



Plant Breeder's Rights Amendment Act 2002

No. 148, 2002

**An Act to amend the *Plant Breeder's Rights Act
1994*, and for related purposes**

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

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An Act to amend the *Plant Breeder's Rights Act 1994*, and for related purposes

[Assented to 19 December 2002]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Plant Breeder's Rights Amendment Act 2002*.

2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Plant Breeder's Rights Act 1994

Part 1—Amendments

1A Subsection 3(1)

Insert:

indigenous means:

- (a) a member of the Aboriginal race of Australia; or
- (b) a descendant of the indigenous inhabitants of the Torres Strait Islands.

1 Subsection 3(1) (definition of *synonym*)

Repeal the definition, substitute:

synonym, in relation to the name of a plant variety, means a name that:

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

2 Subsection 3(1)

Insert:

test growing includes a comparative test growing.

3 At the end of section 11

Add:

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

4 Section 18

Repeal the section, substitute:

18 Restriction on grantee's rights in certain circumstances

(1) If:

- (a) a person is authorised by or under a law of the Commonwealth or of a State or Territory to do an act referred to in a paragraph of section 11 in relation to propagating material of a plant variety; and
 - (b) the act is one which (apart from this provision) would require authorisation from the grantee of PBR in the plant variety; and
 - (c) before the person does the act, the person either pays equitable remuneration to the grantee in respect of the act or arranges for the payment of such remuneration; and
 - (d) the person does the act;
- then the grantee is not entitled to exercise PBR in the plant variety against the person in respect of that act.
- (2) To avoid doubt, subsection (1) does not limit the operation of section 17 in relation to the conditioning or reproduction of propagating material in the circumstances referred to in that section.
 - (3) In this section:

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

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

5 At the end of section 23

Add:

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

- (i) to a country that does not provide PBR in relation to the variety; and
 - (ii) for a purpose other than final consumption.
- (4) To avoid doubt, nothing in subsection (1) or (3) prevents the exercise of the rights of the grantee of PBR in a plant variety in relation to any propagating material of that variety that is obtained by reproduction of the propagating material to which that subsection applies.

6 Paragraph 26(2)(g)

Repeal the paragraph, substitute:

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

7 At the end of subsection 26(2)

Add:

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

8 Paragraph 27(2)(b)

Omit “, by which the variety will also be known and sold in Australia”.

9 After subsection 27(3)

Insert:

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

10 Subsection 27(4)

Omit "A name under subsection (1), or a synonym under subsection (3)", substitute "A name (including a synonym)".

11 Paragraph 27(5)(e)

Omit "*Trade Marks Act 1955*", substitute "*Trade Marks Act 1995*".

12 Subsections 27(5), (6) and (7)

Omit "A name under subsection (1), or a synonym under subsection (3)", substitute "A name (including a synonym)".

13 Subsections 29(1) and (2)

Repeal the subsections, substitute:

(1) If:

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

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

14 Subsections 29(3) and (4)

Omit "to the priority date referred to in subsection (2)", substitute "to have the date of lodgment of the foreign application treated as the priority date for the purposes of the local application".

15 Paragraph 30(5)(b)

Omit "the application" (first occurring), substitute "the applicant".

16 At the end of section 34

Add:

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

17 At the end of section 36

Add:

- (3) However, this section does not entitle a person to inspect the part of the application that contains the information referred to in paragraph 26(2)(ga) or to have a copy of the part of the application containing that information, unless the person is:
- (a) the applicant; or
 - (b) the applicant's authorised agent; or
 - (c) the Minister; or
 - (d) the Secretary; or
 - (e) a person who is required to inspect the part of the application in the course of performing his or her duties in accordance with this Act; or
 - (f) a person prescribed for the purposes of this subsection.

18 Subsection 37(1)

Omit all the words after "relates, the" (other than the note), substitute:
Secretary:

- (d) must give written notice of that decision:
- (i) to the person who made the application, objection or request; and
 - (ii) in the case of an objection to an application for PBR—also to the applicant; and
 - (iii) in the case of a request for revocation of PBR—also to the grantee; and
- (e) may also give written notice of that decision to any other person whom the Secretary considers appropriate if the test growing or further test growing is a comparative test growing.

