## Article 48

## Expiry

The Ownership Title shall expire for the following reasons:

- I. At the end of the lawful period of the breeder's right, in which case the variety shall be of public use.
- II. Renunciation by the breeder of his right, thereby placing the variety from that time on in the "public domain."

## Article 49

## Nullity

The Ownership Title granted shall remain null and void, if it is verified that:

- I. at the time the Ownership Title is granted, the established conditions of novelty and distinguishability are not satisfied effectively;
- II. where the grant of the Ownership Title was based essentially on the information and documents provided by the breeder, and the fixed requirements of uniformity and stability established were not satisfied effectively at the time the Ownership Title was granted; or
- III. The Ownership Title was granted to a person who did not have the right thereto, unless the Title has been transferred to the appropriate person.

No breeder's right may be declared null and void for reasons other than those mentioned in the previous paragraphs.

## Article 50

## Cancellation

The Ownership Title granted shall remain cancelled, if it is verified that:

- I. The requirements of uniformity and stability established in this Resolution are no longer satisfied.
- II. If, within an established period and after a request has been submitted:
  - (a) the breeder does not submit to the authority the information, documents or material considered necessary for verifying the maintenance of the variety.
  - (b) the breeder does not propose another appropriate denomination, where the denomination of the variety is revoked once the right has been granted.
  - (c) the annual fee for entry in the Register of Ownership of Varieties has not been paid, within a period of three (3) months since its notification.

The breeder's right may not be revoked for reasons other than those mentioned in the previous subparagraphs.

## CHAPTER XI

ORGANIZATION AND PROCEDURES  
GENERAL REGULATIONS

## Article 51

## Right to be heard

Any individual or collective person who believes that he or she has been harmed by a decision of the Competent National Authority shall be entitled to appeal in writing to that Authority, within 30 days of the date of receipt of the official communication.

## Article 52

## Notifications

Any communication between the Competent National Authority and an applicant or Owner shall be made by means of written notification.

## Article 53

## Registrations

The Competent National Authority shall keep a Public Register on the Protection of Breeders of Varieties, which shall be retained for a period of five (5) years from the date of withdrawal, rejection of the application or expiry of the breeder's right, according to the individual case.

The tests to which the variety is subject, for the purposes of its protection or the maintenance of rights, shall be public and may be verified by any interested party.

## Article 54

## Opening of the Register

The National Register of Protected Varieties of a particular genus or species shall be considered open from the time the first application for protection of a variety of the genus or species mentioned is accepted by the Competent National Authority.

## Article 55

## Regulation of procedures

The Competent National Authority shall regulate:

- I. the form and content of the application;
- II. the examination of form and substance of the application;
- III. the technical examination of the variety;

IV. the procedure for challenges;

V. other procedures relating to the grant of the breeder's right.

## Article 56

## Grant of the right or rejection of the application

The Competent National Authority shall grant the breeder's right, by means of the "Ownership Title," as a result of the technical examination of the variety, and shall verify that the variety satisfies the requirements of this Resolution. Where the opposite is proven, the application shall be rejected.

## CHAPTER XII

## OBLIGATIONS OF THE APPLICANT AND BREEDER

## Article 57

## Obligations of the applicant

The applicant shall:

- I. supply any information, documentation or necessary material, requested by the Competent National Authority, for the purposes of examining the application and the variety;
- II. supply appropriate samples of the variety to be protected, for the purposes of the technical examination which may consist of field and laboratory tests, and
- III. pay for the services relating to the acquisition of the right.

## Article 58

## Obligations of the breeder

The owner shall:

- I. pay the annual fee for maintaining the right in force, during the period of protection;
- II. maintain the protected variety, with the features with which it was protected or, where appropriate, its hereditary components, while the breeder's right is valid;
- III. submit additional documentation, at the request of the Competent National Authority; and,
- IV. where required, transfer to the Competent National Authority, necessary material of the protected variety, for inspection purposes. The material shall possess and maintain the same features by means of which it is defined as subject matter for protection.

