



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Options Paper

Review of the Plant Variety Rights Act 1987

July 2019



MBIE 4920



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE)

Hikina Whakatutuki - Lifting to make successful

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

MBIE combines the former Ministries of Economic Development, Science + Innovation, and the Departments of Labour, and Building and Housing.

More information

www.mbie.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.mbie.govt.nz or by calling us free on 0800 20 90 20.

Disclaimer

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Ministry of Business, Innovation and Employment is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

ISBN (online) 978-1-98-857092-1

July 2019

©Crown Copyright 2019

The material contained in this report is subject to Crown copyright protection unless otherwise indicated. The Crown copyright protected material may be reproduced free of charge in any format or media without requiring specific permission. This is subject to the material being reproduced accurately and not being used in a derogatory manner or in a misleading context. Where the material is being published or issued to others, the source and copyright status should be acknowledged. The permission to reproduce Crown copyright protected material does not extend to any material in this report that is identified as being the copyright of a third party. Authorisation to reproduce such material should be obtained from the copyright holders.

How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Monday, 9 September 2019**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at: <https://www.mbie.govt.nz/have-your-say/plant-variety-rights-act-1987-review-options-paper>. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to PVRActReview@mbie.govt.nz.
- mailing your submission to:

Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Please direct any questions that you have in relation to the submissions process to PVRActReview@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on changes to the Plant Variety Rights regime. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

Private information

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.

Contents

How to have your say	3
Glossary	7
Foreword	11
Executive summary – structure and key recommendations	12
1 Introduction	17
Purpose of this Options Paper	17
Background to the review.....	17
Process and timeline.....	19
2 Objectives of the PVR Act	20
Objectives of the PVR Act	20
MBIE comment	21
3 The Sapere Report – economic analysis of the PVR System	23
4 CPTPP obligations and UPOV 91	26
Preliminary analysis of options in relation to our CPTPP obligations.....	26
UPOV 91 – other policy issues	28
5 Treaty of Waitangi obligations	30
Recap of our Issues Paper discussion	31
What did we hear at the issues stage?	32
Approach to Treaty of Waitangi compliance in the PVR regime	34
The issues to be addressed.....	35
Proposals and options analysis.....	36
6 Criteria for analysis of options for aligning with UPOV 91	48
Criteria for preliminary options analysis.....	48
7 Definitions	52
8 Scope of the right – general issues	55
Scope of the breeder’s right	55
Exceptions to the breeder’s right	58
9 Scope of the right – specific issues	60
Term of the right.....	60
Essentially derived varieties (EDVs).....	64
Rights over harvested material.....	71

	Farm saved seed	77
10	Post-grant issues	85
	Compulsory licences	85
	Enforcement: infringements.....	94
	Enforcement: offences	99
	Exhaustion of the breeder’s right	104
	Cancellation and nullification of the breeder’s right.....	105
11	Additional issues	109
	Algae	109
	Provisional protection.....	109
	Transitional provisions.....	111
	Administrative/process issues	113
12	Recap of questions	114

Glossary

Descriptions of key terms here are not intended to be definitions.

2005 draft Bill	The draft <i>Plant Variety Rights Amendment Bill</i> released for consultation in 2005
biological resources	Includes genetic resources, organisms, parts of organisms, populations and any other biotic component of an ecosystem with actual or potential use or value for humanity (CBD definition) (e.g. honey)
bioprospecting	The collection of biological material and the analysis of its material properties, or its molecular, biochemical or genetic content, for the purpose of developing a commercial product
botanical variety	A naturally occurring plant grouping within a species. They are generally used to distinguish groups of plants of a species that have a common single characteristic or one or more defining common sets of characteristics. Some botanical varieties are known as subspecies
CBD	Convention on Biological Diversity
Commissioner	The Commissioner of Plant Variety Rights. The Commissioner is part of the Plant Variety Rights Office, within the Intellectual Property Office of New Zealand
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
cultivated variety	A plant grouping within a single botanical taxon of the lowest rank, whose horticultural or agricultural origin is primarily due to intentional human activity, and is defined by traits which are consistently expressed, and can be propagated unchanged (e.g. the kiwifruit variety 'Zesy002' which is commonly sold under the brand SunGold®). Includes any clone, hybrid, stock, or line, of a plant, and excludes botanical varieties
DUS	Distinct, uniform and stable (requirement)
EDV	Essentially derived variety
EU	European Union
genetic resources	Genetic material of actual or potential value. 'Genetic material' is any material of plant, animal, microbial or other origin containing

	functional units of heredity (CBD definition) (e.g. mānuka plant)
genotype	The genetic makeup of an organism
hybridise	To cross-breed two different varieties or species of plant, often to attain desired characteristics in the parent plants
IPONZ	Intellectual Property Office of New Zealand
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
kaitiaki	Guardian, protector, caretaker (Wai 262 report)
kaitiaki relationship recommendations	The Waitangi Tribunal’s two main recommendations in the Wai 262 report: <ul style="list-style-type: none"> • that the Commissioner be empowered to refuse a PVR that would affect the kaitiaki relationship; and • that the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest
kaitiakitanga	The obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection (Wai 262 report)
mātauranga Māori	The Waitangi Tribunal referred to mātauranga Māori as “the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional knowledge” (Wai 262 report)
mana	Authority, prestige, reputation, spiritual power (Wai 262 report)
mauri	The life principle or living essence contained in all things, animate and inanimate (Wai 262 report)
MBIE	Ministry of Business, Innovation and Employment
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
phenotype	The set of observable characteristics of an organism resulting from the interaction of its genotype with the environment (e.g. leaf shape)
PVR Journal	A journal published quarterly by the Plant Variety Rights Office. It includes notice of every decision to make or decline a grant, and all prescribed particulars relating to applications and grants
PMAC	In this paper, PMAC refers to the Patents Māori Advisory Committee (not the Plant Market Access Council, which will be familiar to farmers)

propagating material	<p>Any part of a plant that is normally or traditionally used to propagate plants, including reproductive (e.g. spores, seeds) and vegetative (e.g. cuttings) propagating material</p> <p>While the term ‘reproductive material’ is used in the PVR Act to describe all propagating material, we consider that ‘propagating material’ is more accurate and have used this term in this paper</p>
PVR	Plant variety right
PVR Act	<i>Plant Variety Rights Act 1987</i>
PVR regime	New Zealand’s plant variety rights regime
PVR Office	Plant Variety Rights Office
reproductive material	Any part of a plant that is normally or traditionally used to reproduce a plant (e.g. seeds). Reproductive material is a subset of propagating material. See ‘propagating material’
RMA	<i>Resource Management Act 1991</i>
rangatiratanga	Chieftainship, self-determination, the right to exercise authority; imbued with expectations of right behaviour, appropriate priorities, and ethical decision-making (Wai 262 report)
rohe	Traditional tribal area, territory (Wai 262 report)
rongoā	Traditional Māori medicine, including herbal medicine made from plants, physical techniques like massage, and spiritual healing
taonga	A treasured possession, including property, resources and abstract concepts such as language, cultural knowledge, and relationships (Wai 262 report)
taonga species	Taonga species are native birds, plants and animals of special cultural significance and importance to Māori
tino rangatiratanga	The greatest or highest chieftainship; self-determination, autonomy; control, full authority to make decisions (Wai 262 report)
TPP	Trans-Pacific Partnership Agreement
Tribunal	Waitangi Tribunal
TRIPS Agreement	World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UPOV	International Union for the Protection of New Varieties of Plants

(Union Internationale pour la Protection des Obtentions Végétales)

UPOV Convention	International Convention on the Protection of New Varieties of Plants
UPOV members	Countries that have ratified the International Convention on the Protection of New Varieties of Plants
UPOV 78	The 1978 revision of the International Convention on the Protection of New Varieties of Plants
UPOV 91	The 1991 revision of the International Convention on the Protection of New Varieties of Plants
variety	See 'cultivated variety'
variety denomination	A generic name which allows the protected variety to be identified
vegetative propagation	A form of asexual reproduction of plants (e.g. reproduction by bulbs or tubers, the planting of cuttings, or grafting and budding of fruit trees)
Wai 262 report	Waitangi Tribunal 2011 report entitled <i>Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity</i>
whakapapa	Genealogy, ancestral connections, lineage (Wai 262 report)
whanaungatanga	Ethic of connectedness by blood; relationships, kinship; the web of relationships that embraces living and dead, present and past, human beings and the natural environment (Wai 262 report)

Foreword

As the Minister of Commerce and Consumer Affairs, I am pleased to release this Options Paper as part of the review of the *Plant Variety Rights Act 1987*.

This paper follows public consultation on an Issues Paper carried out from September to December 2018. That paper sought feedback on issues with the Plant Variety Rights (**PVR**) Act, and has informed the development of the options in this paper. I would like to thank all those who engaged with the issues stage consultation and took the time to make a submission on the Issues Paper and attend the workshops and regional hui.

New Zealand's plant variety rights regime makes an important contribution to economic activity in the agricultural, horticultural and ornamental sectors. New varieties of kiwifruit, apples and hops—along with our world-leading ryegrasses that play such an important role in our pastoral sector—are all examples of innovation facilitated by the granting of PVRs. These rights give plant breeders the opportunity to get a return on the investment they make in their breeding programmes. They also encourage overseas breeders to bring their new varieties to New Zealand.

The current Act is more than 30 years old and we need to modernise the regime to reflect the changes that have taken place in the plant breeding industry in this time. Many of the options in this paper are informed by New Zealand's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) to align our regime with the most recent version of the International Union for the Protection of New Varieties of Plants (**UPOV 91**).

We also need a regime that protects kaitiaki interests in indigenous plants consistent with the Treaty of Waitangi – a central focus of this review. This means having a regime that encourages early and meaningful engagement between plant breeders and kaitiaki, and puts kaitiaki interests at the heart of PVR decision-making.

This paper sets out options to improve the PVR regime, consistent with our Treaty of Waitangi and CPTPP obligations. As we consider these options, it is important that we find the right balance between encouraging innovation by plant breeders and ensuring this innovation is available to growers, breeders and the general public, so that New Zealand as a whole will benefit from the PVR regime.

I encourage you to have your say on the options discussed in this paper. The information and evidence you provide will inform decisions on how to amend the Plant Variety Rights Act.

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs



Executive summary – structure and key recommendations

1. This paper discusses options for change to the Plant Variety Rights (PVR) regime. Broadly speaking, the three key issues this paper addresses are:
 - a. how we meet our obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) to either accede to the 1991 version of the International Convention on the Protection of New Varieties of Plants (**UPOV 91**) or “give effect” to it;
 - b. how we propose to make the PVR regime compliant with te Tiriti o Waitangi/the Treaty of Waitangi (the **Treaty**);
 - c. what other changes are required to align our regime with UPOV 91.
2. The structure of the paper reflects these key issues. Following an introduction (**Part 1**), the paper starts with a discussion of the objectives of the PVR Act (**Part 2**) followed by a brief summary of the economic analysis MBIE commissioned to support our analysis in this paper (**Part 3**). We then address how we propose to meet our CPTPP obligations (**Part 4**) and Treaty of Waitangi obligations (**Part 5**).
3. The remainder of the paper then focuses on the third issue, namely what changes we propose to align our regime with UPOV 91. We first set out our criteria for analysing options (**Part 6**) and then group the UPOV 91 issues as follows: Definitions (**Part 7**), Scope of the right (**Parts 8 and 9**), and Post-grant issues (**Part 10**). We finish with discussion of some additional issues (**Part 11**).
4. Given our CPTPP obligation to align our regime with UPOV 91 (subject to Treaty obligations) we generally start each section by describing the differences between the current PVR Act and the requirements of UPOV 91. We then give a brief overview of what we heard from submitters during the Issues stage. We then set out the options for change in response to these issues (where we retain some domestic policy flexibility over and above that required to meet our Treaty obligations), along with our preliminary analysis of these options. In most instances we indicate a preferred option.
5. Below, we briefly summarise each part and our key preferred options.

