PGRFA.

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Australian Government

Department of Agriculture, Fisheries and Forestry

Supplementary Submission to the Joint Standing Committee on Treaties

Australian Ratification

International Treaty on Plant Genetic Resources for Food and Agriculture

November 2003

International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty)
Response to Industry Stakeholder Questions

Overview

1. The Australian Government Department of Agriculture, Fisheries and Forestry (the Department) has undertaken additional consultations with the Grains Council of Australia (GCA), Grains Research and Development Corporation (GRDC) and the Seed Industry Association of Australia (SIAA) on the Treaty.

2. These consultations addressed a number of specific questions raised by these three organisations about the Treaty's obligations, including potential costs and benefits for their interests from Australian ratification. Attachment A sets out the questions together with responses.

- A number of questions address operational matters to be implemented through the Treaty's Governing Body[1]. In those instances the response recognises that the views of these three groups would be important in the formulation of an Australian position for Governing Body meetings.

- GRDC contributed analytical work on the Treaty to these discussions[2].

- Drafts of the responses were discussed between the Department and these three industry organisations.

- State and Territory agriculture agencies were provided with the questions and draft responses and an opportunity was provided in September for joint discussions between the three industry organisations and agriculture agencies.

- States and Territories (which are the prime direct users of plant genetic resources covered by the Treaty) recognise the importance of Australia being on the Treaty's Governing Body in order to protect and advance our interests in the new multilateral arrangements for access. In consultations on Australian ratification commitments in support of Australian ratification have been sought and obtained from all States and Territories which also confirm State and Territory interests in participating in the multilateral system.

3. The three industry stakeholders generally support the Treaty's objectives which are the conservation and sustainable utilisation of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits from their use for sustainable agriculture and food security.

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[1] The Governing Body will be the Treaty's primary administrative institution comprised of all countries which have ratified or adopted the Treaty. It will take all its decisions by consensus (unless by consensus it agrees on another approach). This decision making approach ensures the view of each Contracting Party must be taken into account in the Governing Body

[2] It commissioned a study (by an independent expert Professor Don Marshall) which examined potential impacts on the Australian breeding sector under the Treaty. It also organised a series of seminars on the Treaty by an overseas expert (Professor Cary Fowler)

- They also recognise the dynamic nature of the broader international policy and operational environment for access to plant genetic material for plant variety development which has resulted in previous non binding arrangements being superseded by the Treaty.

- However, these stakeholders have some issues with ratification, and associated domestic implementation considerations, as covered through their questions about the Treaty.

4. The significance of the Treaty to Australian plant breeders and growers is that it defines terms of access by Australian plant breeders to world wide collections of plant genetic material in the context of the new global framework for conservation and exchange of plant genetic resources for plant variety improvement required to maintain competitiveness.

- Australian agriculture depends almost entirely on access to overseas sources for the plant genetic material necessary for improvement in new plant varieties. This material is sourced from many different countries and institutions.

- The Treaty differs from existing arrangements for access to plant genetic resources for food and agriculture by providing a legal framework for minimum reciprocal terms of access[3].

- The multilateral system established by the Treaty will cover sources of plant genetic material on which Australian agricultural plant breeders depend for new plant variety development. This will include material contributed by other Contracting Parties as well as material from collections of the International Agricultural Research Centres, the latter of particular significance to Australian growers and breeders.

- If Australia were to be a non party, then Australians would have no direct rights or obligations in relation to the multilateral system.

5. Nothing in the Treaty requires derogation from our existing national interests in its implementation.

- The Treaty does not require legislative change by the Australian Government and can be implemented administratively.

- Treaty secretariat costs are envisaged as being funded by the Australian Government through normal budget processes. No cost recovery is proposed in respect of this contribution.

  Treaty obligations do not change existing rights of industry, such as common law rights or to claim property under existing domestic laws, for example intellectual property rights.

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[3] As set out through the Treaty's provisions for a multilateral system of facilitated access and benefit sharing, which cover general principles as well as more detailed specific obligations for both providers and users of plant genetic material, summarised in the NIA tabled on 9 December 2002

- Australian ratification of the Treaty does not prevent bilateral arrangements or dealings with non Parties.