## CHAPTER XIII

## RIGHT OF PRIORITY

## Article 59

## Priority

The applicant for a breeder's right who has duly filed an application for protection of a new variety in a State shall enjoy a priority right for a period of twelve (12) months in order to file his application for protection in another State, with respect to the same variety. This period shall be calculated from the filing date of the first application. The day of filing shall not be included in that period.

## Article 60

## Priority claim

In order to benefit from the priority right, the interested party shall claim expressly in the subsequent application his priority right for the first application and, within a three-month period, submit copies, certified by the corresponding Competent National Authority, of the documents contained in said application.

## Article 61

## Additional period

The applicant shall be authorized to request a postponement, of a maximum of two (2) years from the date on which the priority period expires [three (3) years from the filing date of the first application], for the examination of the variety. Notwithstanding, if the first application is rejected or withdrawn, the Competent National Authority may start the examination of the variety before the date indicated by the applicant; in that case, the applicant shall be granted an appropriate period to supply the information, documents or material necessary for the examination.

## CHAPTER XIV

## PUBLICATIONS AND GAZETTE

## Article 62

## Publication of protection

Once an application for registration has been filed and subject to the study of the case record, the Competent National Authority shall publish, once only in three national daily newspapers, a summary of the application, and from that date shall make available a period of thirty (30) working days for third parties to lodge any appropriate appeals. Once said period

has expired and provided that no objection has been raised, the Ownership Title shall be transferred, subject to the requirements of the law being satisfied.

If, within this period, an appeal is lodged, the applicant shall have sixty (60) working days to provide the appropriate evidence. With the case record, the Competent National Authority shall grant the title or shall reject the application filed.

## Article 63

## Publication of expiry

Any expiry, nullity or cancellation, transfer or loss of a breeder's right, shall be published once only in three national daily newspapers, following which the variety shall enter the public domain.

## Article 64

## Gazette

The Competent National Authority shall publish at least once a year details of the relationship between applications, denominations, expiries, rejections, grants of rights, licenses, transfers and other appropriate matters, in a Gazette specifically designed for this purpose.

## CHAPTER XV

## ADMINISTRATIVE PROCEDURE IN THE PROTECTION OF BREEDERS' RIGHTS

## Article 65

## Competent National Authority

The Competent National Authority shall be responsible for defending and protecting the breeder's right in administrative terms. It shall settle, in the first and second instance, the administrative cases, excluding disputes, that are referred to it by means of a denunciation by a party or *ex officio*. The National Seeds Program shall, together with all its components and relevant bodies, be designated as the Competent National Authority.

## Article 66

## Offences and penalties

The Competent National Authority shall punish, by means of a fine and where appropriate confiscation of multiplication material or closure of the institution, any person performing acts contrary to the owner's rights, without his consent or authorization and infringing the provisions of this Resolution.

## CHAPTER XVI

## TRANSITIONAL PROVISIONS

## Article 67

## Protection of known varieties

A variety, which was not novel on the date on which the National Register of Protected Varieties remained open for the filing of applications, may be registered, notwithstanding the provisions of Articles 12, 13 and 14, provided that it meets the following requirements:

- I. The application is filed within two years of the first grant of an Ownership Title for the genus or species corresponding to the variety, and,
- II. The variety has been entered in a Register of Varieties, be it for protection purposes or otherwise, of any country which has legislation relating to protection and which grants reciprocal treatment.

The validity of the Ownership Title, granted subject to this provision, shall be proportionate to the period which has already elapsed since the entry or registration in the country to which reference is made in paragraph II of this article. Where the variety has been registered in various countries, the oldest date of entry or registration shall apply.

## Article 68

## Previous regulations

The rights granted to breeders under the rules established in Secretariat Resolution No. 064/96, of August 9, 1996, issued by the National Secretariat of Agriculture and Livestock, shall be recognized. Issues of suitability and disputes relating to this recognition shall be considered by the Competent National Authority.



## REPUBLIC OF LATVIA

### PLANT VARIETIES PROTECTION LAW\*

#### CHAPTER ONE

#### GENERAL PROVISIONS

##### Section 1

##### The aim of this Law

The aim of this Law is to define the procedure for granting of breeder's right and provide the protection of breeder's right.