Part 3: The Sapere report – economic analysis of the PVR system

6. To support the analysis in this paper, MBIE commissioned the Sapere Research Group to undertake an independent economic analysis of the current state of the plant varieties innovation system. Part 3 presents a brief summary of this analysis.
7. The analysis focuses on the role of the legislative settings in the innovation system and examines the question of whether New Zealand is missing out on new varieties as a result of current settings. The analysis also looked in some detail at the issues of farm-saved seed, rights over harvested material and compulsory licences. The analysis paints a healthy picture of the current state of the system, though acknowledges the concerns for the future raised by breeders and researchers.
8. The full report is available [here](#).¹

Part 4: CPTPP obligations and UPOV 91

9. Part 4 discusses the options we have under CPTPP in relation to UPOV 91 – namely to either accede to UPOV 91, or “give effect” to it – and the provision in CPTPP that gives New Zealand the necessary flexibility to meet its obligations under the Treaty of Waitangi.
10. Our preferred option is to “give effect” to UPOV 91 as this would enable us to implement our preferred package of options in relation to compliance with the Treaty of Waitangi (which we discuss in Part 5).

Part 5: Treaty of Waitangi obligations

11. Part 5 considers the Government’s obligations under the Treaty of Waitangi in the PVR regime. We discuss the Wai 262 recommendations in relation to PVRs as well as what we heard through written submissions and the regional hui we held during the issues stage.
12. We present a package of proposals designed to incentivise early and meaningful engagement with kaitiaki when breeders are considering working with plants where there is a kaitiaki interest. The package includes additional information disclosure requirements, the establishment of a Māori advisory committee and options for consideration of kaitiaki interests in decision-making processes. Our preferred decision-making option implements the Wai 262 recommendation that a PVR grant may be refused to protect kaitiaki interests. This option is incompatible with acceding to UPOV 91. As discussed in Part 4, our preferred option in relation to our CPTPP obligations is, therefore, to “give effect” to UPOV 91.
13. A summary of the package of proposals for Treaty compliance is available on the PVR Review “Have your say” page [here](#).²

¹ <https://www.mbie.govt.nz/dmsdocument/5885-what-is-really-driving-innovation-in-our-plant-based-sectors>

² <https://www.mbie.govt.nz/have-your-say/plant-variety-rights-act-1987-review-options-paper>

Part 6: Criteria for options analysis

14. Part 6 describes the analytical framework we use for our preliminary analysis of the options to align our PVR regime with UPOV 91. That is, we discuss the criteria that we use when assessing options for change to the PVR Act. Discussion and analysis of these options form the rest of this Options Paper (Parts 7-10).

Part 7: Definitions

15. Part 7 discusses issues with the consistency of definitions used in our domestic legislation compared to those used internationally (e.g. in UPOV 91). We have to ensure that the definitions in our domestic legislation (such as for “breeder” and “variety”) align with those in UPOV 91. We also recommend adding a definition of “breed” to clarify that a plant discovered in the wild cannot get a PVR, as human input is required to develop a new cultivar. This definition was endorsed by the Waitangi Tribunal in the Wai 262 report.

Part 8: Scope of the right – general issues

16. Parts 8 and 9 discuss the scope of the right (i.e. what the right allows the rights holder to do). Part 8 sets out the compulsory changes required by UPOV 91. These are the new exclusive rights provided for in UPOV 91, and the compulsory exceptions to those rights. We do not discuss options in this part as there is no domestic policy flexibility here, other than that which may be required to meet our Treaty of Waitangi obligations (which is discussed in Part 5).

Part 9: Scope of the right – specific issues

17. Part 9 sets out options for areas where we retain some domestic policy flexibility (over and above that permitted by CPTPP to meet our Treaty obligations). It covers (i) the term of the right, (ii) essentially derived varieties (**EDVs**), (iii) rights over harvested material and (iv) farm saved seed.
18. In relation to each of these:
 - a. **Term of the right** – this concerns the maximum period that a PVR can last. Our preferred option is to provide for the minimum periods required by UPOV 91 (25 years for woody plants and rootstock and 20 years for all other plants).
 - b. **Essentially derived varieties** – these are varieties that are distinct in their own right (so would be eligible for a PVR), but retain the “essential characteristics” of the variety they are derived from. Our view is that the wording in UPOV 91 is too ambiguous and so our preferred option is to follow an approach similar to Australia, which is to restrict EDVs to “copycat” varieties that add no new significant features to the variety.
 - c. **Rights over harvested material** – this concerns the extent to which rights are extended to the harvested material grown from the protected propagating material. Our preferred option is to provide for the minimum required by UPOV 91, namely that rights extend to harvested material when the material was obtained through the unauthorised use of the

propagating material and the PVR owner did not have a reasonable opportunity to assert their rights in relation to the propagating material.

- d. **Farm saved seed** – this concerns whether the new rights under UPOV 91 should cover farmers saving seed from one season to plant the next season’s crop. Our preferred option is to implement the exception for farm saved seed in UPOV 91 so that farmers can continue to save seed without the authorisation of the breeder, and allow for regulations to be made that limit that exception if there is a clear case for this.

Part 10: Post-grant issues

19. Part 10 considers post-grant issues, i.e. those aspects of the regime that are relevant only after a PVR has been granted. This covers (i) compulsory licences, (ii) enforcement, (iii) exhaustion of the right, and (iv) cancellation and nullification of the right.
20. In relation to each of these:
 - a. **Compulsory licences** – we propose a number of changes in response to concerns raised by submitters (e.g. the need for clear procedures, restrictions on export and clarifying that compulsory licences must be non-exclusive). We only consider options in relation to (i) the “grace period” and (ii) section 21(3). Our preferred options are retaining the status quo in relation to both of these.
 - b. **Enforcement** – this covers both infringements and offences. While we acknowledge the issues with enforcement in relation to infringements of a plant breeder’s rights, there are no easy fixes to this issue. We propose a number of changes to clarify the provisions in the Act (e.g. in relation to the remedies for infringement and where disputes should be held). In relations to offences (which are mostly concerned with false and/or misleading information), we indicate our preferred option is to remove the offence provisions from the Act, as they are mostly covered by other pieces of legislation.
 - c. **Exhaustion of the right** – we discuss what is required to align with UPOV 91.
 - d. **Cancellation and nullification of the right** – we discuss what is required to align with UPOV 91. We also propose that a claim for cancellation/nullification can be a counterclaim to an alleged infringement.

Part 11: Additional issues

21. Part 11 considers a number of additional issues. These are:
 - a. **Algae** – whether the PVR regime should be extended to include algae.
 - b. **Provisional protection** – this refers to the protection an applicant for a PVR receives between application and determination of whether a grant will be made. Currently an applicant can commence action for an alleged infringement during this period, but the Act makes no provision for the situation in which a PVR is not granted. We prefer an approach that action for infringement cannot be commenced until after a grant is made.

- c. **Transitional provisions** – these concern what happens to current applications/grants when the new regime comes into effect.
- 22. We also indicate that MBIE will run a consultation process on a range of administrative issues, including what regulations will be required under the new legislation, later in 2019.

1 Introduction

Purpose of this Options Paper

1. The Ministry of Business, Innovation and Employment (**MBIE**) is reviewing the *Plant Variety Rights Act 1987* (**PVR Act**). The PVR Act provides for the grant of intellectual property rights called 'plant variety rights' (**PVRs**). Plant breeders and developers may apply for PVRs over new plant varieties that they have developed. The purpose of the PVR regime is to incentivise the development and importation of new varieties of plants.
2. In September 2018, MBIE released the *Plant Variety Rights Act Review Issues Paper* (the **Issues Paper**) for public consultation. The purpose of the consultation was to better understand the issues with the current PVR regime from the point of view of industry stakeholders, Treaty of Waitangi partners and other interested parties. MBIE also held a number of industry workshops and regional hui during the consultation period (the **Issues stage**). The consultation closed on 21 December 2018.
3. MBIE received 36 written submissions on the Issues Paper and these, along with the feedback received at the workshops and hui and our international commitments, have informed the options for change to the PVR regime that are set out in this Options Paper.
4. The purpose of this paper is to seek your views on the proposed options and our preliminary analysis of these options. In most instances we have indicated a preferred option. Your views will inform the advice we provide to Ministers once analysis of submissions is complete. Where possible, please provide evidence of costs and benefits to support your submission.
5. Submissions are due by **5pm on Monday, 9 September 2019**.

Background to the review

6. The Issues Paper that was released last year provides a comprehensive background to the review and the PVR regime. This can be found on the [PVR review](#)³ pages of the MBIE website. Readers are referred to these pages for more information. Here we provide a brief summary.
7. There are three key drivers for this review:
 - a. The PVR Act is now over 30 years old and is in need of modernisation to reflect the significant changes in the plant breeding industry over this time. Internationally, PVRs are

³ <https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/plant-variety-rights/plant-variety-rights-act-review/>

governed by the International Convention on the Protection of New Varieties of Plants (**UPOV Convention**). Our PVR Act gives effect to the 1978 version of this convention (**UPOV 78**), whereas the majority of our main trading partners (including Australia, the United States of America, Japan, the European Union (**EU**) and Canada) have ratified the more recent, 1991, version (**UPOV 91**).

- b. The PVR regime needs to reflect the Crown’s obligations to Māori under the Treaty. In 2011, the Waitangi Tribunal released its report, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (**Wai 262 report**). This included a number of recommended changes to the PVR regime to recognise and protect Māori interests in taonga plant species. These recommendations were used as the starting point for our engagement during the Issues Paper consultation to better understand how the PVR regime could be made Treaty compliant.
 - c. On 30 December 2018, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) came into force for New Zealand. The CPTPP requires New Zealand to either (i) accede to UPOV 91, or (ii) implement a PVR regime that gives effect to UPOV 91. The options were negotiated specifically by New Zealand to ensure that the Crown could implement measures it deems necessary to fulfil its obligations under the Treaty of Waitangi.
8. Prior to the release of the Issues Paper last year, MBIE had undertaken some pre-consultation engagement with some interested groups to assist with information-gathering and planning for the Issues stage consultation. The Issues stage was the first stage of public consultation in the review of the PVR regime. The release of this Options Paper represents the second stage of public consultation in this review.
 9. The individual submissions received in response to the Issues Paper, along with a summary of these submissions, and notes from our regional hui are all available on the [PVR review](#) pages of the MBIE website.

Process and timeline

10. An outline of the intended review process is below. The stages in dark green represent opportunities for you and other members of the public to provide your input into the process.