- Australia has expressed its support for an open and fair system of exchange in plant genetic resources. Australia has made clear that to achieve its objectives, the Treaty must encourage wide participation and that its multilateral system must be implemented in a commercially realistic manner.

6. Potential implications arise for industry interests from the Treaty's entry into force through the operating environment for commercial contracts involving use of plant material subject to terms under the Treaty's multilateral system.

- This means the Treaty could potentially have implications for industry whether or not Australia is a Contracting Party to the Treaty by flow on effects under commercial contracts.

- If Australia is on the Governing Body it would be able to influence implementation of the multilateral system.

7. Of specific concern to the three industry groups are potential costs from the Treaty's benefit sharing obligation in contracts. These are limited. The obligation would arise only in those circumstances when commercialising new plant varieties incorporating material from the Treaty's multilateral system and when that new commercialised variety is not made available for ongoing research and development.

- The study commissioned by GRDC as part of the consultations concluded that there would be minimal domestic impact from such commercial benefit sharing arrangements because new commercial plant varieties in Australia are generally available for ongoing research and development and would therefore not be liable for any payment.

8. Closely related to the concerns of these three groups on operational arrangements for implementation of the multilateral system are some issues related to domestic management of plant genetic resource centres. These centres are the prime vehicle for bringing plant genetic material into Australia, distributing this to breeders and conserving material for later use.

- The discussions with the three groups reflected the diverse views among Australian agriculture interests on the roles and responsibilities of such Australian centres in the context of changing commercial structures for plant breeding and commercialisation.

- Governments involved in managing centres recognise there is a distinct set of issues involving their reform in response to the changed environment in plant breeding and commercialisation. Reform of the centres is not required for domestic implementation of the Treaty. The Treaty does not prevent Australia undertaking such reforms.

9. The Department notes the Treaty provides for close cooperation with other international institutions and organisations involved in plant genetic resources for food and agriculture, including with institutions and organisations in which Australian

industry and governments already have interests. The Treaty is therefore likely to have broader implications for Australian interests in plant genetic resources for food and agriculture in the new global environment for cooperation and exchange.

- The Treaty is the only multilateral agreement dealing specifically with conservation, sustainable use and exchange of plant genetic resources for food and agriculture.

- The policies and programs adopted through the Treaty's Governing Body to achieve its objectives are likely to have an influential role in defining global exchange, conservation and use policies arising in other international organisations involved in plant genetic resources for food and agriculture, including those with which industry groups such as GRDC are involved in breeding and conservation activities.

- Australian participation in the Treaty's Governing Body would enable Australia to progress its interests in an integrated and strategic manner consistent with its interests across the range of international fora in which we have interests in plant genetic resources for food and agriculture.

10. The Australian Government is committed to developing Australian positions on matters to be addressed through the Treaty's Governing Body in consultation with all stakeholders.

- Of note, some of these, such as operational arrangements for the standard material transfer agreement (to underpin exchanges of plant genetic material under the Treaty's multilateral system), will require careful consideration of their commercial practicality.

Attachment A

International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty)
Industry Stakeholder Questions - Responses by the Department of Agriculture Fisheries and Forestry

1 Funding

(i) Who will pay for the administration of the Treaty (including costs of membership and meeting Treaty obligations within Australia) and what are those costs for governments, farmers and the seed industry?

(a) Treaty Membership costs

There are no mandatory international membership costs as such, but there are likely to be costs associated with the Secretariat. The Secretary will be appointed by the United Nations Food and Agriculture Organization (FAO) with approval of the Governing Body. The Australian Government currently funds Australia's membership of the FAO. The Australian Government intends meeting its share of future secretariat costs in the context of its funding and membership of international institutions. On the basis of the cost of similar international secretariat arrangements, the Department estimates Australia's share of such secretariat costs could be of the order of $250,000 pa.