##### Section 2

##### Scope of Application of this Law

(1) This Law applies to varieties of all plant genera and species (including hybrids).

(2) 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. It 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. Variety is considered as a unit with regard to its suitability for being propagated unchanged.

##### Section 3

##### Conditions for granting of breeder's right

(1) The breeder's right shall be granted if a variety is:

new;

distinct;

uniform;

stable.

(2) In order to grant the breeder's right, the variety shall be assigned a denomination in accordance with the provisions of Section 20 of this Law. Breeder or it's authorised representative shall comply with the procedure provided for by this Law. No other conditions shall be proposed to granting of breeder's right.

#### Section 4

#### Novelty of a Variety

A variety shall be deemed to be new if, breeder or it's authorised representative or someone else with his or her consent has not sold, or in any other way transferred the seed, planting material (hereinafter – the propagating material) or harvested material of a variety to a third party for commercial use before the date when an application for the granting of breeder's right (hereinafter – an application) is registered:

- 1) in Latvia – earlier than one year before the registration of the application;
- 2) outside of Latvia – earlier than six years before the registration of the application in respect of vines and trees;
- 3) outside of Latvia – earlier than four years before the registration of the application in respect of other plants which are not referred to in Clause 2) of this Section.

#### Section 5

#### Distinctness of a Variety

(1) A variety shall be deemed to be distinct if it clearly differs from any other variety that has become a matter of common knowledge before the date of registration of the application.

(2) In particular, a variety shall be deemed to be a matter of common knowledge, if the application for granting of breeder's right or the inclusion of a variety in the official catalogue of varieties has been registered in any country and, if after such submission the breeder's right has been granted, or the variety has been included in the official catalogue of varieties. It shall be deemed to be a matter of common knowledge starting from the date when the said application has been registered.

#### Section 6

#### Uniformity of a Variety

A variety shall be deemed to be uniform if plants thereof which have been propagated observing the particular features of the variety propagation are sufficiently uniform in respect of the relevant characteristics of the variety.

\* Text provided by the Authorities of the Republic of Latvia. Adopted in Saeima on 2 May, 2002.

The Law "On Plant Variety Protection" (Republic of Latvia Supreme Council and Government Journal, 1993, No.18; Republic of Latvia and Cabinet of Ministers Journal, 1995, No. 22; 1999, No. 23) is hereby repealed.

## Section 7

## Stability of a Variety

A variety shall be deemed to be stable if, after repeated propagation or at the end of each cycle (if a particular cycle of propagation is used) the relevant characteristics of the variety do not differ substantially.

## Section 8

## Breeder

- (1) In accordance with this Law, a breeder means:
- 1) a physical person who has bred, or discovered and developed the relevant variety;
  - 2) is the employer of the aforementioned person or a commissioner who has concluded the contract with a person mentioned in Clause 1) of this Section on breeding or discovery and development of the relevant variety; or
  - 3) the successor in title of the persons mentioned in Clause 1) and 2) of this Section.
- (2) If a variety has been developed as a result of the joint activities of several breeders, they shall have joint breeder's right defined by a written agreement. If an agreement is not entered into, each of them has right to exercise breeder's right at his or her own discretion, with the exception of granting licences, as well as of transferring the breeder's right to another person. The joint owners of the breeder's right carry out such activities only by mutual agreement or in accordance with a court decision.

## Section 9

## Holder of breeder's right

Holder of breeder's right is the person mentioned in Section 8 of this Law who has acquired the breeder's right in accordance with the procedures prescribed by this Law.

## Section 10

## Authorized representative

- (1) The State Plant Protection Service shall register the authorized representative on the basis of breeder's authorization and issue certificate of authorized representative.
- (2) The authorised representative shall be the citizen of Latvia, person who has a right for a non-citizen passport, person who has a permanent residence in Latvia as well as a legal entity registered in Latvia.
- (3) Persons of other states shall submit the applications through mediation of an authorised representative only.