Stage of the review	What does this involve?	Timing
Issues stage	Pre-consultation phase: information gathering, planning, engagement with interested groups to support development of Issues Paper and Māori Engagement plan	2017/first half of 2018 COMPLETE
	Release of Issues Paper for public consultation (following Cabinet agreement) including regional hui and public meetings	September to December 2018 COMPLETE
Options stage	Development of options in response to feedback received during the Issues stage	January to June 2019 COMPLETE
	Release of Options Paper for public consultation	July to September 2019
Drafting legislation	MBIE provides advice to Ministers following analysis of submissions, Cabinet makes policy decisions, Bill is drafted	September 2019 to April 2020
Legislative stage	PVR amendment Bill is introduced to Parliament	April/May 2020
	Select Committee process, including public submissions on the Bill	Commences May 2020, timing depends on general election dates
	Select Committee reports back, Bill goes through final stages	Bill passed first half 2021
Implementation stage	Implementation and transition to new regime	New regime in place by 30 December 2021

2 Objectives of the PVR Act

Objectives of the PVR Act

Original proposal

11. In the Issues Paper we proposed that the main objectives of a modern, fit-for-purpose PVR regime should be:
 - a. to promote innovation and economic growth by incentivising the development and dissemination of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and society as a whole;
 - b. compliance with New Zealand’s international obligations; and
 - c. consistency with the Treaty of Waitangi.
12. The first objective reflects the social contract at the heart of any intellectual property regime, and the main purpose of the PVR regime.
13. A temporary, commercial monopoly is granted because it is considered that, with the correct settings, there will be a net benefit to society. In the case of PVRs, breeders will be incentivised to develop new varieties knowing they will get an adequate return on that investment and New Zealand as a whole will benefit from the flow-on economic effects of that innovation. If rights are too weak, plant breeders will not have sufficient incentive to invest in breeding new, innovative varieties and New Zealand will lose out on the economic benefits that flow from this innovation. If rights are too strong, costs (such as reduced competition, higher costs for growers and reduced incentive for follow-on innovation) can outweigh the benefits.

What submitters said

14. We received a lot of feedback on the objectives both in submissions and at the stakeholder meetings and hui. Key themes were:
 - a. the meaning of some words is unclear and they should either be clarified or replaced. Several submitters commented that:
 - i. “dissemination” should be replaced with “use”, as it implies plant material should be distributed widely;
 - ii. the phrase “appropriate balance” needs defining.

- b. an “efficiency and effectiveness” objective is needed;
- c. the regime needs to provide greater certainty for both rights holders and users/growers;
- d. the interests of users/growers needs to be more clearly stated;
- e. the objective relating to the Treaty of Waitangi is weak, suggestions included:
 - i. providing explicit protection of Māori rights and responsibilities as set out in international agreements the Crown is a party to (e.g. the UN Declaration on the Rights of Indigenous Peoples);
 - ii. changing it to “Compliance with Crown’s Treaty of Waitangi” obligations, or “Giving effect to the Treaty of Waitangi” (as in section 4 of the *Conservation Act 1987*);
 - iii. providing greater clarity of what Treaty of Waitangi compliance means, e.g. explicit recognition of tino rangatiratanga over taonga species, mātauranga Māori, and kaitiaki relationships with native species.
- f. consider better alignment with other intellectual property legislation, e.g. the *Patents Act 2013*.

MBIE comment

- 15. It is important to note that the specific wording of the objectives we are working towards is likely to differ in any eventual bill developed by the Parliamentary Counsel Office to give effect to the Government decisions that will be made in this review.
- 16. However, we largely agree with the feedback we have received on the original objectives. It is important that terms are as clear as possible. We broadly agree with the “dissemination v use” issue. We consider that another way to think about this is that the balance is primarily about encouraging innovation on the one hand (through ensuring that breeders can get a reasonable return on their investment) and ensuring reasonable access to that innovation on the other hand (e.g. so that products can be developed that satisfy consumer demand, supporting New Zealand’s economic growth, and so that researchers can continue to develop new varieties). If the balance is right, then New Zealand will stand to benefit overall.
- 17. We agree that there needs to be reference to having an efficient and effective system to capture the importance of having a regime that has proportionate compliance costs and that provides certainty to both rights holders and the public (including growers).
- 18. We have also changed our language from “Treaty consistency” to that of “Treaty compliance”. This is intended to put it beyond doubt that we are seeking to meet the Crown obligations under the Treaty of Waitangi in the PVR Act through this review.

1

Objectives of the PVR Act

Do you have any further comment to make on the objectives of the PVR Act?

3 The Sapere Report – economic analysis of the PVR System

19. To support the options analysis in this paper, MBIE commissioned the Sapere Research Group (**Sapere**) to undertake an independent economic analysis of the plant varieties innovation system, and the role the legislative settings play in that system. The key questions MBIE put to Sapere were:
 - a. What is the current ‘state of health’ of the plant varieties innovation system?
 - b. What is the role of our legislative settings in this system?
 - c. Is there evidence that New Zealand is missing out on new varieties, either because of insufficient returns on investment in domestic breeding programmes, or because overseas breeders are reluctant to bring new varieties to New Zealand?
20. The report by Sapere begins by setting out a framework for considering the drivers of innovation in plant varieties, and identifies three mutually reinforcing drivers:⁴
 - a. the industry structure and innovation in the “value chain”;
 - b. the plant characteristics and technical innovation in plant cultivation;
 - c. the legal protections for rights and innovation in the law.
21. It then applies this framework to the following sectors: agricultural and vegetable crops; pasture plants, amenity grasses and fungi; fruit and nuts; and ornamentals, trees and other plants.⁵ For each of these sectors, the report considers both the current state and possible evolution of:
 - a. breeding activity and financial flows;
 - b. industry structure;
 - c. plant characteristics;
 - d. legal and social institutions;

⁴ While the Sapere Report only briefly mentions this, another important consideration is access to plant germplasm, including cultivars and species material. For example, a key concern of breeders – though outside the scope of this review – is delays in importation of genetic material.

⁵ The report also briefly comments on algae, which are not currently covered by the PVR Act.

e. characteristics of market demand.

22. The Executive Summary of the report summarises the general conclusions of the analysis as follows:

“The review finds that the balance between providing an opportunity for a plant breeder to obtain a reward for their effort in developing a new plant variety, and the benefits to growers and society from having access to new and improved plant varieties, has been reasonably well-set.

We did not see evidence that New Zealand is missing out on new plant varieties as a result of the PVR regime (although many comments were made on challenges associated with the import regime).

While breeders and growers pointed out costs and uncertainties associated with some parts of the system (particularly enforcement), we have observed a relatively healthy, dynamic system for generating new cultivars from within New Zealand. Joint venture arrangements between CRIs and private entities have emerged and are becoming more sophisticated, and these are working to generate and commercialise new cultivars. We have observed (on the whole) outcomes that show trust and confidence in New Zealand’s systems for protecting plant-related IP. We have seen a combination of legal instruments being used to protect property rights in new plant varieties, including PVRs, contracts and patents. These legal instruments are being used in parallel with industry structure to strengthen the appropriability of plant innovations.”

23. For example, even though the number of applications has fallen from 170-200 in the second half of the 90s to 125-150 in the period 2012-2018, this trend is mirrored in UPOV 91 countries. The report considers that this is a result of (a) advances in plant breeding in the 80s and early 90s, which are now tailing off, and (b) a decrease in the share of ornamental varieties as effort is put into lower volume, higher profitability crops such as fruit and agricultural plants. Apples, kiwifruit, hops, berries and ryegrasses are all noted as examples of a healthy plant varieties innovation system in New Zealand.
24. However, the report also acknowledges the concerns raised by breeders and researchers, summarised in the Executive Summary as follows:

“Despite these apparent successes, we spoke with numerous parties who emphasised to us their view that the PVR system is starting to fray at the seams. They told us that New Zealand’s legislative settings are starting to introduce uncertainty, which will affect innovation if not addressed soon. We have not seen evidence of this uncertainty playing out in the statistics, but this does not mean that it does not exist. In particular, our legislative settings were seen by many of the people interviewed as:

- *lagging behind the rest of the World by not aligning with the most recent UPOV convention*
- *lacking enforcement power*

- *being constrained in the ability to extend enforcement to unauthorised harvested material (in particular, from offshore)*
- *uncertain, particularly in regards to compulsory licensing*
- *not future-proofed, particularly in regards to evaluation settings*
- *preventing reasonable methods of royalty capture, particularly for farm saved seeds.*

The plant-based industries are overwhelmingly supportive of moves to modernise the Plant Variety Rights Act. The new Act needs to reflect a new reality in which plant technology is changing, industry structures are changing and the plant-based industries are among New Zealand’s largest producers.”

25. The report then looked in more detail at three elements of the PVR regime: farm saved seed; rights over harvested material; and compulsory licensing. The conclusions of the report in relation to these will be covered in the relevant sections of this Option Paper.
26. The full report is available [here](#).⁶

⁶ <https://www.mbie.govt.nz/dmsdocument/5885-what-is-really-driving-innovation-in-our-plant-based-sectors>

4 CPTPP obligations and UPOV 91

27. The CPTPP requires New Zealand to either (i) accede to UPOV 91, or (ii) implement a PVR regime that “gives effect” to UPOV 91. The options were negotiated by New Zealand to ensure that the Crown could fulfil its obligation under the Treaty. Specifically, New Zealand can adopt:⁷

“any measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party.”

28. This provision sits alongside to the general ‘Treaty exception’ clause in CPTPP which gives New Zealand the policy space in relation to any matter covered by the CPTPP to implement measures it “deems necessary to accord more favourable treatment to Māori ... including in fulfilment of its obligations under the Treaty of Waitangi”.⁸ Under both provisions, what is “necessary” is for New Zealand to determine.
29. Together, these provisions mean that if we determine that a particular policy that is not compatible with UPOV 91 is nonetheless necessary to meet our Treaty obligations, then we can choose not to accede to UPOV 91. Instead we can “give effect” to UPOV 91 by aligning our regime with UPOV 91 outside of what is required to comply with the Treaty, and still meet our CPTPP obligations.

Preliminary analysis of options in relation to our CPTPP obligations

30. As we have noted above, New Zealand can choose to depart from UPOV 91 as opposed to accede to UPOV 91 if any of the measures we deem necessary to meet our Treaty obligations are incompatible with acceding to UPOV 91.

UPOV 91 and the Treaty of Waitangi

31. Our Treaty of Waitangi obligations are discussed in detail in Part 5. There we present a package of proposals intended to make the regime compliant with the Treaty. Here we only provide a brief summary to set out how we arrive at our preferred option in relation to our CPTPP obligations, which is to “give effect”, rather than accede, to UPOV 91.

⁷ CPTPP, Annex 18-A

⁸ CPTPP, Article 29.6

32. **We consider that the Treaty of Waitangi requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in the PVR regime. This requires a genuine and balanced consideration of kaitiaki interests at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR.**
33. Insofar as compliance with UPOV 91 is concerned, the key issue for achieving Treaty of Waitangi compliance relates to PVR decision-making processes. In Part 5, we present three options for this process, and set out the criteria against which we assess each of these options.
34. Our preferred option is to introduce a new power to allow the refusal of a PVR if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant (Option 2 in Part 5 below).
35. **We consider that Option 2 best provides the degree of protection of kaitiaki interests necessary to meet our Treaty obligations, without creating too much uncertainty for breeders.** It represents a genuine and balanced consideration of kaitiaki interests, and reflects the main recommendation of the Waitangi Tribunal in the Wai 262 report. It is also consistent with other intellectual property regimes. For example, in the *Patents Act 2013*, a patent can be refused on the grounds that the commercial exploitation of the invention is likely to be contrary to Māori values.
36. We consider Option 2 is necessary to meet our Treaty obligations. Option 2 is not compatible with UPOV 91 as UPOV 91 does not permit UPOV member states to impose additional criteria for a grant of a PVR. **The implication of this is that New Zealand cannot accede to UPOV 91, but must instead “give effect” to UPOV 91. This is, therefore, our preferred option in relation to our CPTPP obligations.**

Implications of “giving effect” to UPOV 91

37. Implementation of our preferred Treaty compliance option means that the regime would look like UPOV 91 for over 90 per cent of PVR applications (as well as the great majority of our trade relating to plant varieties), but would implement additional protections in relation to varieties where there is a kaitiaki interest, consistent with the Treaty.
38. Some stakeholders have argued that full accession to UPOV 91 is important as it is a clear demonstration to our trading partners that we take PVR protection seriously, and provides clear assurance as to the level of protection provided.
39. Our CPTPP obligations do not permit us to take into account economic considerations when deciding which option to choose, nor would we propose weighing these against Treaty considerations. However, we do note there is no clear evidence that acceding to UPOV 91 would be significantly more advantageous to New Zealand than “giving effect” to UPOV 91, i.e. having a regime that is UPOV 91 in all but name (with some variation that only applies to the minority of PVRs that relate to varieties where there is a kaitiaki interest).

