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SEEDS AND PLANT VARIETIES ACT

CHAPTER 326

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CHAPTER 326

SEEDS AND PLANT VARIETIES ACT

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

1. Short title.
2. Interpretation.

PART II – SEEDS

3. Seeds regulations.
- 3A. National designated authority.
- 3B. Appointment of inspectors, analysts and examiners.
- 3C. Power of inspectors.
- 3D. Seizure and disposal of seeds and seed processing facilities.
- 3E. Disclosure of confidential information.
4. Civil liabilities of sellers of seeds.
5. Defences in proceedings for offences against seeds regulations.
6. Presumption regarding statutory statements.
7. Index of names of plant varieties.
8. Restrictions on sales of seeds of unindexed plant varieties.
- 8A. Maintenance of national plant variety list.
9. Performance trials and reports.
10. Offences, etc.

PART III – SEED TESTING

11. Seed testing stations.
12. Certificates of test.
13. Use of samples in criminal proceedings.
14. Tampering with samples.

**PART IV – CONTROL OF IMPORTS AND
PREVENTION OF CROSS-POLLINATION**

15. Control of imports of potentially deleterious seeds.
16. Prevention of injurious cross-pollination.

PART V – PLANT BREEDER'S RIGHTS

17. Grant of plant breeder's rights.
18. Conditions for grant of rights.
19. Period for which rights are exercisable.
20. Nature of rights.
21. Protected plant varieties.
22. Maintenance of reproductive material.
23. Licences.
24. Regulations.
25. False representation and information.
26. Application of Part to Government.
27. *Deleted.*
- 27A. Establishment of National Plant Genetic Resources Centre.

Seeds and Plant Varieties

PART VI – THE SEEDS AND PLANTS TRIBUNAL

- 28. Establishment of Tribunal.
- 29. Jurisdiction of Tribunal.

PART VII – GENERAL

- 30. Powers of entry.
- 31. Institution of criminal proceedings.
- 32. General provisions as to offences.
- 33. General penalty.
- 34. Supplemental provisions as to regulations.
- 35. Repeal.

SCHEDULES

- FIRST SCHEDULE – PROCEDURE FOR COMPILING AND AMENDING THE INDEX
 - SECOND SCHEDULE – CROSS-POLLINATION INJURING PROTECTED CROPS
 - THIRD SCHEDULE – PROTECTION OF APPLICANT FOR RIGHTS WHILE APPLICATION IS PENDING
 - FIFTH SCHEDULE – PLANT BREEDER’S RIGHTS IN SPECIAL CASES
 - SIXTH SCHEDULE – THE SEEDS AND PLANTS TRIBUNAL
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CHAPTER 326
SEEDS AND PLANT VARIETIES ACT

[Date of assent: 16th May, 1972.]

[Date of commencement: 1st January, 1975.]

An Act of Parliament to confer power to regulate transactions in seeds, including provision for the testing and certification of seeds; for the establishment of an index of names of plant varieties; to empower the imposition of restriction on the introduction of new varieties; to control the importation of seeds; to authorize measures to prevent injurious cross-pollination; to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties; to establish a national centre for plant genetic resources; to establish a Tribunal to hear appeals and other proceedings; and for connected purposes

[Act No. 1 of 1972, L.N. 152/1998, Act No. 2 of 2002, Act No. 53 of 2012.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Seeds and Plant Varieties Act.

2. Interpretation

In this Act, unless the context otherwise requires—

"authorization" means the delegation of some or all aspects of seed certification and seed testing services by the Inspectorate to a competent private or public person;

"authorized officer" *deleted by Act No. 53 of 2012, s. 3(a);*

"breeder" means the person who breeds, or discovers and develops a seed or plant variety and includes the employer of such a person;

"compulsory licence" means a licence granted by the Minister under section 23 of this Act;

"inspector" means a person appointed under section 3B(1)(a);

"Minister" means the Minister for the time being responsible for matters relating to Agriculture;

"national variety list" means the list of all plant varieties which are for the time being exploited commercially;

"plant breeder's rights" means rights granted under section 17 of this Act;

"plant examiner" means a suitably qualified person appointed under section 3B;

"plant variety" means a plant grouping within a single botanical taxon of the lowest known rank, defined by the expression of the characteristics resulting from a given genotype or combination of genotypes distinguished from any other plant grouping by the expression of at least one of the said characteristics and considered as a unit with regard to its suitability for being propagated unchanged;

"positive direction" *deleted by Act No. 53 of 2012, s. 3(d);*

"protective direction" means the provisional protection given to applicants for rights while pending actual grant of rights under paragraph 1 of the Third Schedule in regard to an application for plant breeders' rights;

"scheme" *deleted by Act No. 53 of 2012, s. 3(e)*;

"seed" means that part of a plant which is or is intended to be used for propagation and includes any seed, seedling, corm, cutting, bulb, bulbil, layer, marcott, root, runner, scion, set, split, stem, stock, stump, sucker or tuber so used or intended to be so used;

"seed analyst" means a suitably qualified person appointed under section 3B;

"seed crop" means a crop grown for the production of certified seed;

"seed field" means a field where registered seed crop is grown;

"seeds regulations" means regulations made under section 3 of this Act;

"sell" includes barter, exchange, and offering or exposing for sale;

"Service" means the Kenya Plant Health Inspectorate Service established by the Kenya Plant Health Inspectorate Service Order, 1996 (L.N. 305/1996) or its successor;

"statutory statement" means a statement given in pursuance of seeds regulations, whether the statement be in the form of a notice or other document, or in the form of particulars given on any label, container or package, or in any other form, and includes a statement delivered under subsection (5) of section 30 of this Act;

"testing station" means an official seed testing station established under section 11 of this Act;

"the Index" means the index of names of plant varieties prepared under section 7 of this Act;

"the Tribunal" means the Seeds and Plants Tribunal established under section 28 of this Act.

[Act No. 53 of 2012, s. 3.]

PART II – SEEDS

3. Seeds regulations

(1) The Minister, after consultation with representatives of such organizations as he deems to have a substantial interest in the matter to be regulated and of such other interests as appear to him to be concerned, may make regulations for the production, processing, testing, certification and marketing of seeds, and without prejudice to the generality of this power, such regulations may, in particular, be made for any or all of the following purposes—

- (a) for ensuring that reliable and adequate information is afforded as to the nature, condition and quality of seeds intended for sale;
- (b) for preventing the sale of seeds which are deleterious, or which have not been produced in specified conditions, or which have not been tested for purity or germination, or which are of a plant variety of which the performance has not been subjected to trials;

Seeds and Plant Varieties

- (c) for requiring the registration of persons growing any specified crop for the main purpose of seed production, or of persons selling any seed;
- (d) for preventing the spread of plant disease by the sale of seeds;
- (e) for requiring the treatment of seed, by any specified means, for the control of plant disease and regulating the importation, quality, testing and sale of any material used in such treatment;
- (f) for regulating the descriptions under which seed is sold;
- (g) for regulating, controlling or prohibiting the export of seeds;
- (h) for prescribing anything which, under this Part, is to be prescribed or which, under any other provision of this Act, is to be prescribed by seeds regulations.

(2) Seeds regulations may include provisions as to the packets, bags, trays or other containers in which seed may be sold or delivered to purchasers, and requirements as to the marking of such containers.

(3) Without prejudice to any other provisions of this section, seeds regulations may—

- (a) require information to be given in a prescribed manner, which may include the giving of it on any label, container, or package, as regards seeds which are sold, and may require the seller to deliver a statement, containing prescribed particulars, to the purchaser within such time as may be limited by the regulations;
- (b) require any of the particulars contained in such statement to be particulars ascertained on a test of the seeds;
- (c) prohibit the selling of seeds which have not been certified in the prescribed manner, or which contain more than a prescribed proportion of weed seeds, or of weed seeds of a prescribed kind, or which lack any other prescribed quality factor;
- (d) prohibit the use, in relation to the sale of seeds, any prescribed name, designation or description except where the seeds have been grown or selected under the prescribed conditions;
- (e) require persons who deal in seeds to supply to the prescribed authority information as to, and to keep records of—
 - (i) transactions in seeds generally or in seeds of specified kinds;
 - (ii) statutory statements given or received by them, and other statements or invoices given or received by them in connexion with the sale of seeds;
 - (iii) processes or treatments applied to seeds;
 - (iv) the results of tests of seeds,

and authorize prescribed persons to call for production of such records;

- (f) where persons who deal in seeds also grow seeds, require such persons to supply to the prescribed authority information as to, and to keep records of—
 - (i) acreages sown;
 - (ii) the yields of the crops,

and authorize prescribed persons to call for production of such records;

- (g) regulate the procedure to be observed at, and the conduct of testing stations and other establishments at which tests may be carried out for the purposes of the regulations;
- (h) provide for governance of forestry seeds and other species including domestication of wild plants;
- (i) provide for the maintenance and propagation of varieties that are not commercially attractive to the private sector, and
- (j) provide for the integration and harmonization of the seed industry;
- (k) regulate the manner in which tests are to be made for the purposes of this Part.

(4) In prescribing the manner in which samples are to be taken for the purposes of this Part or of seeds regulations, such regulations—

- (a) may impose conditions as to the persons empowered to take samples and the places where they may be taken;
- (b) may require the person taking a sample to give part of it to the owner of the seeds or to some other person, may prescribe the manner in which the sample is to be divided into parts, and may impose duties in respect of the making or labelling and the preservation of the parts of the sample;
- (c) may provide for the identification, by the labelling or marking of their container, or by some other method, of seeds from which a sample has been taken.