## Section 11

## Personal Rights of Breeder

- (1) A breeder (physical person) irrespective of who is a holder of breeder's right has a personal right not assigned to other person and not transferable by inheritance. This is the right to:
  - 1) be mentioned in materials and publications of the relevant variety;
  - 2) submit a proposal for the name of the variety; and
  - 3) claim to equitable compensation for the utilisation of the variety in the cases provided in the contract concluded with the employer.
- (2) The rights laid down in the Paragraph one of this Section in the case of breach may be protected in court in accordance with the procedure relevant for protection of copyright.

## Section 12

The Tasks of the National Plant Variety Council  
and the State Plant Protection Service in  
Respect of Variety Protection

- (1) The National Plant Variety Council submit proposals on guidelines of plant breeding and protection of breeder's right to the Ministry of Agriculture and other institutions.
- (2) The State Plant Protection Service shall:
  - 1) accept and review applications and other related documents;
  - 2) carry out an expert- examination of the conditions for the granting of the breeder's right;
  - 3) take decisions on approval of variety examination results obtained in other countries according to the criteria approved by the minister of agriculture;
  - 4) organise the examination of varieties;
  - 5) take decision on the granting, cancellation and nullity of the breeder's right;
  - 6) issue certificates on the granting of the breeder's right;
  - 7) register licences for the transfer of breeder's right;
  - 8) maintain the Latvian State Register of Protected Plant Varieties;
  - 9) within the limits of its competency co-operate with international organizations; and
  - 10) carry out other functions provided by this Law.



## Section 13

## The Latvian State Register of Protected Plant Varieties

(1) The information on applications and protected varieties shall be included in the Latvian State Register of Protected Plant Varieties (hereinafter – the Register);

(2) In respect to applications the following information shall be included in the Register:

- 1) the number and date of the application registration;
- 2) the name and address of the breeder or his authorised representative (hereinafter – the applicant) and the authorisation, if the applicant is not the breeder;
- 3) the denomination proposed for the variety;
- 4) the name and address of the breeder;
- 5) the questionnaire of the variety technical description or the variety description set up carrying out the examination of the variety (hereinafter – the variety description);
- 6) the date of priority;
- 7) information on examination of the application.

(3) In respect to protected varieties the following information shall be included in the Register:

- 1) the name and address of the holder of the breeder's right, the breeder, the authorised representative;
- 2) the variety denomination;
- 3) the variety description;
- 4) a reference to variety components, if such are used for propagation of the variety;
- 5) the date of the granting of the breeder's right, duration, cancellation and nullity of the breeder's right;
- 6) information on the issued licences.

(4) The applicant and the holder of the breeder's right shall be responsible for furnishing of the information included in the Register, as well as truthfulness, updating and changes of the said information.

## CHAPTER TWO

## APPLICATION FOR GRANTING OF BREEDER'S RIGHT AND ITS EVALUATION

## Section 14

## Application for Granting of Breeder's Right

The application shall be submitted by the applicant to the State Plant Protection Service. The acceptance and examination pro-

cedure of the application is provided by the instruction issued by the minister of agriculture.

(2) The application shall consist of a filled-out application form and the following annexed documents:

- 1) the variety description;
- 2) the common variety description;
- 3) the copy of payment document on submitting application;
- 4) the authorisation, if the applicant is not the breeder;
- 5) documents referred to in Section 15 of this Law if the convention priority is required;
- 6) the photocopy of the first certificate on granting of breeder's right if the breeder's right is protected in another states.

(3) The application shall be registered if the technical form of variety description and the application form are submitted with the following information:

- 1) the name and address of the applicant;
- 2) the name and address of the breeder if the applicant is not the breeder;
- 3) proposed denomination;
- 4) the state where the application is registered and the date of registration if the convention priority is required.

(4) An application form shall be filled out in the Latvian language. If the documents annexed to the application are in any foreign language the State Plant Protection Service has a right to require its translation into Latvian.

(5) If the variety is bred using other varieties (components), the applicant has right to require that information on components of the variety is regarded as information of limited accessibility.