40. Our current PVR Act is based on UPOV 78 which falls well short of the standards of protection in UPOV 91. Yet there is no clear evidence that New Zealand is currently missing out on new varieties either through foreign breeders not bringing their intellectual property here, or through domestic R&D being hampered by insufficient return on investment in breeding programmes.
41. This is supported by the independent economic analysis MBIE commissioned:
- “we have observed a relatively healthy, dynamic system for generating new cultivars from within New Zealand. We have observed (on the whole) trust and confidence in New Zealand’s systems for protecting plant-related [intellectual property]”*
- “we did not see evidence that importers of plant material are being dissuaded from bringing propagating material into New Zealand because of our PVR regime (although this is hard to assess quantitatively)”*
42. “Giving effect” to UPOV 91 means that New Zealand remains a member of UPOV 78, despite the fact the regime will look like UPOV 91 for over 90% of protected plant varieties, and close to UPOV 91 for varieties where there is a kaitiaki interest. UPOV 78 also does not permit additional criteria for the grant of a PVR but unlike UPOV 91 it does not require the provisions be extended to all plant genera and species.
43. Finally, the outcome of our Treaty compliance analysis at this time does not mean that acceding to UPOV 91 could *never* be Treaty of Waitangi-compliant. The difficulty in crafting effective Treaty-compliant options that are consistent with UPOV 91 stems in part from the lack of policy development relating to Māori rights and interests in taonga species generally in New Zealand. We discuss this further in Part 5.

2 Meeting our CPTPP obligations

Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?

UPOV 91 – other policy issues

44. Whatever final decision the Government makes on accession to UPOV 91 and how we incorporate the Treaty into the regime, the future PVR regime must still be consistent with UPOV 91 as far as is possible, subject to the flexibility we have to meet our Treaty obligations.
45. For instance, the definitions we use (such as breeder, propagating material etc.) must be consistent with UPOV 91 (see Part 7); we must provide at least the new exclusive rights in relation to propagating material and, in certain circumstances, harvested material; and we must implement the compulsory exceptions to the exclusive rights (see Part 8). In this Options Paper we will make it clear when we are discussing UPOV 91 provisions that we have no flexibility as to how they are implemented (subject to our Treaty obligations).

46. However, there remain a number of provisions within UPOV 91 that leave room for domestic policy flexibility (over and above that required to meet our Treaty obligations). The main ones are:
- a. the term of the right (beyond the minima provided for in UPOV 91);
 - b. how we implement the new provisions relating to “essentially derived varieties (**EDVs**)”;
 - c. whether we extend the rights to harvested material and the products of harvested material beyond the minimum required by UPOV 91;
 - d. how we address the issue of farm saved seed;
 - e. how we implement the compulsory licence provisions;
 - f. how infringements are enforced;
 - g. what, if any, offence provisions we need.
47. These are discussed in Parts 9 and 10.

5 Treaty of Waitangi obligations

48. Following our discussion of our preferred option in relation to meeting our CPTPP obligations, in this part we now go into the detail of our proposals and options for making the PVR regime Treaty compliant.
49. We start by providing a recap of our Issues Paper discussion of Treaty considerations in the PVR regime, and provide an overview of the responses on Treaty issues from submitters and participants at our regional hui and industry workshops.
50. We then outline our understanding of the issues to be addressed. We cover this at two levels. First, we explain, at a high-level, our understanding of what Treaty compliance means in this review. Then, we describe a package of proposals for Treaty compliance in the PVR Act review. As part of our package, there are three options for decision-making to protect kaitiaki interests. The majority of our analysis relates to these options.
51. Our recommended package of proposals is to:
 - a. introduce new information disclosure requirements for breeders, requiring them to provide information about the origin of the plant material used to develop their varieties and if applicable, who kaitiaki are, any engagement the breeder has had with kaitiaki, and the breeder's assessment of whether kaitiaki interests would be affected by the commercialisation of the new variety;
 - b. establish a PVR Māori advisory committee, to:
 - i. develop guidelines for breeders and kaitiaki on engagement;
 - ii. provide advice to breeders and kaitiaki at the pre-application stage;
 - iii. provide advice to the Commissioner of Plant Variety Rights and the Chair of the Māori advisory committee as to whether kaitiaki interests would be adversely affected by the grant of a PVR and, if so, whether the impact can be mitigated to a reasonable extent such as to allow the grant.
 - c. empower the Commissioner of Plant Variety Rights, jointly with the Chair of the Māori advisory committee, to decide whether, on the basis of the Māori advisory committee's advice, the PVR should be granted.
52. We have discussed in Part 4 above the implications of our recommended approach to Treaty compliance for CPTPP compliance. Introducing a new power to refuse a PVR to protect kaitiaki interests is inconsistent with UPOV 91, as UPOV 91 does not permit states to implement new criteria for a grant of a PVR. We propose that New Zealand not accede, but instead "give effect", to UPOV 91.

Recap of our Issues Paper discussion

The Waitangi Tribunal's recommendations on plant variety rights

53. In our Issues Paper, we discussed the Waitangi Tribunal's findings and recommendations in the 2011 Wai 262 report, *Ko Aotearoa Tēnei*.
54. The Wai 262 report has provided a useful starting point for considering the PVR regime from a Treaty perspective. You can find more information about the Wai 262 inquiry and report on the Waitangi Tribunal website [here](#).
55. The Waitangi Tribunal made recommendations on the genetic and biological resources of taonga species in Chapter 2 of the Wai 262 report. This is relevant to the PVR regime because it regulates matters relating to cultivated varieties of plant species, including taonga plant species.
56. The Tribunal's key finding on the genetic and biological resources of taonga species was that the Treaty does not guarantee ownership in taonga species (or mātauranga Māori relating to taonga species), but it does guarantee tino rangatiratanga.
57. For the Tribunal, the principle of tino rangatiratanga requires recognition and protection of kaitiaki relationships with taonga species and mātauranga Māori. This means providing kaitiaki with a level of control over the use of genetic and biological resources of taonga species sufficient for kaitiaki to protect their relationships with those species to a reasonable degree.
58. After reviewing New Zealand's law and policy regulating the continuum of activities from bioprospecting through to research and development and finally, commercialisation, the Tribunal concluded that there was not adequate protection for kaitiaki relationships. It made a range of recommendations on bioprospecting, genetic modification and intellectual property law and policy to address this.
59. On the PVR Act, the Tribunal made two recommendations (which we refer to as the **kaitiaki relationship recommendations**).⁹ These were that:
 - a. the Commissioner of PVRs be empowered to refuse a PVR that would affect the kaitiaki relationship;
 - b. the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest.
60. The Tribunal also supported two Government proposals in the 2005 *Plant Variety Rights Amendment Bill* that was put on hold in 2007 in anticipation of the Wai 262 report. These were:

⁹ Those changes were never enacted, however, as the work was put on hold in 2007 in anticipation of the Wai 262 report.

- a. to clarify the level of human input into the development of a plant variety for the purposes of PVR protection ('discovered' varieties);¹⁰
- b. to enable the Commissioner to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori (offensive names).

61. We asked for feedback on these proposals and the issues underlying them.

Additional issues

62. We also discussed concerns raised in our pre-consultation engagement about the availability of information to facilitate Māori engagement with the PVR regime in the Issues Paper. Participants in our pre-consultation workshops had been interested in understanding how varieties are developed (for example, whether a variety is developed using plant material from an indigenous species) and by whom (for example, whether the breeder identifies as a kaitiaki).
63. To explore this issue further, we asked what information submitters felt should be accessible on the register, and queried whether breeders should be required to disclose more information (for example, disclosure of origin) as part of their application.

What did we hear at the issues stage?

Protecting kaitiaki relationships in the PVR regime

64. In submissions and hui, Māori emphasised the significance of kaitiaki relationships with native plants. Key ideas we heard about in connection to kaitiakitanga were:
- a. **whakapapa**, which connects all life forms to each other and to Papatūānuku and Ranginui, and underlies the obligations of kaitiaki;
 - b. **mauri**, and concern about how plant breeding may affect the mauri of plants used in breeding programmes as well as native plants in the wild.
65. Many were frustrated that the Treaty was not mentioned, and Māori rights and interests not explicitly protected, in the PVR Act. Some submitters considered that this review was an opportunity for the Crown to update the PVR Act and acknowledge the roles and responsibilities of Māori as kaitiaki, which they considered the Crown had thus far failed to do.
66. We did not encounter any opposition to incorporating the Treaty into the PVR Act in our workshops, hui or submissions. In general, Māori and breeders were supportive of the Wai 262 recommendations. Some Māori considered that the Wai 262 recommendations did not go

¹⁰ This issue is discussed in Part 7.

far enough or that the ability of breeders to gain PVRs over varieties derived from indigenous plant species was not consistent with the Treaty. Breeders were open to meeting additional requirements. The key differences in views related to what those requirements might be.

67. Some breeders expressed concern about clarity on key questions, including:
 - a. What are taonga plant species?
 - b. How should breeders identify kaitiaki of taonga species plant material they may seek to use in their plant breeding programmes?
 - c. What is likely to be of concern to kaitiaki in their breeding programmes?
68. Some breeders were concerned about what it would mean to implement the Waitangi Tribunal's recommendations. They were concerned about New Zealand's PVR regime disadvantaging domestic breeders, given that genetic material from indigenous plant species is "freely available overseas to overseas breeders". All submitters who commented on the Waitangi Tribunal recommendation to allow offensive names to be refused by the PVR Office were supportive of the proposal.

Māori advisory committee

69. In general, feedback and submissions on the Māori advisory committee favoured introducing a Māori advisory committee mechanism into the PVR regime. Views tended to differ however on what the function of the committee should be.
70. There were some tensions in how Māori perceived the role of the committee. Some felt the Māori advisory committee should have a decision-making role in the grant process, i.e. the committee's consideration of applications shouldn't be a "tick box" exercise. Others suggested that the committee should play an intermediary role between kaitiaki and the PVR Office, noting concern about the committee replacing genuine consultation and that only mana whenua can represent their own interests, not a committee.
71. It was also suggested that our interpretation of the Waitangi Tribunal's recommendations on the PVR regime was too narrow, and that we should take into account comments made on the patents Māori advisory committee. This was the model the Tribunal had recommended for PVRs (but is not the design of the committee that has been implemented in the *Patents Act*).
72. Industry was generally supportive of establishing a Māori advisory committee. Those who commented on the effect of the committee's advice generally did not think it should be binding on the Commissioner. One submitter expressed concern about the potential powers of the Māori advisory committee, and was keen to ensure that safeguards would be built in to ensure that its function would not be "window dressing for commercial self-interest".

Transparency and participation in plant breeding and the PVR regime

73. One of the key questions we sought to better understand was how industry currently works with kaitiaki in the development of plant varieties, and any examples of how the kaitiaki relationship has been considered in the development of new varieties. We understand from our engagement with breeders and Māori alike that, currently, this happens sparingly, and we did not receive any examples via submissions.
74. Few breeders submitted on the origin of genetic material used in plant breeding, but those who did confirmed that they gather this information. These submitters also suggested other information that breeders could provide to assist kaitiaki in engaging with the PVR register, including pedigree records, DNA fingerprinting information, and a summary of breeding methodology (as required in Australia).