(5) Seeds regulations may exempt, or authorize the exemption of, any person or class of persons, or persons generally, from compliance with any of the provisions of the regulations, and may provide that such exemptions are to be, or may be made, subject to conditions.

(6) Any person who includes in a statutory statement anything which is false in a material particular shall be guilty of an offence.

[Act No. 53 of 2012, s. 4.]

3A. National designated authority

The Service shall be the national designated authority for matters relating to seeds and plant variety protection and shall, subject to the directions of the Minister, be responsible for the administration of this Act.

[Act No. 53 of 2012, s. 5.]

3B. Appointment of inspectors, analysts and examiners

(1) For the purposes of enforcing the provisions of this Act, the Service—

- (a) shall appoint seed inspectors, seed analysts and plant examiners; and
- (b) may authorize competent private or public persons to perform specified functions under this Act on its behalf:

Provided that an authorization may be withdrawn in cases of misconduct.

(2) The Service shall publish in the *Gazette*—

- (a) the names of the seed inspectors, seed analysts and plant examiners appointed or authorized under subsection (1)(a) or (b), and
- (b) the names of persons whose authorization is withdrawn.

(3) Subject to the provisions of section 3(2)(b) the Service shall specify the scope and aspects of authorized activities for inspectors in the instruments of appointment.

(4) A person appointed under subsection (1)(a) shall not, while being so appointed, engage in any business connected with the production, processing, sale or distribution of seeds.

(5) A person appointed under this section shall be issued with proof of identification in a form prescribed by the Inspectorate.

[Act No. 53 of 2012, s. 5.]

3C. Power of inspectors

(1) An inspector may—

- (a) at all reasonable times and upon producing his identification issued under section 3B(5), enter any place or premises—
 - (i) for the purposes of enforcing any provision of this Act;
 - (ii) in which he reasonably believes a seed material to which this Act applies is being, or has been processed, stored or used;
 - (iii) in which he reasonably believes there is seed material that is contaminated;
 - (iv) which is used or capable of being used in the processing of seeds;
- (b) examine any seed or material found in any place or premises;
- (c) open any package found in any place or premises that he has reason to believe contains seed material; and
- (d) require any person to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom, any books, shipping bills, bills of lading, documents containing instructions, or any other document or papers concerning any matter relevant to the administration of this Act.

(2) The owner or the person in charge of any place or premises referred to in subsection (1) shall give an inspector all reasonable assistance required to enable the inspector to carry out his duties and shall furnish him with any information he may reasonably require for the purpose of enforcing this Act.

(3) Any person who refuses entry to an inspector acting under this section or obstructs him from entering or inspecting, or who, without reasonable excuse, fails to produce any seed material for examination or any document required under this section shall be guilty of an offence.

[Act No. 53 of 2012, s. 5.]

3D. Seizure and disposal of seeds and seed processing facilities

(1) Whenever an inspector reasonably believes that the provisions of this Act have been breached, the inspector may seize and detain any seeds in respect of which, the breach has been committed.

(2) Any seeds seized under subsection (1) shall not be detained—

- (a) for a period exceeding fourteen days, in cases where, after investigation, the inspector finds that no provision has been breached; or

(b) for a period exceeding six months, unless upon the inspector finding that a provision of the Act has been breached, proceedings have been instituted in court within that period, in which case the seeds may be detained until the proceedings are concluded.

(3) A court may, upon convicting a person of an offence under this Act, make an order—

(a) for the forfeiture or disposal of any seed in respect of which the offence was committed; or

(b) requiring the convicted person to pay for the costs or expenses incidental to the analysis of any seed or seed processing facility in respect of which the conviction was obtained.

(4) Where an inspector seizes any seed and the owner or person in whose possession the seed was at the time of the seizure consents, in writing, to its disposal, such seed shall be disposed of in such manner as the Service may direct, under the supervision of the Service, at the expense of the owner or person consenting to the disposal.

(5) Any person who obstructs an inspector in the exercise of his powers under this section commits an offence.

[Act No. 53 of 2012, s. 5.]

3E. Disclosure of confidential information

(1) No person who is or who has been engaged in the enforcement of the provisions of this Act shall disclose, except for the purpose of the exercise of his functions or when required to do so by a court or under any written law, any information acquired in the exercise of functions under this Act.

(2) Any person who contravenes the provisions of subsection (1) commits an offence.

[Act No. 53 of 2012, s. 5.]

4. Civil liabilities of sellers of seeds

(1) If and so far as seeds regulations provide that a statutory statement shall constitute a statutory warranty for the purposes of this section, the statutory statement, when received by a purchaser, and notwithstanding any contract or notice to the contrary, shall have effect as a written warranty by the seller that the particulars contained in the statutory statement are true.

(2) If and so far as seeds regulations apply this subsection to the particulars in a statutory statement and prescribe limits of variation in relation to those particulars, those particulars shall, for the purposes of any legal proceedings on a contract for the sale of the seeds to which the statutory statement relates, be deemed to be true except so far as there is a misstatement in the particulars which exceeds the limits of variation so prescribed.

(3) If and so far as seeds regulations apply this subsection to the particulars in a statutory statement, such particulars shall, for the purposes of any legal proceedings on a contract for the sale of seeds to which the statutory statement relates, be deemed to be true unless it is made to appear on a test carried out at a testing station, and made on a sample taken in the prescribed manner and within the prescribed period, that the particulars were untrue.

(4) Where a purchaser intends to obtain a test of seeds for the purposes of subsection (3) of this Act, the seller of the seeds shall give written notice of such

intention not more than the prescribed period after delivery to the purchaser of the seeds under the sale, and seeds regulations shall prescribe a procedure for the taking of a sample of seeds to be tested for the purposes of the said subsection which will afford to the seller of the seeds or his agent an opportunity of being present when the sample is taken, and of obtaining part of the sample.

(5) A contravention of seeds regulations shall not affect the validity of a contract for the sale of seeds or the right to enforce such a contract.

5. Defences in proceedings for offences against seeds regulations

(1) If and so far as seeds regulations for the purposes of this section prescribed limits of variation in relation to the particulars in a statutory statement, it shall be a defence to proceedings under this Act for including in a statutory statement any false particulars to prove that the mis-statement in the particulars alleged to be false do not exceed the limits of variation so prescribed.

(2) Subject to the provisions of this section, it shall be a defence to proceedings

- (a) under this Part for including false particulars in a statutory statement; or
- (b) for an offence against seeds regulations relating to the nature, condition or quality of any seeds; or
- (c) for an offence against seeds regulations relating to a prescribed name or designation or description,

to prove—

- (i) that the accused took all reasonable precautions against committing an offence of the kind alleged and had not at the time of the alleged offence any reason to suspect that an offence was being committed by him; and
- (ii) where the accused obtained the seeds to which the alleged offence relates from some other person, that on demand by or on behalf of the prosecutor the accused gave all the information in his power with respect to the name and address of that other person and with respect to any statutory statement or other document in his possession or power relating to the seeds and the contract of sale.

(3) If, in any proceedings under this Part for including false particulars in a statutory statement, any of the particulars alleged to be false are particulars which, by seeds regulations, are to be particulars ascertained by means of a prescribed test, the defence under subsection (2) of this section shall not be available unless it is proved—

- (a) that those particulars were ascertained on such a test and that the test was made not earlier than the date, if any, prescribed for the purpose; or
- (b) that—
 - (i) the accused purchased the seeds from another person who, in connection with the sale, duly delivered to the accused a statutory statement giving particulars of the seeds which were the same as the particulars alleged to be false; and
 - (ii) the accused had no reason to believe that paragraph (a) of this subsection did not apply in relation to those particulars.

6. Presumption regarding statutory statements

For the purposes of this Part and of any seeds regulations, any statutory statement made in respect of seeds which are in distinct portions shall be presumed to be made both in respect of the seeds as a whole and also in respect of each portion taken separately.

7. Index of names of plant varieties

(1) The Minister may, in accordance with the provisions of this section, cause to be prepared an index of names of plant varieties for use in connexion with the sale of seeds of those varieties.

(2) The Index shall be compiled in sections, and each section shall define the class of plant varieties to which it relates in such terms as to make it possible to determine whether any plant variety belongs to the class or not, irrespective of whether that variety is for the time being in the Index or not.

(3) Different sections of the Index may be prepared, and may be brought into force, at different times.

(4) Notice of the coming into force of a section of the Index, and of all additions, corrections and erasures in a section of the Index after it has come into force, shall be published in the *Gazette*, and in such other manner as is appropriate for ensuring that persons particularly concerned with the Index, or with the class of plant varieties to which the section of the Index relates, have their attention drawn to it.

(5) After a section of the Index has come into force, any person who, in selling seed of a plant variety for which a name is given in that section, uses some name not given in the Index for that plant variety, being a name which serves or is intended by him to serve to distinguish the seed from seed of other plant varieties within the class to which the section relates, shall be guilty of an offence.

(6) The Minister may, for the purposes of this section, arrange for the establishment of a reference collection of plant material.

(7) The First Schedule to this Act shall have effect as to the procedure for compiling the Index and the other matters therein mentioned.

(8) In this section and sections 8 and 9 and the First Schedule to this Act —

“**class**” means a class of plant varieties to which a section of the Index relates;

“**name**” includes any designation, and for the purposes of those provisions, a plant variety shall not be regarded as distinct from another plant unless it is sufficiently distinguishable by one or more of such important characteristics as may be prescribed.

