**Attention: Department of Agriculture, Land Reform and Rural Development**

To:
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Dear Angeline, Noluthando and Herman

## Additional comments on Draft PBR and PI Regulations

First, we would like to extend our gratitude to the Department of Agriculture, Land Reform and Rural Development (DALRRD) for having hosted stakeholder consultations in both Pretoria and Cape Town recently, to which the African Centre of Biodiversity (ACB) was invited. Further to this, we are grateful for having been given opportunities in both consultations to make our inputs in both the plenary sessions and breakaway groups.

Second, we are on record, over the years, in regard to engaging with both the Plant Breeders' Rights (PBR) and Plant Improvement (PI) Bills and Acts, as well as the draft Regulations. We have submitted extensive and comprehensive comments already, on the draft regulations, which we attach hereto for ease of reference.

In addition to these, we would like to thank you for another opportunity to submit some further comments, which we do so below, with a focus on the most pertinent issues.

### Exceptions to Breeders' Rights in the PBR Act

At the outset, we point out that the legislators are bound to implement the exceptions already provided for by the PBR Act in section 10, by way of Regulations. The exemptions contemplated in section 10 of the Act are not of a *carte blanche* nature but already expressly limit these exceptions to: categories of farmers who may use propagating material of protected varieties; the category or categories of plants that may be used; and the use to which it may be put. It must be noted that Section 10 does not request the Minister to add an additional restriction to the category or category of plants that may be used, to volumes that may be used for such category or categories of plants, as has been done in the draft Regulations. Such limitation appears thus to be *ultra vires* Section 10.

What the draft Regulations have done is go beyond the remit of Section 10 and provide additional layers of restrictions, thus providing for triple restrictions. In this regard, we vehemently oppose such **triple restriction** – first on farmer category, and then also on which crops the exception applies to, and then also on volumes produced.

During the consultations in both Pretoria and Cape Town, we were taken aback by the zeal expressed by the seed industry to dramatically reduce even the quantity restrictions that have been proposed in the draft Regulations, misplaced as these restrictions are. During these consultation processes and, in particular, the small breakaway groups that focussed on category or category of plants to be exempt, it was not clarified that such quantity restrictions refer only to material that will be used for propagation, rather than the entire harvest. In any event, we oppose restrictions on volumes, as they will undermine the ability of homestead and smallholder farmers to increase their yields and to secure local food security when they crafted the exemptions contemplated in Section 10 of the PBR Act.

In regard to the use to which protected material may be put, while we strongly support exchange, we do not support a restriction on local rural sales, as such use must be permitted, where such sales are of a non-commercial nature. In this regard, non-commercial sales should be defined, and in doing so, regard must be had to the intention of Section 10. Discretion has been created regarding what "use" means in practice, in order to allow the legislators to balance the socio-economic interests of previously disadvantaged farmers with those of the legitimate interests of the breeders. Here, we must point out that the interests of the breeder must be demonstrably compromised and substantially adversely affected for use to be restricted to, for example, the very narrow exemption provided by the International Union for the Protection of New Varieties of Plants (UPOV) 1991, to reuse on the farmer's own holding. In any case, SA is not a Party to UPOV 1991 and is thus only bound legally to implement the provisions of UPOV 1978.

In regard to the category or category of farmers, we reiterate strongly our position that all three categories of farmers should be retained and that these align with the Comprehensive Producer Development Support (CPDS) policy. We cannot stress enough the essential need to retain all three categories, in order to enable the state to support smallholder and homestead producers, who can in turn then stabilise and develop their productive capabilities. We point out that the government has a mandate – as included in multiple laws and policies – and responsibility to facilitate the development of black smallholder farmers. The Regulations should not undermine efforts to build these categories of farmers, and government should be impervious to lobbying by the seed industry that would enable squeezing profits from these previously disadvantaged small-scale producers as well.

Small-scale farmers by definition do not produce huge volumes of seed or crops for that matter. The link to the CPDS policy regarding small-scale or smallholder farmers is turnover. Turnover can be verified from tax submissions and registration on DALRRD farmer databases to allay fears by the seed industry of potential abuse, as commercial enterprises will mostly be registered. It will thus be grossly unfair to impose restrictions on a whole category of farmers simply because there are fears that a handful may escape through the cracks, since what is at stake here is an issue of national importance; namely, the development of black smallholder producers. With regard to PBRA Regulation 5 (3)(a) in reference to "exchange

within their category", we call for free exchange between the three categories, and not restricted to exchange within each category. The latter presents a restriction without any clear objective, and is practically impossible to monitor and enforce.

