



**CPVO**

Community Plant Variety Office

**CPVO BOARD OF APPEAL DECISION DATED 12 JANUARY 2024 IN  
JOINED PROCEEDINGS REGARDING:**

**Case No. A019/2021 regarding Community Plant Variety Right Title No. 1640  
(Variety denomination 'Cripps Pink', Species 'Malus domestica Borkh')**

**and**

**Case No. A020/2021 regarding Community Plant Variety Right Title No. 3425  
(Variety denomination 'Cripps Red', Species 'Malus domestica Borkh')**

**Concerning appeals lodged by:**

Teak Enterprises Pty Limited  
10, Louise Close  
Bunbury, WA 6230  
AUSTRALIA

**Appellant**

Represented by:  
Mr Roberto Manno  
Avv. Roberto Manno  
Via Geremia di Scanno 65  
70051 Barletta (BT)  
ITALY

**Against decisions of:**

Community Plant Variety Office  
3 Boulevard Maréchal Foch  
49000 Angers  
FRANCE

**CPVO**

Represented by:  
Ms Montserrat García-Moncó Fuente and others

**With the intervention of:**

Western Australian Agriculture Authority ("WAAA")  
3 Baron Hay Court  
South Perth, WA 6151  
AUSTRALIA

**Intervener**

Represented by:  
Mr Thomas Bouvet  
Jones Day LLP  
2, Rue Saint Florentin  
75001 Paris  
FRANCE

On 16 July 2021, Teak Enterprises Pty Limited (hereinafter: the “Appellant”) lodged with the Registry of the CPVO Board of Appeal (hereinafter: the “Registry”) two Notices of Appeal concerning decisions adopted by the Community Plant Variety Office (hereinafter: the “Office” or “CPVO”) as regards nullity proceedings and two separate Community plant variety rights (“PVRs”), namely: (1) Title No. 1640, variety denomination ‘Cripps Pink’, species *Malus domestica* Borkh (hereinafter: “Cripps Pink” or “Pink Lady”), and (2) Title No. 3425, variety denomination ‘Cripps Red’, species *Malus domestica* Borkh (hereinafter: “Cripps Red” or “Sundowner”).

The CPVO Board of Appeal, composed of Mr Marcus Navin-Jones as Alternate Chairperson, Mr Paul de Heij as the Legally Qualified Member, and Mr Axel Metzger as the additional Legally Qualified Member, gives the following Decision:

## **I. Form of Action Sought**

1. The Appellant requests, as clarified at the Oral Hearing, the Board of Appeal to, amongst other things:
  - (i) Set aside and annul the CPVO decisions not to open nullity proceedings, and/or
  - (ii) Order and declare the PVRs as null and void.
2. The CPVO, together with the Intervener, contend that the appeal is not well founded and should be dismissed.
3. As regards the Appellant’s request for the Board of Appeal to declare the PVRs as null and void (paragraph [1(ii)] above), the CPVO and the Intervener contend that the powers of this Board of Appeal are limited such that, in these cases, the Board of Appeal is only able to review the CPVO’s decisions as to whether the nullity proceedings should be opened, and cannot declare the PVRs as null and void at this stage. The CPVO asserts that these requests are outside the scope of these appeal proceedings. The Intervener asserts that the Appellant’s requests in this regard are inadmissible.

## **II. Summary of the Facts**

4. On 29 August 1995, WAAA submitted two applications to the CPVO for PVRs concerning the species *Malus domestica* Borkh. The first application concerned the proposed variety denomination ‘Cripps Pink’. The second application concerned the proposed variety denomination ‘Cripps Red’.
5. On 15 January 1997, the CPVO granted WAAA a PVR for the variety Cripps Pink (“Pink Lady PVR”). On 7 September 1998, the CPVO granted WAAA a PVR for the variety Cripps Red (“Sundowner PVR”).
6. On 15 December 1998, the details of the Pink Lady PVR and the Sundowner PVR (“the PVRs”) were published in the Gazette.
7. On 21 December 2020, following the rectification of certain issues, the Appellant submitted two petitions to the CPVO. The first petition requested the Pink Lady PVR be declared null and void pursuant to Article 20 of Council Regulation (EC) No 2100/94 (“Basic Regulation”). The second petition requested the Sundowner PVR be declared null and void pursuant to Article 20 of the Basic Regulation. In addition, the Appellant submitted, in each case, Exhibits 1-25.
8. On 17 May 2021, the CPVO adopted two separate decisions regarding the Pink Lady PVR and Sundowner PVR respectively, namely CPVO Decision NN 26 (“CPVO Pink Lady Decision”) and NN 27 (“CPVO Sundowner Decision”). Both decisions concluded, amongst other things, that: “On the basis of all the above considerations, the Office considers that the conditions laid down in Article 53a of the Commission Regulation (EC) No 874/2009, required in order to open nullity proceedings, are not met. Accordingly, the Office decides not to declare the variety [‘Cripps Pink’][‘Cripps Red’] null and void pursuant to Article 20(1)(a) of Council Regulation (EC) no. 2100/94.” (See paragraphs 95 and 96 of the CPVO Pink Lady Decision, and paragraphs 87 and 88 of the CPVO Sundowner Decision).



### **III. Procedure before the Board of Appeal**

9. On 16 July 2021, the Appellant lodged with the Registry, two Notices of Appeal concerning the CPVO Pink Lady Decision and the CPVO Sundowner Decision respectively.
  10. On 25 August 2021, WAAA informed the Registry of its intent to participate in the appeal proceedings concerning Case A019/2021 (Pink Lady) and Case A020/2021 (Sundowner).
  11. On 24 September 2021, the Appellant submitted to the Registry its Grounds of Appeal in Case A019/2021 (Pink Lady) and in Case A020/2021 (Sundowner). In addition, the Appellant submitted, in each case, its Exhibits 1-25 and, in addition, its Exhibits 26a, 26b, 27a, 27b, 28, 29 and 30.
  12. On 30 September 2021, Case A019/2021 (Pink Lady) and Case A020/2021 (Sundowner) were procedurally joined and the same composition of Board of Appeal members appointed to decide on both cases.
  13. On 15 October 2021, details of Board of Appeal Case A019/2021 (Pink Lady) and Board of Appeal Case A020/2021 (Sundowner) were published in the Gazette.
  14. On 13 July 2022, the CPVO submitted to the Registry its first observations on the Appellant's Notices of Appeal and Grounds of Appeal. In its pleas and submissions, the CPVO asserts that certain documents lodged by the Appellant in these appeal proceedings (specifically Exhibits 27a, 27b, and 28), should be declared as inadmissible and not considered by the Board of Appeal in either Case A019/2021 or Case A020/2021.
  15. On the same date, i.e. 13 July 2022, the Intervener submitted to the Registry its first observations on the Appellant's Notices of Appeal and Grounds of Appeal. In addition, the Intervener submitted, in each case, its Exhibits 1.1 to 1.6, 2.1 to 2.16, 3.1 to 3.12 and 4.1.
  16. On 26 January 2023, the Appellant submitted its reply observations to the Registry responding to the first observations of both the CPVO and WAAA. The Appellant also submitted its Exhibit 31.
  17. On 6 April 2023, the CPVO submitted its rejoinder observations to the Registry of the CPVO Board of Appeal. In its pleas and submissions, the CPVO asserts that Exhibit 31 should be declared as inadmissible and not considered by the Board of Appeal in either Case A019/2021 or Case A020/2021. In addition to submitting its rejoinder observations, the CPVO submitted to the Board of Appeal its Exhibits 1 to 3 in Case A019/2021 (Pink Lady).
  18. On the same date, i.e. on 6 April 2023, WAAA submitted its rejoinder observations to the Registry of the CPVO Board of Appeal.
  19. On 19 June 2023, the Intervener requested the Board of Appeal to convene an oral hearing. On 30 June 2023, the Appellant requested the Board of Appeal to convene an oral hearing. On the same date, i.e. 30 June 2023, the CPVO informed the Board of Appeal that the CPVO did not request an oral hearing to be convened.
  20. On 5 September 2023, the CPVO Board of Appeal served on the parties a summons to attend an oral hearing.
  21. On 12 October 2023, the oral hearing was held, following which the oral proceedings were closed.
- ### **IV. Admissibility**
22. The Appellant asserts that the appeals are admissible. The CPVO, together with the Intervener, as confirmed by the CPVO and the Intervener at the Oral Hearing, also take the view that the appeals are admissible.



