

REPUBLIC OF SOUTH AFRICA

PLANT BREEDERS' RIGHTS BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
the Bill published in Government Gazette No. 38398 of 23 January 2015)
(The English text is the official text of the Bill)*

(MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES)

[B 11B—2015]

ISBN 978-1-4850-0337-3

No. of copies printed 800

BILL

To provide for a system whereunder plant breeders' rights relating to varieties of certain kinds of plants may be granted; for the requirements that have to be complied with for the grant of such rights; for the scope and protection of such rights; and for the grant of licenses in respect of the exercise of such rights; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions 5

CHAPTER 1

REGISTRAR AND REGISTER OF PLANT BREEDERS' RIGHTS

2. Designation and functions of Registrar
3. Exercise of discretionary powers by Registrar
4. Register of plant breeders' rights 10
5. Register to be evidence
6. Inspection of documents submitted in connection with an application for plant breeder's right

CHAPTER 2

PLANT BREEDER'S RIGHT 15

7. Protection given to holder of plant breeder's right
8. Duration of plant breeder's right
9. Period of sole right
10. Exceptions to plant breeder's right
11. Exhaustion of plant breeder's right 20
12. Joint holders of plant breeder's right
13. Transfer of plant breeder's right
14. State bound by plant breeder's right

CHAPTER 3

APPLICATION FOR PLANT BREEDER'S RIGHT 25

15. Varieties in respect of which plant breeders' rights may be granted
16. Application for grant of plant breeder's right
17. Priority and redating of applications

18.	Provisional protection	
19.	Rejection of application	
20.	Acceptance and registration of application	
21.	Amendment of application	
22.	Objection to application for grant of plant breeder's right	5

CHAPTER 4

VARIETY DENOMINATIONS

23.	Denomination of variety	
24.	Amendment of denomination	
25.	Marking of labels and containers	10

CHAPTER 5

EXAMINATION OF VARIETY AND GRANT OF PLANT BREEDER'S RIGHT

26.	Tests and trials	
27.	Refusal to grant plant breeder's right	
28.	Grant of plant breeder's right	15

CHAPTER 6

HEARING OF OBJECTIONS

29.	Hearing of objection	
-----	----------------------	--

CHAPTER 7

OBLIGATIONS OF HOLDER OF PLANT BREEDER'S RIGHT 20

30.	Payment of annual fee	
31.	Maintenance of propagating material	

CHAPTER 8

ENFORCEMENT OF PLANT BREEDERS' RIGHTS

32.	Infringement of plant breeder's right	25
33.	Remedies in respect of infringement of plant breeder's right	

CHAPTER 9

LICENCES

34.	Licences	
35.	Application for compulsory license	30
36.	Hearing of application for and issue of compulsory license	

CHAPTER 10

TERMINATION OF PLANT BREEDER'S RIGHT

37.	Expiry of plant breeder's right	
38.	Cancellation of plant breeder's right	35
39.	Voluntary surrender of plant breeder's right	

CHAPTER 11

PLANT VARIETY JOURNAL

40.	Matters to be published in Plant Variety Journal	
-----	--	--

CHAPTER 12

APPEALS

- | | |
|--|---|
| 41. Right to appeal | |
| 42. Appeal Board, composition and membership | |
| 43. Investigation and consideration by Board | 5 |
| 44. Consideration of appeal by Minister | |

CHAPTER 13

ADVISORY COMMITTEE

- | | |
|--|----|
| 45. Establishment of Advisory Committee | |
| 46. Appointment of members of Advisory Committee and termination of membership | 10 |
| 47. Disclosure of interests by members of Advisory Committee | |
| 48. Meetings of Advisory Committee | |

CHAPTER 14

GENERAL PROVISIONS

- | | |
|--|----|
| 49. Entering premises for inspection, sampling and seizure of certain articles | |
| 50. Request for test results by authority of another country | |
| 51. Defect in form not to invalidate documents | |
| 52. Correction of errors | |
| 53. Disclosure of information | 20 |
| 54. Regulations | |
| 55. Offences and penalties | |
| 56. Jurisdiction of magistrate's court | |
| 57. Prohibition of trafficking by officers | |
| 58. Delegation | 25 |
| 59. Transitional provisions and savings | |
| 60. Repeal of laws | |
| 61. Short title and commencement | |

SCHEDULE

Definitions 30

1. In this Act, unless the context indicates otherwise—
- “**Advisory Committee**” means the Plant Breeders’ Rights Advisory Committee established by section 45(1);
- “**agent**” means a person who is domiciled and resident in the Republic and who has been duly authorised by a breeder or the holder of a plant breeder’s right to act on his or her behalf; 35
- “**applicant**” means a breeder who makes an application for the granting of a plant breeder’s right in terms of section 16;
- “**breeder**”, in relation to a variety contemplated in section 15, means— 40
- (a) the person who bred, or discovered and developed, the variety;
- (b) the employer of the person contemplated in paragraph (a), if that person is an employee whose duties are such that the variety was bred, or discovered and developed, in the performance of those duties; or
- (c) the successor in title of the person contemplated in paragraph (a) or the successor in title of the employer contemplated in paragraph (b); 45
- “**conditioning**”, in relation to propagating material of a plant variety, means—
- (a) cleaning, drying, coating, sorting, grading or packaging of the material;
- (b) testing for germination and vigour; or
- (c) any other similar treatment, 50
- undertaken for the purposes of preparing the material for propagation or sale;
- “**convention country**” means a country or intergovernmental organisation that is a member of the International Union for the Protection of New Varieties of Plants;

- “**denomination**”, in respect of a protected variety, means the denomination contemplated in section 23;
- “**Department**” means the Department responsible for agriculture;
- “**employee**” has the meaning ascribed to it in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994), but does not include an employee contemplated in the definition of breeder; 5
- “**essential characteristics**”, in relation to a plant variety, means heritable traits that are determined by the expression of one or more genes, or other heritable determinants, that contribute to the principal features of the variety;
- “**kind of plant**” means a group of plants of the same taxon; 10
- “**mark**” has the meaning ascribed to it in section 2 of the Trade Marks Act, 1993 (Act No. 194 of 1993);
- “**material**” in relation to a variety, means—
- (a) any propagating material;
 - (b) harvested material, including an entire plant or any part of a plant; or 15
 - (c) any product made directly from the harvested material;
- “**Minister**” means the Minister responsible for agriculture;
- “**persons**” includes a trust;
- “**Plant Breeders’ Rights Act, 1976**” means the Plant Breeders’ Rights Act, 1976 (Act No. 15 of 1976); 20
- “**plant breeder’s right**” means a plant breeder’s right granted in terms of section 28;
- “**prescribed**” means prescribed by regulation;
- “**propagating material**” means any reproductive or vegetative material of a plant from which, whether alone or in combination with other parts or products of that 25 plant, another plant with the same characteristics can be produced;
- “**protected variety**” means a variety in respect of which a plant breeder’s right has been granted;
- “**register**” means the register kept in terms of section 4;
- “**Registrar**” means the employee contemplated in section 2(1); 30
- “**regulation**” means a regulation made in terms of section 54;
- “**sell**” includes—
- (a) agree to sell;
 - (b) to offer, keep, expose, send, convey or deliver for sale; and
 - (c) to exchange or to otherwise dispose of to any person in any manner; 35
- “**successor**”—
- (a) in relation to a breeder of a plant variety, means a person to whom the right of the breeder to make application for a plant breeder’s right in that variety has been assigned by operation of law, testamentary disposition or otherwise; and
 - (b) in relation to a holder of a plant breeder’s right, means a person to whom that 40 right has been assigned by operation of law, testamentary disposition or otherwise;
- “**this Act**” includes the regulations;
- “**variety**” means any plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether or not the conditions for the grant of a plant breeder’s right are fully met, can be— 45
- (a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
 - (b) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and 50
 - (c) considered as a unit with regard to its suitability for being propagated unchanged.

CHAPTER 1

REGISTRAR AND REGISTER OF PLANT BREEDERS’ RIGHTS

Designation and functions of Registrar 55

2. (1) Subject to the Public Service Act, 1994 (Proclamation No. 103 of 1994), and after following the recruitment processes prescribed by and in terms of that Act, the Minister must appoint and designate a person as the Registrar of Plant Breeders’ Rights.

(2) The Registrar is the authority to whom the protection of varieties is entrusted and must perform the functions entrusted to the Registrar under this Act.

Exercise of discretionary powers by Registrar

3. (1) Subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)— 5

- (a) any discretionary power conferred on the Registrar in terms of this Act must not be exercised by him or her to the prejudice of any applicant or any other person who appears to the Registrar to be an interested party, without giving such applicant or such other person an opportunity to be heard within such period as may be so prescribed or, if no period has been prescribed, within such reasonable period as the Registrar may determine; and 10
- (b) an applicant or other interested party referred to in paragraph (a) may not waive the right to be heard.

(2) Whenever a period is specified under this Act within which any act or anything must be done, the Registrar may, except where otherwise expressly provided, extend the period. 15

Register of plant breeders' rights

4. (1) The Registrar must keep a register in which the prescribed particulars in respect of all applications for plant breeders' rights in terms of this Act must be entered.

(2) The register must be open for inspection at the office of the Registrar. 20

(3) The Registrar must furnish, at the request of any person and upon payment of the prescribed fee, a copy of any particulars in the register within seven days.