8. Restrictions on sales of seeds of unindexed plant varieties

(1) Subject to the provisions of this section, after a section of the Index has come into force any person who, in selling seed of a plant variety which is within the class to which that section of the Index relates, but which is not in the Index, uses a name which serves or is intended by him to serve to distinguish such seed from seed of other plant varieties within that class, shall be guilty of an offence.

(2) Subsection (1) of this section shall not apply to a person who reasonably believes that the seed—

(a) is to be used for scientific purposes or for the purposes of research; or

(b) will be used outside Kenya.

(3) Where any person makes, or proposes to make, arrangements under which some other person uses seed under the control of the first-mentioned person for the purposes of increasing the first-mentioned person's stock, or of carrying out tests or trials, and under which the whole of the material produced, directly or indirectly, from the seed, and any unused seed, becomes or remains the property of the first-mentioned person, subsection (1) of this section shall not apply—

- (a) to a sale of the seed by the first-mentioned person to the other person as part of such arrangements; or
- (b) to a sale by that other person to the first-mentioned person of seed produced, directly or indirectly, from that seed.

(4) Except as provided by paragraph 3(3) of the First Schedule to this Act, an application for the inclusion of a plant variety in the appropriate section of the Index after it has come into force shall be granted only—

- (a) when the value for cultivation and use surpasses that of the existing ones in some aspect according to the results in official tests;
- (b) is sufficiently distinguishable from any other variety whose existence is a matter of common knowledge at the time of application;
- (c) is sufficiently varietal pure and stable in its essential characteristics.

(5) If at any time it appears to the Minister that a decision cannot be given on an application in respect of an annual mentioned in subsection (4) of this section within three years from the time when the applicant has complied with the conditions prescribed under the First Schedule to this Act, or if so directed by the Tribunal, he shall cause an entry to be made in the Index giving to the plant variety concerned such provisional name as is appropriate, and when the decision is given such correction shall be made to the Index as may be necessary to give effect to the decision.

[Act No. 53 of 2012, s. 6.]

8A. Maintenance of national plant variety list

(1) The Service shall cause the preparation of a national plant varieties list which shall comprise the names of plant varieties released for commercialization.

(2) The Service shall maintain and update the national varieties list and shall cause its publication in the *Gazette* and in such other manner as to afford access to it by members of the public.

[Act No. 53 of 2012, s. 7.]

9. Performance trials and reports

(1) The Minister may, in consultation with representatives of such organizations as he deems to have a substantial relevant interest in the matter to be regulated, make regulations for the carrying out of national performance trials, and may by order apply such regulations to any class of plant varieties within the national varieties list and to any new varieties in that class.

(2) For the purposes of this section, a plant shall be deemed to be a new plant variety if it was not on the national variety list on the date of the coming into operation of an order under subsection (1), unless it had been exempted under subsection (3).

(3) The Minister may, on an application from any person and on being satisfied that seed of a plant variety, although not in the Index, was in commercial use

in Kenya before the order under subsection (1) of this section came into force, exempt that plant variety from the provisions of this section.

(4) Subject to the provisions of this section, it shall be an offence—

- (a) to sell seed of a new plant variety to which this section applies; or
- (b) to advertise any such seed for use,

until seed of that plant variety has been submitted for the purpose of performance trials in accordance with this section, and until a report on the result of such trials has been published in the prescribed manner, and this subsection shall apply whether or not an offer or advertisement relates only to sales after the trials and report.

(5) Subsection (4) of this section shall not apply to a sale of any seed which is not in Kenya when the sale is made but, subject to the provisions of this section, where a person has acquired seed of a new plant variety to which this section applies, being seed which was not in Kenya when he acquired it, he shall be guilty of an offence if, in the course of business, he—

- (a) uses any of that seed in Kenya as reproductive material at any time when, under subsection (4) of this section, it is unlawful to sell seed of that plant variety; or
- (b) at any time so disposes of any of that seed, otherwise than by way of sale, while it is in Kenya as to make it available for use in Kenya as reproductive material.

(6) Subsection (4) of this section shall not apply to any sale of the kind described in subsection (3) of section 8 of this Act and subsection (5) of this section shall not apply to the use of seed for the purpose of carrying out tests or trials.

(7) If it appears to the Minister that a new plant variety to which this section applies has undergone performance trials and that an adequate report of the result of those trials is generally available, or that there is any other sufficient reason for exempting such variety from the provisions of subsections (4) and (5) of this section, he may direct that those subsections shall cease to apply to seed of that plant variety, but without prejudice to any liability for any offence previously committed.

(8) For all new plant varieties to which this section applies there shall be a time limit by which, so far as practicable, the report on the result of the performance trials is to be published, and if such report is not published within such time limit, subsections (4) and (5) of this section shall cease to apply to seed of that plant variety, but without prejudice to any liability for any offence previously committed.

(9) The time limit in respect of an annual crop for the purposes of subsection (8) of this section shall, except so far as seeds regulations may otherwise provide for any class or part thereof, be three seasons from the date on which the performance trials commence.

(10) Entries made in a section of the national variety list after an order under this section has come into force in relation thereto shall—

- (a) be made in such a manner as will distinguish those entries from all earlier entries, and as will indicate which of the later entries relate to plant varieties exempted under subsection (3) of this section; and
- (b) contain additional entries showing when subsections (4) and (5) of this section have ceased to apply to seeds of the plant varieties concerned.

(11) Without prejudice to any other provision of this Part, seeds regulations may provide—

- (a) for the manner of making applications under subsection (3) of this section, and of making applications for submitting plant varieties for performance trials;
- (b) for the information to be afforded by an applicant and the materials to be submitted at the time of application or subsequently;
- (c) for the manner in which reports are to be published and brought to the attention of those concerned;
- (d) for the compiling of a register of applications for the submission of seeds for performance trials, of the reports of the results of such trials and of the dates of publication of the reports, and for including entries which will show the date when the time limit under subsection (8) of this section will fall;
- (e) for requiring the publication of notice of any direction under subsection (7) of this section and of any class where a report is not published within the time limit under subsection (8) of this section;
- (f) for the payment of fees in respect of matters under this section;
- (g) for the conduct and management of performance trials and reports.

(12) Reference in this section to advertising are references to advertising in any medium, including sound and television broadcasting, but do not include the communication of information in any publication for scientific purposes or purposes of research.

[Act No. 53 of 2012, s. 8.]

10. Offences, etc.

(1) If any information submitted by or on behalf of—

- (a) a person making an application or representations in respect of any matter connected with the compilation or alteration of the national varieties list; or
- (b) an applicant under subsection (3) of section 9 of this Act,

is false in any material particular, and the person giving such information knows that it is false, or gives such information recklessly, he shall be guilty of an offence.

(2) Notwithstanding any provision of any other written law as to time limits in criminal proceedings, proceedings in respect of an offence under sections 7, 8 or 9 of this Act may be brought at any time not more than two years from the date upon which it is alleged that such offence was committed.

(3) It shall be a defence to proceedings in respect of an offence under sections 7, 8 or 9 of this Act to prove—

- (a) that the accused took all reasonable precautions against committing an offence of the kind alleged and had not at the time of the alleged offence any reason to suspect that an offence was being committed by him; and
- (b) where the accused obtained the seeds to which the alleged offence relates from some other person, that, on demand by or on behalf of the prosecutor, the accused gave all the information in his power with respect to the name and address of that other person and with respect

to any statutory statement or other document in his possession or power relating to those seeds and the contract of sale.

(4) Any person who—

- (a) with intent to defraud, gives false information to a seed inspector, a seed analyst or a plant examiner;
- (b) obstructs, hinders, interferes with or fails to comply with any lawful order given by any seed inspector in execution of his powers or duties under this Act;
- (c) makes or causes to be made any false statement, false advertisement, and or produces or displays any certificates required to be produced or displayed, under this Act which are false in any material particular
- (d) while not registered as a seed merchant, imports, processes seed and packages seed for sale purposes;
- (e) sells or displays for sale any seed which does not correspond with the description in any certificate required to be produced or displayed under this Act;
- (f) offers for sale, seed that fails to meet the requisite standards or has been rejected at any seed certification stage;
- (g) otherwise contravenes any other provisions in this Act,

shall be guilty of an offence, and upon conviction, shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years, or to both.

[Act No. 53 of 2012, s. 9.]

PART III – SEED TESTING

11. Seed testing stations

The Service shall, either alone or in conjunction with any other body, establish one or more official seed testing stations.

[Act No. 53 of 2012, s. 10.]

12. Certificates of test

(1) A certificate of the result of a test by a seed analyst of a sample taken by an authorized officer for the purposes of any of the provisions of this Act shall be in the form prescribed by seeds regulations.

(2) A certificate of the result of a test at a testing station of any sample taken for the purposes of this Act, and purporting to be issued by a seed analyst—

- (a) if the sample was taken by an authorized officer, shall, if a copy of the certificate has been served on the accused, be sufficient evidence of the facts stated in the certificate in any proceedings for an offence under this Act; or
- (b) if the sample was taken by a person other than an authorized officer in order to obtain a test for the purposes of subsection (3) of section 4 of this Act, shall be sufficient evidence of the facts stated in the certificate in any such legal proceedings as are mentioned in that subsection,

unless, in either case, either party to the proceedings requires that the person issuing the certificate be called as a witness.

13. Use of samples in criminal proceedings

(1) Evidence shall not be adduced in proceedings for an offence under Part II respecting a sample taken by an authorized officer unless the sample was taken in the manner prescribed by seeds regulations.

