

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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*(As read a first time)*

**PLANT VARIETY RIGHTS BILL 1981**

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1980-81

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Presented and read a first time, 7 May 1981

(Minister for Primary Industry)

## A BILL

FOR

### An Act to provide for the granting of proprietary rights to persons originating new plant varieties, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

#### PART I—PRELIMINARY

##### Short title

1. This Act may be cited as the *Plant Variety Rights Act* 1981.

##### Commencement

2. This Act shall come into operation on a date to be fixed by Proclamation.

##### Interpretation

3. (1) In this Act, unless the contrary intention appears—
- “applicant”, in relation to an application, means the person for the time being shown in the application as the person making the application;
- “application” means an application under section 12 for plant variety rights;
- “breeder”, in relation to a new plant variety, means—
- in the case of a variety originated by one person only—that person; or
  - in the case of a variety originated by 2 or more persons (whether jointly, independently at different times or otherwise)—each of those persons;

“Department” means the Department of Primary Industry;

“grantee”, in relation to plant variety rights, means the person for the time being entered on the Register as the grantee of those rights;

“new plant variety” means a plant variety that—

- (a) is homogeneous having regard to the particular features of its sexual reproduction or vegetative propagation;
- (b) is stable;
- (c) was originated by a person; and
- (d) is distinguishable by one or more important morphological, physiological or other characteristics from all other plant varieties whose existence was a matter of common knowledge when the variety was originated;

“plant variety” includes cultivar, clone and strain;

“plant variety rights” means the rights specified in section 9;

“prescribed court” means the Supreme Court of a State, the Supreme Court of the Australian Capital Territory or the Supreme Court of the Northern Territory of Australia;

“Register” means the Register of Plant Variety Rights kept in pursuance of section 8;

“Registrar” means the Registrar of Plant Variety Rights;

“reproductive material”, in relation to a plant, means—

- (a) a seed of that plant;
- (b) a cutting from that plant; or
- (c) any other part, or product, of that plant, from which another plant can be produced;

“Secretary” means the Secretary to the Department and includes a person performing the duties of the office of Secretary to the Department;

“sell”, in relation to a plant or reproductive material of a plant, includes exchange by way of barter or let on hire;

“successor”, in relation to a breeder of a new plant variety, means a person to whom the right of the breeder to make an application for plant variety rights in respect of that plant variety has been assigned or transmitted;

“will” includes a codicil.

(2) For the purposes of this Act, a plant variety in respect of which an application has been made shall be taken to be stable if, and only if, plants of the variety remain true to the description of a plant of the variety given in the application—

- (a) except where paragraph (b) applies—after repeated reproduction or propagation of plants of the variety; or
- (b) where the application specifies a particular cycle of reproduction or multiplication—at the end of each of those cycles.

(3) For the purposes of this Act, where a plant variety is originated by the selective breeding of plants, the person who carried out that breeding shall be taken to have originated that variety.

5 (4) For the purposes of this Act, where a plant variety is originated by a humanly induced genetic mutation, the person who induced that mutation shall be taken to have originated that variety.

10 (5) For the purposes of this Act, a person shall not be taken to have originated a plant variety by reason only that he discovered the existence of plants of that variety, whether as the result of a deliberate search or otherwise.

(6) For the purposes of this Act, the existence of a plant variety shall be taken to have been a matter of common knowledge at a particular time if—

- 15 (a) plants of that variety were sold or exposed or advertised for sale before that time;
- (b) that variety was included at that time in an official register of plant varieties or in a recognized commercial or botanical book, list or catalogue of plant varieties; or
- 20 (c) a precise description of plants of that variety appeared before that time in a newspaper, magazine or journal.

(7) In this Act, a reference to public notice is a reference to notice published—

- (a) in the *Gazette*; and
- 25 (b) in a newspaper, magazine or journal that the Secretary, having regard to the persons likely to be interested in the matter contained in the notice, considers appropriate.

#### Act to bind Crown

4. This Act binds the Crown in right of the Commonwealth, of each of the States and of the Northern Territory.

### 30 PART II—ADMINISTRATION

#### Registrar of Plant Variety Rights

5. (1) There shall be a Registrar of Plant Variety Rights.

(2) The Registrar has such functions and powers as are conferred on him by this Act or by the regulations or are delegated to him by the Secretary under section 6.

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(3) The Registrar shall be an officer of the Department.

#### Delegation

6. (1) The Secretary may, either generally or as otherwise provided in the instrument of delegation, by writing signed by him, delegate to the Registrar or to another officer of the Department all or any of his powers under this Act, other than this power of delegation.

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(2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Secretary.

(3) A delegation under this section does not prevent the exercise of a power by the Secretary.

#### **Certain persons not to acquire plant variety rights**

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7. (1) The Secretary, the Registrar, a person performing the duties of the Registrar or a person who, during the preceding 12 months has held, or performed the duties of, the office of Secretary or Registrar shall not apply for plant variety rights or acquire, except by gift, by will or by operation of law, any such rights or an interest in any such rights.