Approach to Treaty of Waitangi compliance in the PVR regime

75. In our Issues Paper, we stated that we considered that one of the main objectives of a modern, fit-for-purpose PVR regime is “consistency with the Treaty of Waitangi”. As we have noted in Part 2 (in which we discussed the objectives of the PVR Act), we are now using the term “Treaty of Waitangi compliance”. Before we discuss our proposals and options for Treaty compliance, we think it is useful to explain our perspective on Treaty compliance in this review.

This review remains focused on the plant variety rights regime ...

76. The PVR regime forms part of a wide range of law and policy that relates to how plants can be accessed and used, by whom, and for which purposes. We have heard, through our hui and other channels, frustration with lack of Crown policy work on the fundamental issues around who owns or controls taonga species and mātauranga Māori, particularly in the context of the Wai 262 inquiry.
77. Many people have told us that they think our review should cover these underlying, and other related issues including: bioprospecting policy (and an access and benefit sharing regime); accession to the Nagoya Protocol; government funding of (Māori) research and science; protection of rongoā Māori; and more.
78. These kinds of issues are outside of the scope of the current review. However, there is work happening across government to consider how the Crown might take a joined-up approach to addressing them. We will be able to update you on this work and its relationship to the PVR Act review shortly.

... but our view on Treaty compliance in the PVR regime responds to the legislative context...

79. The PVR Act allows the Government to provide exclusive rights to plant breeders over the propagating material of new plant varieties they develop. **In our view, the Treaty of Waitangi requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in the PVR regime. This requires a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR.**
80. We consider that this reflects both the Waitangi Tribunal’s Wai 262 recommendations and, to a large extent, what we have heard in our engagement process.
81. We have heard from Māori in this review that, in general, legislation relating to taonga plant species (which largely predates the release of the Waitangi Tribunal’s Wai 262 report) does not protect their interests. Our proposals, options and criteria for complying with the Treaty in the PVR regime reflect this legislative context.
82. For example, we do not consider that excluding new varieties derived from taonga plant species from the PVR regime would facilitate protection of kaitiaki interests. In our consultation process, some people have suggested that plant breeders should not be granted exclusive rights to authorise the propagation of the new varieties derived from indigenous plant species under any circumstances. While we can understand this perspective, we do not agree with it. Excluding new varieties derived from the plant material of indigenous plant species from PVR protection would result in little to no regulation of plant breeding of these species. This review provides an opportunity to ensure plant breeding in New Zealand (and perhaps, internationally) is inclusive of kaitiaki interests. We discuss our proposals for achieving this in detail below.

... and our proposed approach is subject to change as related legislation comes up for review.

83. Our conception of what is necessary to comply with the Treaty in the PVR regime is heavily influenced by the current legislative context, and is subject to change as underlying issues relating to the protection of taonga plant species and mātauranga Māori come up for consideration.
84. One hui participant described the current PVR Act review, and the changes that can be made, as part of a broader continuous improvement process. This is how we see it, too. Any new PVR Act arising from this review may be improved at a later date to reflect the broader legislative context around taonga plant species as it evolves.

The issues to be addressed

85. Our understanding of the issues to be addressed in this review is based on our understanding, as outlined above, that the Treaty of Waitangi requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in

the PVR regime. This requires a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR.

86. The PVR Act contains no references to the Treaty or te ao Māori. It does not explicitly provide for consideration of the kaitiaki relationships that Māori hold with plants and mātauranga Māori to be considered in the PVR grant decision-making process. This creates a risk that PVRs may be granted that negatively affect kaitiaki relationships. The current decision-making process does not provide sufficient consideration of kaitiaki interests as required under the Treaty of Waitangi.
87. Because there is no provision for taking kaitiaki interests into account in decision-making in the PVR Act, information about these interests, and the potential impact of PVRs on them, is not provided by PVR applicants and it is generally not sought by the PVR Office. In general, breeders do not gather this information as there is no expectation that they do so. We understand that it is rare for plant breeders to engage with kaitiaki at all.
88. If this information was gathered and provided by breeders as part of the application process, the PVR Office would have limited capacity currently to consider this information, which requires a good understanding of te ao Māori and, more specifically, kaitiaki interests.
89. We consider, then, that there are three related key issues to be addressed:
 - a. a lack of engagement by breeders with kaitiaki, which limits breeders' understanding of the impact of their breeding activity on kaitiaki interests and their capacity to provide information on these matters to the PVR Office;
 - b. a lack of provision for consideration of kaitiaki interests in the PVR grant decision-making process, which risks negatively affecting these interests;
 - c. a lack of capacity in the PVR Office to consider matters related to kaitiaki interests.

Proposals and options analysis

High-level overview

90. To achieve Treaty compliance in the PVR regime, we have developed a package of key proposals to address the three issues identified above (the **package**).
91. The package contains proposals relating to:
 - a. **Disclosure requirements:** the information on kaitiaki interests that we propose must be provided by plant breeders when they apply for a PVR;
 - b. **Decisions relating to kaitiaki interests:** how decisions are made in relation to information on kaitiaki interests provided in a PVR application;

- c. **Decision-makers and advisors:** who is involved in considering kaitiaki interests in the PVR grant decision-making process, and how.
92. The package reflects the Wai 262 recommendations, and feedback received through consultation and other engagement.
93. Within the proposal on decisions relating to kaitiaki interests, we have outlined three options. These options represent different levels of consideration for kaitiaki interests and are the main focus of our analysis.

Criteria

94. Taking into account the current PVR regime, potential changes that could be made, and the broader legislative context, we have considered how the PVR regime as a whole could be made compliant with the Treaty of Waitangi. Our criteria for assessing our options and proposals for implementing this are necessarily different from those applied to other proposals in this paper (see Part 6).
95. For Treaty compliance, our criteria for options development and assessment are:
- a. facilitates meaningful and mana-enhancing consideration of kaitiaki interests in PVR decision-making processes;
 - b. provides clarity for plant breeders for whom kaitiaki interests will be a relevant consideration in the PVR grant process;
 - c. minimises additional compliance costs.
96. In assessing the options, we assign a double weighting to criterion (a) as it directly responds to the problem definition. Criteria (b) and (c) are secondary objectives and require us to consider the workability of changes we may seek in the specific context of the PVR regime.

Treaty compliance – criteria for analysis

3

Do you agree with the criteria that we have identified? Do you agree with the weighting we have given the criteria? If not, why not?

Approach to key terms

97. Before we continue on to our proposals, it is useful to set out our approach to key terms.
98. A major concern we have heard from breeders and Māori relates to how new PVR legislation will deal with the concepts of ‘taonga species’ and ‘kaitiaki’ used in the Wai 262 report.
99. We do not think at this stage that the terms ‘taonga species’ and ‘kaitiaki’ should be defined within the PVR Act, in advance of a broader and more comprehensive policy development process around the protection of taonga species generally. The new PVR Act would not be the

appropriate vehicle for defining these terms in legislation (if at all), given the Act's narrow application and, consequently, the narrow nature of the discussions we have had on these issues.

100. We are also unsure of how useful the concept of 'taonga species' is in the PVR context. The more helpful focus is likely to be on the origin of plant material used in breeding programmes, i.e. whether it originated in New Zealand from indigenous plant species or other species of significance to Māori, given that not all species indigenous to New Zealand are endemic (indigenous to New Zealand only). For example, we consider that there are unlikely to be kaitiaki interests in sticky hopbush or ake ake (*dodonaea viscosa*) where this has been sourced from Australia (where it is also indigenous), but there may be kaitiaki interests where it has been sourced from New Zealand.
101. However, we agree it is important that (i) we provide certainty to plant breeders about whether the new requirements we propose below apply to their breeding programmes, and (ii) provide clarity to iwi, hapū and whānau about how their interests in plants will be considered in the PVR Act specifically.
102. We suggest proceeding on the basis of the following principles:
 - a. Where plant material originating in New Zealand from indigenous plant species (**indigenous plant material**) has been used to develop a new plant variety, there is a presumption that there are kaitiaki who may have interests in the indigenous plant material.
 - b. Generally, iwi, hapū or whānau who hold mana whenua over the rohe in which the plant material has been sourced in the wild may have kaitiaki interests in indigenous plant material.
 - c. Iwi, hapū and whānau may also have kaitiaki interests in plant material from species that are not strictly indigenous to New Zealand – for example, species that were introduced to New Zealand on the migrating waka, like kumara. We refer to these in the remainder of this Part as **non-indigenous species of significance**.
 - d. Where the indigenous plant material or plant material from non-indigenous species of significance has been used to develop a new plant variety but its regional origin is not able to be identified, those who hold mana whenua over the rohe where the variety has been developed (e.g. the location of the nursery) may have a kaitiaki interest in the new variety.
103. Our preference at this stage is that these principles be expressed, and further explained, in guidelines produced by the Māori advisory committee, building on the findings of the Tribunal and in collaboration with kaitiaki and breeders. We are interested in your views on these general principles and how they might be expressed and apply in practice in the PVR regime – for example, whether it would be useful to specifically list non-indigenous species of significance in any new legislation.

Treaty compliance – key terms

4

Do you agree with our proposed approach to these key terms?

Do you have any comments on the principles listed above and how they might apply in practice? For example, would it be useful to specifically list non-indigenous species of significance?

Key proposals

104. Here we set out our proposals and options in relation to the three elements of the proposed package:
- a. disclosure requirements;
 - b. decisions relating to kaitiaki interests;
 - c. decision-makers and advisors.

New information disclosure requirements

105. A key message we heard in our hui and submissions from Māori was that there would be considerable value from early, meaningful and ongoing engagement with kaitiaki by plant breeders in their breeding programmes. As we have mentioned, this happens rarely if at all. This means that breeders are not considering the impact of their breeding programmes on kaitiaki relationships, and that kaitiaki have low or no awareness about breeding programmes that may affect their kaitiaki obligations.
106. To incentivise quality engagement between kaitiaki and breeders – and facilitate consideration of kaitiaki interests by the PVR Office – we propose adding new disclosure requirements to the PVR regime. This would require breeders to first indicate whether their new variety is derived from plant material from either indigenous species or non-indigenous species of significance. If so, the breeder will also be required to disclose:
- a. who the kaitiaki are;
 - b. a record of engagement with kaitiaki, and the outcome of that engagement;
 - c. their assessment of whether kaitiaki interests would be affected by the commercialisation of the relevant variety and if so, how the impacts will be mitigated.
107. If an applicant does not provide information requested by the Commissioner within a specified period, the application will lapse. This means that the application will not proceed to testing, with the effect that a PVR will not end up being granted. Information provided by breeders would be made available on the PVR register, unless confidential.

108. These information disclosure requirements implicitly require breeders and kaitiaki to work together to understand and balance each other's interests, and decide how they might work together throughout a potential breeding programme and beyond.
109. Engaging with kaitiaki to understand their interests will be new to many breeders. Different kaitiaki will have different interests and require different levels of engagement. To facilitate effective engagement between kaitiaki and breeders, we propose a collaborative process involving the PVR Office, breeders and kaitiaki to establish engagement protocols at some stage following policy decisions. These protocols should be informed by the criteria discussed above (and where possible will draw on existing tools such as the Te Puni Kōkiri registered iwi database).

