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Plant Breeder's Rights Amendment Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 164 2001-02

Plant Breeder's Rights Amendment Bill 2002

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Law and Bills Digest Group
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Contents

| | |
|--|---|
| Purpose..... | 1 |
| Background..... | 1 |
| Plant Breeding Industry in Australia | 2 |
| What are Plant Breeder’s Rights?..... | 2 |
| Food, fodder or fuel exception (section 18 of the Act) | 3 |
| Main Provisions | 5 |
| Concluding Comments..... | 6 |
| Endnotes..... | 7 |

Plant Breeder's Rights Amendment Bill 2002

Date Introduced: 13 March 2002

House: Senate

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Royal Assent

Purpose

The stated aims are to amend the *Plant Breeder's Rights Act 1994* (the Act) in order to:

- clarify the rights of plant breeders to remuneration in circumstances where certain public interest restrictions are placed on the exercise of plant breeder's rights
- enhance the access of plant breeders to the Plant Breeder's Rights (PBR) scheme, and
- improve the administration of the Act and the PBR scheme.

Background

The *Plant Breeder's Rights Act 1994* (the Act) gives effect to Australia's commitments as a contracting party to the 1991 text of the International Convention for the Protection of New Varieties of Plants, generally known as the UPOV Convention.¹ The UPOV Convention is a United Nations multilateral agreement that aims to ensure international protection for new plant varieties developed in member countries. It acts to encourage investment, innovation, multiplication and release of new plant varieties in, and between, member countries. UPOV member countries include France, Germany, Japan, New Zealand, United Kingdom and the United States. The text of the 1991 UPOV Convention is set out in the Schedule to the Act.

The reasons for having a Plant Breeder's Rights (PBR) scheme are two-fold. Firstly, to encourage plant breeding and innovation through the grant of a limited commercial monopoly to breeders of new varieties. Secondly, to give innovators legal protection, without which anyone could commercialise the variety without recourse to the innovator.²

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Plant breeder's rights legislation was controversial when it was introduced in 1987.³ It was feared that the Australian seed industry would be taken over and dominated by a small number of multinational corporations and that Australian farmers and other consumers would have to pay higher prices for seeds.⁴ It was also argued that world-wide genetic resources would be eroded⁵ and that PBR would have detrimental repercussions in developing countries.⁶ This controversy, while not completely dissipated, is now much fainter.

Plant Breeding Industry in Australia

Currently the Australian seed industry is estimated to be worth more than \$400 million per annum, resulting in production assessed to be in excess of 850,000 tonnes.⁷ About 4,500 farmers form the core of the industry, which is based around the private commercial sector. Seeds from field crops account for 80 per cent of the value of all seed produced, with pasture and amenity seeds accounting for 15 per cent and horticultural crops the remaining five per cent.⁸ Commercial production and marketing is undertaken by private individuals and national organisations, including collectives where production is pooled for marketing. Production and marketing of proprietary and hybrid seeds is organised through the companies owning the particular varieties.⁹ The favoured form of protection for such seeds is PBR.

Traditionally most plant propagating material used in Australia has been produced in Australia and, conversely, most Australian produced plant propagating material has been used locally. Due to recent developments in the agricultural sector the nature of the relationships between farmers and seed breeders have become more difficult to discern. We know that about 70 per cent of research is undertaken by public organisations, though that research is now often funded by licensed seed companies, both foreign and local. There are a number of seed companies, including subsidiaries of multinationals, that see themselves simply as commercial entities. In recent years, however, a number of statutory bodies and growers' cooperatives have restructured themselves into (often unlisted) public companies. In turn these public companies have spun off subsidiaries dedicated to plant breeding and seed selling. The interests of growers and breeders, then, remain interlocked in ways that are not often easy to see.¹⁰

Most of the PBRs for commercially important crops are held by Australian concerns, in many cases by growers' bodies, reflecting the historical development of the agricultural industry. On the other hand most patents for genetically modified varieties are held by (subsidiaries of) large multinational companies.¹¹

What are Plant Breeder's Rights?