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Penalty: \$500.

(2) A grant of plant variety rights applied for in contravention of sub-section (1) or an acquisition of plant variety rights in contravention of that sub-section is void.

#### **Register of Plant Variety Rights**

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8. The Registrar shall keep at a place approved by the Secretary a register, to be known as the Register of Plant Variety Rights, in which shall be entered particulars required to be entered by this Act or by the regulations.

### **PART III—PLANT VARIETY RIGHTS**

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#### *Division 1—Preliminary*

##### **Plant variety rights**

9. (1) Plant variety rights, in respect of a new plant variety, are—

- (a) the exclusive right to sell, including the right to license other persons to sell, plants of that variety;
- (b) the exclusive right to sell, including the right to license other persons to sell, reproductive material of plants of that variety;
- (c) the exclusive right to produce, including the right to license other persons to produce, plants of that variety for sale; and
- (d) the exclusive right to produce, including the right to license other persons to produce, reproductive material of plants of that variety for sale.

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(2) Plant variety rights in respect of a plant variety are subject to any conditions imposed in respect of those rights under section 29.

##### **Plant variety rights to be granted in relation to certain varieties only**

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10. (1) Plant variety rights may be granted only in respect of plant varieties the plants of which are—

- (a) ornamental plants;
- (b) plants for use in horticulture; or
- (c) plants for use as pasture or fodder.

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(2) Plant variety rights shall not be granted in respect of a plant variety unless the plants of that variety are plants of a genus or species declared by the regulations to be a genus or species to which this Act applies.

5 (3) The Governor-General shall not make a regulation declaring a genus or species to be a genus or species to which this Act applies unless he is satisfied that the organization known as the Australian Agricultural Council has consented to the declaration.

10 (4) For the purposes of this section, a plant that is a hybrid derived from plants of different genera or species shall be taken to be a plant of either of those genera or species.

**Plant variety rights not to be granted in respect of varieties previously sold**

15 11. Where an application is made for plant variety rights in respect of a plant variety, those rights shall not be granted if there has been a sale of a plant, or reproductive material of a plant, of that variety by, or with the consent of, the breeder or a breeder, or a successor of the breeder or of a breeder, of the variety, being a sale that took place—

(a) in Australia before the making of the application; or

(b) in another country earlier than—

20 (i) in the case of any variety of grape-vine, forest tree, fruit tree or ornamental tree—6 years, or

(ii) in any other case—4 years,  
before the making of the application.

***Division 2—Applications for Plant Variety Rights***

**Application for plant variety rights**

25 12. (1) A breeder of a new plant variety may make an application to the Secretary for plant variety rights in respect of the variety.

30 (2) A breeder of a new plant variety has the right under sub-section (1) to make an application for plant variety rights in respect of that variety whether or not he is an Australian citizen, whether or not he is resident in Australia and whether he originated the variety in Australia or in another country.

35 (3) The right under sub-section (1) of a breeder of a new plant variety to make an application for plant variety rights is personal property and is capable of assignment or of transmission by will or by operation of law, and that right may be assigned or transmitted notwithstanding that the application has been made.

(4) An assignment of a right to make an application for plant variety rights does not have effect unless it is in writing signed by or on behalf of the assignor.

(5) Subject to sub-section (6), where 2 or more persons are entitled to make applications for plant variety rights in respect of a new plant variety, whether by reason that they originated the variety jointly or independently or otherwise, those persons or some of those persons may make a joint application for those rights. 5

(6) Where 2 or more persons (in this sub-section referred to as the "breeders") originate a new plant variety jointly, one of those breeders or a successor of one of those breeders shall not make an application for plant variety rights in respect of that variety otherwise than jointly with, or with the consent in writing of, the other person, or each other person, entitled to make an application for those rights by reason of the variety having been originated by those breeders. 10

### **Form of application**

13. An application for plant variety rights in respect of a plant variety shall be in writing in a form approved by the Secretary, shall be lodged with the Secretary in the prescribed manner and shall contain— 15

- (a) the name of the person making the application;
- (b) where the applicant originated the variety, a statement that the applicant is the breeder of the variety;
- (c) where the applicant did not originate the variety, the name and address of the breeder whose right to make an application has been assigned or transmitted to the applicant and particulars of the assignment or transmission; 20
- (d) a description, or a description and photograph, of a plant of the variety sufficient to identify plants of that variety; 25
- (e) particulars of the characteristics that distinguish the variety from other varieties;
- (f) particulars of the manner in which the variety was originated;
- (g) the name of the variety;
- (h) particulars of any application for, or approval of a grant of, rights in respect of the variety in any other country; 30
- (j) particulars of any tests carried out to establish that the variety is homogeneous and stable (including particulars of any cycle of reproduction or multiplication for the purposes of paragraph 3 (2) (b) ); 35
- (k) an address in Australia for the service of documents on the applicant for the purposes of this Act; and
- (m) such other particulars (if any) as are prescribed.