(6) After the application registration the variety shall be deemed to be a matter of common knowledge and the temporary protection shall be applicable to it.

## Section 15

## Convention Priority

(1) The applicant who submits the application according to a relevant procedure in another member state of the International Union for the Protection of New Varieties of Plants (UPOV) has a right to submit an application regarding the same variety in Latvia within a 12-month period, using the right of priority of the first application. The stated 12-month period shall be counted from date continued after date of submission of the first application.

(2) In order to certify priority, the applicant shall, within a three-month period from the registration of an application to the State Plant Protection Service, submit a photocopy of registered application confirming the priority date.

(3) For three years after the priority date, the applicant has the right to submit to the State Plant Protection Service additional information, documents or materials which are required for the expert-examination of the application and the examination of the variety.

(4) The registration of another application on variety mentioned in the first application, the utilisation of this variety or the publishing of information regarding this variety may not be a reason for the rejection of the second application. The mentioned activities may not serve as basis for the arising of any rights to the variety for a third party.

#### Section 16

##### Application Examination

(1) Within a one-month period from the day of registration of the application, the State Plant Protection Service shall:

- 1) check whether the applicant is entitled to submit an application and the compliance of the variety with the provisions of Sections 4 of this Law;
- 2) inform the applicant in writing on necessity to supplement the registered application with documents mentioned in Section 14, Paragraph two of this Law and to supplement the translations of annexed documents into Latvian as well as the procedure of the variety examination.

(2) If, during the examination of the application it is established by the State Plant Protection Service that variety does not meet the requirements of Paragraph one, Clause 1 of this Section the application shall be rejected, the applicant shall be informed in writing on it.

#### Section 17

##### Submission of Objections

(1) Interested persons have a right to submit the objections to the State Plant Protection Service within three month period after publication of the information on application. Objections may concern novelty, distinctness, uniformity, stability of variety or right to submit an application. Objections shall be submitted in writing accompanied by a documentary motivation.

(2) The applicant shall submit the explanation on objections within two months subsequent to receiving the objections. If the applicant fails to submit the explanation, the application shall be rejected by the State Plant Protection Service.

(3) If objections concern distinctness, uniformity and stability of variety the State Plant Protection Service has a right

to require the performance of a repeated examination of variety.

#### Section 18

##### Examination of a Variety

(1) The State Plant Protection Service shall organise the examination of the distinctness, uniformity and stability of a variety in accordance with instructions approved by the Minister of Agriculture. The variety examination methods of the distinctness, uniformity and stability shall be approved by the Minister of Agriculture.

(2) If the examination of the distinctness, uniformity and stability of a variety for which an application is submitted has been carried out in another state the applicant shall submit the variety description to the State Plant Protection Service.

#### Section 19

##### Decision on Granting of Breeder's Right

(1) After the examination of a variety has been completed (if such was necessary), the State Plant Protection Service shall send to the applicant the notification concerning the examination results. The applicant has a right to submit objections on examination carried out to the State Plant Protection Service within a two-month period.

(2) The breeder's right shall be granted:

- 1) if the filled-out application form is submitted and the documents mentioned in Section 14 Paragraph two of this Law are annexed;
- 2) in accordance with the provisions of Sections 3., 4., 5., 6. and 7 of this Law.

(3) The breeder's right shall be granted by the decision of the State Plant Protection Service which takes force on the date of taking the decision. The State Plant Protection Service shall inform the applicant in writing on said decision and issue the certificate on the granting of the breeder's right.

#### Section 20

##### Denomination of Variety and Its Registration Procedure

(1) The variety denomination shall be proposed by submitting the application. If the variety is a matter of common knowledge, it shall be proposed with a previously used denomination. If the application is submitted in several states simultaneously the applicant shall use the same denomination of the variety. After granting of the breeder's right and expiration of the variety protection the registered denomination of the variety shall be used.

(2) The variety denomination shall comply with requirements of International Union for the Protection of New Varieties of Plants (UPOV) in respect of the international nomen-

clature of cultivated plants. The variety denomination may consist of words, combination of words and figures, as well as of figures, if that is the established practice of granting denominations. The denomination must enable the variety to be identifiable and clearly distinguishable from the variety denomination of the same or closely related plant species, title of registered company, as well as it shall comply with the language norms.