(b) Domestic implementation costs

The Treaty builds on existing activities in plant genetic resource use, conservation and exchange. While there will be some domestic implementation costs, they will mainly be based on existing Australian activities in plant genetic resources for food and agriculture. Existing Australian activities in conservation and sustainable utilisation of plant genetic resources for food and agriculture meet our obligations under the Treaty.

The Treaty does not require legislative change by the Australian Government and can be implemented administratively.[1] Australia has considerable flexibilities in implementation of activities under the Treaty.

Implementation costs can broadly be categorised as being of a 'general nature' to cover the range of issues to be addressed through the Treaty's Governing Body (which will mainly involve governments) and those of a 'commercial nature' arising from being a party to the standard material transfer agreement under the Treaty.

Costs of a 'general nature' will mainly relate to Australia's role on the Governing Body and any associated subgroups. New regulatory measures to recover costs of participation in the Governing Body are not being proposed with ratification. It is intended that costs of a general nature would be a normal part of government agency running costs, funded through budget processes. They would cover staffing and travel costs associated, as appropriate, with developing, representing and implementing decisions on matters arising through the Treaty's Governing Body. There may be some

[1] This would cover procedures to make material covered by the Treaty's multilateral system available in accordance with the standard material transfer agreement and would take into account relevant considerations arising from policy commitments from States and Territories.

administrative costs for stakeholders from any involvement they have in participating in the development of Australia's positions for Governing Body meetings.

The second type of implementation cost arising is that of a 'commercial nature' which will be associated with the adoption and use of the standard material transfer agreement to underpin the multilateral system. The standard material transfer agreement is envisaged as a commercial contract between two commercial interests. The Treaty defines the minimum terms which must be contained in this standard material transfer agreement. The Treaty does not establish a regulatory mechanism for its use or enforcement.[2]

The use of a material transfer agreement is not a new concept or mechanism for industry in accessing and using plant genetic resources. Australia has stated throughout the negotiations that the standard material transfer agreement will need to be implemented in a commercially realistic manner.

There is nothing in the Treaty which requires commercial interests to change their approach to use of commercial contracts, beyond factoring in conditions contained in the standard material transfer agreement if they use material subject to its terms. Nor does the Treaty interfere with the capacity of commercial interests to enter into commercial arrangements different from the standard material transfer agreement if both mutually agree.

While there may be a cost of putting in place a standard material transfer agreement, there may also be administrative and implementation savings if a standard form of contract such as the standard material transfer agreement enters into common use. It will be important that industry contributes its views (including potential cost implications of any proposed arrangements) in the course of developing Australia's position on the standard material transfer agreement.

(ii) What role will monetary benefit sharing under the multilateral system have in paying for the Treaty and how will it be set?

Monetary benefit sharing is one of a number of sources of funds which has been identified in the Treaty's funding strategy (Article 18) to implement the Treaty's objectives.

Monetary benefit sharing will be required in some instances under the terms of the standard material transfer agreement. The detail of this obligation is defined through specific provisions in the Treaty, namely Article 13.2 (d) (ii) and Article 12.4 [3]. One of the aims of the Treaty is to promote the use and further development of plant genetic resources for food and agriculture. The Treaty requires a monetary payment if new

[2] The Treaty states that disputes under such agreements are exclusive to the parties to the contract. Contracting Parties need to ensure they have measures in place in accordance with applicable jurisdictional requirements to enable such contractual disputes to be resolved, for example, in Australia contractual disputes may be resolved through contract law. The general compliance provision under the Treaty (Article 21) envisages measures to promote compliance.

[3] Article 12.4 brings together the various specific obligations which must be contained in the standard material transfer agreement. This includes a reference to the specific monetary benefit sharing obligation of Article 13.2 (d) (ii)

commercial plant material is developed from material in the multilateral system without allowing others access to the new variety for research and development.

The role it will have in paying for the Treaty will be determined through the Governing Body in the context of its considerations on budget, plans and programs and funding (Article 19.3).

(iii) What is meant by 'in line with commercial practice' and how will industry views be taken into account?

