

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

THE PLANT BREEDER'S RIGHTS BILL 1994

EXPLANATORY MEMORANDUM

Circulated by the authority of

The Minister for Primary Industries and Energy

Senator Bob Collins



OUTLINE

1. This Bill proposes to replace the Plant Variety Rights Act 1987 ("the PVR Act") which would be repealed. The Bill provides for transitional arrangements between grants of plant variety rights as if they were plant breeder's rights made under the Bill. Applications being examined on the day of proclamation will be examined under provisions of the PVR Act, and if successful, be considered to be plant breeder's rights.
2. Under existing legislation, The Plant Variety Rights Act 1987, Australia's Plant Variety Rights scheme conforms to the 1978 Act of the Convention of the International Union for the Protection of New Varieties of Plants. This Bill proposes to increase the effectiveness of the scheme to conform with the 1991 Act of the Convention of the International Union for the Protection of New Varieties of Plants (the 1991 Act of the UPOV Convention).
3. The Bill provides for, subject to certain defined exemptions and extensions, the grant of an exclusive right to the following acts of exploitation of the propagating material of new varieties:
 - (a) production or reproduction of the material;
 - (b) conditioning the material for the purpose of propagation;
 - (c) offering the material for sale;
 - (d) selling the material;
 - (e) importing the material;
 - (f) exporting the material; and
 - (g) stocking the material for any of the purposes listed in (a) to (f)
4. The Bill provides for the extension of the right to include "essentially derived" and certain dependent varieties and prescribes the actions that may be taken to have a variety declared essentially derived.
5. The Bill proposes to extend the breeder's right to the harvested material, but only if the grantee of the right has not had a reasonable opportunity to exercise the right to the propagating material.
6. The Bill includes the following public interest provisions that are exemptions to the exclusive right of the grantee of plant breeder's rights in relation to propagating material :
 - (a) acts done by any person privately and for non-commercial purposes,
 - (b) acts done for *bona fide* experimental and research purposes

(c) acts done for the purpose of breeding other plant varieties.

7. There is a further specific exemption to the breeder's right in the Bill, namely the farmer's privilege or farm-saved-seed exemption which permits the farmer to save seed from a crop to plant a future crop on his own land. The Bill provides for certain groups or species of plants to be declared by regulation to be exempt from this provision.
8. The Bill provides for administrative procedures for the making of, and dealing with, applications for plant breeder's rights, including objections to applications and for test growing of plant varieties and conditions to be fulfilled for provisional protection and the granting and revocation of breeder's rights.
9. The Bill contains enforcement provisions and proposes to extend the penalty provisions to include penalties for infringement of the breeder's right, but provides for innocent infringement as a defence against unintentional infringement.
10. The Bill establishes the position of Registrar of Plant Breeder's Rights in the Department, provides for the delegation of the Secretary's powers to the Registrar and establishes a Plant Breeder's Rights Advisory Committee, with membership representing consumers, producers and breeders holding office as part-time members.

FINANCIAL IMPACT STATEMENT

11. This Bill will not introduce any new direct costs for Government. The administration of penalty provisions and the cost of AAT reviews and Court action to which the Registrar is a party, are potential costs that have been associated with the Scheme from its inception. This potential is small because the legislation retains its non-adversarial nature and alternative dispute resolution provisions of the Plant Variety Rights Act 1987. The Plant Breeder's Rights Scheme, like the Plant Variety Rights Scheme it proposes to replace, will continue to fully recover from the users of the Scheme, the costs of administration and staffing. In the medium term, the Scheme is expected to also recover overhead costs, such as the cost of accommodation in the Department.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

12. Provides for the Act to be called the Plant Breeder's Rights Act 1994.

Clause 2 - Commencement

13. Provides for the Bill to come into effect on the day it receives Royal Assent.

Clause 3 - Definitions

14. Explains terminology and technical terms used in the Bill, in particular defines "plant" in the traditional sense as including algae and fungi, but not bacteria or viruses.

Clause 4 - Definition of essentially derived varieties

15. Describes an essentially derived variety as one which is genetically similar to the variety from which it is derived and differing only in cosmetic features, rather than in principal features or features of value.

Clause 5 - Definition of breeding

16. Defines breeding and proposes to include, in addition, the joint process of discovery and development of a new plant variety by a person or persons, as a breeding process.

Clause 6 - Genetic modification

17. That a plant is a plant for the purpose of plant breeder's rights despite being modified by genes that are not from plants.