Register to be evidence

5. (1) The register is *prima facie* evidence of all matters directed or authorised by this Act to be noted therein. 25

(2) A copy of an entry in the register or an extract from the register, certified by the Registrar, may be admitted in evidence in any court without further proof or production of the register.

Inspection of documents submitted in connection with an application for plant breeder's right 30

6. (1) Any person may inspect any document submitted in connection with an application for a plant breeder's right at any reasonable time and upon payment of a prescribed fee.

(2) The Registrar must furnish a person contemplated in subsection (1), on payment of a prescribed fee, with a copy of the document contemplated in that subsection within seven days. 35

(3) Notwithstanding subsections (1) and (2) but subject to subsection (4), a person may not—

- (a) inspect that part of the document in question that contains information in respect of the name of each variety used in the breeding program and in respect of the manner in which the variety was bred; 40
- (b) be furnished with a copy of the part of the document referred to in paragraph (a); or
- (c) inspect, or be furnished with a copy of, any other prescribed confidential information. 45

(4) Subsection (3) does not apply to—

- (a) the applicant;
- (b) the applicant's authorised agent; or
- (c) any other person who has to inspect that part of the documentation or information contemplated in subsection (3) in the course of the performance of any function entrusted to him or her in terms of this Act. 50

CHAPTER 2

PLANT BREEDER'S RIGHT

Protection given to holder of plant breeder's right

7. (1) The protection given under this Act to the holder of a plant breeder's right is that prior authorisation has to be obtained for the duration of the plant breeder's right from that holder, by way of a licence granted or issued in terms of section 34 or section 36, by any person intending to undertake— 5

- (a) the production or reproduction (*multiplication*) of the protected variety;
- (b) the conditioning for the purposes of propagation of the protected variety;
- (c) the sale or any other form of marketing of the protected variety; 10
- (d) the exporting of the protected variety;
- (e) the importing of the protected variety; or
- (f) the stocking of the protected variety for any of the purposes referred to in paragraphs (a) to (e).

(2) (a) The undertaking of any activity referred to in subsection (1)(a) to (f) in respect of harvested material obtained through the unauthorised use of propagating material of the protected variety also requires the authorisation of the holder of the plant breeder's right concerned, unless that holder has had reasonable opportunity to exercise his or her right in respect of that propagating material. 15

(b) For the purposes of paragraph (a), "harvested material" includes an entire plant, any part of such plant or any product made directly from harvested material of such plant. 20

(3) (a) Subsections (1) and (2) also apply to a variety—

- (i) that is essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety; 25
- (ii) that is not clearly distinguishable from the protected variety in accordance with section 15(2)(b); or
- (iii) whose production requires the repeated use of the protected variety.

(b) For the purposes of paragraph (a)(i), a variety must be regarded as being essentially derived from another variety if— 30

- (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety;
- (ii) it is clearly distinguishable from the initial variety; and
- (iii) it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety except for the differences which result from the act of derivation. 35

Duration of plant breeder's right

8. (1) A plant breeder's right is valid for a period of 20, 25 or 30 years depending on the particular kind of plant, calculated from the date on which the certificate of registration is issued in terms of section 28(b). 40

(2) The period of validity of the plant breeder's right in respect of a particular kind of plant must be prescribed.

Period of sole right

9. (1) The holder of a plant breeder's right has the sole right to undertake any activity referred to in section 7(1), or to have any such activity undertaken by any other person, during such period as may be prescribed as a period for the exercise of sole rights in respect of the kind of plant to which such a variety belongs. 45

(2) During the period prescribed in terms of subsection (1) the Registrar may not order the issue of a compulsory licence in terms of section 36 in respect of the variety in question. 50

Exceptions to plant breeder's right

- 10.** (1) Notwithstanding section 32(a), a plant breeder's right in respect of a variety obtained in a legitimate manner does not extend to—
- (a) any act done in respect of that variety for private and non-commercial purposes; 5
 - (b) any act done in respect of that variety for experimental purposes;
 - (c) any act done in respect of that variety for the purposes of breeding other varieties and, except where section 7(3) applies, any act contemplated in section 7(1) and section 7(2) in respect of such other varieties; or
 - (d) a farmer who uses the protected variety in accordance with subsection (2). 10
- (2) (a) In respect of subsection 1(d), the Minister must prescribe—
- (i) the category or categories of farmers who may use the protected variety;
 - (ii) the category or categories of plants that may be used;
 - (iii) the uses to which the protected variety may be put; and
 - (iv) where applicable— 15
 - (aa) conditions for payment of royalties; and
 - (bb) labelling requirements.
- (b) When the Minister acts in terms of paragraph (a), the Minister must ensure that the legitimate interests of the breeder are safeguarded.

Exhaustion of plant breeder's right 20

- 11.** A plant breeder's right does not extend to any act concerning any material of the protected variety or of a variety covered by section 7(3) that has, in the Republic, been sold or otherwise marketed by the holder of a plant breeder's right concerned, or sold or otherwise marketed with his or her written authorisation, or any material derived from the said material, unless the act— 25
- (a) involves further propagation of the variety in question; or
 - (b) involves exportation of material of the variety in question, which enables the propagation of the variety, into any country that does not protect varieties of the particular kind of plant, except where the exported material is for consumption purposes. 30

Joint holders of plant breeder's right

- 12.** (1) Where a plant breeder's right is granted to two or more persons jointly, each such person is, subject to any written agreement to the contrary between them, entitled—
- (a) to an equal share in such right; 35
 - (b) to undertake in connection therewith for his or her own benefit any activity referred to in section 7, if he or she discloses any such activity in writing to the other joint holders; and
 - (c) to institute any action in respect of any infringement of that right.
- (2) A joint holder of a plant breeder's right may not without the written authorisation 40 of the other joint holders—
- (a) grant a licence under section 34; or
 - (b) transfer the whole or any part of his or her interest in such right.

Transfer of plant breeder's right

- 13.** (1) The holder of a plant breeder's right must, after such right or any part thereof has been transferred to any other person, in the prescribed manner inform the Registrar of the name and address of the person to whom the right or part thereof has been transferred. 45
- (2) A person to whom a plant breeder's right or any part thereof has been transferred must, if he or she appoints an agent in respect of such right, inform the Registrar in the 50 prescribed manner of the name and address of such agent.

State bound by plant breeder's right

- 14.** A plant breeder's right binds the State in all respects in the same way as it binds any other person.

CHAPTER 3

APPLICATION FOR PLANT BREEDER'S RIGHT

Varieties in respect of which plant breeders' rights may be granted

15. (1) A plant breeder's right may be granted in respect of any variety of all plant genera and species, if it is new, distinct, uniform and stable and has an acceptable variety denomination. 5

(2) A variety contemplated in subsection (1) must be regarded as—

(a) new, if propagating material or harvested material thereof has not been sold or otherwise disposed of by, or with the consent of, the breeder for the purposes of exploitation of the variety before the date of filing of the application for a plant breeder's right— 10

(i) in the Republic, for a period of not more than one year; and

(ii) in any other country, in the case of—

(aa) varieties of vines and trees, for a period of not more than six years; 15

or

(bb) other varieties, for a period of not more than four years;

(b) distinct, if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application;

(c) uniform, if it is sufficiently uniform with regard to the characteristics of the variety in question taking into account the variation that may be expected from the particular features of the propagation of that variety; and 20

(d) stable, if the characteristics thereof remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

(3) Subsection (2)(a) does not apply to the sale of plant material of a plant variety to a person by, or with the consent of, the breeder if— 25

(a) the sole purpose of the sale is for the person to multiply plant material of that plant variety on behalf of the breeder;

(b) by virtue of the agreement of sale, ownership in the new plant material vests in the breeder immediately after the plant material has been multiplied; or 30

(c) 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:

(i) field trials;

(ii) laboratory tests; 35

(iii) small-scale processing trials; or

(iv) tests or trials prescribed for the purposes of this paragraph.

(4) For the purposes of subsection (2)(b), the filing of an application for the—

(a) granting of a plant breeder's right; or

(b) entering in an official register of varieties, 40

of another variety in any country, renders that other variety a matter of common knowledge from the date of such application, if such application results in the granting of a plant breeder's right of that other variety or the entering in the official register of varieties of the said other variety, as the case may be.

Application for grant of plant breeder's right 45

16. (1) An application for the grant of a plant breeder's right must be made by an applicant in the prescribed manner and must be accompanied by the following documents and non-refundable fees—

(a) An application form obtainable from the office of the Registrar, duly completed; 50

(b) a technical questionnaire in respect of a kind of plant of the variety in question obtainable from the office of the Registrar, duly completed;

(c) such application fee and such examination fee as may be prescribed;

(d) written proof of the appointment of an agent by the breeder, if applicable; and

(e) written proof of the transfer of the variety to the applicant, if applicable. 55

(2) If the applicant is not domiciled and resident in the Republic, the application must be submitted through an agent.

(3) The Registrar must notify the applicant of any outstanding documentation or information within 21 days of receiving the application.

(4) The applicant must furnish the Registrar with any documentation or information required by the Registrar within three months of the notification contemplated in subsection (3), failure of which may result in the application being returned to the applicant. 5

(5) (a) The effective filing date is the date on which the requirements of subsection (1) have been met.

(b) Copies of documents referred to in subsection (1)(e) to (f) may be submitted in order to secure a filing date, but the original documents must be submitted to the Registrar within three months of the filing date. 10

(6) In the event that a variety may not be used without prior approval in terms of other legislation, the application must be accompanied by the relevant permit or proof of general release for the variety issued in terms of such legislation.

