HORTICULTURAL-PLANT VARIETY RIGHTS BILL 1984
(Private Senator's Bill - Senator Hill)

Date Introduced: 11 October 1984
House: Senate
Presented by: Senator Hill

Short Digest of Bill

Purpose

To introduce proprietary rights to sell or produce commercially plants used in horticulture, registerable by the breeder of a new plant variety and potentially subject to conditions imposed in the public interest.

Background

Even within a plant species, plants exhibit considerable diversity. Where particularly desirable traits are confirmed by further breeding, a plant 'variety' may be created as a sub-group within a species. The sub-group is identifiable by reference to its characteristics and because these characteristics are passed on to subsequent generations. The variety is marketable because its characteristics may include greater productivity, higher tolerance of adverse conditions, or other characteristics.

A hybrid variety exhibits particular characteristics generated by crossing its two parent lines, but its own offspring do not. Breeders of hybrid varieties therefore enjoy some natural protection in that they may sell seed which cannot be used for further propagation.

Open pollinated varieties and vegetatively propagated varieties (e.g. cuttings) may be further propagated. Although in many overseas countries cereal farmers purchase seed commercially, the ability of a plant variety to breed true to type gives the original breeder little control over subsequent use of the variety, and little opportunity to recover development costs.

A plant variety right (PVR) is a legal right granted to the breeder to prevent further propagation of the plant variety or to enforce payment of a royalty for use of the variety. It is thus a form of industrial property right similar to a patent or other right protecting 'inventions'.


Issues arising in respect of PVR legislation include the requirements for a plant variety to fall within the legislative scheme and the method for demonstrating that those requirements have been satisfied. Implementation of PVR is generally similar to patents in that the variety must be registered, and the legal protection lasts only for a definite period (20 years in this Bill).

Two main models for PVR legislation exist. First, in the United States, a variety is registerable where a computer search reveals no existing registered variety having the same stated characteristics. Although samples may be required from the breeder, there are no official tests of the variety to be registered. Payment of royalties on seeds passing through commercial channels is enforced, although sale of seed between farmers is exempt.

Secondly, a number of countries have implemented PVR in accordance with an international convention administered by the Union pour la Protection des Obtentions Vegetales (the 'UPOV scheme'). The registration of a variety is conditional on two requirements, each of which must be demonstrated. First, the novelty and integrity of a variety are specified by reference to the distinctness, uniformity and stability of the variety (the 'DUS requirement'), and must be demonstrated in official trials over two years. Secondly, value for cultivation and use (the 'VCU requirement') must be demonstrated prior to commercial release, although the testing of this criterion is not particularly thorough. The UPOV scheme establishes in each country a National List of approved varieties. Sale by varietal name is permitted only for varieties on a National List. After two years on a National List within the EEC, the variety becomes accessible to participating countries through inclusion in a Common Catalogue, with royalty payments to the developer.

PVR has been introduced in most agriculturally advanced Western nations and has been under discussion in Australia for some years. In 1981 a Bill was introduced and was passed by the House of Representatives in 1982. The Bill was referred by the Senate to the Senate Standing Committee on National Resources but lapsed with the dissolution of Parliament in February 1983. The Committee has since reported.

An important issue in the Australian PVR debate is the coverage of the system. A draft Bill circulated by the Department of Primary Industry in 1979 would have applied to any species. Following criticism, it was redrafted to apply only to horticultural, ornamental and selected pasture and fodder species, but not field crops. Amendments in the
House of Representatives restored its original wide coverage. The present Bill introduces PVR's only in respect of plants for use in horticulture.

The PVR debate in Australia has involved arguments based on principle and also on empirical observations in those jurisdictions where PVR has been introduced. Some of these arguments can be found in the references listed below.

Main Provisions

The Bill is in many clauses identical to the Plant Variety Rights Bill 1981 as amended and passed by the House of Representatives in 1982.

The first major difference is the species coverage of the scheme. The present Bill is limited to plants "for use in horticulture" (clause 12) while the 1982 Bill extended to any species prescribed by regulations with the prior consent of the Australian Agricultural Council. The term "horticulture" is not defined.