Clause 7 - Approved forms

18. States that approved forms are those approved in writing by the Secretary.

Clause 8 - Approved persons

19. Provides for the Secretary to designate persons with suitable qualifications and experience as 'approved persons' for particular plant species. Approved persons may act as consultants to applicants and participate in the application process.

Clause 9 - Act to bind the Crown

20. The Bill binds the Crown in right of the Commonwealth and each of the States and Territories.

Clause 10 - Extent of the Bill

21. Provides for the granting of plant breeder's rights (PBR) in a plant variety if Australia is a party to the UPOV Convention, reprinted in the schedule to the Bill, or the breeding of the plant variety constitutes an invention for the purposes of paragraph 51(xviii) of the Constitution.

PART 2 - PLANT BREEDER'S RIGHT

Clause 11 - General Nature of PBR

22. Subject to the public interest exemptions described in clauses 16, 17, 18, 19 and 23, this clause describes the nature of the plant breeder's right as the exclusive right to exploitation of propagating material of the variety. It is the exclusive right to:

- (a) produce or reproduce the propagating material;
- (b) condition, that is to coat, sort, grade, etc. 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; and
- (g) stock the material for the purposes described in paragraph (a), (b), (c), (d), (e), or (f).

Clause 12 - Extension to cover essentially derived varieties.

23. Provides for the extension of PBR in an initial protected variety to cover another new variety essentially derived from the initial variety.

Clause 13 - Extension of PBR to cover certain dependent plant varieties

24. Provides for the extension of PBR in an initial plant variety to
- (a) any other plant variety that is not clearly distinguishable from the initial variety, and which is clearly distinguishable from any variety which was 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 for example an F1 hybrid will be protected by PBR on

an inbred variety that is used commercially for hybrid seed production.

Clause 14 - Extension of PBR to harvested material in certain circumstances

25. Provides for the extension of PBR to material harvested from the propagating material, if the breeder has not had a reasonable opportunity to exercise his exclusive right to propagating material granted under Clause 11. This provision may be used, subject to recommendation to the Minister, by industry sectors to impose breeder royalties on delivery of grains thereby providing incentive for investment in breeding Australia's principal grain crops.

Clause 15 - Extension of PBR to products obtained from harvested material in certain circumstances

26. Provides for the extension of PBR to products obtained from harvested material if the breeder has not had a reasonable opportunity to exercise his exclusive right to the propagating material or to harvested material.

Clause 16 - Certain acts done for private, experimental or breeding purposes do not infringe PBR

27. Provides that any act done in relation to propagating material of a variety with PBR that is done privately or for non-commercial purposes, or for experimental purposes, or for breeding other plant varieties does not infringe PBR.

Clause 17 - Conditioning and use of farm saved seed does not infringe PBR

28. Seed saved by a farmer from harvested material and treated (conditioned) for the purpose of sowing a crop on that farmer's own land is not an infringement. Certain sectors of the grain industry may request the Minister, through the Plant Breeder's Rights Advisory Committee, to prescribe a particular crop to be a crop to which this provision does not comply.

Clause 18 - Other acts that do not infringe PBR

29. Provides that the breeder's rights are not infringed when propagating material is used as a food, food ingredient or fuel or for any other purpose not leading to or involving the production or reproduction of propagating material.

Clause 19 - Reasonable public access to plant varieties covered by PBR

30. Subclauses (1) and (2) prescribe that the public have reasonable access to varieties covered by PBR.
31. Subclauses (3) to (11) outline the responsibilities of the Secretary for ensuring that there is reasonable public access to the plant variety if it has direct use as a consumer product. In the event that the public does not have reasonable access, the Secretary may license an appropriate person to sell or to produce plants or propagating material of the variety.

Clause 20 - PBR is personal property

32. States that PBR is personal property and capable of assignment, or of transmission by will or by operation of law.

Clause 21 - Registrar must be notified of an assignment of PBR

33. States the administrative steps to be taken by the assignee and by the Registrar.

Clause 22 - Duration of PBR

34. States that PBR lasts for, in the case of trees and vines, 25 years, and for any other variety, 20 years, from the date the grant is made.
35. Stipulates that the length of the PBR in the case of dependent varieties and essentially derived varieties shall not be longer than that on the initial variety.

Clause 23 - Exhaustion of PBR

36. Specifies that should propagating material of a plant variety be sold, rights to that propagating material cease to apply unless there is multiplication of the material after the sale.

PART 3 - APPLICATION FOR PLANT BREEDER'S RIGHT

Division 1 - The making of the application

Clause 24 - Right to apply for PBR

37. States that a breeder can make application for a grant of PBR whether or not the breeder is an Australian citizen, resident in Australia or the variety was bred in Australia. Provides for two or more breeders to make joint applications.