## Findings of the Board of Appeal

23. The Board of Appeal notes, amongst other things, that both the CPVO Pink Lady Decision and the CPVO Sundowner Decision (“CPVO Decisions”): (1) concern the request to declare the variety rights null and void on the basis of Article 20 of Council Regulation (EC) No 2100/94 (“Basic Regulation”) which are CPVO decisions appealable before this Board of Appeal pursuant to Article 67 and 68 of the Basic Regulation, (2) are final and intended to have binding legal effects as reflected in the express wording of the decisions themselves which state “This decision is subject to appeal in accordance with Article 67 of [the Basic Regulation]”, (3) were addressed and sent to Appellant, and (4) were of direct and individual concern to the Appellant given that the Appellant’s legal situation was affected and the Appellant has certain peculiar attributes, and there were certain circumstances, which differentiated the Appellant from other persons. As stated in the CPVO Decisions themselves, the decisions afforded and enabled the Appellant to bring appeals before this Board of Appeal before certain deadlines. The Appellant has a specific interest in obtaining declarations that the rights are null and void given, amongst other things: (i) the retroactive effect of such declarations, and (ii) the fact that CPVO has, in the past, granted the Appellant a PVR for plant variety PLBAR B1 (Title No. 49206) but which was subsequently declared a variety essentially derived from the Pink Lady variety following a request from the Intervener and Titleholder (decision of 7 December 2020 of the Tribunal judiciaires de Rennes, France, case 20/00293).
24. The Board of Appeal further notes that: (1) the deadlines for lodgment of the Notices of Appeals and the Grounds of Appeal have been respected. The decisions were served on 24 May 2021. The appeals were filed on 16 July 2021 (within two months after service) and the grounds of appeal on 24 September 2021 (within four months after service) – in compliance with Article 69 of the Basic Regulation; (2) the relevant appeal fees have been paid. On 15 July 2021 one third of the appeal was paid, with the remaining part paid on 30 September 2021; and (3) the Notice of Appeal and other relevant documents contain the relevant elements in accordance with, amongst others, Article 45 of Commission Regulation (EC) No 874/2009 (“Implementing Rules Regulation” or “IRR”).
25. Having regard to the above, the Board of Appeal concludes that the appeals are admissible and must be examined in accordance with Article 71(1) of the Basic Regulation.
26. As stated at paragraph [3] above, the Intervener has requested the Board of Appeal to treat a certain part of the Form of Action Sought by the Appellant, as inadmissible. More specifically, the Intervener has requested the Board of Appeal to treat the part of the Appellant’s Form of Action Sought, whereby the Appellant seeks a declaration from the Board of Appeal pronouncing the PVRs in these appeal cases as null and void, as inadmissible. From the outset, the Board of Appeal notes that neither of the main parties in these proceedings have sought this form of action. The CPVO has stated only that this part of the Form of Order Sought should be regarded as outside the scope of the appeals and should be dismissed. The Board of Appeal notes that requests made by intervener parties in proceedings such as the CPVO Board of Appeal proceedings, should generally be limited to supporting the form of order sought by one of the parties (see, by analogy, Article 40, last paragraph, of the Statute of the Court of Justice of the European Union). In any event, the Board of Appeal finds that the Intervener’s request, and the related plea and arguments, regarding this issue are not well founded and must therefore be dismissed. Article 72 of the Basic Regulation provides that: “The Board of Appeal shall decide on the appeal on the basis of the examination carried out pursuant to Article 71. The Board of Appeal may exercise any power which lies within the competence of the Office, or it may remit the case to the competent body of the Office for further action. [...]” (emphasis added). It follows that parties before this Board of Appeal must be entitled to submit requests, pleas and arguments to this Board of Appeal to take any action which is clearly within this Board of Appeal’s legal powers to do so, including, for example, the annulment of CPVO decisions regarding Article 20 of the Basic Regulation (Article 67(1) of the Basic Regulation). The Board of Appeal notes, in this regard, that the scope of the Appellant’s petitions submitted to the CPVO, mentioned at paragraph [7] above, called upon the CPVO to not merely open nullity proceedings but also, and in particular, for the CPVO to declare the Pink Lady PVR and Sundowner PVR as null and void. The Appellant’s request, and the related pleas and arguments, calling upon the Board of Appeal to declare the PVRs as null and void cannot, therefore, be regarded



as inadmissible. As such, the Board of Appeal concludes that the Appellant's request, and its related pleas and arguments, for the Board of Appeal to declare the PVRs as null and void, are admissible.

27. The CPVO has asserted that certain documents provided by the Appellant during these appeal proceedings, in particular documents 27a, 27b, 28 and 31, are inadmissible and cannot be considered by the Board of Appeal. As a preliminary issue, the Board of Appeal recalls that: (1) the CPVO must not take into account documents which have not been provided by the relevant deadlines (Article 53a of the IRR); (2) there is an absence of specified and express rules setting out limits for appellants to provide evidence to this Board of Appeal; and (3) in the absence of procedural provisions, the CPVO is required to apply the principles of procedural law generally recognized in Member States (Article 81 of the Basic Regulation). It is generally recognized in Member States that boards of appeal, such as this Board of Appeal, when deciding appeal cases, are required to undertake a diligent and impartial examination of all matters of fact and law brought to its attention by the relevant parties consistent with, amongst other principles: (a) the principle of sound administration (Article 41 of the Charter of Fundamental Rights of the European Union and, see, by analogy, *max.mobil Telekommunikation Service GmbH v Commission*, Case T-54/99, ECLI:EU:T:2002:20, paragraphs 48-49); and (b) the principle of administrative continuity (see, to that effect, *N.V. Elekriciteits – Produktiemaatschappij Zuid-Nederland EPZ v ECHA*, ECHA Board of Appeal Decision A-001-2010, paragraph 30, 33-35, Case T-308/01, *Henkel KGaA v OHIM*, [2003] ECR II-03253, ECLI:EU:T:2003:241, paragraph 29, Case C-29/05 P, *OHIM v Kaul*, [2007] ECR I-02213, ECLI:EU:C:2007:162, paragraphs 56 and 57). This Board of Appeal further notes that, as regards other EU boards of appeal – in particular the European Chemicals Agency Board of Appeal, “No further evidence may be introduced after the first exchange of written pleadings unless the Board of Appeal decides that the delay in offering the evidence is duly justified” (Article 12(1) of Regulation (EC) No 771/2008). Having regard to the specific facts and circumstances of this case, and having regard to the fact that the CPVO itself has provided evidence at a late stage in these appeal proceedings (see paragraph [17] above), and in the absence of arguments brought forward by the CPVO to sufficiently justify a conclusion that the documents must be regarded as inadmissible – this Board of Appeal finds that there are doubts that the documents must be considered as inadmissible. At the same time, the Board of Appeal notes that the documents can only be attributed a limited degree of importance in these appeal cases. That is because, amongst other things, the documents in question are of only limited relevance to the core substantive issues in these cases, in particular the decisions not to open nullity proceedings. Moreover, this Board of Appeal notes that, as a general rule, when assessing acts and omissions adopted by the CPVO, it is generally called upon to assess the legitimacy of those measures at the time of their adoption (see, to that effect, judgment of the General Court of 20 September 2019, *PlasticsEurope v European Chemicals Agency*, Case T-636/17, ECLI:EU:T:2019:639, paragraph 217).
28. The CPVO has asserted that certain arguments raised by the Appellant in these appeal cases constitute a new plea, and, as such, are inadmissible and cannot be considered by this Board of Appeal. More specifically, the CPVO argues that the Appellant's arguments asserting that the titleholder acted in bad faith, and abused the procedures, when applying to the CPVO to grant plant variety rights in relation to these varieties, and that the PVRs lack distinctness – are new pleas and inadmissible. At the Oral Hearing, when invited to respond to this point, the Appellant asserted that these arguments should not be considered a new plea, but merely an extension of the Appellant's arguments concerning the alleged lack of novelty and, as such, cannot be regarded as inadmissible. The Board of Appeal notes, in this regard, the preliminary issues mentioned in paragraph [27] above. The Board of Appeal further notes that in General Court proceedings, and as a general rule, no new plea in law may be introduced in the course of proceedings, but a plea which constitutes an amplification of a plea made previously, and which is closely connected therewith, is to be declared admissible. (see, Article 84(1) of the Rules of Procedure, and Judgment of the General Court of 25 January 2023, *Emilio De Capitani v Council of the European Union*, Case T-163/21, ECLI:EU:T:2023:15, paragraph 26 and the case-law cited therein). Having regard to general absence of arguments brought forward by the CPVO to sufficiently justify a conclusion that the Appellant's arguments constitute a new plea, and having regard to the fact that, in these appeal cases, the arguments advanced by the Appellant have a connection to the Appellant's existing pleas and arguments, the Board of Appeal finds that these arguments are admissible, and should be considered.