Priority and redating of applications 15

17. (1) If an application in terms of section 16 is preceded by another application by or on behalf of the same applicant for protection of the same variety in a convention country, and such other application has been deposited in accordance with the laws in force in the convention country in question, the Registrar must give priority to the application submitted in terms of section 16, if it is— 20

(a) submitted to the Registrar in the prescribed manner within a period of 12 months of the date on which such other application was duly filed in the convention country in question; and

(b) accompanied by the prescribed fee.

(2) An application contemplated in subsection (1)(a) must be confirmed within three months by submitting a copy, certified as correct by the appropriate authority in the relevant country, of each document that constituted the relevant preceding application. 25

(3) The Registrar must allow the applicant to, within two years after the—

(a) expiration of the period of priority; or

(b) first application is rejected or withdrawn, 30

furnish the relevant information, documents or material required for the purposes of undertaking the tests and trials in terms of section 26.

(4) If two or more applications for the protection of the same variety have been deposited on different dates in different convention countries, the period referred to in subparagraph (1)(a) must be calculated as from the date on which the earliest of such applications was deposited with the appropriate authority. 35

(5) During the period referred to in subsection (1)(a), the filing of another application, the publication or use of the variety that is the subject of the first application or such other event as may be prescribed does not constitute grounds for the rejection of the subsequent application. 40

Provisional protection

18. (1) An applicant has provisional protection in respect of the variety in question from the filing date of the application for a plant breeder's right until the granting or refusal thereof.

(2) An applicant who has provisional protection in a plant variety in terms of this section may not institute proceedings for any alleged infringement of such right during the period of provisional protection. 45

(3) The effect of provisional protection is that the applicant is entitled to equitable remuneration from any person who, during the period of provisional protection, carries out any act contemplated in section 7 that would, once the plant breeder's right is granted, require the authorisation of the holder of the plant breeder's right. 50

(4) An applicant has the provisional protection contemplated in subsection (3) only in respect of a person who has been notified in the prescribed manner.

Rejection of application

19. (1) The Registrar must reject an application made in terms of section 16, if— 55

(a) the application does not comply with any provision of this Act;

- (b) the variety in respect of which the application is made does not fulfill the requirement contemplated in section 15(2)(a);
- (c) the applicant is not entitled to make an application under this Act;
- (d) the application contains a misrepresentation; or
- (e) the applicant refuses or has failed to or is not able to propose an acceptable denomination. 5

(2) If the Registrar rejects an application in terms of subsection (1), the Registrar must advise the applicant in writing of the rejection and must state the reasons for the rejection within 21 days of the rejection.

Acceptance and registration of application 10

20. If the Registrar accepts the application, the Registrar must register the application and must notify the applicant in writing of the acceptance within 21 days of the registration of the application.

Amendment of application

21. An applicant whose application has been registered in terms of section 20 may, at any time before or after the granting of a plant breeder's right, apply in the prescribed manner to the Registrar for the amendment of that application, subject to the approval of the Registrar and upon payment of the prescribed non-refundable fee: Provided that such amendment does not affect the description of the variety which is the subject of the application. 20

Objection to application for grant of plant breeder's right

22. (1) Any person may lodge an objection in the prescribed manner with the Registrar in respect of an application for the grant of a plant breeder's right following the publication of the prescribed information regarding the application in the Journal referred to in section 40 within 60 days from the date of publication. 25

(2) The Registrar must within 14 days of the receipt of an objection—

- (a) inform the applicant concerned in writing of the objection; and
- (b) provide the applicant with a copy of the objection.

(3) The applicant may, in the prescribed manner, lodge with the Registrar a counter-statement against the objection within 60 days of notification. 30

CHAPTER 4

VARIETY DENOMINATIONS

Denomination of variety

23. (1) An applicant for the grant of a plant breeder's right must propose a denomination that complies with the prescribed requirements and such denomination is subject to the approval of the Registrar. 35

(2) No denomination other than the denomination approved by the Registrar in terms of subsection (1) may be used in connection with the variety in question, whether before or after the expiry of the term of the plant breeder's right granted in respect of the variety. 40

(3) Subsection (2) does not prohibit the proprietor or other registered user of a mark to use such mark in conjunction with the denomination in respect of which a plant breeder's right has been granted, if such mark is clearly distinguishable from the variety denomination.

(4) A variety must be submitted to the Registrar under the same denomination as the denomination by which it is known in any other country, unless the Registrar considers that denomination unacceptable in which case the applicant must submit an alternative denomination. 45

Amendment of denomination

- 24.** (1) The Registrar must amend the denomination approved in respect of a variety in terms of section 23(1), if—
- (a) ordered by a court on application by a person who in law has a preferential claim to the use of the denomination in question; 5
 - (b) the information submitted to the Registrar in the application for the approval of, or in connection with, the denomination in question was incorrect and such denomination would not have been approved had the Registrar known at the time of the application that such information was incorrect; or
 - (c) information comes to light which, if discovered earlier, would have resulted in the refusal of such denomination. 10
- (2) (a) If an amendment becomes necessary on any ground referred to in subsection (1), the Registrar must notify the relevant applicant or holder of the plant breeder's right accordingly in writing within 21 days and must give reasons in the notice why the amendment is necessary. 15
- (b) The applicant or holder must submit proposals in writing to the Registrar for an alternative denomination within 30 days from the date of the notice.
- (3) An applicant may request the Registrar in the prescribed manner and upon payment of the prescribed fee at any time before the grant of the plant breeder's right to amend the approved denomination. 20
- (4) The Registrar must consider the request in terms of subsection (3) and must notify the applicant of his or her decision and the reasons for the decision in writing within 21 days of the date on which the request was received.
- (5) Any person may lodge an objection in the prescribed manner and within the prescribed period against an intended amendment of a variety denomination. 25

Marking of labels and containers

- 25.** (1) If any propagating material of a variety in respect of which a plant breeder's right has been granted is sold for the purposes of propagation or for any other purpose, the denomination of that variety must, in such manner as may be prescribed, clearly and legibly appear on a label attached thereto or, if it is packed, clearly and legibly appear on the container. 30
- (2) If a mark is used in conjunction with the denomination of the relevant variety, such mark and denomination must be clearly distinguishable.

CHAPTER 5

EXAMINATION OF VARIETY AND GRANT OF PLANT BREEDER'S RIGHT 35

Tests and trials

- 26.** (1) The Registrar must, in order to enable him or her to determine whether a variety in respect of which an application has been accepted is new, distinct, uniform and stable in accordance with the provisions of section 15—
- (a) undertake, or cause to be undertaken, such tests and trials as may be necessary; or 40
 - (b) use the results of tests and trials obtained from the appropriate authority in another country.
- (2) (a) The applicant must furnish the Registrar within the prescribed period with such material as may be prescribed. 45
- (b) The Registrar may grant an extension to the applicant from compliance with paragraph (a) for a period not exceeding the initial prescribed period.
- (c) An application for extension contemplated in paragraph (b) must be submitted to the Registrar in writing and must—
- (i) set out reasons for the request of an extension; and 50
 - (ii) in the event of imported plant material, include prescribed proof that the plant material has been imported into the Republic.
- (d) An application in terms of section 16 lapses if the material contemplated in paragraph (a) is not furnished to the Registrar within the prescribed period or extended period, as the case may be. 55

(3) If an objection has been lodged against an application for the grant of a plant breeder's right in terms of section 22, the Registrar may terminate all actions performed in accordance with subsection (1)(a) or (b) in the event that such objection is upheld.

Refusal to grant plant breeder's right

27. (1) The Registrar must refuse to grant a plant breeder's right to an applicant if, after examining the results of any tests or trials conducted in terms of section 26(1) in respect of the variety in question, the requirements specified in section 15 have not been met. 5

(2) If the results from the tests or trials conducted in terms of section 26(1) indicate that two or more varieties in respect of which different applications have been registered in terms of section 20 cannot be distinguished, the Registrar must grant a plant breeder's right to the applicant whose application was submitted— 10

(a) first in time in accordance to section 16(1); or

(b) in accordance to section 17(1),

whichever is the earlier. 15

(3) The Registrar must advise any applicant contemplated in subsection (1) or (2) in writing within 21 days of the Registrar's decision and of the grounds of the refusal, as the case may be.

Grant of plant breeder's right

28. The Registrar must— 20

(a) grant a plant breeder's right to an applicant in respect of the variety applied for if, after the examination contemplated in section 26(1), that variety conforms to the requirements specified in section 15; and

(b) issue a certificate of registration to the applicant in respect of each plant breeder's right granted within 90 days of receiving examination results. 25

CHAPTER 6

HEARING OF OBJECTIONS

Hearing of objection

29. (1) In considering an objection lodged in terms of section 22, the Registrar must conduct a hearing in accordance with this section. 30

(2) The Registrar must determine the date on and the time and place at which the objection will be heard and must inform the person objecting and the applicant in writing of such date, time and place 30 days prior to the hearing.

(3) The Registrar when considering a matter at the hearing may utilise one or more of the persons contemplated in section 43 who have experience in the administration of justice or skill in any matter which may be considered at the hearing, to assist and advise the Registrar with regard to the hearing of the objection. 35

(4) The Registrar may, for the purposes of the hearing of an objection—

(a) summon any person who may give material information concerning the subject of the hearing or who has in his or her possession or custody or under his or her control any document that has any bearing upon the subject of the hearing, to appear before the Registrar at a time and place specified in the summons, to be interrogated or to produce that document, and the Registrar may retain for examination any document so produced; 40

(b) administer an oath to or accept an affirmation from any person called as a witness at the hearing; and 45

(c) call any person present at the hearing as a witness and interrogate him or her and require him or her to produce any document in his or her possession or custody or under his or her control.