Plant breeder's rights are exclusive commercial rights to a registered variety. The rights are a form of intellectual property, like patents and copyright, and are registered under the

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Plant Breeder's Rights Act 1994. The general nature of PBR is set out in section 11 of the Act. PBR is an exclusive right to do, or license another person to do, any of the following in relation to propagating material of the plant variety: produce or reproduce that material; condition it for propagation;¹² sell, import or export it; or stock it for any of the foregoing purposes.

There are important limits to PBR. These are to be found in sections 16-19 and section 23 of the Act.

- It is possible to use protected plant varieties privately and for non-commercial purposes, to experiment with them, and to use them for breeding other varieties (section 16).
- The 'farmer's privilege' or 'farm-saved seed exemption' allows farmers to harvest and use legitimately obtained seed (section 17).
- Propagating material may be used as a food, food ingredient or fuel, or for any other purpose that does not involve production or reproduction of the material (section 18). This point is discussed further below because this Bill repeals section 18 and substitutes a modified limitation requiring the payment of equitable remuneration when other legislation restricts the exercise of the breeder's right.
- 'Reasonable public access' to protected plant varieties is required, something which is satisfied by making propagating material available free or at a reasonable price in sufficient quantities to meet demand (section 19); and
- Once propagating material has been sold by the rights owner or with the rights owner's consent, PBR is 'exhausted' to the extent that the material may lawfully be sold or imported thereafter, though it still cannot be used for further production or reproduction of the material (section 23).

The rights conferred by the Act subsist for 20 years, or for 25 years in the case of trees or vines, from the date of acceptance of the application. PBR may be held by the original breeder of the new variety, or by their employer if the original breeder is an employee of an organisation, or by a person who has acquired ownership rights from the original breeder. PBR is administered by the Plant Breeder's Rights Office (PBRO) located in the Department of Agriculture, Fisheries and Forestry – Australia. Each year the PBRO receives approximately 300 applications to register new varieties.¹³ Sixty per cent of applications are received from overseas breeders.

Food, fodder or fuel exception (section 18 of the Act)

Section 18 exempts from the scope of the breeder's right any act referred to in section 11 that enables propagating material of a protected variety to be used as a food, food ingredient or fuel, or for any other purpose that does not involve the production or

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reproduction of the propagating material. So the use of propagating material by way of allowing it to sprout and then eating it, or using it in the preparation of food, before it has developed further is not a use that involves the production or reproduction of propagating material. According to the Explanatory Memorandum to this Bill, 'Section 18 was designed to acknowledge public interest concerns regarding the limitations that the breeder might place on the use of their propagating material as, say food (for example, it is not in the public interest for a breeder to disallow bread making).'¹⁴

There is no direct equivalent in the 1991 UPOV Convention to the exception in section 18, other than possibly the compulsory exception of acts done privately and for non-commercial purposes. One commentator has asked whether Australia is honouring its commitment, as a contracting party, to strengthen the breeder's right, since section 18 would appear to detract from the breeder's right to an extent not recognised in the UPOV Convention.¹⁵

Two related court actions have highlighted a possible misinterpretation of section 18. Both cases involve the State of Tasmania, a South Australian seed company, Cultivaust Pty Ltd., and a statutory marketing authority, the Grain Pool of Western Australia. In 1990 the Commonwealth granted the Tasmanian Department of Primary Industry and Fisheries plant breeder's rights in respect of Franklin barley. Franklin is a malting barley variety that is used in some beers, including James Boag and Cascade, and is exported to brewers in China, Japan and South Africa. Most of those who use the barley pay Tasmania a royalty through the State's agent, South Australian company Cultivaust Pty Ltd.