(3) The State Plant Protection Service shall check whether the proposed denomination complies with the conditions of Paragraphs one and two of this Section. If the proposed denomination:

- 1) is compliant, it shall be published. Interested persons have a right to submit objections to the proposed denomination of a variety to the State Plant Protection Service within a three month period from the date of publication. The State Plant Protection Service shall inform the applicant on objections received and conformity of the denomination of a variety with conditions of this Law;
  - 2) is non-compliant, the applicant shall submit the proposal to new denomination of a variety within one month period. If the applicant does not submit the proposal, the application shall be rejected, the applicant shall be informed on it in writing.
- (4) The denomination shall be registered at the same time as the breeder's right is granted.
- (5) The State Plant Protection Service shall consider the denomination of a variety as unappropriate, if:
- 1) it is established that the variety denomination registered does not comply with the conditions of Paragraphs one and two of this Section.;
  - 2) a written request of the holder of the breeder's right is received;
  - 3) the relevant decision of higher institution or Court is received.
- (6) The variety denomination considered as unappropriate shall be cancelled and the new denomination is registered.

#### Section 21

##### Publications

The State Plant Protection Service shall publish in the newspaper "Latvijas Vēstnesis" the following information:

- 1) the registered and rejected applications;
- 2) the proposed denominations of variety and changes in denominations of varieties protected;
- 3) the granting, cancellation or nullity of the breeder's right;
- 4) changes of the breeders, the holder of the breeder's right or authorised representative;

- 5) other notifications related to this Law.

#### Section 22

##### The State Fee

The state fee on the protection of the breeder's right in accordance with the procedure and amount set by the Cabinet shall be paid by the holder of the breeder's right or authorised representative.

### CHAPTER THREE

#### BREEDER'S RIGHT

#### Section 23

##### Scope of the Breeder's right

(1) No other person may turn a variety into a source of income without the permission (the license contract) of the holder of the breeder's right. In compliance with the conditions of Section 24 of this Law, the permission of the holder of the breeder's right is required for the performance of the following activities with the propagating material of protected varieties:

- 1) production and propagation;
- 2) processing in conformity with the sowing requirements to multiply the variety;
- 3) offering for sale;
- 4) sales or other types of marketing;
- 5) export and import;
- 6) stocking for the purposes referred to in Clauses 1, 2, 3, 4 and 5.

(2) In compliance with the conditions of Section 24 of this Law, for the activities referred to in Paragraph one, Clauses 1, 2, 3, 4, 5 and 6 of this Section with the harvested product (including entire plant and parts of the plant) obtained through the unauthorised use of the propagating material of the protected variety, the permission from the holder of the breeder's right is required unless they have had an opportunity to exercise their right in relation to the propagating material of said variety.

(3) The provisions of Paragraphs one and two of this Section shall also apply to the following plant variety:

- 1) which is essentially derived from a protected variety if this protected variety is not itself an essentially derived variety;
- 2) which, complying with the provisions of Section 5 of this Law, is not clearly distinguishable from the protected variety; and

- 3) the production of which requires the repeated use of the protected variety.
- (4) The variety referred to in Paragraph three, Clause 1 of this Section shall be deemed to be essentially derived from another (initial) variety, if it:
  - 1) is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
  - 2) is clearly distinguishable from the initial variety; and
  - 3) conforms to the essential characteristics of the initial variety that result from the genotype or combination of genotypes of the initial variety, except for the differences that have arisen from the act of derivation.
- (5) A variety may essentially be obtained by selecting natural or induced mutants or somaclonal variants, or individuals that differ from the initial variety, as well as by utilising back-crossing or transformation by genetic engineering or other methods.

#### Section 24

##### Restrictions of Breeder's right

Agricultural producers shall pay remuneration to the holder of the breeder's right according to mutual agreement on the propagation of harvested product obtained from a protected variety they have sown themselves, but the remuneration shall not exceed 50% from the remuneration for licensed propagating material of the same variety in the same area.