(5) The procedure at the hearing of an objection must be prescribed. 50

(6) The person objecting and the applicant may, if he or she appears before the Registrar at the hearing of an objection, be represented.

(7) The Registrar must advise the person objecting and the applicant in writing of his or her decision and of the grounds on which it is based within 21 days after the hearing of the objection. 55

CHAPTER 7

OBLIGATIONS OF HOLDER OF PLANT BREEDER'S RIGHT

Payment of annual fee

30. (1) A person to whom a plant breeder's right has been granted in terms of section 28 must pay the prescribed annual fee for the duration of the plant breeder's right in question. 5

(2) The holder of the plant breeder's right must pay the first annual fee on or before 31 March of the year following the date on which a plant breeder's right was granted, and must pay any subsequent annual fee on or before 31 March of each year thereafter.

(3) In the event that an annual fee has not been paid on or before the date contemplated in subsection (2), the plant breeder concerned may pay an amount double the amount of such fee in order to ensure that the registration of the plant breeder's right does not lapse, but such late payment may only be effected during a period not exceeding three months from the date on which the payment was due in terms of that subsection. 10

(4) If no fee is paid in terms of subsection (2) or within the period contemplated in subsection (3), the registration of the plant breeder's right in question may be cancelled in accordance with section 38. 15

Maintenance of propagating material

31. (1) The holder of a plant breeder's right must ensure that he or she is in a position for the duration of the right when requested by the Registrar— 20

(a) to furnish the Registrar with propagating material of the variety in respect of which the right was granted that is capable of reproducing the variety in question in such a manner that the characteristics of the variety correspond with those described at the time of the grant of the relevant right; and

(b) to provide the Registrar with the information and access to the relevant facilities to satisfy the Registrar that the holder is maintaining propagating material that conforms with the requirements contemplated in paragraph (a). 25

(2) The Registrar may, during normal business hours, undertake such inspection in connection with any matter contemplated in subsection (1) as may be necessary in order to ensure compliance with the provisions of that subsection. 30

CHAPTER 8

ENFORCEMENT OF PLANT BREEDERS' RIGHTS

Infringement of plant breeder's right

32. Subject to section 10, a plant breeder's right is infringed by any person who—

(a) not being the holder of the plant breeder's right, performs, or causes to be performed, an act contemplated in section 7(1), read with section 7(2) and section 7(3), without having been granted a licence contemplated in section 34 or section 36; 35

(b) in the case of an essentially derived variety performs, or causes to be performed, an act contemplated in section 7(1), read with section 7(2) and section 7(3), without an authorisation from the holder of the plant breeder's right of the— 40

(i) initial variety; or

(ii) essentially derived variety, in the event that separate protection for the essentially derived variety exists; 45

(c) uses the approved denomination of a protected variety in relation to plants or propagating material of any other variety for any purpose whatsoever; or

(d) sells plants or propagating material of a protected variety—

(i) under a denomination other than the approved denomination of that variety; or 50

(ii) without using the approved denomination.

Remedies in respect of infringement of plant breeder's right

33. (1) The holder of a plant breeder's right or any person to whom a licence contemplated in section 34 or section 36 has been granted may, upon proof of an infringement of that right and with proof of damages suffered by that holder or licensee, recover by action in any competent court from the person who infringed the plant breeder's right compensation in respect of such infringement. 5

(2) The holder of a plant breeder's right may not institute an action contemplated in subsection (1) while the relevant plant breeder's right or variety is the subject of an appeal in terms of section 41.

(3) If the person to whom a licence contemplated in section 34 or section 36 has been granted institutes a claim contemplated in subsection (1), the holder of the relevant plant breeder's right must be joined as a party to those proceedings. 10

(4) In addition to any other remedy, a competent court may, in proceedings due to the infringement of a plant breeder's right, make an order in respect of the custody, surrender or disposal of any book, document, plant, propagating material, product, substance or other article. 15

CHAPTER 9

LICENCES

Licences

34. The holder of a plant breeder's right may enter into a written licence agreement authorising any person to undertake any activity referred to in section 7. 20

Application for compulsory license

35. (1) Any person who is of the opinion that the holder of a plant breeder's right unreasonably refuses to grant him or her a license under section 34, or that such a holder is imposing unreasonable conditions for the issue of such a license, may in the prescribed manner apply to the Registrar to issue a compulsory license in respect of the relevant plant breeder's right. 25

(2) The Registrar must inform the holder of the plant breeder's right in writing of the application contemplated in subsection (1)(a) within 21 days of receiving that application. 30

(3) The holder of the plant breeder's right may lodge a counter-statement with the Registrar within 60 days of receiving the information contemplated in subsection (2) in which the holder concerned sets out the reasons why he or she contests the application in question.

(4) If the person who made the application and the holder of the relevant plant breeder's right at any stage after the application has been lodged with the Registrar reach an agreement with regard to the issue of a license, the person who made the application must inform the Registrar of the agreement within 21 days of reaching the agreement. 35

Hearing of application for and issue of compulsory license

36. (1) The Registrar must determine the date on and the time and place at which an application contemplated in section 35(1) will be heard and 30 days prior to the hearing must inform the person who made the application and the holder of the plant breeder's right in question in writing of such date, time and place. 40

(2) (a) The Registrar may appoint one or more persons who have experience in the administration of justice or skill in any matter which may be considered at the hearing, to assist and advise him or her with regard to the hearing of the application for a compulsory license. 45

(b) A person appointed in terms of paragraph (a) must receive such remuneration as may be prescribed.

(3) The Registrar may, for the purposes of the hearing of an application for a compulsory license— 50

(a) summon any person who may give material information concerning the subject of the hearing or who has in his or her possession or custody or under his or her control any document that has any bearing upon the subject of the

- hearing, to appear before the Registrar at a time and place specified in the summons, to be interrogated or to produce that document, and the Registrar may retain for examination any document so produced;
- (b) administer an oath to or accept an affirmation from any person called as a witness at the hearing; and 5
- (c) call any person present at the hearing as a witness and interrogate him or her and require him or her to produce any document in his or her possession or custody or under his or her control.
- (4) The procedure at the hearing of an application for compulsory license must be prescribed. 10
- (5) The person who applied for a compulsory license and the holder of the plant breeder's right in question may, if he or she appears before the Registrar at the hearing, be represented.
- (6) The Registrar must advise the applicant for a compulsory license and the holder of the plant breeder's right in question in writing of his or her decision and of the grounds on which it is based within 21 days after the hearing of the application for a compulsory license. 15
- (7) (a) The Registrar must issue a compulsory license if it has been established that—
- (i) the granting of a compulsory licence is in the public interest;
- (ii) the holder of a plant breeder's right is unreasonably refusing a license referred to in section 34 or is imposing unreasonable conditions for the issue of such a license; and 20
- (iii) the reasonable requirements of the public with regard to the variety in question are not being satisfied or will not be satisfied as a result of such refusal or the imposition of such conditions. 25
- (b) A compulsory license contemplated in paragraph (a)—
- (i) may include such condition as the Registrar may determine; and
- (ii) may at any time be reviewed by the Registrar by reason of representations made to him or her for the amendment or withdrawal of that compulsory licence. 30
- (8) In setting the terms of a compulsory license the Registrar must endeavour to ensure that propagating material of the variety in question is available to the public at reasonable prices consistent with the holder of a plant breeder's right deriving a reasonable advantage therefrom.
- (9) (a) A compulsory license may be granted to any person whether or not the holder of the relevant plant breeder's right has granted a license in terms of section 34 to any other person. 35
- (b) The issue of a compulsory license does not prevent the holder of the plant breeder's right from granting additional licenses in terms of section 34.
- (10) In the event that a compulsory licence is issued in accordance with subsection (7), the Registrar must ensure the payment of equitable compensation to the holder of the plant breeder's right concerned. 40

CHAPTER 10

TERMINATION OF PLANT BREEDER'S RIGHT

Expiry of plant breeder's right 45

37. A plant breeder's right expires at the end of the relevant period contemplated in section 8.

Cancellation of plant breeder's right

38. (1) The Registrar may cancel a plant breeder's right if—
- (a) it is established that a requirement specified in section 15(2)(a) or (b) has not been complied with at the time of the grant of the right; 50
- (b) a requirement specified in section 15(2)(c) or (d) is no longer complied with;
- (c) the right has been granted to a person who is not entitled to it, unless it is transferred to a person who is so entitled; or
- (d) the holder of the plant breeder's right concerned has failed to— 55
- (i) provide the Registrar with information or material considered necessary for verifying the maintenance of the variety within three months of the

- date on which the Registrar requested the information or material in terms of section 31(1);
- (ii) pay the annual fee to maintain the plant breeder's right; or
 - (iii) propose, within 30 days from the date of notification in terms of section 24(2), another suitable denomination if the denomination of the variety is cancelled after the grant of the plant breeder's right. 5
- (2) The Registrar must—
- (a) notify the holder of the plant breeder's right concerned in writing that an application for the cancellation of the right has been received and is being considered; 10
 - (b) request the plant breeder to submit reasons in writing within the prescribed period as to why the plant breeder's right should not be cancelled;
 - (c) consider any reasons received pursuant to the notice contemplated in paragraph (a);
 - (d) make a decision whether or not to cancel the plant breeder's right; and 15
 - (e) in the event that the he or she decides to cancel the plant breeder's right in accordance with subsection (1)—
 - (i) inform the holder of the plant breeder's right concerned in writing of the intended cancellation and the reasons for the cancellation; and
 - (ii) cancel the plant breeder's right within 60 days of the date on which the Registrar has informed the holder of the plant breeder's right in terms of subparagraph (i). 20
- (3) The Registrar must cancel a plant breeder's right before the expiry of the plant breeder's right if ordered by a court or the Minister in terms of section 44.
- (4) A plant breeder's right may not be cancelled for any reasons other than those contained in subsections (1) or (3). 25
- (5) A variety in respect of which a plant breeder's right has been cancelled under this section vests, by operation of law, in the public domain and is not capable of registration in accordance with this Act.