Clause 25 - Right to apply for PBR is personal property

38. States that the right to apply is personal property and capable of assignment and of transmission by will or by operation of law.

Clause 26 - Form of application for PBR

39. Specifies the information to be supplied when lodging an application for PBR in a plant variety.

Clause 27 - Names of new plant varieties

40. Defines what is an acceptable name or synonym for a plant variety which is the subject of an application for PBR. More specifically the name must comply with the International Code of Botanical nomenclature and its related codes.

Clause 28 - Applications to be given priority dates

41. States that the Secretary must ensure that a priority date is assigned to each application for PBR and that unless section 29 applies, this is the date when the application was lodged. If 2 or more applications are made for the same variety, the Secretary must first consider the application having the earlier priority date.

Clause 29 - Priority dates arising from foreign application

42. The applicant can claim as the priority date, the date of an earlier foreign application, provided the application in Australia is lodged not later than 12 months after the date of the foreign application.

Clause 30 - Acceptance or rejection of applications

43. Outlines the administrative and procedural details to be considered by the Secretary when making a decision to accept or reject an application for PBR in a plant variety.

Clause 31 - Requests for variation of application

44. Provides for the variation in an application after acceptance of the application but before completing the examination of that application, for a prescribed fee.

Clause 32 - Notification of decisions on requests to vary application

45. Outlines the administrative duties of the Secretary regarding notification of decisions on requests to vary applications whether the request is accepted or rejected.

Clause 33 - Withdrawal of application

46. Provides for the giving of public notice by the Secretary of a withdrawal of an application for PBR in a plant variety.

Division 2 - Dealing with the application after its acceptance

Clause 34- Detailed description in support of application to be given to the Secretary

47. Outlines the time frame for the submission of a detailed description, the details to be provided and the fee prescribed for the examination of that description of the plant variety and for public notice of that description to be given by the Secretary.

Clause 35 - Objection to application for PBR

48. Provides for the lodging of a written objection to an application for PBR in a plant variety that has been accepted. For such an objection to be valid the objector must provide proof that their commercial interests would be affected by the grant of PBR and that the application does not fulfil some specified condition for the granting of PBR.

Clause 36 - Inspection of applications and objections

49. Provides for any person to inspect or copy all relevant details of an application for PBR in a plant variety or an objection to such an application.

Clause 37 - Test growing of plant varieties

50. Provides for the administrative arrangements required of the Secretary to institute proceedings for a test growing or a further test growing of a variety to which an application, objection or request relates.

Clause 38 - Characteristics of plant varieties bred or test grown outside Australia

51. Provides for a test growing carried out outside Australia to take the place of a test growing in Australia, subject to conditions.

Division 3 - Provisional protection

Clause 39 - Provisional protection

52. Provides for the applicant to be taken to be the grantee of the right after the acceptance of the application. Such a person, taken to be the grantee,

is not entitled to begin an action or proceeding for infringement during the provisional protection.

DIVISION 4 - ESSENTIAL DERIVATION

Clause 40 - Applications for declaration of essential derivation

53. Outlines the responsibilities and rights of the Secretary and the applicant for PBR in a variety (the initial variety) in the event that the applicant applies to the Secretary to have another plant variety (the second variety) declared to be a variety which is essentially derived from the initial variety.

Clause 41 - Test growing associated with application for declarations of essential derivation

54. Outlines the process involved in the Secretary seeking a test growing of both the initial and second variety in order to establish whether the second variety is a variety essentially derived from the initial variety.

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

Clause 42 - PBR not to be granted in excluded varieties

55. Establishes that PBR must not be granted to any variety of plant in a taxon (group) declared by regulation to be one to which the Bill does not apply. Initially no taxa will be prescribed. This clause is an enabling provision should the need to prescribe taxa arise in the future. The 1991 UPOV Convention requires that all plant species be eligible for PBR.

Clause 43 - Registrable plant varieties

56. Itemises the attributes that a plant variety must have in order to be registrable, including novelty, distinctness, uniformity and stability, and defines each of these attributes.

Clause 44 - Grant of PBR

57. Outlines the administrative procedures required and criteria that must be fulfilled if a variety is to be eligible for grant and specifies a six month public notice period from publication of the description before a grant can be made provided that no objection has been received.

Clause 45 - Grant of PBR to be exclusive

58. Provides for the issue of one grant per plant variety irrespective of the number of owners of that variety

or whether the variety is an "initial variety" or "the derived variety".