19 After subsection 37(2)

Insert:

- (2A) A person to whom a notice is sent under this section must comply with the requirements of the notice:
- (a) in the case of trees and vines, or propagating materials of trees and vines—within 2 years from the date of service of the notice; and
 - (b) in the case of other species of plant or propagating materials of other species of plant—within 12 months from that date.
- (2B) If a person, without reasonable excuse, fails to comply with the requirements of a notice issued under this section, the Secretary may:
- (a) if the person is the grantee—revoke PBR, in the plant variety to which the notice relates, under section 50; or
 - (b) if the person made an application, objection or request—decide not to further proceed with the application, objection or request for revocation.

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

20 Paragraphs 37(5)(b) and (c)

Repeal the paragraphs, substitute:

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

21 After paragraph 39(2)(a)

Insert:

- (aa) a decision has been taken under paragraph 37(2B)(b) not to proceed with the application; or
- (ab) the application has been withdrawn; or

22 After paragraph 39(2)(b)

Insert:

- or (c) at least 12 months have elapsed since the publication of the detailed description that was given to the Secretary under subsection 34(1);

23 Subsections 43(5) and (6)

Omit “propagating or harvested material”, substitute “plant material”.

24 At the end of subsection 43(6)

Add:

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

25 Subsection 43(7)

Omit “propagating or harvested material”, substitute “plant material”.

26 After subsection 43(7)

Insert:

- (7A) Subsection (6) does not apply to a sale of plant material of a plant variety to a person by, or with the consent of, the breeder if:
 - (a) the sole purpose of the sale is for the person to multiply plant material of that plant variety on behalf of the breeder; and
 - (b) under the agreement for the sale, immediately after the plant material is multiplied, property in the new plant material vests in the breeder.
- (7B) Subsection (6) does not apply to a sale of plant material of a plant variety to a person by, or with the consent of, the breeder if the sale is part of an agreement under which the person agrees to use plant material of that variety for the sole purpose of evaluating the variety in one or more of the following tests or trials:
 - (a) field tests;
 - (b) laboratory trials;
 - (c) small-scale processing trials;
 - (d) tests or trials prescribed for the purposes of this subsection.
- (7C) Subsection (6) does not apply to a sale of plant material of a plant variety to a person by, or with the consent of, the breeder if:
 - (a) the sale only involves plant material that is a by-product or surplus product of one or more of the following:

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

27 Paragraph 43(8)(b)

Repeal the paragraph, substitute:

- (b) the application is proceeding, or has led, to the grant of PBR.

28 At the end of section 43

Add:

- (10) In this section:

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

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

29 Paragraph 48(2)(c)

Omit "section 39", substitute "section 40".

30 Subsection 49(1)

Omit "that the Minister proposes to make, or an existing grant of PBR", substitute ", whether proposed or made".

31 After paragraph 50(2)(a)

Insert:

- (aa) the Secretary is satisfied that the grantee, without reasonable excuse, has failed to comply with the requirements of a notice under section 37; or

32 After subsection 53(1)

Insert:

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

33 Subsection 54(1)

Omit “may be begun in the Court”, substitute “may be begun in the Court only by the grantee”.

34 After paragraph 63(2)(a)

Insert:

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

34A Paragraph 64(1)(e)

Repeal the paragraph, substitute:

- (e) one member who will represent the conservation interests in relation to new plant varieties and the potential impacts of new plant varieties; and
- (f) one member who will represent indigenous Australian interests in relation to new plant varieties and the source, use and impacts of new plant varieties; and
- (g) 2 other members who, in the opinion of the Minister, possess qualifications or experience that are appropriate for a member of the Advisory Committee.

34B Subsection 65(1)

Omit “and (e)”, substitute “, (e), (f) and (g)”.

34C Subsection 67(2)

Repeal the subsection, substitute:

(2) At a meeting of the Advisory Committee, 5 members constitute a quorum.

35 Subsection 64(4)

Omit “2”, substitute “3”.

36 Paragraph 77(1)(a)

Omit "subsection 49(1)", substitute "subsection 49(2)".

37 After subparagraph 77(1)(b)(viii)

Insert:

(viiiia) under paragraph 37(2B)(b) not to proceed further with an application, objection or request for revocation; or

38 Article 14(1)(a)(vii) of the Convention as set out in Schedule 1

Omit "(iv)", substitute "(vi),".

Part 2—Application provisions

39 Application of item 4

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

40 Application of item 16

The amendment made by item 16 applies in relation to:

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

41 Application of items 18, 19 and 31

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

42 Application of item 20

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

43 Application of items 21 and 22

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

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

44 Application of items 23, 25, 26 and 28

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

45 Application of item 27

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

*[Minister's second reading speech made in—
Senate on 13 March 2002
House of Representatives on 12 December 2002]*

(65/02)