Voluntary surrender of plant breeder's right 30

- 39.** (1) The holder of a plant breeder's right may, at any time, surrender his or her plant breeder's right by notifying the Registrar in writing of such surrender.
- (2) A variety in respect of which a plant breeder's right has been surrendered as contemplated under this section vests, by operation of law, in the public domain and is not capable of registration in accordance with this Act. 35

CHAPTER 11

PLANT VARIETY JOURNAL

Matters to be published in Plant Variety Journal

- 40.** (1) The Registrar must ensure that a journal, to be styled the "Plant Variety Journal", is published on an annual basis or at regular intervals within each year. 40
- (2) The subject matter of the journal contemplated in subsection (1) must be prescribed.

CHAPTER 12

APPEALS

Right to appeal 45

- 41.** A person who feels aggrieved by any decision or action taken by the Registrar may appeal in the prescribed manner to the Minister against such decision or action.

Appeal Board, composition and membership

- 42.** (1) The Minister may constitute a board known as the Appeal Board to investigate and consider any appeal referred to it in terms of section 41. 50

- (2) The Board must consist of at least three members appointed by the Minister, of whom—
- (a) one person must be appointed on account of his or her knowledge in the relevant fields of the law; and
 - (b) two or more persons must have expert knowledge of the subject of the appeal. 5
- (3) The Minister must designate the person referred to in subsection (2)(a) as the chairperson.
- (4) The remuneration of a member of the Board must be prescribed after consultation with the Minister of Finance.
- (5) Any person appointed in terms of subsection (2) must recuse himself or herself as a member of the Board if he or she has any direct or indirect personal interest in the outcome of the appeal. 10

Investigation and consideration by Board

- 43.** (1) The Minister may refer an appeal to the Board.
- (2) An appeal must be heard on the date and at the time and place determined by the chairperson. 15
- (3) The chairperson must inform the appellant and any other party that has an interest in the appeal in writing of the date, time and place of the hearing 30 days prior to the hearing.
- (4) The chairperson may, for the purposes of the hearing of an appeal— 20
- (a) summon any person who may have material information concerning the subject of the hearing or who has in his or her possession or custody or under his or her control any document which has any bearing upon the subject of the hearing, to appear before the Board at a date, time and place specified in the summons, to be questioned or to produce that document, and the chairperson may retain for examination any document so produced; and 25
 - (b) administer an oath to or accept an affirmation from any person called as a witness at the hearing.
- (5) A person who appeals in terms of section 41 and the Registrar may be represented at the appeal. 30
- (6) If a member of the Board—
- (a) dies during the investigation or proceedings of the appeal or so soon before the commencement of the investigation that the vacancy cannot be filled in time;
 - (b) is unable to act and another person cannot be appointed in time; or
 - (c) is, after the investigation has commenced, unable to continue therewith, 35
- the parties may agree that the investigation be continued by the remaining members of the Board.
- (7) Where the member of the Board who has died or has become incapacitated as envisaged in subsection (6) was or is the chairperson of the Board, the Minister must designate one of the remaining members of the Board to act as chairperson. 40

Consideration of appeal by Minister

- 44.** (1) Where the Minister has referred an appeal to the Board in terms of section 43(1), he or she may—
- (a) confirm or set aside the recommendations of the Board; and
 - (b) order the Registrar to execute the decision in connection therewith. 45
- (2) Where the Minister considers an appeal, he or she may—
- (a) confirm, set aside or vary the decision of the Registrar; and
 - (b) order the Registrar to execute the decision in connection therewith.
- (3) The decision of the Minister must be in writing and a copy thereof must be furnished to the Registrar, appellant and any other party to whom decision must be conveyed within 90 days. 50
- (4) If the Minister—
- (a) sets aside any decision or action by the Registrar the prescribed fee paid by the appellant in respect of the appeal must be refunded to the appellant; or
 - (b) varies any decision or action by the Registrar, the Minister may direct that the whole or any part of such fee, be refunded to the appellant. 55

CHAPTER 13

ADVISORY COMMITTEE

Establishment of Advisory Committee

45. (1) A committee to be known as the Plant Breeders' Rights Advisory Committee may be established. 5
- (2) The Advisory Committee may advise the Registrar on—
- (a) any technical matter arising from any provision of this Act; and
 - (b) any other matter relating to the administration of this Act referred to the Advisory Committee by the Registrar.

Appointment of members of Advisory Committee and termination of membership 10

46. (1) The Minister may appoint as members of the Advisory Committee—
- (a) two persons who are appropriate persons to represent breeders of new plant varieties;
 - (b) two persons who are appropriate persons to represent farmers;
 - (c) one person who is an appropriate person to represent the interests of consumers of new plant varieties or of the products of new plant varieties; 15
 - (d) one person to represent conservation interests in respect of new plant varieties and the potential impacts of new plant varieties on the environment;
 - (e) one person to represent indigenous interests in respect of new plant varieties and the source, use and impacts of new plant varieties; and 20
 - (f) one person with qualifications in respect, or experience in the relevant fields of law, including but not limited to Intellectual Property Law and Administrative Law.
- (2) Whenever it is necessary to appoint a member of the Advisory Committee—
- (a) the Minister must, by notice in any appropriate media, call for the nomination of persons who comply with the criteria contemplated in subsection (1); 25
 - (b) the Minister must establish a selection committee, consisting of not more than five members appointed by the Minister;
 - (c) the Minister must refer all nominations received to such selection committee;
 - (d) the selection committee must compile a short-list of candidates in accordance with the provisions of subsection (1); 30
 - (e) the selection committee must, within 30 days after the signing of the letters of appointment of its members, recommend to the Minister a list of not less than three candidates for each of the categories referred to in subsection (1); and
 - (f) the Minister must appoint such number of members as is required from the list of candidates recommended by the selection committee. 35
- (3) A member of the of the Advisory Committee serves in a part-time capacity.
- (4) A member of the Advisory Committee serves for a period not exceeding three years as specified in the letter of appointment and may be reappointed for one more term not exceeding three years. 40
- (5) If, upon the expiration of the term of office of the members of the Advisory Committee, the Minister has not yet appointed new members to take their place, the existing members continue in office until new members have been appointed to replace them.
- (6) The Minister may at any time terminate the appointment of a member of the Advisory Committee if that member is incapable of performing his or her functions or is found guilty of misconduct. 45
- (7) If the appointment of a member of the Advisory Committee is terminated in terms of subsection (6), the Minister must give the person written notice informing him or her of the termination and must set out the reasons for the termination in the notice. 50
- (8) A member of the Advisory Committee may resign by written notice to the Minister.
- (9) The Registrar is a member of the Advisory Committee by virtue of his or her office.
- (10) A member of the Advisory Committee must receive such subsistence and travelling allowances as may be prescribed by the Minister after consultation with the Minister of Finance. 55

Disclosure of interests by members of Advisory Committee

47. (1) Any member of the Advisory Committee who has a direct or indirect pecuniary interest in a matter being considered at a meeting of the Advisory Committee must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at the meeting. 5

(2) A disclosure in terms of subsection (1) must be—

- (a) recorded in the minutes of the meeting of the Advisory Committee; and
- (b) made known in any advice given by the Advisory Committee in relation to that matter.

Meetings of Advisory Committee 10

48. (1) The Registrar must convene a meeting of the Advisory Committee when it is necessary for the purposes of the performance of the functions of the Advisory Committee.

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

(3) The members must elect one of the members present at the meeting to preside at the meeting. 15

(4) The Advisory Committee may determine the procedure to be followed in the performance of its functions.