## V. Substance

29. In support of its appeals, the Appellant relies on the following pleas and arguments:
- (1) The CPVO erred in its assessment of the facts and evidence, and erred in its conclusions, that there were no serious doubts as regards the validity of the Pink Lady PVR and Sundowner PVR.
  - (2) The CPVO failed to open nullity proceedings in breach of relevant law, in particular Article 53a of the Implementing Rules Regulation.
  - (3) The CPVO failed to declare the Pink Lady PVR and the Sundowner PVR null and void in accordance with relevant law, in particular Article 20 of the Basic Regulation.

### **First and second pleas alleging the CPVO erred by not open nullity proceedings**

30. By these pleas the Appellant essentially alleges that the CPVO failed to comply with Article 53a of the IRR and open nullity proceedings as legally required.
31. The CPVO, together with the Intervener, rejects this plea and the related lines of argument as unfounded.

#### Findings of the Board of Appeal

32. As a preliminary issue, the Board of Appeal recalls some of the general legal framework concerning nullity and nullity proceedings.
33. Article 20 of the Basic Regulation states:

#### *Article 20*

### **Nullity of Community plant variety rights**

1. The Office shall declare the Community plant variety right null and void if it is established:
- (a) that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right; or [...]

34. Article 53a of the IRR states:

#### *Article 53a*

### **Proceedings for nullity and cancellation**

1. Proceedings on nullity and cancellations as referred to in Articles 20 and 21, respectively, of the basic Regulation may be opened by the Office when there are serious doubts as regards the validity of the title. Such proceedings may be initiated by the Office on its own motion or upon request.
2. A request to the Office to open the proceedings on nullity or cancellation, as referred to in Articles 20 and 21, respectively, of the basic Regulation, shall be accompanied by evidence and facts raising serious doubts as to the validity of the title and shall contain:
- (a) as regards the registration in respect of which nullity or cancellation is sought:
    - (i) the registration number of the Community plant variety right;
    - (ii) the name and address of the holder of the Community plant variety right;
  - (b) as regards the grounds on which the request is based:
    - (i) a statement of the grounds on which the request to open the proceedings on nullity or cancellation is based;
    - (ii) an indication of the facts, evidence and arguments presented in support of those grounds;
  - (c) the name and address of the person making the request and, where he has appointed a procedural representative, the name and address of that representative.
3. Any decision of the Office to reject a request as referred to in paragraph 2 shall be communicated to the person who made the request and the holder of the Community plant variety right.



4. The Office shall not take into account written submissions or documents, or parts thereof, that have not been submitted within the time limit set by the Office.
5. Any decision of the Office to declare null and void or cancel a Community plant variety right shall be published in the Official Gazette referred to in Article 87.
35. Paragraph 29 of the Preamble of Commission Implementing Regulation (EU) 2016/1448 of 1 September 2016 amending Regulation (EC) No 874/2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office, states: “(29) For reasons of legal certainty, it is appropriate to add rules with regard to a decision of the Office in proceedings for nullity and cancellation as referred to in Article 20 and Article 21, respectively, of the basic Regulation.” Article 53a of the IRR was adopted following the Judgment of 21 May 2015 of the Court of Justice of the European Union Ralf Schröder v Community Plant Variety Office (CPVO), Case C-546/12 P, ECLI:EU:C:2015:332 (Lemon Symphony), and reflects some of the principles as set out in the Judgment (see, amongst others, paragraph 56 of that Judgment).
36. As a preliminary issue, the Board of Appeal also recalls some of the core legal principles as established by the clear and consistent case-law of the Courts and of this Board of Appeal. In particular, the Board of Appeal notes the following points.
37. The CPVO generally has wide discretion concerning annulment of a plant variety right for the purposes of Article 20 of Regulation No 2100/94. That is because, during the procedure for granting protection, a variety must undergo a substantive examination and a thorough and complex technical examination pursuant to Articles 54 and 55 of the Basic Regulation (see, for example, Case C-546/12 P (Lemon Symphony), cited above at paragraph [35], paragraphs 55-56).
38. Nullity proceedings consist, in principle, of two stages. At the first stage the CPVO is called upon to decide whether nullity proceedings must be opened. At the second stage, and having opened nullity proceedings, the CPVO is called upon to decide whether to declare the Plant Variety Right null and void (see, for example, Case C-546/12 P (Lemon Symphony), cited above at paragraph [35], paragraphs 55-60). At both stages of the nullity proceedings the CPVO is required to respect, amongst others, the principle of good administration codified in Article 41 of the Charter of Fundamental Rights of the EU, and which requires the CPVO to examine carefully and impartially all the relevant aspects of the individual case (see judgment of the General Court of 3 October 2019, BASF v ECHA, T-805/17, EU:T:2019:723, paragraph 57; judgment of the General Court of 3 October 2019, BASF and REACH & colours v ECHA, T-806/17, ECLI:EU:T:2019:724, paragraph 75). The CPVO will generally discharge these duties and obligations, at the first and preliminary stage of the nullity proceedings, by examining all the facts and points of law brought to its attention by the nullity petitioner without being required to investigate of its own motion or initiative (ex officio) other issues (see Case C-546/12 P (Lemon Symphony), cited above at paragraph [35], paragraphs 54-58, and Judgment of the General Court of 18 September 2012, Ralf Schröder v Community Plant Variety Office (CPVO), Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09, ECLI:EU:T:2012:430, paragraphs 122-140 and, by analogy, Opinion of the Advocate General of 3 June 2021, European Commission v Tempus Energy Ltd and others, Case C-57/19 P, ECLI:EU:C:2021:451, paragraph 81). Whereas, in contrast, the CPVO will generally only fulfil these duties and obligations, at the second stage, by conducting a full and exhaustive examination, of its own motion and initiative, of all the relevant facts, evidence, concerns and points of law. This requires a thorough and comprehensive investigation of all the relevant issues and cannot be confined or limited to the information or evidence adduced by the petitioner alone (see, by analogy, Judgment of the European Court of Justice of 2 April 1998, Commission v Sytraval and Brink's France, C-367/95 P, ECLI:EU:C:1998:154, paragraph 62).
39. At the first stage of the nullity proceedings the burden of proof and legal onus is firmly on the nullity petitioner to provide sufficient, clear and concrete evidence able to raise serious doubts concerning the legality of the PVR. In the event the nullity petitioner fails to adduce such evidence in its nullity petition, the CPVO is not, per se, required to open nullity proceedings (see, for example, Case C-546/12 P (Lemon Symphony), cited above at paragraph [35], paragraphs 53-58).