Decision-making on kaitiaki interests

110. We envisage that over time, with sufficient guidance, advice from the Māori advisory committee and goodwill from all parties, kaitiaki and breeders will be able to agree among themselves how their interests in relation to any new variety should be balanced and provided for, leading to a straight-forward grant process.
111. However, there will inevitably be situations where the engagement has not gone so well or perhaps not even happened at all. It is important that there is a genuine balancing of interests in the decisions on the PVRs as a backstop measure for these situations where breeders and kaitiaki have been unable to work matters through themselves.
112. We suggest three options for achieving this:
 - Option 1:** introduce a new power to limit the exercise of a PVR over a variety if the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee consider that kaitiaki interests are affected by the grant of the PVR
 - Option 2:** introduce a new power to allow the refusal of a PVR by the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant
 - Option 3:** introduce both of the Option 1 and Option 2 powers.
113. Option 1 is a UPOV 91-compliant option. Under UPOV 91, a PVR must be granted if it meets five criteria (the variety is new, distinct, uniform, stable, and has an acceptable name). UPOV 91 members cannot require additional criteria (such as that proposed in the Wai 262 kaitiaki recommendations) for a grant of a PVR.

114. UPOV 91 does, however, allow parties to restrict PVR owners' free exercise of their PVRs if this is in the public interest.¹¹ We consider that protecting the kaitiaki relationship as an example of Treaty partnership is in the public interest.
115. Option 2 is not consistent with UPOV 91 as it adds a sixth criterion for a grant of PVR. It is the first of the kaitiaki recommendations of the Waitangi Tribunal in the Wai 262 report, and is our preferred option.
116. Option 3 combines both option 1 and option 2. This would give decision-makers the widest suite of options to balance the interests of kaitiaki with breeders, giving them the option of not granting a PVR and/or limiting the exercise of a PVR.

Decision-makers and advisors

117. Currently, the PVR Office does not have expertise in-house on te ao Māori or tikanga Māori, and would be ill-equipped to consider and advise on issues relating to kaitiaki relationships.
118. We recommend that a Māori advisory committee be formed to assist in these matters. In slight contrast to the Wai 262 recommendation, we recommend that a new committee is established for the PVR regime (rather than using the patents committee). This reflects the nature of the role that we envisage for the committee. Roles that we consider the committee would do include:
- a. developing guidelines for breeders and kaitiaki on engagement;
 - b. providing advice to, and working with, breeders and kaitiaki at the pre-application stage;
 - c. providing advice to the PVR Office and decision-makers on PVR grant matters, including:
 - i. advice on whether variety names are likely to be offensive to Māori;
 - ii. advice on:
 1. how information disclosed by the breeder might bear on the five criteria for varieties for which there are kaitiaki interests (and if the criteria are met);
 2. whether kaitiaki relationships would be affected by the grant of a PVR over the relevant variety; and if so:
 - a. for Option 1 above, advice on how the exercise of the PVR should be limited to protect kaitiaki interests;
 - b. for Option 2 above, advice on whether kaitiaki interests would be adversely affected by the grant of a PVR and, if so, whether the impact can be mitigated to a reasonable extent such as to allow the grant;

¹¹ See article 17(1) of UPOV 91.

- c. for Option 3 above, advice on whether the grant should be refused, and if not, how the exercise of the PVR should be limited to protect kaitiaki relationships.

119. On grant decisions for varieties for which there is a kaitiaki interest, the Chair of the Māori advisory committee would sit jointly with the Commissioner of PVRs. This reflects feedback we have received through the hui and submissions process that the purely advisory role of any proposed Māori advisory committee may not adequately reflect the Treaty principle of partnership. It also reflects the Waitangi Tribunal’s recommendations on the patents Māori advisory committee in the Wai 262 report that “a mechanism is needed to augment the commissioner’s expertise when dealing with applications raising Māori issues” ensuring that “a Māori voice is at the table when competing interests come to be balanced”.¹²
120. Administrative law and policy considerations would need to be considered in designing this proposal (for example, the Chair’s functions may need to differ from the committee’s, given this advisory and decision-making role). We will be considering this further.

¹² Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua* (Wai 262, 2011) vol 1 at 201.

Summary table: Proposal package with decision-making options

	Package with Option 1 – UPOV 91-compliant	Package with Option 2 – not UPOV 91-compliant	Package with Option 3 – not UPOV 91-compliant
Disclosure requirements	Requires evidence of identification and engagement with kaitiaki, and assessment of the effect of a grant on kaitiaki interests by breeder. Application can lapse if information not provided.		
Decision in relation to kaitiaki relationships	No ability to refuse a grant if kaitiaki interests would be negatively affected.	Grant of a PVR can be refused if kaitiaki interests would be negatively affected, and impacts cannot be mitigated.	
Post grant decision making	Restrictions on the exercise of the breeder’s right post-grant can be made in the public interest.	No restrictions on the exercise of the breeder’s right post-grant can be made in the public interest.	Restrictions on the exercise of the breeder’s right post-grant can be made in the public interest.
Māori advisory committee	<p>Roles would include:</p> <ul style="list-style-type: none"> • developing guidelines for breeders and kaitiaki on engagement • providing advice to, and working with, breeders and kaitiaki at the pre-application stage • providing advice to the PVR Office and decision-makers on PVR pre-grant and/or post-grant matters (depending on the option). 		
Decision-makers on varieties for which there is a kaitiaki interest	Commissioner of PVRs and Māori advisory committee chair.		

Analysis

121. Below we outline our analysis (summarised in the following table) of the three options for considering the kaitiaki relationship in the decision-making process under each of the criteria.

Analysis summary	Meaningful and mana-enhancing consideration of kaitiaki interests	Clarity for plant breeders	Minimise additional compliance costs	Comment
Status quo	Currently no recognition of kaitiaki interests.	Clear, because no obligations on breeders in relation to protecting kaitiaki interests.	No current costs because no obligations on breeders in relation to protecting kaitiaki interests.	The current PVR Act currently does not provide explicit recognition of kaitiaki interests.
Option 1 Post-grant consideration only	Does not allow a genuine balancing of the kaitiaki interest with that of the breeder, but could allow limited control if decision-makers felt so minded.	Middle option in terms of uncertainty.	All participants will experience some increase in costs. Likely to be equal in all three packages.	This option is not Treaty compliant. It does not allow the consideration of kaitiaki interests in a mana-enhancing way (though the outcome of decision-making may be similar to option 2).
Option 2 Pre-grant consideration only (preferred option)	Aligns with existing IP settings to consider kaitiaki interests; is mana-enhancing for all parties.	More uncertain than the status quo, but two clear outcomes of grant (rather than multiple possibilities under Option 1 and 3) makes it the most certain option.	As above.	This option is Treaty compliant. It strikes the best balance between facilitating mana-enhancing consideration of kaitiaki interests and ensuring certainty for breeders.
Option 3 Both pre- and post-grant consideration	Provides widest suite of options for considering and protecting the kaitiaki interest.	Most uncertain. Two layers of uncertainty apply for breeders: whether they will be granted the right, and whether there will be limits if a grant is made. Likely to introduce too much uncertainty for breeders, who may opt out from the regime.	As above.	This option is Treaty of Waitangi compliant. However, if the uncertainty disincentivises breeder engagement with the PVR regime, this may be equivalent to the status quo in terms of actual protection for kaitiaki interests.

Facilitating meaningful and mana-enhancing consideration of kaitiaki relationships

122. All of the options represent an improvement on the status quo. However, they offer different degrees of consideration of kaitiaki relationships.

123. In the Wai 262 report, the Waitangi Tribunal describes mana as “authority, prestige, reputation, spiritual power”. We heard about the importance of decision-making processes being mana-enhancing in our hui and in submissions. We consider that a mana-enhancing decision-making process should reflect the principle that interests of all parties are valid and important, and worthy of consideration in a genuine and meaningful way. Engagement in the PVR regime should enhance the mana of all involved: kaitiaki, breeders, growers, other parties and the Crown.

124. For comparison, in both the patents and trade marks regimes, the decision-making process explicitly recognises that the provision of intellectual property rights may negatively affect Māori interests and that, in those cases, intellectual property rights should not be granted. In the case of patents, a grant may be refused if the commercial exploitation of an invention is likely to be contrary to Māori values. In the trade mark regime, a trade mark can be refused if it is likely to be offensive to Māori. These provisions represent a genuine, mana-enhancing balancing of interests at the grant decision-making stage of each of these regimes.
125. Option 2 gives effect to the main recommendations of the Waitangi Tribunal in the Wai 262 report and best aligns with current intellectual property settings for protecting Māori interests. It would require decision-makers to balance the interests of kaitiaki with those of breeders in the decision whether or not to grant a PVR. We consider that this option is necessary to meet our Treaty obligations as assessed against the first of our criteria for Treaty compliance.
126. Option 1 is the UPOV 91-consistent option. It would result in the granting of PVRs over all varieties that met the “five criteria” under UPOV 91, but would allow decision-makers to make restrictions on the exercise of the breeder’s right post-grant in the public interest. While the outcome of the decision-making process under both Options 1 and 2 could often be similar in practice, we consider that Option 1 process is not mana-enhancing for kaitiaki. The inability of decision-makers to choose not to grant the right, where doing so would negatively affect the kaitiaki relationship, has the effect of prioritising the interests of breeders, who can be given their PVRs before kaitiaki relationships can be considered. This does not reflect a genuine balancing of interests and therefore falls short of what is required under the Treaty (as set out in the first of our criteria for Treaty compliance). Furthermore, it is inconsistent with the Wai 262 recommendations and other intellectual property regimes.
127. Option 2, as compared to Option 1, also reinforces the idea that breeders have a responsibility to engage with kaitiaki and consider their interests in the first instance (though this does not discharge the Crown’s duties to Māori under the Treaty). As we have noted above, these decision-making options are intended to be a backstop measure in what we expect will be the minority of cases where engagement has perhaps not been effective or not happened at all. If breeders know that they will receive a right in some capacity so long as they meet the five criteria, as under Option 2, they may be willing to risk not bothering with kaitiaki engagement at all. This is not an outcome we are seeking.
128. Option 3, in combining Options 1 and 2, provides decision-makers with the widest suite of options for providing consideration of the kaitiaki interest – both in the grant decision, and once the grant decision has been made. However, as we discuss below, Option 3 introduces the most uncertainty for breeders.

Clarity for breeders

129. Certainty and cost-effectiveness are important considerations. There are currently no legal obligations on plant breeders to consider the Treaty or the rights and interests of kaitiaki in their plant breeding processes. There is a significant gap in New Zealand’s regulation relating to access and use of biological and genetic resources generally.

130. The extent to which a new PVR regime can improve this is very limited. Any new requirements that we put into place in the PVR regime will only apply to breeders who seek PVR protection. Some breeders may choose not to apply for a PVR if they consider that the costs of gaining protection will outweigh the benefits. In such cases, plant breeders will put their varieties on the market without protection.
131. To facilitate better protection for kaitiaki relationships, we need to ensure that any new requirements to do so do not disincentivise breeders from applying for PVRs, given the current legislative context discussed above.
132. All of the options add uncertainty for breeders to the PVR regime, however, we consider that Option 2 provides the least amount of uncertainty. Breeders will know that when they come to apply for a PVR, they will either be given a full grant or no grant at all. If they have undertaken engagement with kaitiaki and have agreed with kaitiaki how their interests will be protected, they can be more certain that they will be given a grant of PVR.
133. Options 1 and 3 introduce considerable uncertainty (Option 3 more so), as decision-makers could make any number of restrictions on breeders' rights. In our view, inconsistency across the regime in terms of the scope of PVRs would likely deter breeders from applying for PVRs over varieties derived from indigenous species or species of significance to Māori. We expect that they would continue to breed such varieties but choose to avoid the cost and time it takes to gain protection, given that the outcome would be uncertain. Lack of buy-in from breeders about any new PVR regime will limit the effectiveness of any new requirements if it causes them to opt out of the PVR regime.