#### Section 25

##### Exceptions to the Breeder's Right

Breeder's right shall not concern the following activities:

- 1) which have been carried out privately and for non-commercial purposes;
- 2) which have been carried out for experimental purposes; or
- 3) the purpose of which is the breeding of new varieties, except in cases when the provisions of Section 23, Paragraph three of this Law apply in respect of such activities with varieties which have been referred to in Paragraph one and two of Section 23 of this Law;
- 4) with propagating material, harvested product (including entire plants and parts of plants) and any material obtained from harvested product of the protected variety or varieties referred to in Section 23, Paragraph three of this Law, if this material or varieties have been sold or otherwise released for circulation by the breeder (or with

his consent) unless any of the following activities are carried out:

- a) further propagation of the protected variety; or
- b) export of propagating material, harvested product (including entire plants and parts of plants) and any material obtained from harvested product of the protected variety, which enables the propagation of the variety in a state which does not protect varieties of the genus or species to which the said variety belongs, except in instances when the exported material is intended for final consumption purposes.

#### Section 26

##### Term of Validity of Breeder's Rights

- (1) Breeder's rights shall be acquired on the day when a decision on the granting of the breeder's rights is taken and shall be in effect until the end of the twenty-fifth calendar year, or, in the case of vine and tree species, until the end of the thirtieth calendar year since the year of granting the right.
- (2) Upon the receiving of the justified application from the holder of the breeder's right the State Plant Protection Service has a right extend the term referred to in Paragraph one of this Section by another five years.

#### Section 27

##### Transferring of Breeder's Right

- (1) The holder of the breeder's right has a right to transfer the breeder's right granted:
  - 1) completely – to the transferee of breeder's right;
  - 2) partly – with an authorisation or the license contract according to conditions of Section 28 of this Law.
- (2) The breeder's right shall transfer in writing and it takes force from the date of registration in the State Plant Protection Service.

#### Section 28

##### License Contract

- (1) Holder of the breeder's right has a right to transfer his or her right to use the protected variety as a source of income to another person on the basis of the mutual agreement by issuing a non-exclusive licence or an exclusive licence, or by announcing a free right of use.
- (2) A licence (also, a compulsory licence) contract and the change in a holder of a licence shall be registered in the State Plant Protection Service, by making an entry in the Register. An unregistered licence contract shall not be in effect. If the

validity of the licence is terminated, the relevant entry in the Register shall be made.

#### Section 29

##### A non-exclusive licence

When issuing a non-exclusive licence, that is, when granting the right to use a variety to a holder of the licence (a licensee), the issuer of the licence (a licensor) shall retain the right to grant a licence for the same variety to third party. The licensee has no right to transfer his or her right to another person unless such agreement is provided for by the licence.

#### Section 30

##### An exclusive licence

A licensee shall acquire the exclusive right to use a variety in accordance with the conditions provided by the license contract. The licensor shall retain the right to use the variety to the extent provided for by the contract.

#### Section 31

##### Licence of free right of use

(1) Holder of the breeder's right agreed with the State Plant Protection Service has right to publish a notice that any person is entitled to use the variety for a relevant fee, from the day the holder of the breeder's right have been notified thereof in writing and the licence contract has been registered in the State Plant Protection Service.

(2) If the licence of free right of use is announced, the fee for the protection of a variety shall be reduced by 50 per cent as of 1 January of the following year.

(3) In accordance with an application from the holder of the breeder's right and with the consent of all holders of free right of use, the State Plant Protection Service has a right to cancel the action of free right of use.

#### Section 32

##### Compulsory Licence

(1) If the market is not provided with the propagating material of the protected variety which is significant for the interests of the State economy or the public, any person who intends to produce and sell such a variety in Latvia, has a right to submit to Court a claim for the granting of a compulsory licence. The compulsory licence shall also include the right to receive the propagating material from the holder of the breeder's right.