(2) Seeds regulations shall provide for samples being divided into at least two parts, and for one of the parts being given to the owner of the seeds or to such other person as may be prescribed by seeds regulations, and shall provide for a third part of the sample to be retained for production in all cases where use may be made of it by the court under this section.

(3) A certificate in the form prescribed by seeds regulations purporting to be issued by an authorized officer and stating that a sample was taken in the prescribed manner shall be sufficient evidence of the facts stated in the certificate.

(4) If part of a sample taken by an authorized officer is sent to a testing station, it shall be so sent as soon as practicable after the sample is taken.

(5) A copy of a certificate issued by a seed analyst stating the result of a test of part of a sample taken by an authorized officer shall be sent to the person to whom any other part of the sample is given.

(6) In any proceedings for an offence under this Act in respect of seeds which have been sampled by an authorized officer, the accused shall not be required to plead to the charge less than fourteen days from the day upon which he has received a copy of any certificate of a seed analyst which the prosecutor intends to adduce as evidence.

(7) In proceedings for including in a statutory statement false particulars concerning matters which are, under seeds regulations, to be ascertained for the purposes of the statement by a test of the seeds, if any sample of the seeds has been taken by an authorized officer the part of such sample required to be retained as mentioned in subsection (2) of this section shall be produced at the hearing, and the court, if it thinks fit on the request of either party, shall cause the part so produced to be sent to a seed analyst who shall transmit to the court a certificate of the result of a test of that part of the sample.

(8) A sample taken in accordance with the Seeds Act (Cap. 326) prior to its repeal by this Act shall be deemed to have been taken in the prescribed manner for the purposes of subsection (1) of this section.

14. Tampering with samples

If any person—

- (a) tampers with any seeds so as to procure that a sample taken in the manner prescribed by seeds regulations for any purpose does not correctly represent the bulk of the seeds; or
- (b) tampers with any sample so taken; or
- (c) with intent to deceive, sends, or causes or allows to be sent, to any testing station, to be tested for any purpose, a sample of seeds which to his knowledge does not correctly represent the bulk of the seeds,

he shall be guilty of an offence and liable to a fine not exceeding one million shillings or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment.

[Act No. 53 of 2012, s. 11.]

PART IV – CONTROL OF IMPORTS AND
PREVENTION OF CROSS-POLLINATION**15. Control of imports of potentially deleterious seeds**

(1) If it appears to the Service that it is necessary or expedient that he should be able to exercise the powers conferred by this section for the purpose of preventing the importation into Kenya—

- (a) of seeds which, if used as reproductive material in Kenya, will or may cause deterioration of domestic types of varieties of plants by cross-pollination, physical admixture or other means; or
- (b) of seeds which are unsuitable for use in Kenya because they are of a type or variety which have been developed in countries with different climate, different hours of daylight or other different conditions,

he may, by order, apply this section to seeds of any type or variety specified in the notice.

(2) An order under this section may provide for excepting from a specified type or variety any description of seeds defined in any manner and, in particular, any description of seeds defined by reference to the country or territory where they were grown or from which they have been consigned to Kenya, or any seeds which are the subject of a prescribed certificate.

(3) The importation of all seeds to which this section applies is prohibited except under the authority, and in accordance with the terms, of a licence granted by an authorized officer, and any person who imports or attempts to import any seeds in contravention of this subsection shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

(4) A licence under subsection (3) of this section may be, to any degree, general or specific, and may be modified or revoked by an authorized officer at any time.

(5) An order under this section shall be made after consultation with representatives of such interests as appear to the Service to be concerned and may—

- (a) include provision as to the methods by which importers may be required to prove whether consignments of seeds fall within any exception specified in the order;
- (b) prescribe the form and manner in which applications are to be made for licences and the form of licences, and the fees payable therefor;
- (c) contain such other transitional, supplemental and incidental provisions as appear to the Service to be expedient.

[Act No. 53 of 2012, s. 12.]

16. Prevention of injurious cross-pollination

(1) This section shall have effect for the purpose of maintaining the purity of seeds of any types and varieties of plants specified in an order under subsection (2).

(2) The Service may, with the approval of the Minister by order in the *Gazette*—

- (a) develop guidelines and protocols for the management of emerging technologies in seed production; and

(b) apply this section to any area in Kenya where persons are engaged in growing crops for seeds of any type or variety of plant specified in the order, if he is satisfied that in that area satisfactory arrangements have been made for locating such crops so as to isolate them from crops or plants which might cause injurious cross-pollination.

(3) An order under this section—

(a) shall be made after consultation with the persons responsible for the arrangements mentioned in subsection (2) of this section and with persons representative of such other interests as appear to the Service to be concerned;

(b) shall state the types and varieties of plants which are to be protected by the order;

(c) shall specify the kinds and crops of plants which are to be controlled in the area to which the order relates; and

(d) may relate to more than one area and, if so, may make different provisions under paragraphs (a) and (b) of this subsection in respect of the different areas to which it relates.

(4) If in any area where this section is in force controlled crops or plants are growing and, on an application made in accordance with the Second Schedule to this Act, the Service is satisfied—

(a) that they are causing, or may cause, injurious cross-pollination in a protected crop which is being grown in that area; and

(b) in the case of controlled crops or plants which are not self-sown, that the person growing them did not give to the persons responsible for the arrangements mentioned in subsection (2) of this section such notice of his intention to grow those crops or plants to the flowering stage as would have enabled them to take any appropriate steps for altering the arrangements,

he may serve a notice on the occupier of the land where the controlled crops or plants are growing requiring him to take such steps as may be specified in the notice for the purpose of preventing any of the controlled crops or plants from causing or continuing to cause injurious cross-pollination in the protected crops.

(5) If the person served with a notice under subsection (4) of this section does not comply with any requirement in the notice, the Service may authorize any person to enter on the land concerned and do what the person so served has failed to do or, if in the opinion of the Service that would no longer serve the purpose for which the notice was served, may take such other action as appears to the Service appropriate for that purpose, and where, when the default occurs, further obligations remain under the notice, the Service may also take such action as appears to him appropriate to meet the purposes for which those further obligations were imposed.

(6) Where the Service takes any action under subsection (5) of this section, he may recover from the person on whom the notice was served a sum equal to the reasonable cost incurred by the Service or his agents in taking such action, and such sum shall be a civil debt recoverable summarily by the Service.

(7) Any person authorized in writing by the Service may, on production if so required of his authority, at all reasonable times enter on any land, but not into any dwelling-house, in an area where this section is in force for the purpose of

ascertaining whether controlled crops or plants are growing on the land or of inspecting and taking samples of any controlled crops or plants growing on the land.

(8) A notice under this section or the Second Schedule to this Act may be served by leaving it at, or sending it by pre-paid registered post to, the last known address of the person on whom it is to be served, and if it is not practicable after reasonable inquiry to ascertain his name and address, the notice may be served by addressing it to him as “the occupier” of the land and affixing it or a copy of it to some conspicuous object on the land.

(9) Without prejudice to any other proceedings under this section, any person who—

- (a) unreasonably fails to comply with any requirement in a notice under this section; or
- (b) obstructs or impedes, or attempts to obstruct or impede, a person acting in the exercise of the powers conferred by subsection (5) of this section,

shall be guilty of an offence.

(10) In this section, and in the Second Schedule to this Act—

“**controlled crops or plants**” means crops, grown for any purpose, of the types of varieties of plants which are protected by an order in the area concerned, and such additional kinds of crop or plants, whether grown or self-sown and whether of those or any other types or varieties, as may be specified in such order for the purposes of this definition;

“**protected crop**” means a crop of a type or variety of plant which is protected by an order in the area concerned, being a crop grown for the purpose of producing seeds.

“**the occupier**”, in the case of unoccupied land, means the person entitled to the occupation of the land.

[Act No. 53 of 2012, s. 13.]

PART V – PLANT BREEDER’S RIGHTS

17. Grant of plant breeder’s rights

(1) Rights may be granted in accordance with this Part in respect of varieties of all plant genera and species.

(2) Subject to this Part, plant breeder’s rights shall be granted by the authorized officer if he is satisfied that the conditions laid down in section 18 are fulfilled.

(3) The Third Schedule shall have effect for the protection of an applicant for plant breeder’s rights pending a decision on his application.

(4) *Deleted by Act No. 53 of 2012, s. 14(b).*

[Act No. 53 of 2012, s. 14.]

18. Conditions for grant of rights

(1) The conditions laid down in this section must be fulfilled with respect to both the applicant for plant breeder’s rights and the plant variety to which the application relates.

(2) An applicant for plant breeders’ rights must be the breeder, and the provisions of Part I of the Fourth Schedule shall have effect with regard to two

or more persons who have independently bred, discovered and developed a plant variety.

(3) A plant variety must conform to the rules set forth in Part II of the Fourth Schedule to this Act.

(4) *Deleted by Act No. 53 of 2012, s. 15(c).*

[Act No. 53 of 2012, s. 15.]

19. Period for which rights exercisable

(1) Breeders' rights shall be granted for a fixed period of twenty years from the date of the grant, except in respect of trees and vines where the said period shall be twenty-five years from the date of the grant.

(2) *Deleted by Act No. 53 of 2012, s. 16(b).*

(3) *Deleted by Act No. 53 of 2012, s. 16(b).*

(4) *Deleted by Act No. 53 of 2012, s. 16(b).*

(5) *Deleted by Act No. 53 of 2012, s. 16(b).*

(6) A holder of plant breeder's rights may at any time make an application to the authorized officer offering to surrender his rights and if, after notice of the application has been given in the prescribed manner, and after the prescribed procedure for hearing any person on whom the right to object has been conferred by the regulations has been followed, such officer is satisfied that the rights may properly be surrendered, he may accept the offer and terminate the rights concerned.