The term 'commercial practice' qualifies the mandatory monetary benefit sharing obligation (namely Article 13.2 (d) (ii)) of the standard material transfer agreement so that the obligation must be consistent with commercial and market realities in its implementation. This will be defined through further negotiations in the Treaty's Governing Body when implementing the monetary benefit sharing obligation in the standard material transfer agreement.

In developing Australia's position on the standard material transfer agreement (including the monetary benefit sharing obligation) it will be essential that domestic stakeholders (including industry, researchers and State and Territory interests) contribute their views if the arrangements under the Treaty are to be consistent with their interests and their interpretation of 'commercial practice'. If Australia is on the Governing Body it can influence the Governing Body's approach to 'commercial practice', including in respect of industry views.

(iv) Will there be a commercial cost from benefit sharing flowing through to growers in terms of the price they pay for seed?

Monetary benefit sharing under the Treaty is prescribed as a condition of the standard material transfer agreement and would apply in certain circumstances, notably when new varieties are not made available for further research and development.

The Treaty does not interfere with how seed suppliers set the prices for the seed they sell. The cost of seed for new varieties to farmers is determined by seed suppliers. How seed suppliers factor in any benefit sharing requirements from the Treaty will be part of their normal commercial operations.

Farmers uptake of new varieties is a commercial decision for the farming business.

(v) Under what head of power would any funds be collected under the monetary benefit sharing obligation of the standard material transfer agreement and who will meet the costs of the collection of funds and policing of compliance?

This question needs to be considered in the overall context of implementation for the standard material transfer agreement. Based on current commercial practice, there are likely to be only limited circumstances when such a payment might be required.

It is likely that any payments would be made directly by users of the multilateral system into the central fund to be established by the Governing Body for the purpose of receiving funds. For example, where the Government is a commercial party, it is

envisaged it would collect and pay benefits similar to the way it would collect and pay royalties.

The role, if any, of government beyond that of being a commercial party to the standard material transfer agreement (as opposed to a regulator) would be determined as part of Australia's position. This position would be developed in consultation with Australian stakeholders.

The Treaty does not prescribe that governments have to be directly involved in collecting funds and policing compliance of monetary benefit sharing arrangements in those circumstances where it is not a commercial party to the standard material transfer agreement. We do not envisage Australia promoting arrangements for implementation of the Treaty which would involve the government taking on such a regulatory role.

2 Compliance

(i) How will compliance with the Treaty be achieved and will this involve new measures? What will compliance cover and who will be involved in ensuring compliance?

These questions need to be considered in the overall context of achieving the Treaty's objectives.

The Treaty gives the Governing Body the task of elaborating compliance arrangements (Article 21). The operational detail will be developed through further work, and will need to address the following:

- what, if any, institutional structure might be necessary, and the nature of this structure;
- the mechanisms to trigger compliance, including who triggers compliance; and
- the scope of activities.

Australia has taken the position that the approach to compliance under the Treaty should:

- promote and encourage wide participation in the Treaty; and
- be practical, cost effective, non mandatory and non punitive.

That is, we consider the emphasis would be to implement positive measures to help countries comply, rather than adopting punitive measures which could act counter to the Treaty's objectives.

Interim activities preparing for the Treaty's entry into force envisage country submissions on compliance being submitted to the Director General of the FAO. These would be compiled into a reference document for the consideration of all countries and a basis for eventual implementation of compliance. Australia is considering making a submission and will undertake consultations with Australian stakeholders on its content.

(ii) What will happen if the private sector does not make its material available to the multilateral system? Could it be compelled, for example within 2 years of entry into force when an assessment review of this question is required under Article 11.4 ?

The measures the Governing Body might take at a future date in relation to the inclusion of private sector material in the multilateral system will be determined on the basis of relevant information at that time and the scope of the Treaty's obligations. While Article 11 anticipates the Governing Body reviewing certain matters, it cannot compel the private sector to make available its material to the multilateral system. We do not envisage Australia agreeing to a position involving an amendment of the Treaty to compel the private sector to make its material available to the multilateral system nor to decision that would block private sector access to the multilateral system if they did not contribute their material.