### **Names of new plant varieties**

14. (1) The name of a new plant variety shall consist of a word or words (which may be an invented word or words) with or without the addition of letters not constituting a word or of figures. 40



(2) A new plant variety shall not have—

(a) a name the use of which would be likely to deceive or cause confusion, including a name that is the same as, or is likely to be mistaken for, the name of another plant variety;

5 (b) a name the use of which would be contrary to law;

(c) a name that comprises or contains scandalous or offensive matter;  
or

(d) a name, or a name of a kind, that is, at the time when the application is made, prohibited by the regulations.

10 (3) The name of a new plant variety in respect of which an application is made shall not consist of, or include, a name that is chosen by reason that it is or includes—

15 (a) the name of a natural person living at the time of the application, other than a person who has given his written consent to the name of the plant variety;

(b) the name of a natural person who died within the period of 10 years immediately preceding the application, other than a person the written consent of whom, or of whose legal personal representative, to the name of the plant variety has been given; or

20 (c) the name of a corporation, organization or institution, other than a corporation, organization or institution that has given its written consent to the name of the plant variety.

#### **Duties of Secretary when application lodged**

25 15. (1) Where an application is lodged in respect of a new plant variety—

(a) if the Secretary is satisfied that the application complies with the requirements of sections 13 and 14—he shall accept the application; or

(b) if he is not so satisfied—he shall reject the application.

30 (2) Where the Secretary accepts an application, he shall forthwith give written notice to the applicant stating that the application has been accepted and give public notice of the application and of such particulars relating to the application as he considers appropriate.

35 (3) Where the Secretary rejects an application, he shall forthwith give written notice to the applicant stating that the application has been rejected and setting out the grounds on which the application has been rejected.

(4) For the purposes of this Act, an application shall not be taken to be made unless and until it is accepted.

**Variation of application**

16. (1) Where, after the application has been made and before it is disposed of, the applicant requests the Secretary in writing to vary the application, the Secretary may, in his discretion, vary the application in accordance with the request. 5

(2) Where, after an application has been made and before it is disposed of, the right of the applicant to make the application is assigned or transmitted to another person, that person shall forthwith request the Secretary, in writing, to vary the application so that that person is shown as the person making the application and the Secretary, if he is satisfied that that right has been so assigned or transmitted, shall so vary the application. 10

(3) Where an application is varied in a significant manner in pursuance of a request under sub-section (1), or is varied under sub-section (2), the Secretary shall forthwith give public notice of particulars of that variation.

(4) Where the Secretary rejects a request to vary an application, he shall forthwith give written notice to the applicant stating that the request has been rejected and setting out the grounds on which the request has been rejected. 15

**Objections to grant of plant variety rights**

17. (1) Where public notice of an application for plant variety rights in respect of a plant variety or of the variation of such an application is given, any person who considers— 20

(a) that his interests would be affected by the grant of those rights to the applicant; and

(b) that the Secretary cannot be satisfied in relation to that variety of a matter referred to in paragraph 22 (1) (a) (other than a matter referred to in sub-paragraph (viii) ), 25

may, within 3 months after the date of publication of the notice in the *Gazette*, lodge with the Registrar written objection to the grant of those rights setting out particulars of the manner in which he considers that his interests would be affected and of the reasons why he considers that the Secretary cannot be satisfied of that matter. 30

(2) Where, by reason of an error or omission on the part of, or circumstances beyond the control of, a person who is entitled to lodge an objection to the grant of plant variety rights, the objection was not lodged within the period of 3 months referred to in sub-section (1), the Registrar may, upon the application of that person, extend, in relation to that objection, that period of 3 months for such further period (in this section referred to as the “extension period”), not being a period expiring more than 3 months after the expiration of that first-mentioned period of 3 months, as is specified in the application. 35 40

(3) The Registrar may, under sub-section (2), extend in relation to an objection the period of 3 months referred to in sub-section (1) although—

- (a) that period has expired; or
- (b) the extension period has expired.

5 (4) In determining whether to grant an application under sub-section (2), the Registrar shall have regard to—

- (a) the nature of the circumstances upon which the application is founded;
- (b) the reason for those circumstances;
- 10 (c) the time at which the application was made;
- (d) the length of the extension period; and
- (e) such other matters as he considers relevant.

15 (5) Where an objection to the grant of plant variety rights is lodged under sub-section (1), the Registrar shall cause a copy of that objection to be given to the applicant for those rights.

#### **Inspection of applications and objections**

20 18. A person may inspect an application, or an objection lodged under sub-section 17 (1), at any reasonable time and is entitled, on the payment of such fee (if any) as is prescribed, to be given a copy of an application or of such an objection.

#### **Provisional protection**

25 19. (1) Where an application for plant variety rights in respect of a plant variety has been made, the applicant shall, for the purposes of sections 34 and 35, be deemed to be the grantee of plant variety rights in respect of that plant variety during the period commencing on the making of the application and ending—

- (a) when the application is disposed of; or
- (b) if the Secretary has given the applicant a notice under sub-section (2)—at the expiration of the prescribed period after the notice is given,

30 whichever occurs first.