40. At the first stage of the nullity proceedings, the CPVO is required to assess the facts and evidence adduced by the petitioner. More specifically, the CPVO is required to examine whether the evidence adduced by the petitioner is sufficient to raise serious doubts on the legality of a PVR for the opening of nullity proceedings. (See, for example, see, for example, Case C-546/12 P (Lemon Symphony), cited above at paragraph [35], paragraphs 56-57). The core and fundamental question is therefore: whether the evidence provided by the nullity petitioner is sufficient and robust enough to support and substantiate serious doubts regarding the validity of the title. Whether or not the evidence is sufficient, generally relates to its qualitative, not quantitative, substance, and requires an objective assessment of the facts and evidence (see to that effect, Vicente Barber López vs CPVO ('Barberina'), Case A009/2008, paragraph 60).
41. Given the above points, the Board of Appeal finds it necessary to assess, in detail, the CPVO's examination of whether the evidence adduced by the Appellant was sufficient to raise serious doubts concerning the validity of the PVRs in question. Moreover, as the Appellant's petition was based on the premise that the titles were invalid due to an alleged lack of novelty, the Board of Appeal finds it necessary to assess, in detail, whether the evidence adduced by the Appellant was capable and sufficient to raise serious doubts regarding novelty.
42. In this regard, the Board of Appeal notes that for a variety to be protectable it must be new within the meaning of Article 6 of the Basic Regulation at the relevant date. Article 10(1) of the Basic Regulation provides, amongst other things, that:

*Article 10*  
**Novelty**

1. A variety shall be deemed to be new if, at the date of application determined pursuant to Article 51, variety constituents or harvested material of the variety have not been sold or otherwise disposed of to others, by or with the consent of the breeder within the meaning of Article 11, for purposes of exploitation of the variety:
- (a) earlier than one year before the abovementioned date, within the territory of the Community;
  - (b) earlier than four years or, in the case of trees or of vines, earlier than six years before the said date, outside the territory of the Community.

43. The Board of Appeal also notes that one of the PVRs in this case, namely the Pink Lady PVR, has already been subject to a number of previous proceedings concerning its alleged invalidity due to a purported lack of novelty ("Previous PLA proceedings"). On 26 June 2014, Pink Lady America LLC lodged with the CPVO a nullity petition concerning the Pink Lady PVR requesting the CPVO to declare the Pink Lady PVR null and void on the basis of alleged lack of novelty. On 19 September 2016, the CPVO dismissed that petition (Decision No NN 17). On 18 November 2016, Pink Lady America LLC lodged an appeal before this Board of Appeal concerning this issue (Case A007/2016). On 14 September 2017, this Board of Appeal dismissed the appeal. On 23 February 2018, Pink Lady America LLC lodged an application for annulment before the General Court of the Court of Justice of the European Union. On 24 September 2019, the General Court dismissed the action (Judgment of the General Court of 24 September 2019, Pink Lady America LLC v Community Plant Variety Office, Case T-112/18, ECLI:EU:T:2019:679). On 3 December 2019, Pink Lady America LLC lodged an appeal before the European Court of Justice (Case C-886/19 P). On 3 March 2020, the European Court of Justice dismissed the appeal on the basis that it should not be allowed to proceed.
44. In its submissions, the Appellant asserts that the Pink Lady and Sundowner PVRs are invalid and lack novelty, and, in any event, the evidence raises serious doubts concerning their validity - meaning nullity proceedings should be opened, for, amongst others, the following reasons:
- (i) Both varieties were commercially exploited in Western Australia before the novelty bar date with the breeder's consent, and, as such, were not 'new' for the purposes of Article 10 of the Basic Regulation. The novelty bar date is, according to the Appellant, 29 August 1989 – i.e. 6 years before the application for the PVRs were lodged on 29 August 1995. The Appellant asserts that there was commercial exploitation before that date. According





to the Appellant, the Titleholder (and Intervener in these proceedings) was fully aware of the commercial exploitation and had consented to it. This is apparent, according to the Appellant, from, amongst other things: the facts, the implied consent given by the Titleholder to the disposals of variety constituents, the Titleholder's awareness and failure to control or stop commercialisation, and the absence of any express or clear restriction by the Titleholder to commercialise. At the Oral Hearing, the Appellant confirmed that, in its view, all the different aspects of consent given by the Titleholder for commercialisation as put forward in the written submissions related to forms of implied consent. The Appellant states that case-law from the General Court supports the view that consent includes implied consent and/or awareness of sales of variety constituents before the novelty bar date. The Appellant asserts that the evidence it has provided, proves the Titleholder was fully aware of the disposals and commercialisation of the varieties before the novelty bar date. The Appellant refers in particular to Exhibits 3, 4, 5, 7, 8, 10, 17, 18, 27a, 27b and 28. The Titleholder never took any steps to stop commercialisation and/or treat early sales before the novelty bar date, as unauthorised. According to the Appellant, the Titleholder has acknowledged that it did not, and could not, control commercial distribution and production of the constituents of the varieties before the novelty bar date. The very purpose of the Titleholder's breeding programme had been to release the varieties to the whole of the state industry and therefore encourage and spread commercialisation. This meant release of the PVRs before the novelty bar date involved and included consent to the direct exploitation of these varieties. The Appellant states that the General Court Judgment in Case T-767/14 (Oksana) supports the view that a breeder gives consent, specifically implied consent, if and when a breeder provides varieties to third parties without requiring those third parties to obtain the breeder's consent for commercialisation. When the Titleholder submitted the applications for PVRs in relation to the Pink Lady and Sundowner varieties, it did so, according to the Appellant, in bad faith after having made disposals for commercialisation purposes and where the varieties lacked distinctness.

- (ii) According to the Appellant, in its applications of 21 December 2020, the Appellant provided the CPVO evidence and facts which do raise serious doubts regarding the validity of both PVRs, in particular as regards fulfilment of the novelty criterion. According to the Appellant, the CPVO did not correctly assess that evidence. There was evidence and information contained within the applications which neither the CPVO nor other relevant authorities had previously reviewed or seen before. That new evidence was important as, amongst other things, it related to, and supported, other evidence contained within the applications. In particular, the new evidence supported and substantiated other evidence which, despite being assessed and reviewed in previous proceedings – now had to be given more weight and importance in light of the new evidence. The CPVO should have conducted a new, fresh assessment of all the evidence, including the evidence reviewed in past proceedings. The CPVO should have assessed differently the evidence, attributing more weight to the evidence reviewed previously in light of the new evidence, and arriving at different conclusions. According to the Appellant, when the facts and evidence are considered altogether, it is clear that there are at least serious doubts regarding the validity of the Pink Lady and Sundowner PVRs. The conclusions drawn by the CPVO are not supported or substantiated by the evidence. All the evidence which the Appellant provided should have been properly considered. Evidence, including statements and testimony from certain individuals, should not have been discounted, or attributed no or little weight or importance on account of the fact that the individual in question acts/acted for, and/or has/had a professional connection or relationship, with the Appellant company.

45. In contrast to the Appellant's submissions, the CPVO asserts that the Pink Lady and Sundowner PVRs are valid, do not lack novelty, and the evidence does not raise serious doubts concerning their validity - meaning that nullity proceedings do not need to be opened, for, amongst others, the following reasons:

- (i) The CPVO has assessed the applications and evidence in accordance with the legal requirements and assessed whether the Appellant has raised serious doubts regarding the validity of the PVRs that justifies the opening of nullity proceedings. As the CPVO has never opened nullity proceedings, it has not undergone a full examination of the validity of the PVRs themselves, and/or a full assessment of the alleged lack of novelty. According



to the CPVO, as the CPVO has never conducted a full examination and assessment of these issues – but only assessed whether nullity proceedings should be opened – the Board of Appeal is restricted to assessing only whether nullity proceedings should have been opened as regards each PVR. According to the CPVO, the Board of Appeal cannot take a decision declaring the PVRs themselves as null and void and this is 'out of scope'.

