

1. We regret that this opportunity to comment only came to our attention so shortly before the deadline to submit the comments. We believe that we have not been able to make a proper contribution to the bill in the limited time we have had available to do so.
2. Nevertheless, please find some comments on issues, in the meantime, that we believe are pertinent.
3. Definition of “Variety”: The bill defines a variety as, inter alia, if distinguished from any other plant grouping by the expression of **at least one** of the said characteristics. Can you call a variety a new variety if a plant grouping is distinguished by a non-essential characteristic?
4. Essentially derived varieties
 - 4.1. Clause 7 (3) (b) For the purposes of paragraph (a)(i), a variety must be regarded as being essentially derived from another variety if—(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**.
 - 4.2. However, Clause 6 states that: (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**;
 - 4.3. Prohibiting access to the documents that reveal the names of the initial variety, nor the manner in which the “new” variety was bred, undermines

the provisions that purports to protect the owner of the initial variety in respect of essentially derived varieties, as the important information to determine whether a variety is essentially derived or not, i.e. the variety/s from which it is derived and the act of derivation, as specifically excluded!

4.3.1. We believe that this provision violates the underlying principle of Intellectual Property protection, which grants a person the monopoly of an innovation against the disclosure thereof.

4.3.2. Illustrating the un-tenability of this provision, is the contradiction it creates with the deeming provisions of clause 15(4), in terms whereof an application filed is deemed to render a variety a matter of common knowledge. How can this be if the information of the variety is inaccessible?

4.3.3. Regrettably, it appears that in apparently accommodating the interests of some, the bill is perverting the underlying principles of the Convention and the Act.

4.4. UPOV held a conference in October 2013, specifically to try to gain clarity on: 1) whether the nature of the difference between the initial variety and the essentially derived variety is relevant to the determination as to whether the derived variety must be considered essentially derived; 2) whether the number of differences in characteristics between the initial variety and the essentially derived variety is relevant to the determination as to whether the derived variety must be considered essentially derived, and 3) who bears the onus to show whether the variety is essentially derived or not essentially derived, and at which thresholds of genetic similarity.

4.4.1. We note that the bill does not address any of these uncertainties which bedevil the issue of essentially derived varieties, and believe

that the department is missing a valuable opportunity to clarify its position in this regard.

4.4.2. We respectfully submit that the department should consider the representations made at the UPOV conference, and specifically the representations by CIAPORA, for valuable guidance on clarifying these questions.

5. Section 15 (3)

5.1. The inclusion of certain of the provisions of the UPOV explanatory notes on Novelty in the Act is a positive contribution. However, what is left open is what the effect would be of the sale of any of the harvested material of the propagating material being evaluated?

5.2. In this regard, it has long been the industry practice in South Africa to evaluate new varieties in field trials, and to export the fruit to confirm whether the variety can withstand the logistics, cold sterilisation etc and finally the market feedback.

5.3. We believe that the bill must provide clarity on which activities and to which extent, would not constitute an exploitation of the variety for purposes of triggering the novelty requirement.

5.4. In this regard especially, consideration must be given to affording the Minister the right to prescribe such activities, and the extent thereof, and per category of plants.

6. Section 7 (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.

6.1. The tail of this provision is vague, and will no doubt create much uncertainty.

6.2. What constitutes an exercise of his or her rights?

6.2.1. If a holder of a right has granted a license to third party, has he or she exercised his rights, rendering him immune to losing the right to act against those undertaking any activities in respect of the harvested material obtained from unauthorised material?

6.2.2. Or must the holder prosecute the infringers, in which case, is it legal action, or action in terms of the remedies provided in terms of this act, which would amount to exercising a right?

6.3. In either scenario above, what constitutes a reasonable time? Granting a license after two years, or issuing summons within a year after learning of an infringement?

7. Section 46

7.1. Section 46 allows the Registrar (in effect any delegated employee of the Department) to enter any person's property, to inspect and remove plant material.

7.1.1. What this section fails to provide for anywhere is that the Registrar must at least have a reasonable suspicion that such evidence as may be found is evidence of an offence in terms of this act.

7.1.2. The Act obliges the Magistrate to grant a warrant simply based on the reasonable belief that an article will be at such place, and makes no condition of the fact that a search and seize warrant, i.e. the

violation of a person's property under such circumstances, must at least be informed by a reasonable suspicion of an offence. Of course, at any nursery, you will find a plant, but surely there must be a requirement to show the Magistrate that the plant you are looking for is evidence of an offence?

7.1.3. But, there is more.... Section 46 (6) contains the following provision: *“(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 holder of the plant breeder's right or a person who has been authorised in writing by such holder, consents to such entry, search, seizure, taking of samples and removal.”* So if I hold a PBR, I can “authorise” the Registrar's delegated employees to search and seize another person's property. The holder of the PBR is substituting the Magistrate? Surely this cannot be.

7.2. This is an issue that has been raised at the two previous workshops, and it is indeed strange why this issue has not yet been resolved.

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