We would thus propose a re-wording as follows to Regulation 5 (3)(a):

"Any farmer included in sub-regulation 2(a), (b) and (c) who produces protected varieties of any kinds of plants included in the PBRA for saving on their own holdings, sale or exchange within categories in sub-regulation 2(a), (b) and (c)".

We propose the deletion of complicated regulations, such as those of Regulation 5(3)(cc), as it is unknown who will define what "reasonable remuneration" or "amount which is considerably lower" entails. We are in favour of simple and easy-to-read and understand exemptions and urge for the crafting of blanket exceptions for the three farmer categories.

Further to this, we strongly suggest that **Sub-regulation 5 (3) (b) should be totally removed**. We are astounded by the imposition of further difficulties on homestead and smallholder farmers since the category or categories of farmers that Section 10 requires the Minister to prescribe already create a restriction. Further, providing for smallholder farmers as a category, where the turnover is R1 million, is already a restriction and cannot be said to be in contravention of Section 10 of the Act.

In reality, it is indeed highly unlikely that this category of farmers will regularly be saving or exchanging huge volumes of propagating material of protected varieties – and if they exchange re-cycled protected seed outside of the limited categories, what harm will this do? Where it does signify a minute loss to the seed industry, this can and should be viewed as a no-cost subsidy to homestead and smallholder farmers and as a small contribution it can make towards supporting the development of a black smallholder farming class in South Africa.

Further to this, we propose the **outright removal of Regulation 6 on crops** as this imposes multiple restrictions on homestead and smallholder farmers. We are strongly in support of an outright exemption for previously disadvantaged homestead and smallholder farmers, as a contribution to the development of African agriculture.

Rural surveillance is not what is being requested by Section 10 of the Act. It is the mandate of government to facilitate conditions to enable these categories of farmers to expand their operations, and not for the industry to expect that the government should stymie them.

## Plant Improvement Act

### *Exceptions*

We refer specifically here to Section 23 of the PI Act.

Regarding the Regulations of the PI Act, we strongly support Regulation 5(1), as we believe it to be essential to assist smallholder and homestead/subsistence producers to stabilise, strengthen resilience and develop their productive capability. As discussed above, there is a need to maintain an alignment between the definition/inclusion of farmer categories with the CPDS policy.

Regarding Regulation 5(2), we strongly oppose ANY limitation on exemptions for farmers identified in Regulation 5(1)(a) and (b). We do not support the list made for the category of plants for exclusion, as we are of the view that all categories of plants should be exempted. The identification of farmer categories constitutes a restriction on the exemption already, as discussed above. We do not believe that there is a need to add further restrictions, in the form of lists for categories of plants and quantities sold, since these will by definition be limited in terms of the definition of categories of exempted farmers. Even if there are some sales, this will not be at a large commercial level, by definition.

Smallholder farmers should be free to engage in the sale and exchange of all unprotected seeds. Legal provisions to this effect can contribute to meeting the national mandate to support and stimulate homestead and smallholder production for local food security.

Regarding Regulation 5(4), we do not support this provision as we find it to be unduly restrictive unless it is amended to reflect the **"number of trees per variety"** so as not to limit small nurseries and small entrepreneurs to sales of a maximum of 100 trees of any kind per year. If left as it is, this provision can undermine small nursery enterprises.

Regarding Regulation 6 dealing with exempted businesses, we are confronted once again with multiple layers of restrictions concerning small enterprises. Regarding Regulation 6(1)(b), we strongly oppose the triple restriction on small enterprises:

- the first restriction is its relationship with only non-commercial unprotected varieties;
- the second, built into the first restriction is the limitation to some categories of farmers; and
- the third is about maximum quantities allowed to be sold before exemption is cancelled.

We are of the view that one restriction is sufficient; namely, the category of farmers, as it has an already built-in limit as to the quantities that such category of farmers will reasonably possibly sell.

We recommend that a sub-regulation be provided, to exempt any small enterprise from registration requirements based on an annual turnover of R1 million per year or less (aligned with the definition of subsistence and smallholder farmers).

Finally, regarding Chapter V: Registration of varieties**,** we strongly request that provision be made for an alternative system to be developed for the registration of farmers' varieties and that such work should be undertaken in partnerships between the government, farmers, researchers, and other relevant stakeholders. Such a process can constitute tools for the development of a more equitable, biologically diverse, and ecologically sustainable seed and food system.

Thank you once again for this opportunity and I wish you all the best with your onward work.

Kind regards.

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