(2) A compulsory licence shall be issued on the basis of a court adjudication by the State Plant Protection Service and make a relevant entry in the Register. The court shall also determine the extent of the variety use and other licensing con-

ditions. Fee on the use of the variety shall be the same as for issuing the non-exclusive licence for relevant species. Depending on the circumstances of the case the Court may cancel the compulsory licence or determine a new licensing conditions.

#### Section 33

##### Certification or Assessment of Compliance of Propagating Material

The certification or assessment of compliance of propagating material of protected varieties shall be carried out if the producer or the processor of the propagating material is a holder of the breeder's right or has been issued a licence registered with the State Plant Protection Service.

#### Section 34

##### Examination of a Variety During Its Period of Protection

(1) The State Plant Protection Service has right to require for examination of uniformity and stability of a variety during its period of protection the propagating material, documentation and other information necessary for carrying out the examination to the holder of the breeder's right.

(2) The State Plant Protection Service has right to check the maintenance of the variety during the period of its protection. The maintenance of the variety shall be carried out by the holder of the breeder's right.

#### Section 35

##### Release of Information on Use of the Protected Variety

Upon request of a holder of the breeder's right, agricultural producers, seed processors and other service providers as well as the State Plant Protection Service shall provide him or her with the necessary information concerning the production, propagation, processing and sale of propagating material of protected varieties.

### CHAPTER FOUR

#### CANCELLATION AND NULLITY OF BREEDER'S RIGHT

#### Section 36

##### Cancellation of Breeder's Right

(1) The breeder's right shall be cancelled if any of the following conditions has been established:

- 1) the holder of the breeder's right has not paid the state fee according to Section 22 of this Law;
- 2) the holder of the breeder's right does not provide with the propagating material, documents or other materials required for verifying the maintenance of the variety;

- 3) provisions of Sections 6 or 7 of this Law are no longer complied with;
  - 4) the holder of the breeder's right himself or herself provides notification in writing that he or she renounces the breeder's right;
  - 5) the denomination of a variety is considered as inappropriate by the State Plant Protection Service and the holder of the breeder's right has not proposed a new denomination complying with the provisions of Section 20 of this Law within a three-month period;
- (2) If the cancellation of the breeder's right legally grounded the State Plant Protection Service before the decision is taken shall notify the holder of the breeder's right on it indicating the reason of such action, allowing a certain time limit for correction of the conditions referred to under Paragraph one of this Section.

#### Section 37

##### Nullity of the Breeder's Right

The breeder's right shall be declared null and void if:

- 1) the provisions of Sections 4 or 5 of this Law have not been complied with when the decision on the granting of the breeder's right is taken;
- 2) where the granting of breeder's right has been essentially based on the information and documents provided by the breeder, the provisions of Sections 6 or 7 of this Law were not complied with when the decision on the granting of the breeder's right is taken;
- 3) the breeder's right has been granted to a person who is not entitled to it.

## CHAPTER FIVE

### LIABILITY FOR VIOLATION OF THE BREEDER'S RIGHT

#### Section 38

##### Compensation for Losses Caused as a Result of Infringement of Breeder's Right

A person who has infringed the breeder's right shall compensate to the holder of the breeder's right for the utilisation of the variety losses caused as a result of the violation of this Law.

#### Section 39

##### Compensation for Losses Caused in Connection with the Temporary Protection of a Variety

If a third party uses the propagating material of a protected variety the provisions of this Law in respect of violation of the rights of a holder of breeder's right shall apply from the day of publication of the application. In such case, losses shall be compensated only for the part, which concerns the remuneration for the utilisation of the variety, unless the holder of the breeder's right has warned the relevant persons of the registration of the application prior to its publication. The losses shall be compensated from the day of receipt of the warning, however, not earlier than from the day of submitting the application to the State Plant Protection Service.

#### Section 40

##### Liability for Infringement of the Breeder's Right

Persons who have infringed the breeder's right shall be subject to liability prescribed by the law.

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<sup>1</sup> Enacted by Czechoslovakia

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<sup>1</sup> These texts have been integrated into the Intellectual Property Code

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<sup>1</sup> The law has been amended recently



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