It is claimed that no royalties have been paid in Western Australia where Franklin barley was grown and used throughout the 1990s. Tasmania and Cultivaust have taken legal action in the Federal Court in Adelaide against the Western Australian body responsible for distributing the barley, the Grain Pool of WA. They claim that Grain Pool is refusing to pay Tasmania hundreds of thousands of dollars in royalties.¹⁶

In the second action, the Grain Pool of Western Australia took a case to the High Court in 1998, questioning the validity of the Act and arguing that the Commonwealth's plant breeder's rights legislation was not applicable to Franklin barley because the barley it handled was 'food' and therefore exempt.¹⁷ In a decision dated 23 March 2000¹⁸ the High Court upheld the validity of the Act under section 51(xviii) of the Constitution which gives the Commonwealth power to make laws over patents of inventions. On 23 April 2001 the High Court remitted to the Federal Court the proceedings involving the validity of certain provisions in the plant breeder's rights legislation.¹⁹ The proceedings in both outstanding cases are to be heard by the Federal Court in Adelaide.

This Bill seeks to clarify the Act in a way that will remove the scope for misinterpretation of section 18. It does this firstly by repealing section 18, and then by substituting a new provision (to be inserted as new section 18) to the effect that where other Commonwealth, State or Territory legislation restricts the plant breeders' right and authorises a person to

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do an act that would normally require the breeder's authorisation, then equitable remuneration must be paid to the breeder. The Explanatory Memorandum explains the need for these changes in the following terms:

Some parties misinterpret the current section 18 to allow normal commercial activities involving propagating material (eg the trading in commodities that eventually become food) such that the breeder is denied the opportunity to exercise their right. This was not the intent when framing the legislation, which is fundamentally aimed at ensuring that the breeder has the opportunity to gain reward for their innovation. This has led to the situation where the breeder's right to seek reward for their innovation is not being recognised. While the possibility of misinterpretation continues, further denial of the breeder's right of authorisation and non-payment for their innovation may continue. Moreover, further legal challenges cannot be ruled out.²⁰

Main Provisions

Item 4 of Schedule 1 repeals section 18 of the *Plant Breeder's Rights Act 1994* and substitutes a **proposed new section 18**. The effect of the proposed new section is to clarify the existing legislation by providing that the plant breeder is able to exercise his or her right of authorisation under section 11 (that is, to produce or reproduce the material, condition it, sell, import or export it, or stock it for the foregoing purposes) except in circumstances where the breeder's right is restricted by Commonwealth, State or Territory legislation. When that legislation authorises a person to do something that would normally be subject to the breeder's authorisation, then equitable remuneration must be paid to the holder of the PBR. 'Equitable remuneration' is defined in **proposed new section 18** as an amount that is agreed between the person holding the PBR and the person authorised under legislation to do something that would otherwise require the breeder's authorisation. If the two parties cannot agree on an amount, then a court may determine the amount of equitable remuneration to be paid.

According to the Explanatory Memorandum to this Bill, the proposed new section 18 is modelled on Article 17 of the 1991 UPOV Convention.²¹ Article 17 of the Convention states:

[Article 17] Restriction 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.

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Item 5 is related to the previous amendment. It amends section 23 to clarify that the rights of the plant breeder affected by proposed new section 18 are exhausted following the payment of equitable remuneration, except in those instances where the plant variety is propagated through more than one generation.

Items 23, 25 and 28 clarify that the expression 'plant material' means material used for propagating, or harvested material or the products obtained from harvested material of the plant variety.

The effect of **Item 26** is to recognise extended periods of on-farm and experimental testing as valid activities prior to the registration of a new plant variety. It provides that materials derived from testing, research and/or development activities are not considered as 'sales' and therefore do not start the one-year time clock within which a PBR application must be lodged.

Item 30 clarifies that the Minister has the power under subsection 49(1) of the Act to impose conditions on existing and future grants of plant breeder's rights. The Second Reading Speech suggests that this amendment may be used to address public interest concerns about possible limitations on how propagating material may be used.²² If the Minister may exercise this power in respect of existing grants of plant breeder's rights, then the Minister may be able to impose conditions retrospectively.

Concluding Comments

According to press reports, there is a potential for disagreement between some of the statutory export marketing monopolies that control much of Australia's grain export trade, and the growing number of private owners of new grain varieties.²³ In the current dispute between the Grain Pool of Western Australia and the South Australia seed merchant, Cultivaust, involving the Franklin barley variety, Cultivaust says that its rights include an exclusive power to market and export the variety, while the Grain Pool says that the State Grain Marketing Act gives it those rights in Western Australia. It is suggested that the dispute has implications for other grain marketing bodies with export monopolies.