(iii) Is there a risk that even PGR made available for further research and development, e.g commercially protected cultivars such as those covered by Australian PBR, will trigger benefit-sharing payments ? The assessment review "within 5 years" foreshadowed by Article 13.2(d)(ii) points to such a risk.

Australia would not support implementation of future benefit sharing arrangements, (such as in respect of materials registered under plant breeder's rights legislation), if proposed arrangements were considered to be contrary to Australian interests.

Given the five year time frame envisaged for review, the Governing Body will have an opportunity to address this issue in the light of circumstances at the time, including experience with the operation of the Treaty since its entry into force. A key objective of the Treaty is the ongoing availability of plant genetic resources material for research and development. Any subsequent proposals for measures on benefit sharing will have to take into account implications under plant breeder's rights regimes and could not undermine the exercise of the breeder's right under relevant domestic and international law.

(iv) How will compliance co-exist with Australian common law and will compliance interfere with business?

The Treaty does not impede the capacity of business to enter into common law arrangements (such as contracts) for access. Australian common law rights are not affected by the Treaty.

3 Implementation

(i) Will legislative change be required to implement the Treaty in Australia?

No, the Treaty does not require legislative change by the Australian Government and can be implemented administratively. Upon entry into force for Australia, the Australian Government (as Contracting Party) would make that material under its management and control and in the public domain available in accordance with the terms to apply under the standard material transfer agreement.

(ii) Are there implications for intellectual property legislation and protection in Australia?

There are no direct implications for intellectual property legislation in Australia. Intellectual property related matters will however arise during the course of international

implementation of the Treaty, especially in respect of the standard material transfer agreement.

Intellectual property considerations were contentious during the Treaty negotiations. Australia's position on intellectual property is on the Treaty negotiating record. It made clear that the treatment of intellectual property under the Treaty must respect domestic intellectual property laws and international agreements.

The Treaty enables Australia to protect its interests in intellectual property.

- The Treaty's multilateral system of facilitated access and benefit sharing provides that access to material protected by intellectual property or other rights has to respect and be consistent with applicable national laws and international agreements.

- The preamble to the Treaty states that 'nothing in the Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements'.

As a member of the Treaty's Governing Body Australia would be able to ensure (in line with the position on the negotiating record) that the Treaty implementation arrangements do not operate to restrict Australia's capacity to implement domestic intellectual property policy under domestic laws and international agreements. It would be inappropriate for the Treaty's Governing Body to have any role or oversighting responsibilities in matters relating to the protection or grant of intellectual property rights whether under domestic laws or international agreements.

Australia's approach will be developed in the light of all relevant considerations in the context of implementation of the Treaty.

(iii) What Australian material will be included in the multilateral system? Will it include State/Territory collections, material held by universities and in situ material? With reference to Articles 11.2-11.4 how does the Australian Government as the 'contracting party' interpret its obligations under these articles, and can the Government define its definition of 'other holders of plant genetic resources for food and agriculture' in Australia?

The Treaty defines the obligation to contribute material to the multilateral system in a manner which protects and does not undermine the exercise of property rights over material.

In Australia's case, the Australian Government, as Contracting Party, will be the only holder of material required to commit resources. The Australian Government will be required to commit resources over which it has direct management and control and which are in the public domain (Article 11.2).

The Treaty does not compel 'other holders' but encourages them to contribute material and leaves it to their discretion to include material. 'Other holders' in the Australian context would cover all/any holder of plant genetic resources for food and agriculture, including States, Territories, universities and private sectors. The Treaty does not automatically include resources found *in situ.*

As a member of the Treaty, any legal or natural person in Australia would have rights to access material covered by the multilateral system of facilitated access and benefit sharing established by the Treaty. If the Australian Government did not ratify the Treaty, Australians would have no direct rights or obligations in relation to the multilateral system.

(iv) *What is the role of Australian genetic resource centres in implementing the Treaty and what are the effects on their operational procedures, staffing requirements and costs? What Commonwealth and State government support will be given to Australian genetic resource centres to enable them to implement the Treaty's requirements?*

In consultations on Australian ratification commitments in support of Australian ratification have been sought and obtained from all States and Territories which also confirm State and Territory interests in participating in the multilateral system. These commitments recognise that the Treaty can be implemented administratively.