- (ii) According to the CPVO, the CPVO has discretionary powers to decide on how to perform the assessment to determine whether there are 'serious doubts' concerning the validity of a Community Plant Variety Right, pursuant to Article 53a of the IRR.
- (iii) The CPVO did not, according to the CPVO, err in its assessment of the facts and evidence in these cases. The conclusions drawn by the CPVO (namely that there are no serious doubts regarding validity) are substantiated and supported by the facts and evidence. According to the CPVO, the Appellant's applications are based, for the most part, on evidence which relates to the Pink Lady PVR, and which was submitted and assessed during the Previous PLA proceedings (see paragraph [43] above) by the General Court. According to the CPVO, the CPVO cannot per se be required to assess the same evidence multiple times. In this case, the core issue is whether the new evidence in the Appellant's applications, which has not been already assessed in the past by the CPVO and/or the General Court, is sufficient to reach a different conclusion as regards the alleged lack of novelty.
- (iv) The CPVO asserts that the new evidence in the Appellant's applications (i.e. evidence which has not already been considered in previous proceedings) is not sufficient to raise serious doubts about the validity of the PVRs, in particular the fulfilment of the novelty criteria. The CPVO asserts that the new evidence is not sufficient to alter the conclusions that have been reached in the past concerning the Pink Lady PVR, and does not justify opening nullity proceedings. According to the CPVO, the new evidence merely confirms the findings, and accords with the sequence of events, which the CPVO established in past and previous assessments. The CPVO states that certain Appellant's Exhibits do not relate to the Sundowner PVR, but the Pink Lady PVR alone. These include: Appellant Exhibits numbered 2, 9, 12, 13, 14, 23 and 24. With regard to the Appellant Exhibit numbered 25 (Legal Opinion of Professor Mayer), the CPVO states that it disagrees with the view that an agreement can only be regarded as restricting commercialisation, or making it dependent on the consent of a breeder, if there is an express provision in the agreement to that effect. As stated above at paragraph [27], the CPVO has asserted that the Appellant's Exhibits numbered 27a, 27b, 28 and 31 must be regarded as inadmissible as they were provided for the first time during these appeal proceedings.

46. The Intervener supports the CPVO's submissions, and also asserts that the Pink Lady and Sundowner PVRs are valid, do not lack novelty, and the evidence does not raise serious doubts concerning their validity - meaning that nullity proceedings do not need to be opened, for, amongst others, the following reasons:

- (i) The Intervener asserts that the Board of Appeal has limited legal powers, and cannot declare the Pink Lady PVR or the Sundowner PVR as null and void at this stage. According to Intervener, if the Board of Appeal did so, it would deprive the Intervener and Titleholder of its right to a two-stage examination of the validity of the Pink Lady PVR and Sundowner PVR.
- (ii) According to the Intervener, there are no serious doubts concerning the validity or novelty of the Pink Lady PVR and/or the Sundowner PVR. The legal onus and burden of proof is on the Appellant to prove there are serious doubts. The Appellant has failed to discharge that burden as regards the Pink Lady PVR and the Sundowner PVR. The evidence adduced by the Appellant is neither clear nor convincing. The Intervener takes the view that, as it explained at the Oral Hearing, the Appellant's application for the Pink Lady PVR to be declared null and void should be regarded as a mere continuation of the Previous PLA proceedings.
- (iii) The Intervener states that a disposal of a variety constituent before the novelty bar date is only novelty destroying if the breeder intends at the time of the disposal for the variety to be commercially exploited. As such, sale or disposal of the variety must: (a) be consented to by the breeder, (b) be for the purposes of direct and immediate commercial exploitation of the variety, and (c) the breeder must consent to the sale or disposal knowing it is for the purpose of exploitation. According to the Intervener, consent cannot



be automatically or necessarily implied vis-à-vis the transfers of the varieties in this case. It is not correct, and it cannot be presumed, that the sales or disposal of the varieties occurred with the breeder's relevant consent. According to the Intervener, only an officer of the Titleholder, with authorisation and permission to act on behalf of the Titleholder vis-à-vis commercialisation, was able to give permission as regards sales and disposals for commercialisation. Before the novelty bar date, constituents of the varieties had not been disposed of for commercial exploitation purposes. Instead, the disposals of the variety constituents were only for either trial and evaluation purposes, or the production of budwood. In any event, the Titleholder did not consent to disposals for commercial exploitation purposes at the time. Awareness of the disposals is not sufficient to be novelty destroying. Although the Titleholder may not have taken legal or other action regarding these disposals before or after the disposals were made – this does not constitute a form of consent.

47. It is common ground between the parties, and the parties agree, as expressly confirmed by the parties at the Oral Hearing, that:
- (i) The novelty bar date for both the Pink Lady PVR and the Sundowner PVR is 29 August 1989.
  - (ii) Where, in the evidence adduced by the Appellant, references are made to 'Western Australia Department of Agriculture' or 'Department of Agriculture and Food of Western Australia', all such references concern one and the same legal entity; namely WAAA who is the Intervener in this case, and the Titleholder of both the Pink Lady PVR and the Sundowner PVR.
48. From the outset, and before examining the CPVO's assessment of the facts and evidence in this case, the Board of Appeal notes the following points.
49. First, the applications submitted on 21 December 2020 and mentioned at paragraph [7] above, were new and had not been submitted by the Appellant before. They concerned an issue which had the potential to call into question the validity of each of the PVRs; namely the fulfilment of the novelty criterion. And, contrary to the Intervener's submissions made at the Oral Hearing, neither the applications themselves, nor these proceedings, can be regarded as mere a continuation of previous proceedings, or a reiteration of a previous request. The Previous PLA proceedings, referred to at paragraph [43] above, were relevant to the Pink Lady PVR, not the Sundowner PVR per se. The Appellant had never submitted nullity applications vis-à-vis these PVRs before. As such, the Board of Appeal notes that the CPVO was required to conduct new assessments of the applications, and the facts and evidence they contained.
50. Second, the CPVO was required to undertake an impartial and objective assessment of the facts and evidence as provided by the Appellant for each PVR. It was therefore incumbent on the CPVO to ensure that the assessments were conducted in an impartial and objective manner, and that the outcomes were not prejudiced by, for example, an inclination or predisposition to arrive at a conclusion geared towards upholding conclusions drawn in similar assessments conducted in the past.
51. Third, given that a large portion of the evidence submitted by the Appellant in its applications of 21 December 2020 was the same as evidence which had already been assessed vis-à-vis the Pink Lady PVR in the context of the Previous PLA proceedings – it was incumbent on the CPVO to ascertain – before drawing its conclusions on the Appellant's applications, amongst other things: (1) the conclusions drawn by the General Court in the Previous PLA proceedings, this Board of Appeal and the CPVO in the past, (2) the facts and evidence upon which those conclusions had been drawn, and (3) the extent to which the facts and evidence in the Appellant's applications of 21 December 2020 differed from the Previous PLA proceedings. In this regard, the Board of Appeal notes, in particular, that:
- (i) The General Court assessed inter alia the following evidence:
    - the statutory declaration of the breeder, John Cripps, former officer of WAAA, dated 6 August 2015 (in the present case the Intervener's exhibit 3.6);