(7) The Minister shall cancel the grant of plant breeder's rights in any case where he is satisfied—

(a) that any information submitted in the application for the grant of the rights, or any information submitted by or on behalf of the applicant in connexion with the application, was incorrect and that, if the authorized officer had known that such information was incorrect, he would have refused the grant; or

(b) that facts have been discovered which, if known before the grant, would have resulted in the grant being refused on the grounds that rule 1 or rule 2 in Part II of the Fourth Schedule to this Act was not satisfied in respect of the plant variety concerned.

(8) *Deleted by Act No. 53 of 2012, s. 16(b).*

[Act No. 53 of 2012, s. 16.]

20. Nature of rights

(1) Subject to this Part, and of any other written law, the holder of plant breeder's rights in a plant variety shall have the exclusive right to do, and to permit others to do, the following—

(a) production or reproduction;

(b) conditioning for the purpose of Propagation;

(c) offering for sale;

(d) selling or other marketing;

(e) exporting;

(f) importing, or

(g) stocking for any of the purpose set out in the foregoing paragraphs.

- (h) in the circumstances described in the Fifth Schedule to this Act, to this Act, to exercise the other rights therein specified,

and, subject to the provisions of this section, infringements of plant breeder's rights shall be actionable at the suit of the holder of such rights, and in any proceedings for such an infringement all such relief, by way of damages, injunction, account or otherwise shall be available as is available in any corresponding proceedings in respect of infringements of other proprietary rights:

Provided that in so far as the production and the stocking for production of the propagating material of a variety for which plant breeder's rights have been granted, is undertaken solely for research purposes or for developing new varieties in the breeder's own nursery this shall not be deemed to be at variance with the exclusive right of the holder of a plant breeder's rights.

(1A) the matters referred to in subsection (1)(a) to (g) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the permission of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to that propagating material.

(1B) Subject to subsections (1) and (1A), the matters referred to in subsection (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of subsection (1)(b) through the unauthorized use of the said harvested material shall require the permission of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(1C) The provisions of subsection (1)(a) to (c) shall in addition apply in relation to—

- (a) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
- (b) varieties which are not clearly distinguishable from the protected variety, and
- (c) varieties whose production requires the repeated use of the protected variety.

(1D) For the purposes of subsection (1C) (a), a variety shall be deemed to be essentially derived from another variety ("the initial variety") where—

- (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
- (b) it is clearly distinguishable from the initial variety, and
- (c) except for the differences which result from the act of derivation, 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.

(1E) Notwithstanding the provisions of subsection (1), within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers may use the product of the harvest which they have obtained by planting, on their own holdings, the protected variety.

(2) Paragraph (a) of subsection (1) of this section shall not apply to the sale of reproductive and harvested material and products material which is not in Kenya

when it is sold, but if any person purchases such material outside Kenya and uses it in Kenya as reproductive and harvested material and products material, the purchase and subsequent use shall together constitute an infringement of the plant breeder's rights and the purchaser shall be liable to be proceeded against in respect of such infringement, and reference in this subsection to using reproductive and harvested material and products material of a plant variety as reproductive and harvested material and products material in Kenya includes reference to so disposing of that material (otherwise than by way of sale) while it is in Kenya as to make it available for use in Kenya as reproductive and harvested material and products material.

(3) There shall be no right to damages in respect of an infringement of plant breeder's rights—

- (a) if the person infringing the rights was not aware, and had no reasonable grounds for suspecting, that the plant variety in question was the subject of such rights; or
- (b) in a case where the infringement consists of a breach of conditions attached to a licence, if that person had no notice of any of those conditions,

but the person who would, but for the foregoing provisions of this subsection, be entitled to damages shall be entitled to an account of profits in respect of the infringement, and to payment of any amount found due on the account, whether any other relief is granted under this section or not.

(4) The holder of plant breeder's rights may, in permitting other persons to exercise his exclusive rights, impose any conditions, limitations or restrictions which may be imposed by the holder of any other kind of proprietary rights, and plant breeder's rights shall be assignable in the same manner as other kinds of proprietary rights.

(5) A sale of the reproductive material of a plant variety which is the subject of plant breeder's rights, being a sale by the holder of such rights or by any other person permitted to grant a licence in those rights—

- (a) shall not imply that the seller permits the purchaser to produce the reproductive material for the purpose of sale or export; but
- (b) subject to any express terms or conditions imposed by the seller, shall imply that the seller permits the purchaser to sell the reproductive material sold to him.

(6) In this section and in the Fifth Schedule to this Act references to selling reproductive material include references to any transaction effected in the course of business—

- (a) under which the property in the reproductive material passes from one person to another; or
- (b) under which such material is made over by one person to another in pursuance of a contract under which he will use the material for growing further reproductive material or other crops,

and paragraph (b) of this subsection shall apply irrespective of whether the contract provides that the property in the crop will be in the person to be regarded as the seller, or the person to be regarded as the purchaser, or a third party, and any reference to purchasing or a purchaser shall be construed accordingly.

[Act No. 2 of 2002, Sch., Act No. 53 of 2012, s. 17.]

21. Protected plant varieties

(1) The Minister may by regulations under this section provide for the selection of names for plant varieties which are the subject of applications for plant breeder's rights and for the keeping of a register of the names so selected.

(2) The Minister shall cause notice of all entries made in the register, including alterations, corrections and erasures, to be published in the *Gazette* and in such other manner as appears to the Minister to be convenient for bringing such entries to the attention of all persons connected therewith.

(3) *Deleted by Act No. 53 of 2012, s. 18(a).*

(4) Without prejudice to the generality of subsection (1), regulations made thereunder may in particular—

- (a) prescribe the circumstances in which representations may be made regarding any decision as to the name to be registered in respect of any plant variety;
- (b) make provision for the publication or service of notices of decisions which are to be made;
- (c) prescribe the times at which, and the circumstances in which, the register may be inspected by members of the public.

(5) If, where a name is registered under this section for a plant variety, any person uses that name, or a name so nearly resembling it as to be likely to deceive or cause confusion, in selling—

- (a) reproductive material of a different plant variety within the same class; or
- (b) where under paragraph 1 of the Fifth Schedule to this Act plant breeder's rights in the first-mentioned plant variety have been extended to material other than reproductive material, that other material from a different plant variety within the same class,

such use of the name shall be a wrong actionable in proceedings by the holder of plant breeder's rights in such first-mentioned plant variety, but it shall be a defence to a claim for damages in any such proceedings to prove that the defendant took all reasonable precautions against committing a wrong of the kind alleged and had not, when using the name, any reason to suspect that it was wrongful.

(6) In this section, "**name**" includes any designation, and references to plant varieties as being within the same class are references to them as all being within one class which is either—

- (a) a class consisting of all plant varieties of the species or groups prescribed by any one scheme; or
- (b) any other class of plant varieties prescribed for the purposes of this subsection by any scheme.

(7) The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of section 20(1)(a) which has been sold or otherwise marketed in Kenya by the breeder or with his consent, or any material derived from the said material, unless such acts—

- (a) involve further propagation of the variety in question; or
- (b) involve an export of any material of the variety, which enables the propagation of the variety into a country which does not protect

varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(8) For the purposes of paragraph (a), "material" in relation to a seed or plant variety means—

- (a) propagating material of any kind;
- (b) harvested material, including entire plants and parts of plants, and
- (c) any product made directly from the harvested material.

[Act No. 53 of 2012, s. 18.]

22. Maintenance of reproductive material

(1) The provisions of this section shall apply in relation to all plant varieties.

(2) Every holder of a plant breeder's rights shall ensure that, throughout the period for which the rights are exercisable, he is in a position to produce to a Service reproductive material which is capable of producing the variety to which the rights relate with the morphological and physiological and other characteristics taken into account when the rights were granted in respect of the variety.

(3) It shall be the duty of every holder of plant breeder's rights to afford to an authorized officer all such information and facilities as such officer may request for the purpose of ascertaining whether such holder is fulfilling his obligation under subsection (2) of this section, including facilities for the inspection of the measures taken for the preservation of the plant variety.

(4) If at any time the Minister is satisfied that any holder of plant breeder's rights—

- (a) has failed to comply with any request made under subsection (3); or
- (b) is no longer in a position to fulfil his obligations under subsection (2) of this section,

he shall cancel the grant of such rights.

[Act No. 53 of 2012, s. 19.]

23. Licences

(1) The holder of plant breeder's rights has the obligation to stock the market with propagating material at reasonable prices and he may do this by himself or he may grant such licences as are necessary to stock the market with propagating material on reasonable terms and conditions.

(2) The obligation referred to in subsection (1) of this section shall include the obligation of the holder of plant breeder's rights to furnish the licensee with the propagating material he needs at a reasonable price if he is to make proper use of the licence.

(3) If the Minister, upon the application of any person, is of the opinion that the stocking of the market with the propagating material is not adequately ensured, he shall communicate this to the holder of the plant breeder's rights, stating the reasons for his opinion and shall enable him to remedy the situation and, if the holder fails to do so, grant any such rights as respects the plant variety in the form of a compulsory licence to interested parties.