Minimising additional compliance costs

134. Regardless of what option we choose, the package, in general, will increase costs for all parties, including breeders, as compared to the status quo. We have not undertaken an evaluation of the costs for breeders or kaitiaki, as these are likely to vary significantly depending on the nature of the kaitiaki relationship, who identifies as kaitiaki, and the species. The PVR Office and Māori advisory committee will also play an important role in facilitating relationships, particularly early on in the engagement process. As we have noted above, engagement protocols to be established together with breeders, kaitiaki and the PVR Office will provide more certainty on the expectations of each party.
135. We consider that any difference between the costs of the three options is likely to be negligible for breeders, the Māori advisory committee/PVR Office and kaitiaki. All options anticipate a similar level of engagement between breeders and kaitiaki. The PVR Office and Māori advisory committee will likely be required to provide significant assistance to breeders and kaitiaki alike. Kaitiaki are also likely to have similar costs under all options.

Conclusion

136. In the current legislative context, we consider that Option 2 best meets the criteria and represents the level of consideration of kaitiaki interests necessary for Treaty of Waitangi compliance in the PVR regime.

Treaty compliance – options analysis

5

Do you agree with the proposed options? Are there alternatives we have missed?

Do you agree with our analysis and conclusions? If not, why not?

6 Criteria for analysis of options for aligning with UPOV 91

137. As discussed in Part 4, whether we accede to UPOV 91 or not, we are still required to align our regime with UPOV 91, subject to meeting our Treaty obligations. In the remainder of this Options Paper, we discuss and set out our preliminary analysis of options for aligning our regime with UPOV 91. Some provisions of UPOV 91 give us limited, if any, flexibility as to how they are implemented (such as the definitions and the exclusive rights it affords). These are mainly discussed in Parts 7 and 8. Other provisions in UPOV 91 leave considerable domestic policy flexibility as to how they are implemented. Options to implement these provisions are discussed in Parts 9 and 10.

Criteria for preliminary options analysis

138. In terms of the areas in which we retain domestic policy flexibility under UPOV 91 (beyond that required to meet our Treaty of Waitangi obligations) – and for which we need a framework for considering analysis of the different potential options – the PVR regime can be broken down into the following main components:

- a. **Scope of the right** – i.e. what acts does the right cover and what acts are specifically excluded from coverage;
- b. **Compulsory licences** – i.e. what protections are there for rights users against unfair practices on the part of rights owners;
- c. **Enforcement** – i.e. how do rights holders enforce their rights when they are infringed.

Scope of rights

139. This sets out exactly what acts the right covers. Some areas are set by UPOV 91, but there remains policy flexibility around:

- a. term of the right;
- b. how to implement the EDV provisions;
- c. how far to extend the right in relation to harvested material (and products made from harvested material);
- d. how to address farm saved seed.

140. The aim of these provisions is to incentivise the development of new varieties by providing rights holders with a reasonable opportunity to get a return on the investment they make in plant breeding. This must be balanced against the interests of rights users, consumers and others so that there is net benefit to New Zealand. For New Zealand to benefit from this innovation, it is important that there is:
- a. sufficient incentive for breeders to develop new varieties;
 - b. reasonable opportunity for the public to access new varieties and make products that will satisfy consumer demand and support New Zealand's economic growth;
 - c. opportunity for those who do not seek commercial benefit from new varieties to access those varieties;
 - d. opportunity for those who wish to build on the innovation to access those varieties.
141. The last two points are covered by the compulsory exceptions in UPOV 91 (see discussion in Part 8) and so are not directly relevant here.
142. On this basis, we consider the appropriate criteria for analysis of options relating to the scope of the right to be:
- a. incentivises the development of new varieties, and encourages foreign breeders to release their new varieties in New Zealand, by providing sufficient opportunity for rights holders to get a reasonable return on their investment;
 - b. ensures that the public has reasonable access to new varieties so as to meet public demand for the varieties and the products derived from them;
 - c. provides certainty to rights holders and the public about the scope of the right.
143. We consider that criteria (a) and (b) should be given more weight than criteria (c) as they directly respond to the objectives we seek from the PVR regime, whereas (c) is more about the workability of the changes we propose.

Compulsory licences

144. The aim of the compulsory licence provisions is to protect the public interest by providing a mechanism to counter behaviour by PVR owners that is inconsistent with the social contract involved in the grant of PVRs (such as unreasonably restricting the availability of propagating material). This needs to be balanced against the interests of rights holders and the desire to not unreasonably limit innovation.
145. MBIE proposes a number of changes in response to issues raised by submitters. These mainly address issues of clarity with the current provisions and are consistent with other intellectual property regimes where appropriate.

146. Only on two issues are a number of distinct options for change considered (the three year “grace period” and the provisions of section 21(3)). Given the aim of the compulsory licence provisions, the same criteria as for the options for scope of the right are appropriate here (with the third criterion amended accordingly).

Enforcement

147. The issue of enforcement is divided into infringements and offences. MBIE proposes a number of changes in response to issues raised by submitters in relation to infringements, mainly around clarity with infringement provisions. These are primarily guided by considering consistency with other intellectual property legislation. However, we are not proposing any significant change to the current framework, and so do not present any distinct options for change in relation to the infringement provisions.

148. In relation to offences (which are predominantly about misleading or deceptive behaviour) the current framework is quite dated and not utilised, so we do present options for change. We consider the following criteria are appropriate for assessing these options:

- a. the extent to which the option deters misleading and deceptive behaviour in relation to protected varieties;
- b. proportionality: is the nature of the misleading or deceptive behaviour sufficient to justify making it a criminal offence in the PVR Act?
- c. is the misleading or deceptive behaviour dealt with in other legislative provisions?

149. We consider that all these criteria have equal weighting in our analysis.

Treaty of Waitangi considerations

150. Our criteria for analysing the options for incorporating the Treaty in the PVR regime were discussed separately in Part 5.

Options analysis summary

151. We will summarise the options analysis in each instance with a table based on the template below. Where we indicate a preferred option, we will do this by shading (as with Option 2 below). The comment column summarises how the analysis has led to our preferred option.

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1				
Option 2				
Option 3				

UPOV 91 alignment – criteria for analysis

6

Do you have any comment to make about our approach to, and criteria for, the preliminary options analysis in this paper?

7 Definitions

152. New Zealand’s obligations under the CPTPP require us to (at least) implement a regime that gives effect to UPOV 91 (if not, accede to UPOV 91), subject to meeting our Treaty of Waitangi obligations.
153. This means that the definitions considered in this part must, at least, meet the standards required by UPOV 91. Each topic therefore begins with a comparison of the provisions of UPOV 91 and the provisions of the current PVR Act.
154. There are also definitional issues to be addressed in relation to meeting our Treaty of Waitangi obligations – in particular, how we approach the terms ‘taonga species’ and ‘kaitiaki’. We addressed these issues in Part 5.

Owner v breeder

UPOV 91	PVR Act
<p>“Breeder” means:</p> <ul style="list-style-type: none"> the person who bred, or discovered and developed, a variety, the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or the successor in title of the first or second aforementioned person, as the case may be. 	<p>owner, in relation to any variety, means a person who bred or discovered that variety, and includes a successor of that person.</p>

155. While the choice of word itself is not prescribed by UPOV 91 – both refer to the person with the rights over the protected variety – the definition must be made consistent with UPOV 91.¹³
156. We discuss below an option of including a definition of “breed” in the legislation to address concerns raised about “discovery” of varieties in the wild. If this definition is accepted, the UPOV 91 definition of “breeder” would need to be adjusted accordingly.
157. The definition of “owner” in the PVR Act does not expressly include employers, where the variety is bred by an employee. It also does not include a person who commissioned another to breed a new variety. To align with UPOV 91, it will be necessary to clarify that these are also included in the definition.

¹³ We use the terms “PVR owner” and “breeder” interchangeably in this Options Paper.

158. Few submitters commented on this issue, but those who did preferred terms along the lines of “rights holder”. However, this term would only apply once the right had been granted, and the PVR Act also needs to refer to individuals before the grant is made (e.g. in the application process). Final terms will be determined during the legislative drafting process.

Bred v discovered

159. Currently neither the PVR Act nor UPOV 91 has a definition of “breed”. This issue was considered when the previous review of the Act was undertaken in the 2000s to address the uncertainty in the term “developed” in the definition of “owner”. While in practice a variety that is simply discovered will not be eligible for a PVR (human input to develop the plant into a cultivar that would meet the criteria for a PVR is necessary) the wording in the PVR Act is not clear.

160. The draft 2005 Bill addressed this issue by incorporating a definition of “breed”:

breed, in relation to a variety, includes the process of selection within the natural variation of a plant or plant population, together with the process of propagation and evaluation so as to enable the development of the variety.

161. This definition was endorsed by the Waitangi Tribunal, and is one of the four recommendations they made relating to PVRs in the Wai 262 report. For this reason, our preferred option is to incorporate this definition in the new legislation.

162. The alternative option is to adopt the definition of “breeder” in UPOV 91. This, arguably, addresses this issue through the phrase “bred, or discovered and developed”.

Definitions – breed

7

Our preferred option is to incorporate the definition of “breed” that was considered in the previous review to address concerns around discovery of varieties in the wild.

Do you agree? If not, why not?

Variety

UPOV 91	PVR Act
<p>"Variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be:</p> <ul style="list-style-type: none"> • defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, • distinguished from any other plant grouping by the expression of at least one of the said characteristics and • considered as a unit with regard to its suitability for being propagated unchanged. 	<p>variety means a cultivar, or cultivated variety, of a plant, and includes any clone, hybrid, stock, or line, of a plant; but does not include a botanical variety of a plant.</p>

163. The UPOV 91 definition of “variety” is more prescriptive than the PVR Act. The UPOV 91 definition of “variety” only includes botanical organisms of the lowest ranking.¹⁴ A person cannot obtain a PVR grant for an entire plant species (for example, cabbage tree (*Cordyline australis*)) but can obtain a PVR grant for a variety of a plant species.
164. It has been raised that the term “variety” is not strictly correct in this context as it has a specific definition in Linnaean Rules. “Cultivar” is the correct term. While we acknowledge this, we consider that consistency with the terminology of UPOV 91 is preferable. Whatever term we use, it will be necessary that the definition is consistent with UPOV 91.

Other UPOV 91 definition issues

165. UPOV 91 uses different terms from the PVR Act in a couple more places too:
- a. It uses the term “uniform” (in the context of the criteria for a PVR grant), whereas the PVR Act uses the term “homogenous”. Homogeneous implies that the plants must be identical whereas uniform allows for some variation within the variety. In reality there tends to be some variation within a single variety.
 - b. It uses the term “propagating material”, whereas the PVR Act uses the term “reproductive material”. Reproduction is generally understood as reproducing a new organism whereas plants can multiply via cloning (vegetative propagation). “Propagating material” is a broader term and more accurately reflects this process.
166. Whatever terms are used in the final legislation, the meaning should be consistent with UPOV 91.

8

Definitions – general

Do you have any comments on the definitional issues discussed in this Part?

¹⁴ A “single botanical taxon” refers to the taxonomical rankings given to plants (for example, the common taxa are kingdom, class, order, family, genus, and species).

8 Scope of the right – general issues

170. Parts 8 and 9 cover all the issues associated with the scope of a plant variety right. The issues are broken down as follows:

- a. scope of the breeder’s right, including:
 - i. extension to harvested material;
 - ii. essentially derived varieties (EDVs).
- b. exceptions to the breeder’s right, including:
 - i. the farm saved seed exception.
- c. term of the breeder’s right.

171. In this Part, we discuss the provisions of UPOV 91 relating to the scope of the right for which there is no policy flexibility, i.e. that we consider we have to implement to be consistent with or give effect to it.