- a memorandum entitled 'Apple breeding program', dated 3 September 1984 (in the present case the Intervener's exhibit 3.1);
  - letters from Cripps to Olea Nurseries and How Green Nursery dated 31 May 1985 (in the present case the Intervener's exhibit 3.2);
  - Bulletin 4169 entitled 'Apple varieties for Western Australian Orchards' (in the present case Appellant's exhibit 20);
  - the statutory declaration of Geoffry Godley, former agricultural advisor for WAAA, dated 13 January 2015 (Appellant's exhibit 13);
  - other (not further specified) statutory declarations submitted by PLA;
  - invoices from Olea Nursery (in the present case Appellant's exhibit 10);
  - a press release entitled 'Fruit Growers Encouraged to Plant New Apple Varieties', dated 8 September 1992 (in the present case Appellant's exhibit 21);
  - the transcript of a broadcast on 28 June 2009 entitled 'Tickled Pink' (in the present case Appellant's exhibit 23).
- (ii) On the basis of this evidence the General Court held that the Board had correctly concluded that PLA had not provided proof that the Cripps Pink variety had been sold or disposed of to third parties outside the European Union by the breeder or with his consent for the purposes of exploitation of the variety before 29 August 1989. As regards the evidence submitted by PLA the Court underlined that the statutory declarations had been made by persons associated with PLA and who had no knowledge of the legal requirements for the registration of a community plant variety right, were referring to events that had taken place more than thirty years before and had not been supported by contemporaneous evidence. The probative value of these declarations was therefore considered limited.
- (iii) Of importance in the Judgment of the General Court, and also to the Decision of this Board of Appeal, in the Previous PLA proceedings were the letters that had been sent to Olea Nurseries and How Green Nursery (in the present case Intervener's exhibit 3.2). These letters included a condition for the release of trees of the Cripps Pink variety, that is trees were released 'should the Department recommend their planting in commercial orchards' which recommendation was issued only in November 1990. The General Court referred to the declaration of 6 August 2015 in which Cripps had explained that he had distributed 12 Cripps Pink and 12 Cripps Red trees to Olea Nurseries and How Green Nursery and to eight (other) orchardists 'to evaluate the performance of the varieties in a non-research station environment'. However, it had not been demonstrated that WAAA had been aware of, or had consented to, sales made by the nurseries. This distinguished the case from the decision of the Board in case A 007/2013 (Oksana) in which the distribution of the variety constituents had been completely unqualified and had been carried out with the express intent of the breeder that the material be distributed without restriction.
52. Fourth, the CPVO was required to conduct the assessments on the sufficiency and adequacy of the evidence in accordance with, amongst others, the principles of good administration, legal certainty, legitimate expectations, and the requirement to state reasons.
53. It is in the broader context of these general points listed above, that the Board of Appeal assesses the CPVO's examination of the sufficiency and adequacy of the evidence adduced by the Appellant in its applications of 21 December 2020. Those examinations, as explained and stated by the CPVO at the Oral Hearing, essentially consisted of two parts: (1) an examination by the CPVO of each piece of evidence individually or in certain groups – i.e. "clusters", and (2) an examination which, according to the CPVO, assessed all the evidence together – and the weight or importance of the evidence overall.
54. In these appeal cases, the core and fundamental question is whether the Appellant provided sufficient evidence of serious doubts vis-à-vis novelty destroying acts or events having taken place before the novelty bar date.
55. In this regard, the Board of Appeal observes that, as the parties in this case have correctly stated, and as mentioned at paragraph [47] above, the novelty bar date must be considered as 29 August 1989 both as regards the Pink Lady PVR and the Sundowner PVR. This means that it is the sales



and disposals, and the related events and context, of these varieties before this date – 29 August 1989 – which are of relevance.

56. The Board of Appeal also observes that for an act or event to be novelty destroying it must generally involve the sale or other disposal of variety constituents or harvested material to third parties "by or with the consent of the breeder [...]" (Article 10(1) of the Basic Regulation). According to the case-law of this Board of Appeal and the EU Courts, consent can be provided by breeders explicitly; meaning that the breeder(s) gives permission expressly, either in writing or orally. In addition, consent can be provided by breeders implicitly; meaning that the breeder(s) gives permission, which is clear or can be inferred, given the acts and/or behaviour of the breeder, and/or the general facts and circumstances. See to that effect Decision of this Board of Appeal of 15 September 2014, *Boomkwekerij Van Rijn – de Bruijn B.V. v Community Plant Variety Office ('Oksana')*, Case A007/2013, paragraph 27, as upheld by the General Court in its Judgment of 13 July 2017, *Boomkwekerij Van Rijn – de Bruijn B.V. v Community Plant Variety Office ('Oksana')*, Case T-767/14, ECLI:EU:T:2017:494, paragraphs 21, 103-108, and Decision of this Board of Appeal of 2 December 2008, *Vicente Barber López vs CPVO ('Barberina')*, Case A009/2008, paragraph 60).
57. It follows from the above, that any evidence which indicates, or which may indicate, that a breeder has given implied/implicit consent to relevant sales or other disposals before the novelty bar date, is capable of raising doubts, including serious doubts, of the validity of a PVR. It also therefore follows, that the importance of that evidence cannot be discounted or undervalued by the CPVO, when the CPVO assesses the sufficiency of evidence adduced by an applicant to raise serious doubts pursuant to Article 53a of the IRR.
58. Despite the case-law of this Board of Appeal and the EU Courts (referred to, in part, at paragraph [56] above), the Board of Appeal notes that during these appeal proceedings the CPVO has, in effect, taken the position that that implied/implicit consent is generally not sufficient to raise serious doubts on the validity of a PVR. The Board of Appeal finds that this position, and the related lines of argument, cannot succeed and must be dismissed. The Board of Appeal finds that, consistent with its previous case-law, the term 'consent' in Article 10(1) of the Basic Regulation, includes implicit consent. Evidence of implied/implicit consent is capable of destroying novelty and raising doubts on the validity of a PVR. As such, the weight or importance of any evidence brought forward by persons submitting nullity applications, and relating to implied/implicit consent, cannot and must not be discounted or undervalued in CPVO assessments in this regard.
59. The Board of Appeal notes that, in its applications of 21 December 2020, the Appellant brought forward evidence which had not been assessed before by the CPVO or otherwise, and which concerned consent, in particular possible implied/implicit consent, which the breeder may have given to certain sales and other disposals before the relevant date. That new evidence included, for example, the Appellant's Exhibits numbered 3, 15, 17 and 19.
60. As regards Exhibit 17: This document is a statutory declaration dated 23 January 2018 provided by Mr Cripps ("2018 Cripps Declaration"). It follows the statutory declaration dated 6 August 2015 which Mr Cripps had provided previously ("2015 Cripps Declaration"). The Board of Appeal notes that the 2018 Cripps Declaration differs from the 2015 Cripps Declaration, in that it is more detailed and sheds important light on the sales and disposals before the novelty bar date.
61. In the 2015 Cripps Declaration, Mr Cripps describes how the release of the Cripps Pink and Cripps Red varieties were made for the purposes of "...extensive trial and evaluation under commercial conditions..." and how the releases were approved by the "Chief Division of Horticulture and the Principal Officer, Fruit" of WAAA. Following this internal approval, letters were sent by WAAA to Olea Nurseries and How Green Nursery offering to provide these varieties to them. Once the nurseries agreed, WAAA then provided the varieties to the Olea Nurseries and How Green Nursery, as well as eight other orchardists. According to Mr Cripps, distribution was restricted so as to enable WAAA to assess and evaluate development of the varieties. WAAA officers visited the orchardists, inspected the trees, and acquired feedback from the growers. The Cripps Pink variety was then recommended to growers for planting in 1990.