CHAPTER 14**GENERAL PROVISIONS** 20**Entering premises for inspection, sampling and seizure of certain articles**

49. (1) The Registrar may, on the grounds of a warrant issued in terms of subsection (3)—

(a) enter and inspect any place, premises or vehicle in or upon which any plant, propagating material, harvested material, substance or other article in respect of which this Act applies, is or is upon reasonable grounds suspected to be— 25

(i) conditioned for the purposes of—

(aa) propagation contemplated in section 7(1)(b);

(bb) the sale or any other form of marketing of the protected variety contemplated in section 7(1)(c); or 30

(cc) exportation contemplated in section 7(1)(d);

(ii) produced, reproduced, bred, cultivated, processed, treated, prepared, tested, examined, analysed, classified, pre-packaged, marked, labeled, held, kept, packed, removed, transported, exhibited or sold;

(b) direct a person in control of or employed at such place, premises or vehicle to— 35

(i) deliver any book, record or other document, whether in physical, electronic, digital or any other form, which pertains to that plant, propagating material, substance or other article and which is in the possession or under the control of that person; 40

(ii) furnish such information as he or she has with regard to that plant, propagating material, substance or other article; and

(iii) render such assistance as the Registrar, employee or person requires to enable him or her to perform his or her functions in terms of this Act;

(c) inspect any book, record or other document relating to the investigation and make copies thereof or excerpts from it; 45

(d) seize any plant, propagating material, substance, book, record or other document or article which is or may be relevant to a prosecution under this Act and keep it in his or her custody, after allowing the person from whose possession or control any book, record or document has been taken, to make, at his or her own expense and under the supervision of the Registrar, employee or person concerned, copies thereof or excerpts from it; and 50

(e) take samples of any plant, propagating material, substance or other article used or intended for use in the production, reproduction, breeding, cultivation, processing, treatment, preparation, testing, examining, analysing, classification, pre-packaging, marking, labeling, holding, keeping, packing, removal, 55

transport, exhibition or sale thereof, and of any plant, propagating material, substance or other article seized in terms of paragraph (d), and examine, analyse and classify those samples.

- (2) Any sample taken in terms of subsection (1)(e) or (6) must—
- (a) consist of the quantity or mass determined by the Registrar, taken in accordance with the methods determined by him or her; 5
 - (b) be taken in the presence of the person in charge of, or the owner or custodian of, such plant, propagating material, substance or other article, or, if such person, owner or custodian is not available, in the presence of any other witness, and the form as prescribed must be completed in respect thereof; 10
 - (c) if necessary, be packed and identified in such manner as the nature thereof permits; and
 - (d) with all convenient speed be tested, examined or analysed in accordance with such methods as the Registrar may determine or as may be prescribed, and the result of such test, examination or analysis must be entered on the form as prescribed. 15

(3) A warrant referred to in subsection (1) must be issued by a magistrate who has jurisdiction in the area where the place or premises in question are situated, or where the vehicle is or will be, and must only be issued if it appears to the magistrate from information on oath or affirmation that there are reasonable grounds for believing that an article mentioned in subsection (1)(a) and (b) is upon or in such place, premises or vehicle, and must specify which of the acts mentioned in subsection (1) may be performed thereunder by the person to whom it is issued. 20

(4) A warrant issued in terms of this section must be executed by day unless the person who issues the warrant authorizes the execution thereof by night at times which must be reasonable, and entry upon and search of any place, premises or vehicle specified in such warrant must be conducted with strict regard to decency and order, including— 25

- (a) a person's right to, respect for and the protection of his or her dignity;
- (b) the right of a person to freedom and security; and
- (c) the right of a person to his or her personal privacy. 30

(5) The Registrar, employee or person executing a warrant in terms of this section must immediately before commencing with the execution—

- (a) identify himself or herself to the person in control of the place, premises or vehicle, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the place, premises or vehicle; and 35
- (b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(6) The registrar may, without a warrant enter any place, premises or vehicle, and search for, seize, take samples of and remove any article referred to in subsection (1) if the person who is competent to do so, consents to such entry, search, seizure, taking of samples and removal. 40

(7) (a) The Registrar, employee or person who may on the grounds of a warrant issued in terms of subsection (3) enter and search any place, premises or vehicle, may use such force as may be reasonably necessary to overcome resistance to such entry or search. 45

(b) No person may enter upon and search any place, premises or vehicle unless he or she has audibly—

- (i) demanded admission to the place, premises or vehicle;
- (ii) identified himself or herself; and
- (iii) notified the purpose of his or her entry, 50

unless such person is upon reasonable grounds of the opinion that any article may be destroyed if such admission is first demanded, such identification communicated and such purpose is first notified.

(8) If, during the execution of a warrant or the conducting of a search in terms of this section, a person claims that an article found on or in the place, premises or vehicle in question contains privileged information and refuses the inspection or removal of such article, the person executing the warrant or conducting the search must, if he or she is of the opinion that the article contains information which is relevant to the investigation and that such information is necessary for the investigation or hearing, request a magistrate who has jurisdiction to seize and remove that article for safe custody until a court of law has made a ruling on the question whether or not the information in question is privileged. 60

(9) A warrant issued in terms of this section may be issued on any day and remains in force until—

- (a) it is executed;
- (b) it is cancelled by the person who issued it or, if such person is not available, by any person with similar authority; 5
- (c) the expiry of one month from the day of its issue; or
- (d) the purpose for which the warrant was issued, no longer exists,

whichever may occur first.

(10) If no criminal proceedings are instituted in connection with any plant, propagating material, substance, book, record or other article or document seized in terms of subsection (1) or (6), or if it appears that such plant, propagating material, substance, book, record or other article or document is not required at the trial for the purposes of evidence or an order of court, that plant, propagating material, substance, book, record or other article or document must be returned to the person from whom it was seized. 15

Request for test results by authority of another country

50. The Registrar may provide to an appropriate authority the distinctness, uniformity and stability test reports and variety descriptions derived from tests and trials undertaken by him or her in terms of section 26(1)(a) against payment of a prescribed fee.

Defect in form not to invalidate documents 20

51. A defect in the form of any document that in terms of any law is required to be executed in a particular manner, or in a notice issued in terms of this Act, does not, if the document complies substantially with the applicable legal requirements, render unlawful any administrative act performed in terms of this Act in respect of the matter to which such document or such notice relates, and does not constitute a ground for exception to any legal procedure that may be taken in respect of such matter. 25

Correction of errors

52. (1) The Registrar may authorise—

- (a) the correction of any clerical error or error in translation appearing in any plant breeder's right, the application for such a right or any document filed in pursuance of such application, or the register; and 30
- (b) the amendment of any document for the amendment of which no express provision is made in this Act.

(2) The Registrar may exercise the authority under subsection (1) of his or her own accord or upon request in writing. 35

(3) Where the Registrar intends exercising the authority under subsection (1) of his or her own accord, the Registrar must—

- (a) give notice of his or her intention to the holder of the plant breeder's right or the applicant for such right, as the case may be, and to any other person who appears to him or her to have an interest in the matter; and 40
- (b) give such holder, applicant or person an opportunity of being heard before exercising his or her authority.

Disclosure of information

53. Subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), no person may disclose any information obtained by him or her in the performance of his or her functions in terms of this Act, except— 45

- (a) to the extent that it may be necessary for the proper administration of this Act;
- (b) for the purposes of any legal proceedings under this Act;
- (c) upon an order of a competent court; or
- (d) at the request of the Minister, the Director-General or any other person entitled to the information. 50

Regulations

- 54.** (1) The Minister must make regulations by notice in the *Gazette* regarding—
- (a) any matter which may or must be prescribed in terms of this Act;
 - (b) any certificate or other document or form to be issued or used for the purposes of this Act; 5
 - (c) the fees payable in respect of any application, matter or document;
 - (d) the information and facilities to be provided to the Registrar by an applicant for a plant breeder's right, and the reproductive material to be submitted at the time of an application and thereafter; 10
 - (e) the tests, trials, examinations and other steps to be taken by an applicant or the Registrar before a plant breeder's right may be granted, and the time within which they are to be taken;
 - (f) the records relating to reproductive material for sale, multiplication or export to be kept by any person who has such material in his or her possession or under his or her control, the form and manner in which they are to be kept, and how and to whom they must be available for inspection; and 15
 - (g) any ancillary or incidental, administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.
- (2) Different regulations may be made in respect of different classes or groups of plants or in respect of different kinds of plants. 20
- (3) The regulations may in respect of any contravention thereof, or failure to comply therewith, prescribe a penalty—
- (a) in the case of a first conviction, of a fine or imprisonment for a period not exceeding six months; and 25
 - (b) in the case of a second or subsequent conviction, of a fine or imprisonment for a period not exceeding one year.
- (4) A regulation prescribing a fee may be made only after consultation with the Minister of Finance.

Offences and penalties

30

- 55.** (1) (a) A person is guilty of an offence if that person, in relation to propagating material of a plant variety in respect of which a plant breeder's right has been granted in accordance with section 28, perform any of the activities contemplated in section 7(1)(a) to (f) and such activity would, by virtue of section 32, infringe the plant breeder's right in the variety. 35
- (b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.
- (c) The institution of an action for compensation and royalties on account of an infringement in accordance with section 33 in respect of a particular activity does not prevent a prosecution in terms of this subsection in respect of such activity. 40
- (d) A prosecution in terms of this subsection in respect of an activity that allegedly infringe the plant breeder's right in a variety does not prevent the institution of an action for compensation on account of an infringement in accordance with section 33.
- (2) A person is guilty of an offence if that person— 45
- (a) knowingly makes a false entry in the register or causes it to be made therein, or who makes a writing or causes a writing to be made which falsely purports to be a copy of an entry in the register or of a document lodged with the Registrar, or who produces or tenders or causes to be produced or tendered as evidence any such entry or any such copy; 50
 - (b) makes a false statement or representation, or furnishes false information, knowing it to be false;
 - (c) obstructs or hinders the Registrar in the exercise of his or her powers or the carrying out of his or her duties under this Act;
 - (d) falsely represents that propagating material sold by his or her for the purposes of propagation or multiplication is propagating material of a variety in respect of which a plant breeder's right has been granted under this Act, or that the propagating material originates from such a variety; 55

- (e) at the sale of propagating material for the purposes of propagation or multiplication, uses a denomination—
 - (i) for such material which is different from the denomination registered in terms of this Act for the variety in question or uses the registered denomination of another variety of the same kind of plant; or
 - (ii) which corresponds so closely to a registered denomination that it is misleading;
 - (f) falsely holds himself or herself to be the Registrar, an employee or an authorised person; or
 - (g) makes a document or causes a document to be made which purports to be a certificate, authorisation or other document or label issued in terms of this Act.
- (3) Any person convicted of an offence referred to in subsection (2) is liable—
- (a) in the case of a first conviction of an offence referred to in subsection (2)(a), (b), (c), (d) or (e), to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
 - (b) in the case of a second or subsequent conviction of an offence referred to in subsection (2)(a), (b), (c), (d) or (e), to a fine or to imprisonment for a period not exceeding four years or to both such fine and such imprisonment;
 - (c) in the case of a first conviction of an offence referred to in subsection (2)(f), (g) or (h), to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment; and
 - (d) in the case of a second or subsequent conviction of an offence referred to in subsection (2)(f), (g) or (h), to a fine or to imprisonment for a period not exceeding four years or to both a fine and such imprisonment.