States and Territories are potentially users (in breeding programs) and providers of material covered by the multilateral system. In most instances, their interests in the Treaty and multilateral system involve legal and policy considerations which may not impinge directly on the day to day functions of genetic resource centres. For example negotiation and enforcement of contracts is usually not undertaken by managers of plant genetic resource centres, but by commercial managers.

The extent to which genetic resource centres would be directly involved in implementing Treaty interests will depend on the nature of administrative arrangements within each jurisdiction and the nature of its interests in the Treaty. For example, in most jurisdictions negotiation and enforcement of material transfer agreements is undertaken by contract managers, whose administrative roles and functions are distinct from plant genetic resource centres. As already indicated above there is nothing in the Treaty which requires a change to the manner in which jurisdictions chose to enforce commercial contracts. The Treaty does not establish any requirements for tracking. Australia's general position is that arrangements for implementation of the standard material transfer agreement need to be simple and cost effective and encourage participation in the multilateral system.

The Treaty does not require any jurisdiction in Australia to make available new funds or to undertake new activities in conserving or managing plant genetic resources.

There are ongoing discussions with States and Territories which are addressing their interests and implementation arrangements. While concerns have been expressed by some agricultural interests about the future roles and responsibilities of Australian plant genetic resource centres more generally, this is an issue which is independent of Australian ratification of the Treaty.

(v) *Is overseas-sourced material currently held by Australian centres regarded as being held in trust for eg the IARCs and, if so, will it become part of the multilateral system (and therefore subject to the benefit sharing provisions)?*

Any material sourced from other countries held in Australian collections at the time the Treaty enters into force for Australia, will only come within the scope of the multilateral system if it meets the criteria for their inclusion. When an IARC provides material it does so under a bilateral material transfer agreement between it and the recipient. Material in, for example, state collections sourced from IARCs remains subject to the terms on which it was obtained and the Treaty does not override this.

The Treaty foresees that in trust material held by IARCs will also be made available to the multilateral system in accordance with agreements between the IARCs and the Treaty's Governing Body. Such an agreement could not be retrospective. If Australia ratifies the Treaty it will have a say in the arrangements between the IARCs and the Treaty's governing body to give effect to the operational details for the multilateral system, including in relation to material designated as being in trust.

(vi) Will the Treaty impact on industry investment (including arrangements such as the Grains Research Development Corporation (GRDC) sponsored consortia) and will the Treaty affect how they operate?

The Treaty's provisions will not impede the capacity of industry to enter into arrangements such as the GRDC sponsored consortia or any other investment arrangements. If industry uses material subject to terms of the standard material transfer agreement it will need to factor those conditions into commercial transactions and contracts, similar to its current commercial dealings.

(vii) What requirements will plant breeders face in commercialising new plant products incorporating material obtained from the multilateral system?

If plant breeders commercialise new plant products incorporating material obtained from the multilateral system they will need to factor in such contract conditions which may be required under the terms they obtained plant material during the development process. Material transfer agreements, such as those envisaged in the Treaty, already underpin many exchanges of plant genetic resources and are not a new concept.

Article 12.4 of the Treaty specifies the conditions which would apply to material obtained under the standard material transfer agreement from the multilateral system. Such conditions may flow through to the commercialisation stage and in particular the requirement for a monetary payment if the commercialised product is not available for ongoing research and development.

(viii) What constitutes commercial triggering of benefit sharing? What is meant by 'incorporation' of material under the multilateral system? What is meant by 'accessibility and freedom to use for further research"? What will the level, form and method of payment of benefit sharing be under the MTA? How will the MTA be binding under the parties in contract?

These questions are closely related to matters to be addressed in the operational detail for the standard material transfer agreement, which will be settled by the Governing Body.