62. In Exhibit 17 (i.e. the 2018 Cripps Declaration provided by the Appellant in its 21 December 2020 applications), Mr Cripps corroborates the information in the 2015 Cripps Declaration, in particular the letters sent to the Olea Nurseries and How Green Nursery. However, Exhibit 17 focuses, in particular, on other sales and disposals of the Cripps Pink and Cripps Red varieties that were apparently made with a different purpose. Significantly, Exhibit 17 states, amongst other things: “the Department had never sought to nor envisaged taking out any patent or other kind of intellectual property protection in Australia. Consequently, the trees were immediately and proactively distributed to local nurseries and growers from the period beginning 1985 onwards with the intention being to benefit the Australia apple industry with new varieties” (emphasis added). Mr Cripps mentions the letters to Olea Nurseries and How Green Nursery, but refers to other distributions as well. Mr Cripps states that “In addition, many other distributions of the aforesaid trees took place and I personally delivered many of such trees to them well before 1989, without placing any restriction. By way of example, I note that between the period 1982 and 1983, the Pink Lady trees delivered to Tom Price were not placed under formal restriction at all for further planting and commercialisation of this Variety ‘and still discussing Cripps Pink’ At no time did we have a directive from the Department to restrict distribution of propagating material to any grower or nursery (...) Consequently, it was unviable and frankly not even an issue discussed by us to place any restriction that would have affected any rights to further plantings and the sale of these trees” (emphasis added). Mr Cripps states he was aware that also other officers, among them Mr Allan Price and Mr Geoff Godley, provided trees and propagating material to growers and he confirms Mr Allan Price’s statutory declaration dated 28 July 2017. Mr Cripps’ view on the issue is summarised in the statement that “my colleagues at the Department and I assisted and provided commercial growers in the supply of propagative material to build trees that produced fruit to be sold in the marketplace” (emphasis added).
63. As regards Exhibit 15: This document is a statutory declaration dated 28 July 2017 provided by Mr Allan Price. The document states, amongst other things: “During the years 1980 until 1996 I was part of a technical team of advisors within the Horticultural Division of the Western Australia Department of Agriculture [...]. I actively participated with all members of the Technical Team in the commercial distribution and planting of Pink Lady trees since 1986 and budwood supply to several commercial orchards, who were extremely excited to obtain plantings of this extraordinary variety without any restrictions being ever placed by the Department. Many of these disposals are recorded in my personal diaries and records of phone calls. The full collections of my diaries are at the disposal of the competent judicial authorities. I have extracted copies of the relevant information. [...] I have memory and written confirmation of a phone call dated 7 July 1986 from Predo Jotic, asking for 2 grafting sticks each of Pink Lady and Sundowner, the commercial names used then for these apple tree varieties. I personally reported this request to Dr. John Cripps who responded that he would handle the request. [...] I have memory and written confirmation of collection of Pink Lady trees from Stoneville Research Station for the following growers: Padman, Parke and Cross. This occurred on 20 July 1987. I personally assisted the delivery of the trees and budwood in their orchards. On 25 August 1987 equal numbers of trees of the varieties Pink Lady, Sundowner and Gala, each on 3 different rootstocks, were planted at Ian Padman’s property at Brookhampton, WA. From memory this trial covered approximately 1.5 acres. On 12 July 1988 C Cain, an apple grower in the Donnybrook district of Western Australia, ordered 200 grafts each of Gala, Pink Lady and Sundowner. To my recollection these orders were positively provided for by the Department. On 26 July 1988, I personally cut from Padman orchard 120 whips for strap grafts from Pink Lady trees for Mr Padman and wood for 1000 bench grafts of Pink Lady for G Parke, who operated a commercial fruit nursery in Donnybrook. There was no restriction placed by the Western Australia Agriculture Department on the supply of this grafting wood or on subsequent sales of trees from this nursery. I confirm all members of the Technical Team as well as Dr. John Cripps were informed of the planting activities mentioned above, as we were encouraged to develop and promote the varieties. [...] I also have records of a 1986 request from Trevor Boughton asking for any surplus grafting wood over orders to be made available to him for distribution to growers in Manjimup. [...] I hereby attach copies of the pages [taken] from my personal diaries and telephone records relating to the facts reported...”. The attached pages contain relevant entries, for example the (undated) entry of Sundowner and Pink Lady in connection with the name Prado Jotic and an entry dated 15 September 1986 stating that Trevor Boughton “wants remainder of Pink Lady wood”.



64. As regards Exhibit 19: This document is a statutory declaration dated 8 February 2018 provided by Mr Francis John Atherton, an apple grower. In his statutory declaration, Mr Atherton states that, in June 1987, WAAA (in particular Mr Geoff Godley, Western Australia Department of Agricultural Extension specialist) recommended that he plant Pink Lady and Sundowner and that there were no restrictions of any kind. Mr Atherton states that he subsequently ordered and received 875 Pink Lady trees on 12 July 1988 from How Green Nursery. The Board notes that although in 1985 How Green Nursery had been placed under the restriction for sales 'until the Department recommend their planting' (see Mr Cripp's letter to How Green Nursery of 31 May 1985), Atherton's declaration, if correctly reporting the state of affairs, shows that at least in 1988 Godley, a WAAA officer, was seemingly not aware of any obstacle for Atherton to acquire and commercially exploit Pink Lady and Sundowner trees.
65. As regards Exhibit 3: This document is a WAAA report to the Australian Special Rural Research Fund, dated 17 February 1988. It states, amongst other things: 'Growers have shown a willingness to plant new comparatively untried varieties from the programme and approximately 5000 trees each of Pink Lady and Sundowner have been planted in commercial orchards in the two years since release. The rate of planting is only restricted by the lack of planting material' (page 6). It therefore appears to be in line with, and corroborate, the statutory declarations of Mr Cripps, Mr Price and Mr Atherton.
66. The Board of Appeal notes that the new evidence referred to above at paragraphs [59-65], and concerning the Appellants Exhibits numbered 17, 15, 19 and 3, is important for the following reasons.
67. First, the new evidence refers to concrete disposals of variety constituents to commercial nurseries other than Olea Nurseries and How Green Nursery before the novelty bar date, 29 August 1989. There is no mention of any letter like the ones that played an important role in the previous PLA Proceedings. It therefore appears that the material was provided to commercial nurseries without any restrictions as regards their use. In particular, it appears that, although WAAA officers had an interest in knowing how the trees would develop in the commercial nurseries, in the case of these particular disposals there was no mention or other indication of disposal for test purposes only. Such disposals would indicate consent for exploitation of the varieties. The Intervener has briefly questioned the power of its officers to give such consent, but has not elaborated further on this argument. It can therefore not be sufficiently examined in these appeal proceedings.
68. Second, Mr Cripps, Mr Price and Mr Atherton made their declarations under penalty of prosecution in case of a deliberate false declaration. Moreover, unlike apparently some of the declarants in the previous PLA Proceedings, none of the three has or (in the case of Mr Cripps, who has passed away) had any ties with the Appellant nor can they be assumed to have an interest in the outcome of the present proceedings. The declarations of Mr Cripps and Mr Price are of particular importance as in the relevant period they were working for WAAA. In addition, Mr Price's declaration is, to a certain degree, corroborated by contemporaneous evidence in the form of his telephone and diary records. The WAAA report to the Australian Special Rural Research Fund is also to be regarded as contemporaneous evidence.
69. During these appeal proceedings, the CPVO has asserted that the new evidence produced by the appellant in its nullity petition, when considered together and as a whole with the evidence that had been assessed in the previous proceedings, does not raise serious doubts concerning the legality of the plant variety rights requiring nullity proceedings to be opened. According to the CPVO, that is because, amongst other things: (1) there is only a limited amount of new evidence which the CPVO has not already assessed in the previous proceedings, and (2) the new evidence essentially confirms the findings and accords with the sequence of events, which the CPVO established in the previous proceedings. As regards the Exhibits mentioned at paragraphs [60-68] above, the CPVO also asserts, amongst other things, that:
- (i) As regards Exhibit 17 (i.e. the 2018 Cripps Declaration): according to the CPVO, there is nothing in this Declaration to support the conclusion that the material of the variety was sold or otherwise disposed of by or with the breeder's consent for the purpose of exploiting the variety.
  - (ii) As regards Exhibit 15 (i.e. the Price Declaration): the CPVO attributes significant importance to the fact that the Declaration does not mention sales per se.