(2) Subject to sub-section (3) where the Secretary is satisfied, in relation to an application for plant variety rights in respect of a plant variety, that—

- 35 (a) plant variety rights will not, or are unlikely to be, granted to the applicant in respect of that plant variety;
- (b) after the application was made, the applicant sold a plant, or reproductive material of a plant, of that variety in Australia otherwise than for—

- (i) scientific purposes;

- (ii) the purpose of creating a stock of plants, or reproductive material of plants, of that variety for supply to the applicant; or
  - (iii) another prescribed purpose; or
  - (c) the applicant has given an undertaking to a person, whether or not for consideration, not to institute proceedings for the infringement of the rights of which the applicant is deemed to be the grantee by virtue of sub-section (1), 5
- the Secretary may give the applicant notice, in writing, that this section shall cease to apply to that variety. 10
- (3) The Secretary shall not give notice under sub-section (2) in relation to an application unless and until he has given the applicant particulars of the grounds for the proposed notice and a reasonable opportunity to make a written submission to the Secretary in relation to the proposed notice. 15
- (4) Where a person ceases to be deemed to be the grantee of plant variety rights by virtue of a notice under sub-section (2), the Secretary shall give public notice that the person has so ceased.
- (5) For the purposes of paragraph (1) (b), the prescribed period is the period commencing on the day on which the notice referred to in that paragraph is given and ending— 20
- (a) subject to paragraph (b), at the expiration of the period within which an application may be made to the Administrative Appeals Tribunal for a review of the giving of the notice; or
  - (b) if such an application is made to the Administrative Appeals Tribunal—at the time at which the application is withdrawn or finally determined, whether by the Tribunal or by a court. 25
- (6) Nothing in this section shall be taken to affect the powers of the Federal Court of Australia under sub-section 44A (2) of the *Administrative Appeals Tribunal Act* 1975 where an appeal is instituted in that Court from a decision of the Administrative Appeals Tribunal in respect of an application referred to in paragraph (5) (b). 30
- (7) Notwithstanding sub-section (1), a person who is deemed by that sub-section to be the grantee of plant variety rights in respect of a plant variety is not entitled to institute an action or proceeding for an infringement of those rights occurring during the period in respect of which he is deemed by that sub-section to be the grantee of those rights unless and until plant variety rights in respect of that plant variety are granted to him under section 22. 35

### **Tests of plant variety**

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20. (1) Where an application in respect of a plant variety is made, the Secretary may, if he considers it necessary to do so for the purpose of

ascertaining whether the plant variety is homogeneous or stable, require the applicant—

- (a) to supply plants that are claimed to be examples of that variety, or reproductive material of such plants, for test growing (including repeated reproduction or propagation) during such period, in such place or places, and under such conditions, as the Secretary considers appropriate; and
- (b) to furnish such information as is necessary for the test growing.

(2) If the applicant fails to comply with a requirement made of him under sub-section (1) in relation to a plant variety, the plant variety may be regarded for the purposes of this Act as not homogeneous or not stable, as the case may be.

**Withdrawal of application**

**21. (1) An application may be withdrawn by the applicant.**

(2) Where an application is withdrawn after public notice of the application has been given, the Secretary shall forthwith give public notice of that withdrawal.

***Division 3—Grant of Plant Variety Rights***

**Grant of plant variety rights**

**22. (1) Subject to this section, where an application for plant variety rights in respect of a plant variety is made, the Secretary shall—**

(a) if he is satisfied that—

- (i) there is such a variety;
- (ii) the variety is a new plant variety;
- (iii) the applicant is entitled to make the application;
- (iv) the grant of those rights to the applicant is not prohibited by this Act;
- (v) those rights have not been granted to another person;
- (vi) there has been no earlier application for those rights that has not been withdrawn or otherwise disposed of;
- (vii) the name of the variety would comply with section 14; and
- (viii) all fees payable under this Act in relation to the application have been paid,

**grant those rights to the applicant; or**

(b) if he is not so satisfied—refuse to grant those rights to the applicant.

(2) The Secretary shall not grant, or refuse to grant, plant variety rights in respect of a plant variety unless a period of at least 6 months has elapsed since the making of the application, and, if the application has been varied in a significant manner in pursuance of a request under sub-section 16 (1), a period of 6 months has elapsed since the application was so varied, or last so varied, as the case requires.

(3) The Secretary shall not refuse to grant plant variety rights unless he has given the applicant for the rights a reasonable opportunity to make a written submission to the Secretary in relation to the application.

(4) Where an objection to the grant of plant variety rights has been lodged under section 17, the Secretary shall not grant the rights unless he has given the person who lodged the objection a reasonable opportunity to make a written submission to the Secretary in relation to the objection.