Clause 46 - Grant of PBR to be entered on the Register

59. Outlines the details of the PBR grant which must be filed on the Register.

Clause 47 - Notice of grant of PBR

60. Provides for the declaration of a public notice in the Plant Varieties Journal that a grant has been made or that a plant variety is an essentially derived variety of another plant variety.

Clause 48 - Effect of grant of PBR

61. Subclause (1) provides for the grantee of the right to take precedence over any other person who was entitled to make an application for the right in the variety.
62. Subclause (2) provides for persons, after a grant, to apply for the revocation of the rights or a declaration that a plant variety is essentially derived from another plant variety in which that person holds PBR.
63. Subclause (3) provides for the transfer of rights to another if that other was so entitled at law.

Clause 49 - PBR may be subject to conditions

64. Subclauses (1) & (2) provide for the means by which the Minister on advice from the PBR Advisory Committee imposes conditions on a grant.
65. Subclause (3) provides that if any conditions are so imposed the public and grantee must be notified and the Register suitably amended.

Clause 50 - Revocation of PBR

66. Subclauses (1) - (4) provide the administrative framework for the Secretary to revoke PBR in a plant variety.
67. Subclauses (5) & (6) outline the relationship between the revocation, the AAT and the Federal Court.
68. Subclause (7) & (8) stipulates that a person whose interests are affected by a grant of PBR may for those rights to be revoked and the responsibilities of the Secretary to give public notice of the decision.

Clause 51 - Entry of particulars of revocation

69. Provides that, if the Secretary revokes a right, or if a grantee is taken to have surrendered the right by means of the non-payment of fees, then the Secretary must enter particulars of the revocation or the surrender in the Register and to give public notice.

Clause 52 - Surrender of PBR

70. Provides for the holder of PBR in a variety to surrender that right.

PART 5 - ENFORCEMENT OF PLANT BREEDER'S RIGHT

Clause 53 - Infringement of PBR

71. Subject to the exemptions in public interest clauses 16, 17, 18, 19 and 23, Clause 53 outlines the nature of actions that constitute infringement including all those acts in Clause 11 and the unauthorised use of a registered name of a protected variety.

Clause 54 - Actions for infringement

72. Action for infringement may be taken in the Federal Court and the defendant is entitled to make a concurrent counterclaim to have the PBR revoked.

Clause 55 - Declarations as to non-infringement

73. Defines the method by which a person may apply to the Federal Court for a declaration that the performance of an act in relation to propagation material, is not an infringement of the PBR.

Clause 56 - Jurisdiction of the Court

74. Outlines the powers of the Federal Court.

Clause 57 - Innocent Infringement

75. Proposes that the Court may recognise cases of innocent or unintentional infringement of PBR, but provides for a reversal of the onus of proof of innocence in the event that the variety was correctly labelled as protected and on sale for some time and in substantial amounts.

PART 6 - ADMINISTRATION

Clause 58 - Registrar of Plant Breeder's Rights

76. Establishes a Registrar of Plant Breeder's Rights defining the powers and functions of the position.

Clause 59 - Delegation

77. Provides for the Minister and the Secretary to delegate any of their powers or functions to the Registrar or another officer in the senior executive service in the Department.

Clause 60 - Certain persons not to acquire PBR

78. Provides for penalties should the Secretary or the Registrar or those employed in the Plant Breeder's Rights Office acquire, except by will or law, or apply for PBR.

Clause 61 - Register of Plant Varieties

79. Defines the maintenance the Register of Plant Varieties and location of copies of the Register in each state and territory.

Clause 62 - Inspection of the Register

80. Provides for any person to inspect and obtain a copy of an entry in the Register for a prescribed fee.

PART 7 - PLANT BREEDER'S RIGHTS ADVISORY COMMITTEE

Clause 63 - Establishment of Advisory Committee

81. Establishes the Committee and defines the functions of the Plant Breeder's Rights Advisory Committee which are to advise the Registrar on any administrative matter related to the Act and advise the Minister on substantive matters in the regulations.

Clause 64 - Membership of Advisory Committee

82. Establishes the membership of the Advisory Committee, the period of office of two years and defines termination procedures.

Clause 65 - Remuneration and allowances

83. Stipulates that remuneration and allowances of the Advisory Committee are determined by the Remuneration Tribunal and additional allowances may be prescribed in the regulations.

Clause 66 - Disclosure of interests

84. Provides for the disclosure of any pecuniary interest in any matter considered at a meeting by any member of the Advisory Committee.