The first four questions primarily arise in the context of Article 13.2(d)(ii) of the Treaty which concerns the mandatory monetary benefit sharing obligation in the standard

material transfer agreement which would only arise in certain circumstances. This payment would only be triggered when a new plant product is commercialised which incorporates material from the multilateral system and that new plant product is not available for ongoing research and development. This payment would currently only apply to a very small proportion of transfers.

On the fifth question, the Treaty envisages the standard MTA would be legally enforceable in accordance with applicable jurisdictional requirements, but does not specify the nature of such requirements. For example, for contracts to be legally enforceable in Australia a governing law provision in the contract is important.

Stakeholder views on all aspects of the standard material transfer agreement (which includes the five questions related to monetary benefit sharing) will be important in shaping Australia's position on implementing the standard material transfer agreement. We note the International Seed Federation (of which the SIAA is a member) has developed a position paper on matters raised through these five questions which will be taken into account in developing Australia's position on the implementation detail of the monetary benefit sharing obligation.

(ix) Will there be any impact on contracts? Will existing contracts be affected?

There is nothing in the Treaty impeding the capacity of legal and natural persons to continue to exercise their rights to enter into commercial transactions in accordance with relevant domestic laws and any other relevant international agreements. Normal commercial arrangements and contracts existing at the time of the Treaty's entry into force will not be affected.

(x) Will the terms of the standard material transfer agreement also apply to Australian researchers if Australia is not a party?

It is important to clarify and distinguish between rights and obligations involving Contracting Parties (that is the Australian Government) and parties to commercial agreements (such as natural and legal persons under the jurisdiction of a Contracting Party) in matters involving use of the multilateral system.

The legal framework of the Treaty applies only to Contracting Parties to the Treaty. Australian researchers would have a legal guarantee of access on the terms in the standard material transfer agreement if Australia is a Contracting Party. If Australia were to be a non party, then Australians would have no direct rights or obligations in relation to the multilateral system. In particular they have no rights or obligations in respect of access on the terms of the standard material transfer agreement.

There could be indirect consequences for Australian interests arising from international use of the standard material transfer agreement. If Australian industry uses material subject to contractual arrangements arising from the standard material transfer agreement they will need to factor this into their commercial transactions. Depending on how the Governing Body settles terms for third party commercial transfers under the standard material transfer agreement and arrangements with the IARCs, it is possible Australian commercial interests could be affected whether or not Australia has ratified the Treaty. By ratification of the Treaty Australia will be in a position to influence the Governing Body's consideration of issues affecting our national interests.

(xi) Will IARCs want to track germ plasm they have provided and will this cause difficulties for material transfer agreements?

The multilateral system does not envisage tracking (article 12.3(b)).

It is up to IARCs to determine if they want to track germplasm they have provided. The Treaty does not require IARCs to track material provided, but places certain obligations on those IARCs which sign agreements with the Governing Body in respect of MTAs. These requirements include reporting of MTAs entered into and taking appropriate measures, in accordance with their capacity, to maintain effective compliance with the conditions of the MTA (article 15.2 b).

4 Other

(i) What is the rationale/necessity for Treaty status to replace cooperative non binding arrangements?

There are many new policy and technological influences in the global environment in which agricultural industries operate and by which countries exchange biological material. The Treaty's legal framework clarifies the policy basis for international cooperation in plant genetic resources for food and agriculture in the new global environment, in particular through reciprocal rights for access and benefit sharing under the Treaty's multilateral system.

The Treaty will cover sources of plant genetic material on which Australian agricultural plant breeders depend for new plant variety development. These sources will include other Contracting Parties as well as collections of the International Agricultural Research Centres, the latter of particular significance to Australian interests. The international competitiveness of our food and agriculture sector depends heavily on a steady flow of plant breeding improvements. To be able to deliver these improvements, plant breeders must have access to plant genetic material which, for virtually all our commercial agricultural crops, need to be sourced from overseas.

(ii) What happens to the Undertaking, is it voided by the Treaty?

A binding agreement takes precedence over non binding arrangements. There is nothing in the Treaty to specifically terminate the non binding International Undertaking on Plant Genetic Resources. The FAO Conference resolution adopting the text of the Treaty (FAO Conference Resolution 3/2001) recognises the revision of the Undertaking to harmonise it with the Convention on Biological Diversity would take the form of a legally binding instrument.