(5) Plant variety rights shall be granted to a person by the issue to that person by the Secretary of a certificate, signed by the Secretary or by the Registrar, in a form approved by the Secretary and containing such particulars of the plant variety to which the rights relate, as the Secretary considers appropriate.

(6) Where plant variety rights are granted to persons who made a joint application for those rights, those rights shall be granted to those persons jointly.

(7) Where the Secretary refuses to grant plant variety rights in respect of a plant variety, he shall give written notice of the refusal to the applicant for the rights.

#### **Entry of grant of plant variety rights**

23. When the Secretary grants plant variety rights in respect of a plant variety, the Registrar shall enter in the Register—

- (a) a description, or a description and photograph, of a plant of that variety;
- (b) the name of the variety;
- (c) the name of the grantee;
- (d) the name and address of the breeder;
- (e) an address for the service of documents on the grantee for the purposes of this Act, being the address given in accordance with paragraph 13 (k);
- (f) the date on which the rights were granted; and
- (g) such other particulars relating to the grant as the Secretary considers appropriate.

#### **Notice of grant of plant variety rights**

24. Where the Secretary grants plant variety rights, he shall forthwith give public notice of the grant of those rights.

#### **Effect of grant on certain persons**

25. (1) Where plant variety rights in respect of a plant variety are granted to a person, any other person who was entitled to make an application for those rights (including any person who originated that variety independently of the breeder, who or whose successor was granted

those rights) is not entitled to any interest in those rights by reason that he was entitled to make an application for those rights or by reason of the grounds on which he was entitled to make such an application, but nothing in this sub-section prevents any person from applying to the Secretary for the revocation of those plant variety rights or instituting a proceeding before a court or the Administrative Appeals Tribunal in respect of those plant variety rights.

**(2) Where—**

- (a) plant variety rights in respect of a new plant variety are granted to a person; and
- (b) another person was entitled, at law or in equity, to have the right to make an application for those plant variety rights assigned to him,

the other person is entitled to have those plant variety rights assigned to him.

***Division 4—Miscellaneous***

**Nature of plant variety rights**

26. (1) Plant variety rights are personal property and, subject to any conditions imposed under section 29, are capable of assignment or of transmission by will or by operation of law.

(2) An assignment of plant variety rights does not have effect unless it is in writing signed by or on behalf of the assignor.

(3) A licence granted in respect of plant variety rights by the grantee of the rights binds every successor in title to the interest in the plant variety rights of the grantor of the licence to the same extent as the licence was binding on the grantor.

**Assignment of plant variety rights**

27. (1) Where plant variety rights are assigned or transmitted to a person, he shall forthwith inform the Registrar in writing that he has acquired those rights, giving particulars of the manner in which he has acquired the rights, and the Registrar, if he is satisfied that the rights have been so assigned or transmitted, shall amend the Register and enter the name of that person on the Register as the grantee of those rights.

(2) A person whose name is entered on the Register in accordance with sub-section (1) shall give written notice to the Registrar of an address in Australia for the service of documents on him for the purposes of this Act and, if that address is different from the address entered in the Register, the Registrar shall amend the Register accordingly.

**Duration of plant variety rights**

28. Subject to this Act, plant variety rights in respect of a plant variety subsist for a period of 20 years commencing on the day on which they are granted.

**Plant variety rights subject to conditions**

29. (1) Where the Minister considers it necessary in the public interest that plant variety rights in respect of a new plant variety should be subject to conditions restricting the assignment of those rights, conditions requiring, or relating to, the licensing of persons to sell, or produce for sale, plants, or reproductive material of plants, of that variety or other conditions, the Minister may, at the time when those rights are granted or any time while those rights subsist, by instrument under his hand, impose those conditions.

(2) Where the Minister imposes conditions on plant variety rights under sub-section (1)—

- (a) the Secretary shall give to the grantee a copy of the instrument setting out those conditions;
- (b) the Secretary shall give public notice of those conditions; and
- (c) the Registrar shall enter particulars of those conditions in the Register.

**Revocation of plant variety rights**

30. (1) The Secretary shall revoke the plant variety rights in respect of a plant variety if—

- (a) he becomes satisfied that the plant variety is not a new plant variety or that facts exist which, if known before the grant of those rights, would have resulted in the refusal of the grant; or
- (b) the grantee has failed to pay a prescribed fee payable by him in respect of those rights within one month after he has been given notice, as prescribed, that that fee has become payable.

(2) The Secretary may revoke the plant variety rights in respect of a plant variety if he is satisfied that—

- (a) the grantee has failed to comply, in relation to those rights, with any condition imposed under section 29; or
- (b) a person to whom those rights have been assigned or transmitted has failed to comply with the requirements of section 27.

(3) Where the Secretary revokes plant variety rights in respect of a plant variety, he shall give written notice of the revocation to the grantee.