When introducing this Bill in the Senate, Senator the Hon Kay Patterson stated that '90 per cent of PBR protected grain varieties in Australia pass through the commercial system without the PBR breeder having any opportunity to seek reward for their innovation'.²⁴

As a result of the amendment proposed to section 18 of the Act, the State grain marketing bodies may in future be required to negotiate and pay equitable remuneration to the PBR holders for the new varieties that they export and sell.

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Endnotes

- 1 UPOV means the Union for the Protection of New Varieties of Plants. The acronym is derived from its name in French — Union pour la Protection des Obtentions Vegetales.
- 2 'Frequently asked questions about Plant Breeder's Rights', Agriculture, Fisheries and Forestry — Australia. Plant Breeder's Rights website at www.affa.gov.au (visited 3 June 2002).
- 3 The *Plant Breeder's Rights Act 1994* replaced the *Plant Variety Rights Act 1987*, which was based on the International Convention for the Protection of New Varieties of Plants 1961 (the Convention). The drafters of the Convention in the early 1960s were concerned with protecting the results of conventional biological plant breeding. The Convention was revised in 1991 in an attempt to bring the law into line with contemporary technological developments, and the *Plant Breeder's Rights Act 1994* reflects the more up-to-date approach and ensures that Australian law still complies with the Convention. Australia acceded to the Convention on 20 December 1999.
- 4 Sen Robert Hill, Speech to the report of the Senate Standing Committee on National Resources on plant variety rights, Senate, *Hansard*, 30 May 1984, p. 2151.
- 5 Senate Standing Committee on National Resources, *Report on Plant Variety Rights*, May 1984, Canberra, AGPS, 1084, p. 38–42.
- 6 *ibid.*, p. 33–38.
- 7 'The Seed Industry', Website of Seeds Australia Ltd, <http://www.seedsaust.com.au/page5.html> (visited 3 June 2002).
- 8 *ibid.*
- 9 *ibid.*
- 10 Alexander, Andrew, 'Australian plant intellectual property: a growing concern', *Res Publica*, vol. 10, no.1, 2001, p. 11–16.
- 11 *Ibid.*, p. 15.
- 12 'conditioning' includes cleaning, coating, sorting, packaging and grading.
- 13 Agriculture, Fisheries and Forestry — Australia. Plant Breeder's Rights website at www.affa.gov.au (visited 3 June 2002).
- 14 *Explanatory Memorandum*, Plant Breeder's Rights Amendment Bill 2002, p 2.
- 15 Byrne, Noel, 'Plant Breeder's Rights', *Patents, Trade Marks & Related Rights*, General Editor: Professor James Lahore, Butterworths, 2001, p. 27, 128.
- 16 Montgomery, Bruce, 'Barley patent brews trouble', *Australian*, 9 April 2002; 'Grain Pool could lose \$2m', *West Australian*, 11 April 2002.
- 17 Bolt, Cathy, 'Grain Pool defends legal fight', *Australian Financial Review*, 28 March 2000; Montgomery, Bruce, 'Barley patent brews trouble', *Australian*, 9 April 2002.
- 18 *The Grain Pool of WA v The Commonwealth* [2000] HCA 14 23 March 2000.

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- 19 *Cultivaust Pty Ltd v Grain Pool of Western Australia* [2001] FCA 1749 (12 December 2001).
- 20 *Explanatory Memorandum*, Plant Breeder's Rights Amendment Bill 2002, p. 8.
- 21 *ibid.*, p. 11.
- 22 Sen the Hon Kay Patterson, 'Second Reading Speech', Plant Breeder's Rights Amendment Bill 2002, Senate, *Hansard*, 13 March 2002, p. 423.
- 23 Bolt, Cathy, 'Grain Pool defends legal fight', *Australian Financial Review*, 28 March 2000.
- 24 Sen the Hon Kay Patterson, 'Second Reading Speech', Plant Breeder's Rights Amendment Bill 2002, *op. cit.*, p. 423.

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