- (iii) As regards Exhibit 19 (i.e. the Atherton Declaration): the CPVO takes the view that there is no documentary evidence provided by the Appellant to prove that sales or other disposals from How Green Nursery to Atherton actually occurred and, even if such sales or other disposals did occur, it has not been demonstrated that they occurred with the consent of the breeder.
  - (iv) Concerning the WAAA report to the Australian Special Rural Research Fund the Office opines that it is clearly apparent from the reading of the report that, in early February 1988 the Department was still testing the varieties under commercial conditions thanks to the involvement of a number of fruit growers within Western Australia and New Zealand. Apparently this conclusion is based on the paragraph reading: 'The two varieties released to fruit growers from the programme, Pink Lady and Sundowner are being propagated in quantity by nurserymen and 10,000 trees of each should be available over the next years. There is also considerable interest in these varieties in other states and propagating material is becoming widely distributed throughout Australia. Material has also been sent to New Zealand under a testing agreement.'
70. The Board of Appeal finds that the arguments and assertions put forward by the CPVO as briefly summarized in paragraph [69], and particularly as regards these Exhibits and new evidence, cannot succeed.
- (i) As regards Exhibit 17 (i.e. the 2018 Cripps Declaration): The Board of Appeal finds that the CPVO assessment and conclusion is not sustainable in view of at least Mr Cripps' account of the delivery of Pink Lady trees to Mr Tom Price.
  - (ii) As regards Exhibit 15 (i.e. the Price Declaration): The Board of Appeal finds that the CPVO assessment and conclusion is not convincing. An unrestricted disposal of variety constituents to commercial nurseries with the consent of the breeder, whether a sale or otherwise, constitutes a disposal for purposes of exploitation of the variety by the nursery. Also, the CPVO has asserted that Mr Price's recollection of the facts is consistent with the purpose of 'commercial evaluation', meaning that the purpose of the disposals was to assess varieties under commercial conditions. However, the Price Declaration does not provide any indication that the disposals to which he refers were for the purpose of testing commercial conditions or other testing purposes, and, more importantly, that the recipients of the material (like Olea Nurseries and How Nursery) should have been aware of this.
  - (iii) As regards Exhibit 19 (i.e. the Atherton Declaration): The Board of Appeal finds that documentary evidence of sales would be helpful, but is not essential, in accepting the veracity of Atherton's declaration. The Board of Appeal has not been provided any sufficient or relevant evidence to raise valid doubts, or call into question, the accuracy or correctness of Mr Atherton's declaration (paragraph [64] above). Also the CPVO did not sufficiently take into account the fact that the Declaration brings to light that apparently, as of 1988, Mr Godley was seemingly not aware of any obstacle for Mr Atherton to acquire and commercially exploit the Pink Lady and Sundowner trees.
  - (iv) As regards Exhibit 3: The Board of Appeal finds from the passage on which the CPVO based its conclusions it can only be inferred that testing abroad, in New Zealand, was envisaged. It does not refer to testing within Australia. In fact, such testing seems at odds with the passage cited above that 'Growers have shown a willingness to plant new comparatively untried varieties from the programme and approximately 5000 trees each of Pink Lady and Sundowner have been planted in commercial orchards in the two years since release. The rate of planting is only restricted by the lack of planting material '.
71. Taking into account the evidence adduced by the Appellant in its applications of 21 December 2020 – in particular the new evidence as summarized and set out above concerning the Appellant's Exhibits numbered 15, 17, 19 and 3, and taking into account the CPVO's arguments and assertions in this regard, the Board of Appeal concludes that: (1) the Appellant adduced concrete evidence in its applications of 21 December 2020 regarding both the Pink Lady PVR and the Sundowner PVR, (2) the evidence related to the fulfilment of the novelty criterion and therefore the validity of the PVRs themselves, (3) the evidence was of a high qualitative and quantitative standard and involved accounts from individuals with first-hand knowledge and experience of the sales and other disposals at the relevant time where no conflict of interest apparently exists, (4) the evidence did not merely raise hypothetical or abstract concerns regarding the validity of the PVRs but clear and identifiable doubts, (5) the doubts raised concerning the validity were sufficiently serious to mean they could not be left unresolved or unaddressed but which required, instead, the CPVO to open nullity proceedings, and fully investigate, of its own motion, the validity of the PVRs. As such, the Board of Appeal finds that the new evidence, on its own and in isolation of the other evidence, was sufficient to raise serious doubts regarding the validity of the PVRs requiring nullity proceedings to be opened.





72. In addition to assessing the new evidence, as referred to in paragraph [71], it was also incumbent on the CPVO to assess the overall weight-of-the-evidence adduced by the Appellant in each of its applications. The Board of Appeal notes, in this regard, that the CPVO assessments lack a level of detail and clarity such that the Board of Appeal finds it difficult to understand how the CPVO calculated the overall weight-of-the-evidence, and how the CPVO could have arrived at the conclusions, that the overall weight-of-the-evidence, in each of the applications, did not raise serious doubts as regards the validity of each of the PVRs. As stated above at paragraph [71], the Board of Appeal finds that the new evidence, on its own and in isolation of the other evidence, raises serious doubts. In the absence of any other information or evidence which undermines or calls into question that evidence, it follows that the overall weight-of-the-evidence adduced by the Appellant in each of its applications, also raises serious doubts. The Board of Appeal finds that the lack of detail and clarity which characterise the CPVO's assessment of the overall weight-of-the-evidence are not in line with the legal principles of good administration, legal certainty and legitimate expectations, and the requirement to state the reasons. Moreover, the Board of Appeal finds that the conclusions which the CPVO has drawn from its assessments of the overall weight-of-the-evidence, cannot be supported or substantiated, by the evidence itself.
73. The failures by the CPVO to attribute the appropriate weight and importance to the evidence adduced by the Appellant in its applications, constitutes a breach of the CPVO's duty to examine carefully all the relevant aspects of the relevant cases, in accordance with the principle of good administration (also see paragraph [38] above). It also could raise questions as regards compliance, by the CPVO, with the requirement to carry out an objective and impartial examination unaffected by, for example, a possible inclination by the CPVO to arrive at conclusions in these cases which served to reinforce or uphold positions and conclusions adopted by the CPVO in the past (also see paragraph [50] above).
74. In light of the above, the Board of Appeal concludes that the CPVO erred in its assessment of the facts and evidence, and erred in not opening nullity proceedings as required pursuant to relevant law, including Article 53a of the IRR and Article 20 of the Basic Regulation. This constitutes a relevant error in the appraisal of the facts and law, and a breach of a rule of law. The Board of Appeal therefore concludes that this plea is well founded and should be upheld.
75. Without it being necessary to assess the other pleas in law and arguments, the Board of Appeal therefore concludes that the Contested Decisions are vitiated by a manifest error of EU law and must therefore be set aside and nullity proceedings be opened.
76. The Board of Appeal notes that, during the course of these appeal proceedings, it has become apparent that, when assessing the potentially novelty destroying acts and omissions, it would be important for the CPVO to, amongst other things, obtain relevant evidence, information and testimony, on its own initiative, before adopting a decision pursuant to Article 20 of the Basic Regulation. More specifically, the Board of Appeal notes that it would be highly beneficial for the CPVO to make reasonable and proportionate efforts to obtain information, evidence and testimony from individuals with experience and/or knowledge of the sales and other disposals before the novelty bar date for the two PVRs. This should include the evidence and testimony from Mr Allan Price. This may also include, for example, the evidence and testimony from other individuals such as, but not limited to: Mr Francis John Atherton, Mr Tom Price, Mr Predo Jotic, Mr Padman, Mr Sheehan, Mr Parke, Mr Cross, Mr Cain and Mr Boughton, or from officers of WAAA, individuals such as Mr John Gallagher, Mr Robert Paulin and Mr Geoff Godley. Given the current absence of CPVO efforts to obtain and investigate, of its own motion, evidence and information in this regard – and given the relevant facts and circumstances in these appeal cases, the Board of Appeal takes the view that it would not be appropriate for the Board of Appeal to adopt decisions, at this stage, on whether or not to declare the two PVRs in question as null and void. Instead, the Board of Appeal has resolved to take action to ensure the CPVO assesses, in detail, the validity of the PVRs in question in the future, in particular as regards fulfilment of the novelty criterion.

## **VI. Decision and Statement regarding appeal**

77. The CPVO Board of Appeal orders that:
- (i) The appeals be upheld.
  - (ii) The CPVO previous decisions resolving:
    - (a) not to declare the Pink Lady PVR or the Sundowner PVR as null and void, and
    - (b) not to open nullity proceedings concerning the Pink Lady PVR and Sundowner PVR, – be annulled and set aside.



- (iii) The cases be remitted to the CPVO, and that the CPVO open nullity proceedings to assess whether the Pink Lady PVR and the Sundowner PVR should be declared null and void.
- (iv) After opening the respective nullity proceedings, the CPVO conducts comprehensive assessments and investigations of all the relevant facts and evidence, and that the CPVO:
  - (a) Invites relevant individuals to provide information and evidence, regarding the sales and other disposals of the varieties.
  - (b) Takes proportionate steps to gather relevant information and evidence on the sales or other disposals of the varieties at the relevant time, in particular on the express and/or implied consent of the titleholder/breeder of those sales/disposals, and the knowledge of the sales or other disposals which the titleholder/breeder had or should have had of them.
- (v) The CPVO reimburse the Appellant the appeal fees relating to these appeal cases.
- (vi) The CPVO bears the costs incurred by the Appellant essential to the proceedings in accordance with Article 85(1) of the Basic Regulation.

78. Pursuant to Article 73 of the Basic Regulation, an action may be brought before the Court of Justice of the European Union against this decision within two months of its service.

\* \* \*

*M. Navin-Jones*

**Marcus NAVIN-JONES**  
Alternate to the Chairperson of the Board of Appeal

*P. G. J. de Heij*

**Paul de HEIJ**  
Rapporteur