(4) The Secretary shall not revoke plant variety rights in accordance with this section unless and until he has given the grantee and any person who, the Secretary believes, has had those rights assigned or transmitted to him particulars of the grounds for the proposed revocation and given the grantee and any such person a reasonable opportunity to make a written submission to the Secretary in relation to the proposed revocation.



(5) The revocation of plant variety rights in respect of a plant variety takes effect—

- 5 (a) subject to paragraph (b), at the expiration of the period within which an application may be made to the Administrative Appeals Tribunal for a review of the revocation; or
- (b) if such an application is made to the Administrative Appeals Tribunal—at the time when the application is withdrawn or finally determined, whether by the Tribunal or by a court.

10 (6) Nothing in this section shall be taken to affect the powers of the Federal Court of Australia under sub-section 44A (2) of the *Administrative Appeals Tribunal Act* 1975 where an appeal is instituted in that Court from a decision of the Administrative Appeals Tribunal in respect of an application referred to in paragraph (5) (b).

15 (7) Where the revocation of plant variety rights in respect of a plant variety takes effect—

- (a) the Registrar shall enter particulars of the revocation in the Register; and
- (b) the Secretary shall give public notice of the revocation.

20 (8) Any person whose interests are affected by the grant of plant variety rights in respect of a plant variety may apply to the Secretary for the revocation of those plant variety rights under this section.

(9) The Secretary shall consider any application made under sub-section (8) and, if he decides not to revoke the plant variety rights, he shall give written notice of his decision to the applicant.

25 **Plant variety rights not to restrict sales for food, &c.**

**31. (1)** Notwithstanding that plant variety rights have been granted in respect of a plant variety, any person may—

- 30 (a) sell plants of that variety for use as food or fuel;
- (b) sell reproductive material of plants of that variety for use as food or fuel;
- (c) sell with a farm or other land on which plants of that variety are grown any plants or reproductive material of plants of that variety on the land; or
- 35 (d) do anything necessary or desirable for the purpose of producing, or attempting to produce, another new plant variety from plants of that variety by hybridizing or otherwise.

40 (2) A right under sub-section (1) to sell plants or reproductive material of plants includes the right to do anything for the purpose of selling the plants or reproductive material, including the right to produce the plants or reproductive material for the sale.

**Terms and conditions of licence**

32. Subject to this Act and to any conditions imposed under section 29, a licence granted by the grantee of plant variety rights in respect of a plant variety may be on such terms and conditions as the grantee thinks fit.

**Protection of public interest in new plant varieties**

5

33. (1) For the purposes of this section, the reasonable requirements of the public with respect to a plant variety in respect of which plant variety rights have been granted shall be deemed to be satisfied if—

- (a) where there is no demand or no significant demand for plants of that variety but there is a demand or a significant demand for reproductive material of plants of that variety—reproductive material of plants of that variety of reasonable quality is available for sale to the public at reasonable prices in sufficient quantities to meet demand; or 10
- (b) in any other case—plants, or reproductive material of plants, of that variety of reasonable quality are available for sale to the public at reasonable prices in sufficient quantities to meet demand. 15

(2) The grantee of plant variety rights in respect of a plant variety shall, subject to any conditions imposed under section 29, take all reasonable steps to ensure that the reasonable requirements of the public with respect to that plant variety are satisfied. 20

(3) For the purpose of ensuring that the reasonable requirements of the public with respect to a plant variety in respect of which plant variety rights have been granted are satisfied, the Secretary, in accordance with sub-sections (4) to (10), inclusive, may, on behalf of the grantee of those rights— 25

- (a) license a person or persons whom the Secretary considers appropriate to sell plants of that variety;
- (b) license a person or persons whom the Secretary considers appropriate to sell reproductive material of plants of that variety; 30
- (c) license a person or persons whom the Secretary considers appropriate to produce plants of that variety for sale; or
- (d) license a person or persons whom the Secretary considers appropriate to produce reproductive material of plants of that variety for sale, 35

during such period as the Secretary considers appropriate.

(4) Where, at any time later than 2 years after the grant of plant variety rights in respect of a plant variety, a person considers that the grantee of those rights is failing to comply with sub-section (2) in relation to that variety and that the failure affects the interests of that person, that person may, in writing, request the Secretary to exercise a relevant power or powers under sub-section (3) in relation to that variety. 40

(5) A request by a person under sub-section (4) in relation to a plant variety shall—

- (a) set out the reasons why that person considers that the grantee of plant variety rights in respect of that variety is failing to comply with sub-section (2);
- (b) give particulars of the way in which the person considers that the failure affects his interests; and
- (c) give an address for the purpose of a notice to him under sub-section (7).

(6) Where a request under sub-section (4) is made to the Secretary in relation to a plant variety, the Secretary shall give the grantee of plant variety rights in respect of that variety—

- (a) a copy of the request; and
- (b) written notice inviting the grantee to furnish to the Secretary, within one month after the date on which the notice is given, a written statement setting out reasons why the Secretary should be satisfied that the grantee—
  - (i) is complying with sub-section (2) in relation to that variety; or
  - (ii) will so comply within a reasonable time.