Clause 67 - Meetings

85. Outlines the form and frequency of meetings of the Advisory Committee. The Registrar presides at

meetings held as frequently as necessary to perform the functions of the Committee

PART 8 - MISCELLANEOUS

Clause 68 - Public notices

86. Provides for the quarterly publication of public notices regarding plant varieties in the Plant Varieties Journal and if appropriate in another periodical.

Clause 69 - Genetic resource centres

87. Provides for the declaration by the Secretary of a genetic resource centre for the deposit of propagating material in terms of clause 44.

Clause 70 - The herbarium

88. Provides for the declaration by the Secretary of an organisation to be a herbarium for the deposit of plant specimens under clause 44.

Clause 71 - Agents may act in matters relating to PBR

89. Provides for any business or action of one person on behalf of another in matters relating to PBR in a plant variety.

Clause 72 - Service of documents

90. Defines the address of the applicant or grantee for the service of documents in relation to PBR.

Clause 73 - Infringement offences

91. Stipulates that any act in relation to propagating material under clause 11 that would be an infringement under clause 53 will incur a penalty.

Clause 74 - Offences other than infringement offences

92. Provides a list of offences occasioned by intentional or reckless misrepresentation of information which will incur a penalty and specifies the severity of those penalties.

Clause 75 - Conduct by directors, servant and agents

93. Establishes that the state of mind and authority of a body corporate is equivalent to that of the state of mind and delegated authority of the director, servant or agent with respect to proceedings for any offences under Clauses 73 and 74.

Clause 76 - Applications for review

94. Subclause (1) establishes that applications may be made to the AAT for review of decisions made by the Minister or the Secretary.
95. Subclause (2) establishes that the AAT is not empowered to extend the time for making an application for review of decision.
96. Subclause (3) provides for the Secretary to give public notice of all applications for review of decision, any decision of the AAT and any decision of a Court.

Clause 77 - Repeal

97. Provides for the repeal of the Plant Variety Rights Act 1987.

Clause 78 - Compensation for acquisition of property

98. Provides for reasonable compensation to be paid to a person in the event of acquisition of property from a person as a result of the coming into force of this Bill otherwise than on just terms taking into account any damages or compensation otherwise recovered.

Clause 79 - Regulations

99. Provides for the Governor-General to make regulations prescribing all matters required, permitted, necessary or convenient for carrying out or giving effect to this Act including prescribing, refunding, and discounting of fees.

PART 9 - TRANSITIONAL

Clause 80 - Definitions

100. Defines for the purpose of transitional arrangements: "commencing day" as the day on which this Bill receives Royal assent and "old Act" as the Plant Variety Rights Act 1987

Clause 81 - Plant variety rights under old Act to be treated as PBR under this Act

101. Subclauses (1) & (2) provide that any rights granted under the old Act will be carried over as if these provisions in this Bill had been in force at the time those rights were granted, except that the unexpired portion of the right will be the same as it would have been under the old Act.
102. Subclause (3) provides that the holder of rights deemed as PBR in a plant variety under this Bill cannot claim PBR for dependent plant varieties in relation to that particular variety.

103. Subclause (4) provides that the holder of rights deemed as PBR in a plant variety under this Bill cannot seek a declaration that another plant variety is an essentially derived variety of that particular variety unless an application for PBR is made for that variety after the coming into force of this Bill

Clause 82 - Applications for plant variety rights lodged and criminal proceedings begun before commencing day

104. Provides that any application for plant variety rights lodged or under examination or objections made before this Bill comes into force will be processed under the provisions of the old Act, but successful applications will, as provided for in clause 81, be granted a right under provisions of this Bill

Clause 83 - Other applications and proceedings under old Act

105. Provides that any application, request, action or proceeding, except for an application for plant variety rights, begun under the old Act but not determined will be treated as if those actions had begun under provisions of this Bill.

Clause 84 - Transitional arrangements for membership and functions of the Plant Breeder's Rights Advisory Committee(PBRAC)

106. Provides for the current members of the Plant Variety Rights Advisory Committee (PVRAC) to continue to serve as members of the PBRAC with the same terms and conditions of appointment. Advice given to the Minister or Secretary by the PVRAC, but not dealt with, will be considered as if it were given under provisions of this Bill.

Clause 85 - Register of Plant Varieties

107. Provides that the Register of Plant Varieties under the old Act becomes the Register of Plant Varieties under the provisions of this Bill.

SCHEDULE to the PBR Bill:

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.

The Plant Breeder's Rights Bill 1994 is based on and conforms to "the Convention" reproduced in the schedule to the PBR Bill.