**Plant Breeders Rights**

**Note: Patent and Plant Breeders Comparison 🡪 Text book pages 417-418**

**Step 1 – Overview of the Process**

**Plant Breeders Rights Act 1994 (PBR)**

1. **s43** - The Plant Breeders Acts 1994 establishes a system of registration of new ‘plant varieties’ which have the registrable characteristics set out in.
2. There is an application system which includes a system of priority dates s28 – 29 and access for foreign applications s24.

**First Application**

1. **s26(2)(e)** - The original application need only contain a brief description of a plant which is sufficient to establish a prima facie case that the variety is distinct from other variates of common knowledge.

**If First Application is Accepted**

1. **s34** - The applicant must as soon as possible furnish a detailed description which will be made public.
2. **s44(1)(b)(vii)** - It is also required to deposit propagating material for the variety with an approved genetic resource centre; and
   1. **S44(2)** -supply a specimen plant to an official herbarium
3. **s30(2)** – The Secretary must then be satisfied that no other applications for the same thing at an earlier priority date exist and the application complies with all formal requirements under s26.

**Opposition**

1. **s35** – There can be an opposition to an application and a right to petition for revocation s50(8).
2. **S37(1)** – The Secretary can, if in doubt, require for a growing test to be establish to determine whether or not the registrable characteristics are present s37(1).

**Step 1 – Definition of a Plant ?**

1. **Must be contained within the Section 3 definition of the 1994 Act states** “*a plant includes all fungi and algae but does not include bacteria, bacteroids, mycoplasmas, viruses, viroids and bacteriophages”.*

**Step 2 – What is a Planet Variety ?**

1. **S3 defines ‘plant variety’ to mean a plant grouping (including a hybrid):**
   1. That is contained within a single botanical taxon of the lowest rank;
   2. That can be defined by the expression of the characteristics resulting from the genotype of each individual within the plant grouping;
   3. That can be distinguished from any other plant grouping by the expression of at least one of those characteristics; and
   4. That can be considered as a functional unit because of its suitability for being propagated unchanged.

**Step 3 – Characteristics Required for Registration ?**

1. **S43 – Will be registrable if ALL OF THE FOLLOWING are satisfied:**
   1. **The variety has a breeder; and**
      1. **S3(1) –** Person or persons who actually bred it unless they did so in performing duties ‘as a member of employee of a body’ in which case that body is taken to be the breeder.
      2. **S5 –** For the purposes of the Act, ‘breeding’ includes the discovery of a plant together with its use in selective propagation so as to enable the development of a new variety.
         1. **Requirement is that the plant must have been developed with some level of human intervention and not merely a spontaneous, naturally occurring event.**
   2. **The variety is distinct; and**
      1. **S43(2) –** Varieties will be deemed to be distinct if they are clearly distinguishable from another variety that is a matter of ‘common knowledge’ at the date of filing.
         1. **Prior art base** for assessing distinctiveness consists of those varieties which are a matter of common knowledge.
   3. **The variety is uniform; and**
      1. **S 43(3) -** The general requirement of **uniformity** in relevant characteristics on propagation allows for variations in the variety which might be expected from the features of its propagation.
         1. **So the first population of a variety produced by bio-engineering or cloning or cuttings is expected to be more uniform in those new characteristics than other varieties.**
   4. **The variety is stable; and**
      1. **S43(4) –** The requirement of stability is directed to the relevant new and distinctive characteristics after the variety has been propagated.
   5. **The variety has not been exploited or has only recently been exploited.**
      1. **S43(6) –** A variety will be new if at the filing date propagation or harvested material has not been sold, hired out or bartered with the consent of the breeder earlier than one year in Australia, or four years in the territory of another contracting state, except in the case of trees and vines when the period is six years.
      2. **Sold definition** from ‘Sun World International Inv v Registrar, Plant Breeders Right’ – ‘found to bear wide and ordinary meaning and to cover the disposition of vines even when subject to restrictive conditions as to their use’.

**Step 4 – Rights of the Breeder ?**

**Overview** - The breeder is given the exclusive right to produce or reproduce the material in question, to condition it for propagation, to sell, important or export it, or to stock it for any of the foregoing purposes as well as to license others to do any of those things.

Under the Act, rights are given to a successful applicant in relation to:

1. **S11 –** Propagating material of the variety
2. **S14 –** Harvested material of the variety
3. **S15 –** Certain products of the variety
4. **S12 –** Varieties essentially derived from the protected variety
5. **S13(a) –** Varieties not clearly distinguishable from the protected variety
6. **S13(b) –** Varieties whose production requires the repeated use of the protected variety

**Step 5 – Limitations of Rights ?**

1. **Exceptions to Rights - S16 -** Breeders rights do not extend to acts done privately and for non-commercial purposes, for experimental purposes or for breeding other varieties. Nor do they cover acts done in relation to new varieties bred from the breeder’s variety.
2. **Exhaustion of rights –** **s23 –** Once the breeder has placed items on the market the rights cannot be exercised in relation to those particular items, and to some extent the material derived from them. Once the breeder has sold or marketed propagating material (seeds, cutting setc) or sold harvested material (fruits, grains etc) or goods made directly from harvested material, the breeder’s right do not apply to acts performed in relation to this material.
3. **Duration – s22 –** Minimum 25 years for trees and vines, and 20 years for other plants.
4. **Public access and licensing – s19 –** Grantee must take reasonable steps to provide reasonable public access to the plant variety s19(1); and
   1. this will be fulfilled by sales of reasonable quantities of material at a reasonable price, or through gifts in sufficient quantities to meet demand s9(2).

**Step 6 – Infringement of Rights**

1. **s53 –** The rights in a planet variety are infringed by doing something which only the grantee is entitled to do, without that persons authority; by falsely claiming to have the right to do such a thing; or by using a protected varieties name for another variety or plant.
2. **S56(3)** – Federal court is entitled to grant an injunction and either damages or an account of profits at the plaintiffs option.
3. **S57(2) –** If the planet material is labelled as **“protected”** and is sold to a substantial extent before the infringement labelled as protected by PBR, the defendant will be presumed to be aware of the right.
4. **S75 –** It is an office to intentionally misrepresent oneself as the holder of the plant varieties rights or misrepresent the plant being protected.

**Defences & Counterclaim**

1. **S54(2) -** Defendant may counterclaim for the revocation of the right on the grounds that the variety is not a new variety, or that the facts exist which if they had been known to the Secretary at the time of the application would have led to refusal to grant the right.
2. **S57(1) –** Where there is an innocent infringement and the person did not know and had no reasonable grounds to suspect that the right existed, the court has discretion to reduce to grant an award of damages or an account.