Jurisdiction of magistrates' courts

56. Notwithstanding anything to the contrary in any other law, a magistrate's court has jurisdiction to impose any penalty prescribed by this Act.

Prohibition of trafficking by officers

57. (1) The Registrar, or an officer who under the delegation, control or direction of the Registrar exercises the powers and carries out the duties assigned to or imposed upon the Registrar under this Act, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year—

- (a) if he or she buys, sells, acquires or traffics in any plant breeder's right or an interest therein;
- (b) if he or she acquires, otherwise than in the course of his or her duties, or sells any propagating material of a variety in respect of which a plant breeder's right has been granted or applied for.

(2) Any purchase, sale, acquisition or assignment of any plant breeder's right by or to the Registrar or any such officer shall be of no force and effect.

(3) Any propagating material acquired by the Registrar or such an officer must be forfeited to the State.

(4) Nothing in this section contained applies to the person who bred, or discovered and developed, a variety of a plant or to any acquisition by inheritance.

Delegation

58. (1) The Minister may in writing delegate any function entrusted to the Minister under this Act, except a function referred to in section 54, to any employee of the Department.

(2) The Registrar may delegate in writing the performance of any function entrusted to the Registrar under this Act to any employee of the Department.

(3) (a) Any decision made or order given by any employee contemplated in subsection (1) or (2) must be regarded as having been made by the Minister or Registrar, as the case may be.

(b) The Minister or Registrar, as the case may be, may withdraw or amend any decision or order contemplated in paragraph (a), subject to any rights that may have vested as a consequence of such decision or order.

Transitional provisions and savings

59. (1) (a) A plant breeder's right granted in terms of the Plant Breeders' Rights Act, 1976, immediately before the commencement of this Act, must be regarded as a plant breeder's right granted under this Act.

(b) This Act applies with the changes required by the context to a plant breeder's right contemplated in paragraph (a): Provided that the period of protection of that plant breeder's right is regulated by section 21 of the Plant Breeders' Rights Act, 1976, as if that Act has not been repealed by section 60 of this Act. 5

(2) (a) Any application for a plant breeder's right which was received by the Registrar on a date before the date of commencement of this Act, but in respect of which a plant breeder's right has not been granted in terms of section 20 of the Plant Breeders' Rights Act, 1976, before such date of commencement, must be dealt with in all respects in accordance with the Plant Breeders' Rights Act, 1976, as if that Act was still in force, notwithstanding the repeal thereof by section 60 of this Act. 10

(b) If the plant breeder's right has been granted in accordance with paragraph (a), the provisions of this Act apply. 15

(3) (a) In the event that a breeder has developed a variety in respect of which an application for registration of a plant breeder's right of the variety in question has not been submitted in accordance with the Plant Breeders' Rights Act, 1976, before the commencement of this Act, such breeder may, within the period prescribed by the Minister, submit an application for registration of such right in accordance with this Act. 20

(b) No such application may be submitted after expiration of the prescribed period contemplated in paragraph (a).

(4) The employee designated as registrar in terms of section 3(1) of the Plant Breeders' Rights Act, 1976, must be regarded as having been designated as Registrar in terms of section 2(1) of this Act. 25

(5) The register kept in terms of section 4(1) of the Plant Breeders' Rights Act, 1976, must be incorporated in and must form part of the register to be kept in terms of section 4(1) of this Act, and any document supplied to the register under the Plant Breeders' Rights Act, 1976, in terms of any provision thereof, must be regarded as having been furnished to the Registrar under the corresponding provision of this Act. 30

Repeal of laws

60. The laws referred to in the second column of the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

Short title and commencement

35

61. This Act is called the Plant Breeders' Rights Act, 2016, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

SCHEDULE

Laws repealed

(Section 60)

No. and year	Short title	Extent of repeal	
Act No. 15 of 1976	Plant Breeders' Rights Act, 1976	The whole	5
Act No. 5 of 1980	Plant Breeders' Rights Amendment Act, 1980	The whole	
Act No. 14 of 1981	Plant Breeders' Rights Amendment Act, 1981	The whole	10
Act No. 38 of 1983	Plant Breeders' Rights Amendment Act, 1983	The whole	
Act No. 15 of 1996	Plant Breeders' Rights Amendment Act, 1996	The whole	
Act No. 88 of 1996	Abolition of Restrictions on The Jurisdiction of Courts Act, 1996	Section 59	15

MEMORANDUM ON THE OBJECTS OF THE PLANT BREEDERS' RIGHTS BILL, 2015

1. BACKGROUND

1.1 The Bill seeks to replace the Plant Breeders' Rights Act, 1976 (Act No. 15 of 1976) ("the Act"). Various deficiencies in the current Act necessitated the replacement; some of the key issues are listed below:

- Protection is only offered for a limited number of plant genera and species. This limitation is not in line with other international obligations to which the Republic is a party (Article 27.3b of the Agreement on Trade-Related Aspects of Intellectual Property Rights) or other developments in the plant breeding industry.
- Current penalties are inadequate to deter deliberate infringement of the rights of plant breeders. Deliberate abuse of protected varieties without paying the required royalties is a major disincentive for breeders to continue developing new varieties or release varieties into the territory of a country. This may ultimately impact on the competitiveness of the agricultural sector.
- Farmers are allowed to save protected seeds on their own holdings for re-sowing or replanting through a farmer's privilege provision in the Act. Globally, this farmer's privilege provision is included in plant variety protection frameworks in order to provide for seed management practices of subsistence or smallholder farmers. The lack of a clear definition of the targeted beneficiaries of the farmer's privilege, has allowed commercial farmers to abuse this provision.
- Time limits for filing application for a plant breeder's right are important as it impacts on novelty requirements and priority claims. The Act in its current form is unclear on the specific documentation required for applicants to secure a filing date. The transboundary movement of plant material is subject to phytosanitary requirements. The Act prescribes a 12 month period for the submission of plant material to be assessed. This period is inadequate for other industries, e.g. citrus and stone fruit industries, as it may take as long as 8 years from the time material is imported to the time the material is ready for evaluation. Although the Act makes provision for extensions, no conditions or limitations are set for such extension. This has led to a practice where an application is received but the submission of plant material is delayed for an indefinite period.
- Plant variety protection is a complex environment where technical plant science combines with legal rights and obligations. No formal support is provided for the Registrar in the Act, except for the technical evaluations.
- In terms of the Act, the term of the protection expires after 20 or 25 years, depending on crop type. In other countries, the term of protection is extended up to 30 years for selected crops, e.g. potatoes.

2. OBJECTS OF BILL

2.1 Clause 1 of the Bill contains the definitions in order to guide the interpretation of the provisions in the Bill.

2.2 Chapter 1 of the Bill deals with administration. The Bill makes provision in clause 2 for the designation of a Registrar of Plant Breeders' Rights by the Minister. Clause 3 prescribes how the Registrar must exercise his or her discretionary powers. Clause 4 prescribes that the Registrar must keep a register in which the particulars in respect of all applications for plant breeders' rights must be entered. In terms of clause 5 the register in clause 4 will be *prima facie* evidence of all matters directed or authorised by the Bill to

be noted therein. Clause 6 provides for the inspection of documents submitted in connection with applications for national listing.