(7) Where a request is made to the Secretary under sub-section (4) to exercise a power or powers under sub-section (3) in relation to a plant variety, the Secretary shall, after considering the request and any statement furnished by the grantee of plant variety rights in respect of that variety in response to the notice under paragraph (6) (b), decide whether or not to exercise the power or powers concerned and shall—

- (a) give written notice of his decision to the grantee of plant variety rights in respect of that plant variety; and
- (b) cause written notice of his decision to be posted by prepaid post as a letter addressed to the person who made the request at the address given by that person in accordance with paragraph (5) (c).

(8) Where the Secretary proposes to exercise a power under sub-section (3) in relation to a plant variety, the Secretary shall give public notice—

- (a) identifying the variety;
- (b) setting out particulars of the thing or things that he proposes to license persons to do and of the periods for which he proposes to license them; and
- (c) inviting persons to apply in writing to the Secretary, within one month after the date of the publication of the notice in the *Gazette*, to be licensed to do that thing, or to do any of those things, as the case requires, in relation to that variety,

and he shall not exercise that power without considering all applications in response to the invitation in the notice.

(9) The Secretary shall not license a person under sub-section (3) in relation to a plant variety unless, at least one month before so doing, he—

- (a) gave written notice to each person who applied to be licensed in response to the invitation in the relevant public notice given under sub-section (8); and 5
- (b) gave public notice of the name or names of the person or persons whom he proposes to licence.

(10) A licence granted to a person by the Secretary under sub-section (3) on behalf of the grantee of plant variety rights in respect of a plant variety shall be granted on such terms and conditions as the Secretary determines, being such terms and conditions that he considers would be the terms and conditions of the licence if it were being granted by the grantee in the normal course of business. 10

#### **Infringement of plant variety rights**

34. Subject to section 31, the plant variety rights of a grantee in respect of a plant variety are infringed by any person who— 15

(a) not being licensed by the grantee to do so—

- (i) sells, or holds himself out as being willing to sell, plants of that variety;
- (ii) sells, or holds himself out as being willing to sell, reproductive material of plants of that variety; 20
- (iii) produces plants of that variety for sale; or
- (iv) produces reproductive material of plants of that variety for sale;

(b) being a person to whom a licence has been granted in respect of that plant variety, does not comply with a term or condition of the licence; or 25

(c) uses the name of that plant variety, being the name entered in the Register, in relation to any other plant variety or in relation to any plant other than a plant of the first-mentioned variety. 30

#### **Actions for infringement of plant variety rights**

35. (1) An action or proceeding for an infringement of plant variety rights may be instituted in a prescribed court, but nothing in this sub-section prevents such an action or proceeding being instituted in a court that is not a prescribed court. 35

(2) A defendant in an action or proceeding for an infringement of plant variety rights may apply by way of counter-claim in the action or proceeding for the revocation of the plant variety rights.

(3) Where, in an action or proceeding for an infringement of plant variety rights, the court, on an application by the defendant by way of counter-claim, revokes the plant variety rights— 40

- (a) the court shall order the defendant to serve on the Registrar an office copy of the order revoking the plant variety rights; and

- (b) the Registrar shall enter particulars of the revocation in the Register.

**Declaration as to non-infringement**

5 36. (1) A person who desires to sell a plant or reproductive material of a plant, or to produce a plant or reproductive material of a plant for sale, may, by action in a prescribed court against the grantee of plant variety rights, claim a declaration that the sale or production of the plant or reproductive material would not constitute an infringement of plant variety rights although no assertion to the contrary has been made by  
10 the grantee of the plant variety rights.

(2) A prescribed court shall not make a declaration sought in an action under sub-section (1) unless—

- (a) the plaintiff—
- 15 (i) has applied in writing to the defendant for an admission in writing to the effect of the declaration sought;
  - (ii) has furnished the defendant with full particulars in writing of the plant or reproductive material; and
  - 20 (iii) has undertaken to pay a reasonable sum for the expenses of the defendant in obtaining advice in respect of the declaration sought; and

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

(3) The costs of all parties in proceedings for a declaration under this section shall, unless the prescribed court otherwise orders, be paid by the person seeking the declaration.

25 (4) The validity of a grant of plant variety rights shall not be called in question in proceedings for a declaration under this section and the making of, or refusal to make, the declaration does not imply that the grant of plant variety rights is valid.

**Jurisdiction of prescribed courts**

30 37. (1) Subject to sub-section (2), every prescribed court has jurisdiction with respect to matters arising under this Act in respect of which actions or proceedings may, under this Act, be instituted in a prescribed court.

35 (2) The jurisdiction conferred by sub-section (1) on the Supreme Court of a Territory is conferred to the extent that the Constitution permits.

(3) The jurisdiction of a prescribed court under this section shall be exercised by a single judge.

40 (4) The relief that a court may grant in an action or proceeding for infringement of plant variety rights 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.