(4) *Deleted by Act No. 53 of 2012, s. 20.*

(5) In entertaining applications for settling the terms of compulsory licences, the Minister shall endeavour to secure that the plant variety is available to the public at reasonable prices, that it is distributed as widely as possible, that it is maintained

in quality, and that there is reasonable remuneration for the holder of the plant breeder's rights concerned.

(6) A compulsory licence may include terms obliging the holder of the plant breeder's rights to make reproductive material available to the licensee.

(7) Where—

- (a) the holder of the plant breeder's right to which an application under subsection (3) of this section relates is, or is represented by, a society or other organization which has as its main object, or one of its main objects, the negotiation or granting of licences to exercise plant breeder's rights, either as the holder of the rights or as agent for holders; and
- (b) an organization, whether claiming to be representative of persons requiring licences or not, or a person whether requiring a licence or not, applies to the Minister for an opportunity of making representations concerning the application, and the Minister is satisfied that such organization or person has a substantial interest in the application and that the application involves issues which may affect other applicants for compulsory licences under this section; and
- (c) if the applicant under paragraph (b) of this subsection of this subsection is an organization, the Minister is satisfied that it is reasonably representative of the class of persons which it claims to represent,

the Minister shall afford to the organization or person applying under paragraph (b) of this subsection an opportunity of making representations to him and of being heard by the Minister or by a person appointed by the Minister for that purpose.

(8) The Minister, before granting a compulsory licence shall satisfy himself that the applicant is financially and otherwise in a position, and intends, to exploit the rights to be conferred upon him in a competent and businesslike manner, and that the grant of such licence will not compromise the maintenance of the reproductive material concerned.

(9) Without prejudice to the remedies available to the holder of a compulsory licence by the taking of proceedings in any court, the Minister may, if it is represented to him by any person that the holder of the plant breeder's rights concerned has failed to meet any obligation imposed upon him by such licence, and if he is satisfied that the representations are correct, cancel the grant of such plant breeder's rights.

(10) The Minister may at any time, on application made by any person concerned, extend or limit, or vary in any other respect, or revoke, a compulsory licence.

(11) A compulsory licence may be granted whether or not the holder of the plant breeder's rights concerned has previously granted licences to the applicant for the compulsory licence or to any other person, and shall not be an exclusive licence.

(12) If and so far as any agreement purports to bind any person not to apply for a compulsory licence it shall be void.

[Act No. 53 of 2012, s. 20.]

24. Regulations

(1) The Minister may make regulations for the purposes of this Part, and without prejudice to the generality of that power, the regulations may provide for—

- (a) applications for the grant of plant breeder's rights;
 - (b) the charging of fees, including periodical fees payable by the holders of plant breeder's rights;
 - (c) anything which is to be prescribed under this Part.
- (2) Regulations under this section may permit an authorized officer—
- (a) in the case of any failure to pay any fees payable in connexion with an application to such officer under this Part, to refuse such application; and
 - (b) in the case of a failure of a holder of plant breeder's rights to pay any fees payable in connexion with those rights, to cancel the grant of those rights,

with or without a right of appeal, and the regulations may provide for the restoration of the application or grant if the failure to pay fees is made good.

- (3) Regulations under this section may, in particular—
- (a) prescribe the information and facilities to be afforded by an applicant for the grant of plant breeder's rights, and the reproductive and other plant material to be submitted at the time of the application or subsequently;
 - (b) prescribe the tests, trials, examinations and other steps to be taken by such applicant or an authorized officer before a grant of plant breeder's rights is made, and the time within which any such steps are to be taken;
 - (c) restrict the making of repeated applications upon the same subject;
 - (d) prescribe the circumstances in which representations may be made upon any matter under this Part;
 - (e) make provision for the keeping of registers and records of matters under this Part, and the rectification of such registers and records, and prescribe the circumstances in which they may be inspected by members of the public;
 - (f) make provision for the publication or service of notice of applications and decisions made under this Part;
 - (g) prescribe the manner of dealing with objections to applications under this Part.

25. False representation and information

(1) Any person who, knowingly or recklessly, makes any false representation that he is entitled to exercise any plant breeder's rights, or any rights derived therefrom, shall be guilty of an offence, and for the purposes of this subsection it shall be immaterial whether or not the plant variety in respect of which such representation is made is actually the subject of any plant breeder's rights.

- (2) If any information—
- (a) submitted in any application under this Part for a decision against which an appeal lies to the Tribunal; or
 - (b) submitted by or on behalf of the applicant in connexion with any such application; or
 - (c) given in pursuance of a request made under subsection (3) of section 22 of this Act,

is false in any material particular and the person giving such information knows that it is false or gives the information recklessly he shall be guilty of an offence.

26. Application of Part to Government

(1) If any servant or agent of the Government infringes any plant breeder's rights or makes himself liable to civil proceedings under section 21 of this Act, the infringement or wrong is committed with the authority of the Government, then civil proceedings in respect of the infringement or wrong shall lie against the Government.

(2) Subject to subsection (1) of this section, no proceedings shall lie against the Government by virtue of the Government Proceedings Act (Cap. 40) in respect of the infringement of plant breeder's rights or of any wrong mentioned in the subsection.

(3) This section shall have effect as if contained in Part II of the Government Proceedings Act (Cap. 40).

27. Deleted by Act No. 53 of 2012, s. 21.

27A. Establishment of National Plant Genetic Resources Centre

(1) There is established a National Plant Genetic Resources Centre which shall be responsible for the conservation and sustainable utilization of plant biodiversity in Kenya.

(2) The functions of the National Plant Genetic Resources Centre shall be to—

- (a) protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics, associated indigenous knowledge and its use by the communities of Kenya;
- (b) carry out inventories by evaluating and mapping plant genetic resources distribution in the country;
- (c) conserve plant genetic diversity by devising and implementing management procedure, including *ex-situ* and *in-situ* maintenance;
- (d) co-operate with international institutions on matters relating to plant genetic resources, including the administration of material transfer agreements;
- (e) ensure safe custody and accessibility of all plant bred and naturally occurring germplasm;
- (f) document and disseminate plant genetic resources data and information to users;
- (g) collaborate with and institutions of higher learning to address adaptive, applied and strategic research;
- (h) enhance capacity for the effective conservation of plant genetic resources; and
- (i) advice the Government on policies governing the conservation and use of plant genetic resources.

(3) There shall be a National Plant Genetic Resources Centre Committee which shall provide oversight on matters relating to the centre.

(4) The Minister may make regulations to provide for the membership and functions of the Committee.

[Act No. 53 of 2012, s. 22.]

PART VI – THE SEEDS AND PLANTS TRIBUNAL

28. Establishment of Tribunal

(1) There shall be a Seeds and Plants Tribunal in relation to which the provisions of the Sixth Schedule to this Act shall apply.

(2) The Minister may make regulations under this section in respect of any appeals to the Tribunal under this Act, or under any regulations made under this Act, for all or any of the following purposes—

- (a) to authorize any person, in addition to the appellant and the person whose decision is appealed against, to appear and be heard as parties to any appeal;
- (b) to provide for suspending, or authorizing or requiring the suspension of, the operation of any decision pending the final determination of any appeal in respect thereof;
- (c) to provide for the publication of notices or the taking of other steps for securing that persons affected by any such suspension are informed thereof.

29. Jurisdiction of Tribunal

(1) Any person aggrieved by any decision—

- (a) to refuse any application under subsection (4) of section 8 or subsection (3) of section 9 of this Act; or
- (b) to allow or refuse the grant of plant breeder's rights; or
- (c) to cancel the grant of plant breeder's rights; or
- (d) to allow or refuse an application under subsection (5) of section 19; or
- (e) to terminate an extension granted under subsection (5); or
- (f) to allow or refuse any application made under subsection (1), (7) or (8) of section 23 of this Act;
- (g) regarding certification; or
- (h) regarding compensation arising from seed production and sale,

may appeal to the Tribunal against that decision.

(1A) A duly certified copy of any determination or order of the Tribunal may be filed in the High Court by any party to the proceedings before the Tribunal, and on such filing the determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.

(1B) The Tribunal shall, upon filing a copy of a decision under subsection (1A) transmit to the court its record of the proceedings before it, and the record shall be filed by the court along with the certified copy of the determination or order.

(2) Any regulations made under this Act may confer rights of appeal to the Tribunal from decisions taken under such regulations.

(3) There shall be a final appeal to the High Court, from a decision of the Tribunal, on any question of law, but subject thereto a decision of the Tribunal shall be final and conclusive.

(4) The Tribunal shall, in addition to any other jurisdiction conferred upon it, hear and determine any matters agreed to be referred to the Tribunal by any arbitration agreement relating to the infringement of plant breeder's rights, or to matters which

include such infringement, but subsection (3) of this section shall not apply in relation to any jurisdiction conferred by this subsection.

(5) The fees payable to the Tribunal for acting under any arbitration agreement shall be such as the Tribunal may determine, and nothing in section 11 of the Arbitration Act (Cap. 49), shall be taken as applying to the Tribunal.

(6) In this section, “**arbitration agreement**” has the meaning assigned to it in section 2 of the Arbitration Act (Cap. 49).

[Act No. 53 of 2012, s. 23.]

PART VII – GENERAL

30. Powers of entry

(1) The powers of entry conferred by subsection (3) of this section may be exercised for the purpose of exercising—

- (a) the further powers conferred by subsections (4) and (5) of this section; or
- (b) any powers of calling for, inspecting or taking copies of records or other documents conferred by seeds regulations,

or for the purpose of ascertaining whether there is, or has been, on or in connexion with the premises, including any vehicle or vessel, any contravention of any of the provisions of this Act or any regulations made thereunder.