- 2.3 Chapter 2 of the Bill deals with plant breeders' rights. The scope of the protection given to the holders of plant breeders' rights is set out in clause 7. Clause 8 provides for the duration of a plant breeder's right and clause 9 provides for a period during which the holder of a plant breeder's right has the sole right to undertake any activity referred to in clause 7. Clause 10 provides for certain exceptions to plant breeders' rights, including the farmer's privilege. Clause 11 provides for the exhaustion of plant breeders' rights and clause 12 for the granting of a plant breeder's right to joint holders. Clause 13 deals with the transfer of a plant breeder's right whilst clause 14 provides that the State is bound by a plant breeder's right in the same way as it binds any other person.
- 2.4 Chapter 3 of the Bill regulates applications for plant breeders' rights. Clause 15 deals with the varieties in respect of which plant breeders' rights may be granted. The clause further deals with the novelty and technical requirements which must be fulfilled before a plant breeder's right may be granted. Clause 16 regulates the application process for the grant of plant breeders' rights and clause 17 priority and redating of applications. Clause 18 provides for provisional protection afforded to an applicant upon filing an application, which protection is not the same as the protection afforded to the holder of a plant breeder's right to institute proceedings for any alleged infringement of such right. Clause 19 deals with the rejection of applications by the Registrar and clause 20 with the acceptance and registration of applications. Clause 21 provides for amendments of registered applications whilst clause 22 deals with objections in respect of an application for the grant of a plant breeder's right.
- 2.5 Chapter 4 of the Bill deals with variety denominations. Clause 23 requires that the applicant for the grant of a plant breeder's right to propose a denomination in connection of the variety which the Registrar must approve. Clause 24 regulates the amendment of denominations. Clause 25 provides for the marking of labels and containers to clearly reflect the denomination of the variety.
- 2.6 Chapter 5 of the Bill provides for the examination of the variety and the grant of a plant breeder's right. Clause 26 regulates the tests and trials that the Registrar may undertake, cause to undertake or use in order to enable him or her to determine whether a variety in respect of which an application has been accepted is new, distinct, uniform and stable in accordance with the provisions of clause 15 of the Bill. Clause 27 prescribes when the Registrar must refuse to grant a plant breeder's right and clause 28 when the Registrar must grant a plant breeder's right.
- 2.7 Chapter 6 of the Bill in clause 29 provides for and regulates the hearing by the Registrar of objections lodged in terms of clause 22.
- 2.8 Chapter 7 of the Bill provides for the obligations of holders of plant breeders' rights. Clause 30 provides for the payment of an annual fee. Clause 31 requires that the holder of a plant breeder's right must be able to—
- furnish the Registrar with propagating material of the variety in respect of which the right was granted that is capable of reproducing the variety in question in such a manner that the characteristics of the variety correspond with those described at the time of the grant of the relevant right; and
 - to provide the Registrar with the information and access to the relevant facilities to satisfy the Registrar that the holder is maintaining propagating material that conforms with the relevant requirements.

- 2.9 Chapter 8 of the Bill provides for the enforcement of plant breeders' rights. Clause 32 deals with the infringement of a plant breeder's right and clause 33 provides for the remedies in respect of the infringement of a plant breeder's right.
- 2.10 Chapter 9 of the Bill deals with the issue of licences. In terms of clause 34 the holder of a plant breeder's right may enter into a written licence agreement authorising any person to undertake any activity referred to in clause 7. Clause 35 provides that any person who is of the opinion that the holder of a plant breeder's right unreasonably refuses to grant him or her a license under clause 34, or that such a holder is imposing unreasonable conditions for the issue of such a license, may apply to the Registrar to issue a compulsory license in respect of the relevant plant breeder's right. Clause 36 provides for the hearing of an application for a compulsory licence. In terms of the clause, a compulsory licence would only be issued by the Registrar if the granting of a compulsory licence is in the public interest, the holder of the plant breeder's right is unreasonably refusing a license referred to in clause 34 or is imposing unreasonable conditions for the issue of such a license and the reasonable requirements of the public with regard to the variety in question are not being satisfied or will not be satisfied as a result of such refusal or the imposition of such conditions.
- 2.11 Chapter 10 of the Bill deals with the termination of plant breeders' rights. In terms of clause 37, a plant breeder's right expires at the end of the relevant period contemplated in clause 8. Clause 38 provides for the cancellation of a plant breeder's right and clause 39 for the voluntary surrender of a plant breeder's right by the holder thereof.
- 2.12 Chapter 11 of the Bill in clause 40 provides for the publication of a Plant Variety Journal.
- 2.13 Chapter 12 of the Bill in clause 41 provides for appeals. The clause amongst other things provides for the appointment of a board to which a person who feels aggrieved by a decision or an action taken by the Registrar may appeal.
- 2.14 Chapter 13 of the Bill in clause 42 provides for the establishment of an Advisory Committee to advise the Registrar on technical matters arising from the provisions of the Bill and any other matters referred to the Advisory Committee by the Registrar. The appointment of members of the Advisory Committee and the termination of their membership are regulated in clause 43. Clause 44 regulates the disclosure of interests by members of the Advisory Committee. Clause 45 regulates the meetings of the Advisory Committee.
- 2.15 Chapter 14 of the Bill contains general provisions. Clause 46 regulates the entering of premises for inspection, sampling and seizure of certain articles. Clause 47 allows the Registrar to provide to an authority of another country the test reports for distinctness, uniformity and stability and variety descriptions derived from tests and trials undertaken by him or her against the payment of a fee. Clause 48 provides that a defect in the form of any document will not under certain circumstances invalidate the document. Clause 49 empowers the Registrar to correct certain errors and to amend certain documents. Clause 50 provides that a person may not disclose information obtained by him or her through the performance of his or her functions in terms of the Bill, except under circumstances set out in the clause. The clause is subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000). Clause 51 empowers the Minister to make regulations by notice in the *Gazette* in respect of various specified matters. It further empowers the Minister to make different regulations in respect of different classes or groups of plants or in respect of different kinds of plants. Clause 52 provides for offences and penalties. Clause 53 deals with the jurisdiction of magistrates' courts. Clause 54 prohibits certain acts by the Registrar and officers under his or her delegation, control or direction. Clause 55 empowers the Minister to delegate any function conferred upon the Minister under the Bill except the

function to make regulations. The clause also empowers the Registrar to delegate any function entrusted to the Registrar under the Bill to an employee of the Department of Agriculture, Forestry and Fisheries. Clause 56 makes provision for transitional provisions and savings. The clause deals with applications for plant breeders' rights, and plant breeders' rights granted, in terms of the Act immediately before the commencement of the Bill, if promulgated. It also provides for the continuation of registers under the Act and the position of the employee designated as Registrar under the Act. Clause 57, read with the Schedule, provides for the repeal of laws.

2.16 Clause 58 of the Bill contains the short title and provides for the commencement of the Bill.

3. CONSULTATION

3.1 Between 2009 and 2011 the then Department of Agriculture undertook a legislative review process of the Act. This process entailed a lengthy consultative process that resulted in the adoption of a South African Plant Breeders' Rights Policy in 2011. On 7 October 2011, a notice inviting public comments on the Plant Breeders' Rights draft Bill was published in *Gazette* No. 34651. This was followed by a National Workshop held on 1-2 March 2012. Provincial workshops for smallholder/subsistence farmers were also held between August and October 2012 in the Eastern Cape, Free State, Limpopo and the Western Cape. Another National workshop took place in May 2013 and the National House of Traditional Leadership was consulted in May 2013. To ensure further alignment with other legislation, the department also consulted the Competition Commission in June 2014.

3.2 A generalised list of stakeholders consulted follows hereunder:

- Department of Environmental Affairs, Department of Science & Technology, Department of Trade & Industry;
- All provincial departments of agriculture;
- National Farmers Union;
- Agricultural Research Council, University of KwaZulu-Natal, University of Pretoria, Cape Peninsula University of Technology;
- Individuals;
- Plant Breeders;
- Intellectual Property legal experts;
- Commodity/Industry Groups; and
- Regional and International Intellectual Property Institutions.

4. FINANCIAL IMPLICATIONS FOR STATE

4.1 The implementation of the Bill will have financial implications for the Department of Agriculture, Forestry and Fisheries, in that the Department will be responsible for the establishment of the Advisory Committee and appointment of the appeal board and eight additional technical officials.

4.2 The estimated financial implications amount to R10.3 million. These funds will have to be secured in addition to the existing Medium Term Expenditure Framework allocation.

5. PARLIAMENTARY PROCEDURE

- 5.1 The Constitution of the Republic of South Africa, 1996, regulates the manner in which legislation must be enacted by Parliament. It prescribes different procedures for different types of Bills. Section 75 of the Constitution sets out the procedure to be followed when the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 of the Constitution applies. Section 74 deals with Bills amending the Constitution and does not apply to the Bill under discussion. Section 76 of the Constitution on the other hand provides for a procedure that must be followed for ordinary Bills affecting the provinces. In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with a procedure established by either section 76(1) or 76(2) if it falls within a functional area listed in Schedule 4 to the Constitution or provides for legislation envisaged in paragraphs (a) to (f) of section 76(3). Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence.
- 5.2 In *Tongoane v Minister of Agriculture and Land Affairs 2010 (6) SA 214 (CC)*, the Constitutional Court ruled on the test to be used when tagging a Bill. The Court held in paragraph 70 that the “test for determining how a Bill is to be tagged must be broader than that for determining legislative competence”. In paragraph 72 the Court stated as follows: “Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence”. The tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance [paragraph 59 of *Tongoane*].
- 5.3 The Bill seeks to give protection to the holder of a plant breeder’s right by requiring prior authorisation for the duration of the plant breeder’s right from that holder, by way of a licence granted or issued in terms of clause 34 or clause 36, by any person intending to undertake—
- the production or reproduction (multiplication) of the protected variety;
 - the conditioning for the purposes of propagation of the protected variety;
 - the sale or any other form of marketing of the protected variety;
 - the exporting of the protected variety;
 - the importing of the protected variety; or
 - the stocking of the protected variety for any of the purposes referred to above.
- 5.4 The Bill also provides that a plant breeder’s right in respect of a variety obtained in a legitimate manner does not extend to a farmer who uses the protected variety under certain circumstances as regulated under the Bill (the farmers’ privilege provision). “Agriculture” and “Trade” are functional areas of concurrent national and provincial legislative competence listed in Schedule 4 to the Constitution. Since the provisions of the Bill in substantial measure fall within concurrent provincial legislative competences, the Department and the Office of the Chief State Law Adviser are therefore of the opinion that the Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution.

- 5.5 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain any provisions pertaining to customary law or to the customs of traditional communities.