(5) A court may refuse to award damages, or to make an order for an account of profits, against a person in respect of an infringement of plant variety rights in relation to a plant variety if that person satisfies the court that, at the time of the infringement, he was not aware, and had no reasonable grounds for suspecting, that plant variety rights existed in relation to that plant variety. 5

(6) The regulations may make provision for and in relation to the practice and procedure of prescribed courts in actions or proceedings under this Act, including provision prescribing the time within which any action or proceeding may be instituted, or any other act or thing may be done, and providing for the extension of any such time. 10

#### **Transfer of action or proceeding**

38. (1) A prescribed court in which an action or proceeding has been instituted under this Act may, if the court thinks fit, upon application of a party made at any stage in the action or proceeding, by order, transfer the action or proceeding to another prescribed court having jurisdiction to hear and determine the action or proceeding. 15

(2) Where an action or proceeding is transferred from a court in pursuance of this section—

(a) all documents filed of record in that court shall be transmitted by the Registrar or other proper officer of that court to the Registrar or other proper officer of the court to which the action or proceeding is transferred; and 20

(b) the court to which the action or proceeding is transferred shall proceed as if the action or proceeding had been originally instituted in that court and as if the same proceedings had been taken in that court as had been taken in the court from which the action or proceeding was transferred. 25

#### **Appeals**

39. (1) Subject to sub-section (2), an appeal lies to the Federal Court of Australia from a judgment or order of a prescribed court exercising jurisdiction under this Act or a judgment or order of any other court in an action or proceeding referred to in sub-section 35 (1). 30

(2) An appeal lies to the High Court, with special leave of the High Court, from a judgment or order referred to in sub-section (1). 35

(3) Except as provided in the foregoing provisions of this section, no appeal lies from a judgment or order referred to in sub-section (1).

### **PART IV—MISCELLANEOUS**

#### **Inspection of Register**

40. A person may inspect the Register at any reasonable time and is entitled, on the payment of such fee (if any) as is prescribed, to be given a copy of an entry in the Register. 40

**Service of documents**

5 41. Where 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, plant variety rights, that document shall be given by being posted by prepaid 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.

**Contributions by States in respect of administration of Act**

10 42. (1) The Minister may, on behalf of the Commonwealth, enter into an agreement with a Minister of the Crown of a State, on behalf of the State, for the payment of moneys to the Commonwealth by the State in respect of expenses incurred by the Commonwealth in relation to the administration of this Act.

(2) Sub-section (1) has effect as if—

- 15 (a) a reference in the sub-section to a State included a reference to the Northern Territory; and  
(b) a reference in the sub-section to a Minister of the Crown of a State included a reference to a person holding office under section 39 of the *Northern Territory (Self-Government) Act 1978*.

20 **Offences**

43. A person shall not—

- (a) knowingly make a false statement in an application or other document submitted to the Secretary or the Registrar for the purposes of this Act;  
25 (b) falsely represent to another person that he is the grantee of plant variety rights in respect of a plant variety;  
(c) falsely represent to another person that he is deemed to be the grantee of plant variety rights in respect of a plant variety by virtue of section 19; or  
30 (d) falsely represent that a plant is a plant of a plant variety in respect of which plant variety rights have been granted.

Penalty: \$500.

**Applications for review**

35 44. (1) Applications may be made to the Administrative Appeals Tribunal for review of—

- (a) a decision of the Secretary under paragraph 15 (1) (b) rejecting an application;  
(b) the refusal of the Secretary to vary an application upon a request made under sub-section 16 (1) or (2);  
40 (c) the giving by the Secretary of a notice under sub-section 19 (2);

- (d) a grant of plant variety rights by the Secretary under section 22 or a refusal of the Secretary to grant plant variety rights under that section;
  - (e) the amendment of the Register by the Registrar under section 27 or a refusal of the Registrar to amend the Register under that section; 5
  - (f) the revocation of plant variety rights by the Secretary under section 30;
  - (g) a decision of the Secretary under sub-section 33 (7) to exercise a power under sub-section 33 (3); 10
  - (h) a decision of the Secretary to license a person under sub-section 33 (3) or the refusal of the Secretary to license under that sub-section a person who applied to be so licensed in response to an invitation under paragraph 33 (8) (c); or
  - (j) the determination by the Secretary of terms and conditions of a licence in accordance with sub-section 33 (10). 15
- (2) The Administrative Appeals Tribunal does not have power under sub-section 29 (7) of the *Administrative Appeals Tribunal Act 1975* to extend the time for making an application to that Tribunal for a review of a decision referred to in paragraph (1) (g). 20
- (3) The Secretary shall give public notice of any decision of the Administrative Appeals Tribunal on an application made under sub-section (1).

### Regulations

45. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act, and, in particular, prescribing fees, including— 25
- (a) fees on applications for plant variety rights; 30
  - (b) fees payable by grantees of plant variety rights at specified intervals or on specified dates; and
  - (c) fees to meet costs incurred in the test growing of plants under section 20.