(iii) Do natural and legal persons have a say in the Governing Body?

Only Contracting Parties will be members of the Governing Body (Article 19.1) and each Contracting Party will have one vote (Article 19.4). Article 27 makes clear that only sovereign states may accede to the Treaty. Therefore natural and legal persons will not have a direct say in the Governing Body. It is possible for natural and legal persons views to be reflected in the contracting party's position for the Governing Body. For

example, the Australian Government would take into account domestic stakeholder views in developing Australian positions for the Treaty's Governing Body.

(iv) Do non parties have a say in the Governing Body?

Only Contracting parties may be members of the Governing Body. The Treaty deals with non Parties to the extent that "The Contracting Parties shall encourage any Member of FAO or other State, not a Contracting Party to this Treaty, to accept this Treaty" (Article 31). The Treaty's guarantee of minimum reciprocal rights of facilitated access and benefit sharing is available only to Parties and does not extend to non Parties.

(v) Can individual IARCs withdraw if they are not happy with the multilateral system?

There is nothing in the Treaty which specifies a particular response by the IARCs if they are not happy with the multilateral system. The IARCs are invited to sign agreements with the Treaty's Governing Body in accordance with provisions of Article 15. The Treaty's Governing Body would determine the operational detail of arrangements between the IARCs and the Governing Body, including any withdrawal and termination considerations.

(vi) What are the attitudes to the Treaty of the countries that are the main sources (from the public domain) of genetic material for Australia?

Australian researchers need access to material from a wide range of countries and IARCs according to industry development needs. Such access needs vary over time. Important sources of plant genetic material for Australian interests include countries which have signed the Treaty and some which have already ratified. They include diverse countries such as the United States, Colombia, Chile, Turkey, Thailand and Cyprus which have signed the Treaty and countries which have already ratified such as India, Canada, Ethiopia and Sudan.

(vii) What are the 'disbenefits' to Australia of not ratifying the Treaty?

The disbenefits to Australia of not ratifying the Treaty are that:

- we would have no say in the decisions of the Governing Body, and in particular the operational terms to implement the Treaty's multilateral system;
- we would not have legal rights of facilitated access to plant genetic material covered by the Treaty's multilateral system; and
- the wrong signals might be sent to the international community about Australian interests and commitments in plant genetic resources for food and agriculture.

Our commitments to a fair and equitable system of exchange under the Treaty, and our views on making the Treaty workable, have been placed on the negotiating record and reiterated when signing the Treaty. Australia is recognised as a country whose agricultural industries depend on an open exchange of plant breeding material, consistent with our interests in promoting a fair and open international trading system, particularly for agricultural products.

(viii) If Australia does not ratify the Treaty, can Australia pursue 'bilateral trade agreements' with countries that have either ratified or not ratified?

Even when the Treaty enters force, it will not prevent either Parties or non Parties from exchanging PGRFA, on mutually agreed terms, outside the ambit of the multilateral system.

5 Timing

What is the best information available on when an initial meeting of the Expert Group will be held, the expected time between finalising the Group's reports and convening the Interim Committee to consider them, and between the Interim Committee and a first meeting of the Governing Body.

The FAO's Commission on Genetic resources for Food and Agriculture (CGRFA) contemplated only one meeting of a regionally representative expert group to discuss the standard material transfer agreement under the Treaty. To date no funds are available and no meeting timetable is foreshadowed.

There is no legal requirement for further meetings of the Treaty's Interim Committee, or for any other planned activities, before a first meeting of the Treaty's Governing Body. Depending on progress in ratifications, it is possible the Treaty could enter into force and the next meeting is a first meeting of its Governing Body. Such a meeting could occur 90 days after the Treaty's entry into force. The 2001 Ministerial Conference, in Resolution 3/2001, called for meetings relating to the Treaty, including its Governing Body, to be held back to back with meetings of the FAO's CGRFA as far as practical. The next CGRFA meeting is planned for the second half of 2004.