A Horticultural Plant Variety Rights Advisory Committee is established by clause 8 of this Bill to advise the Secretary of the administering Department. Part IV of the Bill provides for the membership of this Committee to comprise a member from each State and the Northern Territory, two experts on horticultural plant matters, two members representing the breeders and two representing the users of horticultural-plants. Members hold office for three years and may be reappointed. Meetings of the Advisory Committee are to be convened and chaired by the Secretary of the administering Department, who is an ex officio member of the Committee. An advisory committee, to represent a wide spectrum of interests, was recommended by the Senate Standing Committee on National Resources in its report on the Plant Variety Rights Bill 1982.[3] A majority of the Senate Committee recommended consideration of introduction of PVR to cover horticultural, ornamental and fodder and pasture species, with further investigation before the inclusion of field crops.

The present Bill does not define the term 'plants', a biological term which includes algae and fungi; nor does it provide extended criteria for determining the novelty of a plant variety, both of which were recommended in the Senate Committee Report. It differs significantly from the 1982 Bill in requiring that names of new varieties conform to the International Code of Nomenclature for Cultivated Plants (clause 16), a suggestion put forward by the Department of Primary Industry.[4]
Further recommendations reflected in the present Bill include the provision of copies of the statutory Register of Horticultural-Plant Variety Rights in capital cities (clause 11(2)), publication of a journal which may contain notifications of matters under the Bill (clause 18), and an additional requirement for applicants to supply particulars of performance tests, though this last requirement is not limited to such tests carried out in Australia (paragraph 15(k)).[5]

The 1982 Bill granted an initial two year exemption period in which plant varieties might be registered in Australia notwithstanding a prior overseas sale earlier than four or six years prior to the application. The Senate Committee recommended that foreign breeders not be given preferential treatment in respect of prior sales. Clause 13 of the present Bill still disregards prior sales overseas within six years of the application, but grants no exemption period.

The 1982 Bill extended the rights of registered PVR holders beyond protection from normal plant and seed suppliers to all retail sellers of protected varieties, including farmers selling fodder [see Bills Digest for Plant Variety Rights Bill 1982, p.2]. The present Bill in clause 35 permits propagation, growing and use of protected varieties for other than commercial purposes. Sales of plants or reproductive material for a use not involving production of plants and, in the case of plant sales, further growing of the plants, is specifically permitted, as is sale of land with such items on the land. Clause 36 is amended to restrict the Secretary's power to license, on grounds of public interest, the production of plants for sale.

PVR is in the nature of personal property. Rights granted by the Secretary under clause 26 of the Bill and registered in the Register of Horticultural Plant Variety Rights kept pursuant to section 10, may be assigned or transferred to another person (clause 30). Clause 31 requires amendment to the Register in this case.

Horticultural plant variety rights granted under the Bill last for 20 years (clause 32). PVR is subject to various qualifications, including conditions imposed by the Minister under section 33. Failure to comply with the conditions is a ground for revocation of the rights. Clause 36 introduces power to license production or sale of plant material where the "reasonable requirements" of the public are not being met. The criterion employed is that reproductive material or, if reproductive material is not the only item in demand, plants of the variety, "of
reasonable quality are available for sale to the public at reasonable prices in sufficient quantities to meet demand". If this criterion is not satisfied, any person may, at least two years after the grant of rights, apply to the Secretary to exercise the power of compulsory licensing, to overcome the grantee's failure to make the variety reasonably available. The right of the grantee to license other persons is included in clause 11 as one of the exclusive rights encompassed by a PVR grant.

The requirements to be satisfied by a plant variety of stability, uniformity, distinguishability, homogeneity and origination by a person (sub-clause 3(1)) are preliminary to a grant by the Secretary under clause 26. Particulars of tests carried out to establish these matters are to be supplied by the applicant under clause 15, and the Secretary of the administering Department is empowered under clause 24 to require a test growing. The relevance of overseas tests is regulated by clause 23.

Interim protection dating from the making of the application is available under clause 22, unless and until the application is determined or the applicant is notified otherwise. A person whose interests would be affected by a PVR grant can, following the application and its public notification, object to the grant on certain grounds (clause 20).

For further information, if required, contact:

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References