(2) This section shall not authorize entry into any premises which are used exclusively as a private dwelling.

(3) An authorized officer may, on production if so required of proof of his authority, at all reasonable hours enter any premises—

- (a) which he has reasonable cause to believe to be used for any purpose of a business in the course of which seeds are sold, whether the sale is by wholesale or retail, and whether the person conducting it acts as principal or agent; or
- (b) on which he has reasonable cause to believe that there is any seed which has been sold and which are to be delivered, or are in the course of delivery, to the purchaser, and the power of entry under this paragraph may be exercised when the seed is in transit in the course of delivery to the purchaser, and in particular when it is in any vehicle or vessel in the course of delivery.

(4) An authorized officer may, on any premises, including a vehicle or vessel, which he has power under this section to enter, examine any seed which he finds there and may without payment take samples of any seed so found.

(5) The owner of any seeds which are offered or exposed for sale, or are stored for the purposes of sale, or any person authorized to sell such seeds, may be required by an authorized officer to deliver to him such statement, if any, as the person selling them would, by seeds regulations, be obliged to deliver to a purchaser of such seeds, and to deliver it within the time prescribed for such a statement.

(6) This section shall apply with regard to—

- (a) all kinds of seeds in respect of which an offence may, under any circumstances, be committed under seeds regulations; and

- (b) seeds of all plant varieties which are within any class to which a section of the Index which has come into force relates.

(7) Any person who—

- (a) fails to comply with the provisions of subsection (5);
(b) gives a false statement in relation to any material particular; or
(c) obstructs or impedes, or attempts to obstruct or impede, any authorized officer from exercising the powers conferred by this section,

commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding one year or to both.

[Act No. 2 of 2002, Sch., Act No. 53 of 2012, s. 24.]

31. Institution of criminal proceedings

(1) Notwithstanding any provision of any other written law as to time limits in criminal proceedings, where a part of a sample has been tested by a seed analyst proceedings for including in a statutory statement false particulars concerning the matters which, under seeds regulations are to be ascertained for the purposes of the statement by a test of the seeds, being proceedings relating to the seeds from which the sample was taken, may be brought at any time not more than six months from the time when the sample was taken.

(2) If, at any time before a test is begun to ascertain whether a part of a sample of seeds is of a specified variety or type, and not more than six months after the sample was taken, the person to whom any other part of the sample was given, or any other person, is notified in writing by an authorized officer that it is intended to test the seeds and that, after the test, proceedings may be brought against that person for including in a statutory statement a false statement that seeds were of a specified variety or type, then, notwithstanding any provision of any other written law as to time limits in criminal proceedings, any such proceedings relating to the seeds from which the sample was taken may be brought against the person so notified at any time not more than two years from the time when the sample was taken, and a certificate purporting to be issued by an authorized officer and stating that a person was so notified shall be sufficient evidence of that fact.

(3) Proceedings for an offence relating to a statutory statement which has been delivered to a purchaser of seeds, or relating to seeds which have been sold and delivered, may be brought before a court having jurisdiction at the place of delivery of the statement or seeds.

32. General provisions as to offences

(1) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Proceedings for any offence under this Act may, without prejudice to any jurisdiction exercisable apart from this subsection, be taken against a person before the appropriate court in Kenya having jurisdiction in the place where that person is for the time being.

33. General penalty

A person who is convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.

[Act No. 2 of 2002, Sch., Act No. 53 of 2012, s. 25.]

34. Supplemental provisions as to regulations

Any regulations under this Act—

- (a) may make different provision for different types or classes of plant varieties, for different seasons of the year, and for other different circumstances;
- (b) may contain such supplemental, incidental and transitional provisions as may appear to the Minister to be expedient;
- (c) may provide penalties not exceeding those mentioned in section 33 of this Act for any breach of the regulations.

35. Repeal

The Seeds Act (Cap. 326) is hereby repealed.

FIRST SCHEDULE

[Section 7.]

PROCEDURE FOR COMPILING AND AMENDING THE INDEX

1. (1) As a first step in compiling a section of the Index, the Minister shall, after consultation with representatives of such organizations as he deems to have a substantial interest in the matter to be regulated and of such other interests as appear to him to be concerned, cause to be prepared a provisional list of plant varieties which are within the class of plant varieties to which the section of the Index will relate, and the seeds of which are in commercial use as reproductive material.

(2) The Minister shall publish the provisional list in the *Gazette* and in such other manner as appears to him appropriate for ensuring that the persons particularly concerned have their attention drawn to the list, and shall publish with the list a notice giving the necessary information as to the manner in which and time within which applications seeking additions, corrections and erasures may be made.

(3) The Minister may bring a section of the Index into force notwithstanding that the section is incomplete because the Minister has not come to a determination in regard to any particular plant varieties.

2. The Minister may, at any time after a section of the Index comes into force, entertain applications from persons seeking additions, corrections or erasures in that section, and may make such additions, corrections and erasures as may appear to him to be called for notwithstanding that no application has been made in that behalf.

3. (1) If at the time when a name, or more than one name, is being selected for a plant variety for the purposes of the Index, there are one or more names which are for the time being in use for that plant variety, that name, or names from

among those names, shall be preferred unless the Minister is satisfied that there are special circumstances calling for the use of a name or names not so in use.

(2) The Minister may require a person making an application for the inclusion of a plant variety in a provisional list, or in a section of the Index, to submit a name for that plant variety.

(3) If it appears to the Minister that no name in use or submitted to him is suitable, he may refuse to include the plant variety in the Index until a name has been submitted which is, in his opinion, suitable.

4. The Minister may require persons making applications which involve the question whether two or more plant varieties are distinct, to supply information and material for carrying out examinations, trials and tests.

5. (1) The Minister, after consultation with representatives of such interests as appear to him to be concerned, may make regulations—

- (a) governing the form and manner in which applications may be made under this Schedule;
- (b) prescribing the period within which a person making application under this Schedule is to supply material or information in support of his representations;
- (c) prescribing the quantity and kind of material to be so supplied;
- (d) prescribing the manner in which applications are to be made in respect of any matter connected with the alteration of the Index, and for the information to be afforded and the material to be submitted, in connexion with any such application.

(2) Regulations under this paragraph may prescribe the fees to be charged for carrying out examinations, tests and trials and for making searches in the Index.

SECOND SCHEDULE

[Section 16.]

CROSS-POLLINATION INJURING PROTECTED CROPS

1. An application under section 16 seeking the issue of a notice under that section shall be in writing.

2. Before deciding whether to issue a notice in accordance with the application the Minister shall serve a notice on the occupier of the land concerned giving him particulars of the application and informing him of his right to make representations.

3. The Minister shall, if so requested within such time as may be specified in the notice under paragraph 2 of this Schedule, afford to the applicant and to the occupier of the land an opportunity of appearing before and making representations to a person appointed by the Minister for the purpose.

4. In deciding whether to issue a notice in accordance with the application, and in deciding the terms thereof, the Minister shall have regard—

- (a) to the need to maintain, in the interests of the public, the purity of the seed of the protected crop;

- (b) to the degree to which the injurious cross-pollination will or may diminish to the value of the protected crop or disturb arrangements made for the purpose of maintaining the purity of the seeds thereof;
- (c) to the value, if any, of the controlled crops or plants and the inconvenience or disturbance involved in complying with a notice.

THIRD SCHEDULE

[Section 17.]

PROTECTION OF APPLICANT FOR RIGHTS WHILE APPLICATION IS PENDING

1. (1) An applicant for the grant of plant breeder's rights shall, in his application, state whether he is also applying for a direction by the authorized officer under this Schedule in respect of the plant variety to which the application relates.

(2) An applicant applying for a protective direction shall include in the application an undertaking to the effect that, subject to the exceptions in subparagraph (3) of this paragraph in the period between the making of the application and the time when the question whether the application is to be allowed or refused is finally determined (or, if the undertaking is discharged under this Schedule at an earlier time, until that time) no plants of the plant variety, and no material forming part of, or derived from plants of that variety, will be offered or exposed for sale or sold in Kenya by the applicant or with his consent.

(3) An undertaking under this paragraph shall not prevent the applicant from making an offer for sale or sale which in the period before the application would be permitted by subparagraphs (3), (4) or (5) of paragraph 2 of Part II of the Fourth Schedule to this Act, or the exposure for sale of material where an offer for sale of that material would be so permitted.

(4) If the authorized officer is satisfied that the applicant has duly given the undertaking, and that he has furnished that officer with all such information, facilities and material as that officer may require for the purposes of the application for the grant of plant breeder's rights, the officer may, if he thinks fit, give a protective direction.

(5) The authorized officer shall not give a protective direction if there is any evidence before him which tends to show that the applicant, or the person whose successor in title the applicant claims to be, is not the person who bred or discovered the plant variety to which the application relates.

2. (1) While a protective direction is in force, anything which, if the plant breeder's rights to which the application in question relates had been granted, would have constituted an infringement of those rights, or would under subsection (5) of section 21 have been actionable in proceedings by the holder of those rights, may be the subject of proceedings under this paragraph.

(2) Proceedings may be brought under this paragraph, by the applicant in whose favour the protective direction is made, against any person for an injunction requiring that person, while the protective direction is in force, not to do any of the things which may be the subject of proceedings under this paragraph, and the court may, if it thinks fit, grant an injunction accordingly on such terms as appear to the court to be just.

(3) An undertaking not to institute or prosecute proceedings under this paragraph, whether or not any consideration is given for the undertaking, shall be void, and if the authorized officer is satisfied that an applicant in whose favour a protective direction has been given has given any such undertaking, whether or not the undertaking be enforceable at law, he shall withdraw the protective direction.

(4) A protective direction shall cease to be in force when the question whether the application for the grant of plant breeder's rights is to be allowed or refused is finally determined, or at such earlier time as is provided under the provisions of this Schedule.

3. (1) The authorized officer may at any time, if in all the circumstances it appears to him to be just, withdraw a protective direction, and shall do so if he is satisfied that there has been a breach of the undertaking given by the applicant under paragraph 1 of this Schedule.

(2) The undertaking given by an applicant under paragraph 1 to this Schedule shall cease to be binding when the protective direction is withdrawn.

4. (1) If at any time the authorized officer is satisfied that there has been a breach of the undertaking given under paragraph 1 to this Schedule, he may refuse the application for the grant of plant breeder's rights.

(2) If there is a breach of an undertaking given under paragraph 1 to this Schedule, the applicant shall be guilty of an offence.

FOURTH SCHEDULE

[Section 18, L.N. 152/1998, s. 2, Act No. 2 of 2002, Act No. 53 of 2012, s. 26.]

PART I – PRIORITIES BETWEEN APPLICANTS FOR RIGHTS

1. (1) If the plant variety was independently bred or discovered by two or more persons, the first of those persons who makes an application relating to that variety in the form prescribed for the purposes of this Schedule by regulations under section 24 of this Act shall be the person entitled to the grant of plant breeder's rights.

(2) As between two persons making applications on the same date, the one who was first in a position to make a valid application for the grant of plant breeder's right, or would have been first in that position if Part V of this Act and the relevant scheme had always been in force, shall be the person entitled to a grant of plant breeder's rights.

2. (1) For the purposes of paragraph 1 of this Part, an application duly made in a country to which this paragraph applies when the application is made shall be treated as if duly made under this Act if the conditions in this paragraph are satisfied.

(2) No account shall be taken under this paragraph of an application made in a country outside Kenya at a time when the plant variety to which the application relates was not one falling within a species or group prescribed by a scheme as a species or group in respect of which plant breeder's rights may be granted.

(3) Not more than twelve months after the application duly made in that country, the applicant must make his application under this Act in the form prescribed for the purpose by regulations under section 24 of this Act, being a form which includes a claim in respect of the priority of the application in the said country.

(4) Within three months of the application under this Act, a copy of the documents constituting the application in the country, certified as correct by the authority in that country to whom the application is made, must be submitted to the authorized officer.

(5) If applications have been made in more than one country to which this paragraph applies, and have been so made at different dates, the period of twelve months mentioned in subparagraph (3) of this paragraph shall be taken from the earlier or earliest of those applications, and subparagraph (4) of this paragraph shall be construed accordingly.

(6) If priority is established for an application by virtue of this paragraph after a grant of plant breeder's rights have been made in pursuance of an application against which the priority is established, the authorized officer shall cancel that grant.

(7) The Minister may, by notice in the *Gazette*, designate any country or territory as a country to which this paragraph applies, and may from time to time vary or revoke any such order but not so as to prejudice applications already made in Kenya or elsewhere.

3. Regulations under section 24 may provide for the forfeiture of any priority obtained under this Schedule if the person making the application does not, within a period prescribed by the regulations, satisfy all the requirements which are to be satisfied by an applicant before a grant of plant breeder's rights can be made.

PART II – RULES FOR GRANT OF RIGHTS

1. (1) The plant variety must—

- (a) be sufficiently distinguishable by one or more important morphological, physiological or other characteristics from any other variety whose existence is a matter of common knowledge at the time of the application, whatever may have been the origin, artificial or natural, of the initial variation from which it resulted;
- (b) *deleted by L.N. 152/1998, s. 2.*
- (c) be sufficiently uniform or homogenous having regard to the particular features of its sexual reproduction or vegetative propagation;
- (d) be stable in its essential characteristics, that is to say, it may remain true to its description after repeated reproduction or propagation or, where the application prescribes a particular cycle of reproduction or multiplication, at the end of each cycle.

(2) For the purposes of subparagraph (1) of this paragraph, common knowledge may be established by reference to plant varieties already in cultivation or exploited for commercial purposes, or those included in a recognized commercial or botanical reference collection, or those of which there are precise descriptions in any publication.

[L.N. 152/1998, s. 2(b), Act No. 2 of 2002, Sch.]

2. A variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety—

- (a) in Kenya, for a period of more than one year; or
- (b) outside Kenya, for a period more than four years,

Seeds and Plant Varieties

or, in the case of trees or vines, for a period of more than six years.

[L.N. 152/1998, s. 2, Act No. 2 of 2002, Sch., Act No. 53 of 2012, s. 26.]

3. (1) Where an application for the grant of plant breeder's rights is made at a time not later than twelve months after this Part comes into operation, and the applicant does not ask for a protective direction, subparagraphs (1) and (2) of paragraph 2 of this Part shall not apply to an offer for sale or sale in the period beginning six months before this Part comes into operation and ending with that time if the authorized officer is satisfied that the applicant took all steps reasonably open to him to ensure that any person to whom material of the plant variety has been offered or sold during the said period has been informed in writing that an application for a grant of plant breeder's rights may be made in respect of the variety.

(2) Where an application is allowed by virtue of this paragraph, subsection (2) of section 23 of this Act shall not apply to any compulsory licence granted in respect of the plant variety to which the application relates.

FIFTH SCHEDULE

Repealed by Act No. 53 of 2012, s. 27.

SIXTH SCHEDULE

[Section 28, Act No. 53 of 2012, s. 28.]

SEEDS AND PLANTS TRIBUNAL

The Chairman

1. (1) The Minister shall appoint a chairman for the Tribunal who shall be a barrister, a solicitor or a person qualified to be appointed as a judge of the High Court.

(2) The appointment of the chairman shall be for such term as the Minister may specify in the instrument of appointment, and a person who ceases to hold office as chairman shall be eligible for reappointment.

(3) The chairman may at any time resign his office by notice in writing to the Minister.

(4) If the Minister is satisfied that the chairman is unfit to continue in office or is incapable of discharging his duties, he may revoke the appointment of the chairman.

2. In the case of the temporary absence or inability to act of the chairman, the Minister may appoint any other person who is a barrister, a solicitor or an advocate to act as deputy for the chairman, and a person so appointed shall, when so acting, have all the functions of the chairman.

The Panels

3. (1) The Minister shall draw up and from time to time revise—

- (a) a panel of persons who have wide general knowledge in the field of agriculture, horticulture or forestry; and
- (b) a panel of persons who have specialized knowledge of particular species or groups of plants,

and the members of the Tribunal, other than the chairman and deputy chairman shall be selected from those panels in accordance with this Schedule.

(2) The power to revise the panels shall include power to terminate a person's membership of either of them.

Remuneration

4. The Minister may pay to members of the Tribunal such remuneration and such allowances as the Minister may, with the approval of the Treasury, determine.

Procedure

5. (1) The jurisdiction of the Tribunal shall be exercised by three members consisting of the chairman and a member selected from each of the two panels, and references in this Act to the Tribunal shall be construed accordingly.

(2) The member from the panel of those with specialized knowledge shall be selected for his knowledge of the subject matter of a particular case or class or group of cases.

(3) The members of the panels who are to deal with any case shall be selected as follows—

- (a) the Minister may select a member or members to deal with that particular case or class or group of cases; or
- (b) the Minister may select for a class or group of cases members from amongst whom members to deal with any particular case shall be selected by the chairman.

(4) Any decision of the Tribunal shall be taken, in the event of a difference between the members, by the votes of the majority.

(5) If, after the commencement of the hearing of any proceedings before the Tribunal, one of the three members of the Tribunal becomes incapable of continuing to hear the proceedings on account of sickness or for any other reason, the proceedings may, with the consent of all parties thereto, be continued before the remaining two members of the Tribunal and heard and determined accordingly, but if the two members differ in opinion the case shall, on the application of any party to the proceedings, be re-argued before and determined by the Tribunal as ordinarily constituted.

(6) A decision of the Tribunal shall not be questioned on the ground that a member was not validly appointed or selected.

6. (1) The Tribunal, in exercising its statutory jurisdiction, may order any party to the proceedings to pay to any other such party either a specified sum in respect of the costs incurred by the second mentioned party, or the taxed amount of those costs, and any costs required to be taxed for that purpose shall be taxed in the same manner and on the same scale as costs in a subordinate court of the first class.

(2) The Chief Justice may make rules as to the procedure in connection with proceedings before the Tribunal in exercise of its statutory jurisdiction and as to the fees chargeable in respect of those proceedings, and in particular the rules may make provision—

- (a) as to the circumstances in which the Tribunal need not, or shall not, sit in public;
- (b) as to the form of any decision of the Tribunal;

Seeds and Plant Varieties

- (c) as to the time within which such proceedings are to be instituted;
- (d) as to the evidence, and the form thereof, which may be required or admitted;
- (e) as to the examination of the parties and of witnesses;
- (f) as to the procedure for securing the attendance of witnesses and the production of documents.

(3) The chairman of the Tribunal shall have power of administer oaths to witnesses in any proceedings before the Tribunal.

(4) In this paragraph “**statutory jurisdiction**” means any jurisdiction of the Tribunal exercisable by or under this Act or any other written law, except for its jurisdiction in any reference under an arbitration agreement.