172. Part 9 addresses the specific issues of term of the right, harvested material, EDVs and farm saved seed. These are discussed in more detail because there remains considerable policy freedom in how these are implemented.

173. As already discussed, our CPTPP obligations require us to at least meet the standards required under UPOV 91 in relation to each of these policy issues. Each topic therefore begins with a comparison of the provisions of UPOV 91 and the provisions of the current PVR Act.

174. Implementation of our CPTPP obligations in relation to UPOV 91 is always subject to the flexibility required to meet our Treaty of Waitangi obligations.

Scope of the breeder’s right

What is the issue?

UPOV 91	PVR Act
Scope of the breeder’s right (Article 14) UPOV 91 requires that the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder: (i) production or reproduction	Rights of Grantees (Section 17) Under the PVR Act, the PVR owner has the exclusive right to produce for sale, and to sell reproductive material of the protected variety. For vegetatively propagated varieties, the exclusive right also extends to propagation of

<p>(multiplication),</p> <p>(ii) conditioning for the purpose of propagation,</p> <p>(iii) offering for sale,</p> <p>(iv) selling or other marketing,</p> <p>(v) exporting,</p> <p>(vi) importing,</p> <p>(vii) stocking for any of the purposes mentioned in (i) to (vi), above.</p> <p>This is a significant extension of rights compared to the PVR Act.</p> <p>It also provides that the breeder may make his authorization subject to conditions and limitations.</p> <p>Article 14 also considers both compulsory and optional extensions of these rights to essentially derived varieties, harvested material and the products made from harvested material.</p>	<p>that variety for the purposes of the commercial production of fruit, flowers, or other products, of that variety.</p> <p>The PVR owner authorise any other person to do any of these things, subject to any terms and conditions set by the PVR owner.</p> <p>Section 19 of the PVR Act provides that a licensee has the same rights as the PVR owner to take proceedings in respect of an infringement.</p>
---	---

175. The current law is based on reproduction for sale whereas UPOV 91 is based on commercial exploitation of the variety as a whole. To give effect to UPOV 91, New Zealand must expand the existing rights under the PVR Act so that they are consistent with those set out in Article 14(1) of UPOV 91.

Right to authorise the production or reproduction

176. Expanding the rights regarding the propagating material to *all* production or reproduction will mean that the PVR owner's permission (i.e. through licensing) will be needed even if the production of the propagating material is not intended for sale, although the exceptions set out in Articles 15 of UPOV 91 (discussed below) will apply.

177. In many cases, contractual agreements between PVR owners and growers already provide for this. However, this change could mean that some PVR owners generate greater returns through increased royalties and sales of propagating material which could lead to increased reinvestment in breeding but additional costs for growers and consumers.

Right to import

178. Under the current legislation, the PVR owner has certain rights over the importation of protected varieties:

- a. Imported reproductive material of a protected variety cannot be propagated, sold or used as reproductive material without the authorisation of the PVR owner.

- b. Produce of a protected variety cannot be imported from a country that is not a UPOV member, or from a country that is a UPOV member but that does not extend protection to that kind of variety.
179. However, there is no restriction on the import of reproductive material if it is not used for reproductive purposes, or on the import of reproductive material from a country where it is possible to protect that variety.
180. Under UPOV 91, a person would not be able to import propagating material of protected varieties without the PVR owner's authorisation. Extending the right to cover importing would have no practical change where material is imported for reproductive purposes, because such use of imported material currently requires the PVR owner's authorisation.
181. Import of propagating material for consumption or other non-reproductive purposes is also unlikely to be impacted. As discussed in Part 10, the right is exhausted when propagating material is exported for non-propagating purposes. So, with regards importing this material into New Zealand, if the country is a UPOV 91 member then exhaustion will apply. If the country is not a UPOV 91 member (or is a UPOV member but the particular variety is not from a genera or species that is available for protection) then the PVR owner would have the opportunity to assert their rights in relation to that material.

Right to authorise conditioning for the purpose of propagation

182. Reproductive material often needs to be "conditioned" (for example, seed drying and cleaning) before being used to grow new plants. This right would make it easier for PVR owners to detect the unauthorised sale of reproductive material because reproductive material could potentially be identified and monitored through the conditioning process before material is sold.

Right to authorise export of the propagating material

183. The PVR Act does not prohibit unauthorised export and PVR owners must rely on the protection afforded to the variety in the country of export. Under this extension of the right, PVR owners would be able to take action in New Zealand and might be able to prevent the propagating material being exported in the first place.¹⁵ This may make it more difficult for foreign growers to "pirate" new varieties protected in New Zealand.

Right to authorise stocking of the propagating material

184. This right means that the authority of the PVR owner is required to stock propagating material of a protected variety for any of the purposes listed above. This would make it easier for PVR owners to prevent the user from undertaking other infringing acts such as unauthorised propagation of the protected variety.

¹⁵ But only if the reproductive material is to be used for further propagation of the variety: see Exhaustion of the right in Part 10.

Exceptions to the breeder's right

What is the issue?

UPOV 91	PVR Act
<p>Article 15(1) of UPOV 91 provides for exceptions to the exclusive rights provided to PVR owners under Article 14. These exceptions are:</p> <ul style="list-style-type: none"> • acts done privately and for non-commercial purposes, • acts done for experimental purposes, • acts done for the purpose of breeding new varieties, and except where the new variety is an “essentially derived variety”, any of the acts set out in Articles 14(1) – (4) in respect of those new varieties. <p>Article 15(2) of UPOV 91 provides for an optional exception for farm saved seed. This is dealt with in Part 9.</p>	<p>Section 18 provides for the following exceptions to PVR owners' exclusive rights:</p> <ul style="list-style-type: none"> • the propagation, growing, or use of a protected variety for non-commercial purposes, • the use of a variety to breed a new variety, and sale of that new variety, unless the production of the new variety requires repeated use of the protected variety, • use of propagating material of a protected variety for human consumption or other non-propagating purposes.

185. In line with New Zealand's CPTPP obligations, we must, as a minimum, align our PVR legislation with UPOV 91. This section looks at the UPOV 91 provisions relating to compulsory exceptions to PVR rights.

186. Exceptions allow persons to do certain acts covered by the exclusive rights granted to PVR owners, without the permission of the PVR owner.

187. The PVR Act provides for exceptions for non-commercial use of a protected variety, the breeding of a new variety (“the breeders' exemption”) and use or sale of that new variety¹⁶, and uses of protected varieties that do not involve further propagation of the variety.

188. Article 15(1) of UPOV 91 provides for compulsory exceptions to PVR rights that are slightly different to those in the PVR Act. We must align the PVR Act with these.

¹⁶ Unless production of the new variety requires repeated use of the protected variety.

What did submitters say?

189. Few submitters mentioned exceptions. One submitter argued that there should be no exception for non-commercial uses as this submitter believed that everyone should pay a royalty for use of a protected variety to acknowledge the breeder's intellectual property. However, intellectual property rights involve a social contract (and, as argued in the Sapere report, are more akin to a conditional grant than a private property right). Breeders receive the right on the condition that the innovation is made available so that there is a net benefit to New Zealand as a whole, and it is the exceptions that give effect to this condition.
190. Another submitter expressed concern at any restriction of the current exemption for non-commercial use to private and non-commercial use. The submitter was worried that this could mean that local bodies would have to pay royalties for non-commercial use of protected varieties (as such use is not "private"). There was concern that this cost would be passed on to ratepayers.

What does MBIE propose?

191. MBIE proposes that the exceptions set out in section 18 of the PVR Act be replaced by the exceptions in Article 15(1) of UPOV 91. Article 15(1) does not contain direct equivalents of sections 18(b) and (c). However, the issue of repeated use of a protected variety to produce another variety in section 18(b) is dealt with in Article 14(5)(a)(iii) of UPOV 91.
192. The exception in section 18(c) is effectively a provision for "exhaustion" of rights, and this issue is discussed in Part 10 of this Options Paper.

10

Exceptions to the breeder's right

Do you have any comments about the exceptions required by UPOV 91?

9 Scope of the right – specific issues

193. In this part, we look at the specific scope of right issues for which there remains some domestic policy flexibility as to how they are implemented. These are (i) term of the right, (ii) essentially derived varieties, (iii) rights over harvested material, and (iv) farm saved seed. In each case, we present options and analysis about how the provisions could be implemented (consistent with UPOV 91), and indicate our preferred option.
194. The policy flexibility discussed in this part is over and above that required to meet our Treaty of Waitangi obligations. As discussed in Part 4, our CPTPP obligations in relation to UPOV 91 are always subject to the flexibility required to meet our Treaty obligations.

Term of the right

What is the issue?

UPOV 91	PVR Act
<p>Article 19 of UPOV 91 specifies that the minimum term of a PVR shall be:</p> <ul style="list-style-type: none"> • for trees and vines, at least 25 years from the date of grant, • for all others, at least 20 years from the date of grant. 	<p>Section 14 of the <i>Plant Variety Rights Act 1987</i> sets out the term of a PVR. This is:</p> <ul style="list-style-type: none"> • 23 years from the date of grant for woody plants or their rootstock, • 20 years for all other plants. <p>In the case of woody plants, the term of a PVR can be extended beyond 23 years by Order-in-Council. Any such Order-in-Council must be made after the date of grant, but before the grant expires. No such Orders-in-Council have been made to date.</p> <p>PVRs must be kept in force by paying annual grant fees. Failure to pay the fee results in the PVR being cancelled.</p>

195. Our CPTPP obligations mean that we are required to provide the minimum PVR terms required by UPOV 91. This means, at least, extending the term for woody plants/rootstock to 25 years. The duration of the grant for other species is already in line with UPOV 91. New Zealand is not required, but can choose, to offer longer terms.
196. For comparison, Australia, the USA and Canada all provide the minimum PVR terms required by UPOV 91. The Australian *Plant Breeder’s Rights Act 1994* also provides that regulations may

be made to extend the term of a Plant Breeder's Right within a specified taxon beyond the minimum terms provided for in the Act.

197. The EU provides a term of 30 years from grant for vine and tree species, and 25 years from grant for all other species. The term for specific genera or species can be extended for up to an additional five years. This provision has been used to extend the term for potato varieties to a maximum of 30 years from grant.

What submitters said

198. Four submitters commented on PVR term. Two submitters (one a breeder and one an importer of potato varieties) supported a longer term. The importer specifically wanted the term for potatoes extended to 30 years as in the EU. Both submitters argued that longer terms were necessary to compensate for the time taken to propagate a variety to the point where it could be marketed, including quarantine time for imported varieties.
199. The other two submitters (one a breeders' representative, the other a growers' representative) support retaining the current term of 20 years for plants other than woody plants/rootstock.

What the options are

200. There appear to be three options in response to this issue:

Option 1: Adopt the UPOV 91 minimum terms, with no provision for extension

Option 2: Provide for longer minimum terms than the UPOV 91 minima, with no provision for extension

Option 3: Adopt either **Option 1 or 2** but provide for extensions to the maximum term under specified conditions.

201. Option 1 is our preferred option.

202. As discussed in Part 6, the criteria for our preliminary options analysis for the issues in this part are:

- a. incentivises the development of new varieties, and encourages foreign breeders to release their new varieties in New Zealand, by providing sufficient opportunity for rights holders to get a reasonable return on their investment
- b. ensures that the public has reasonable access to new varieties so as to meet public demand for the varieties and the products derived from them
- c. provides certainty to rights holders and the public about the scope of the right.

Options analysis

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1	Investment could be impacted if term is too short to get reasonable return. This option increases term for woody plants (keeps term the same for other plants).	Increase in term for woody plants could increase costs, but New Zealand must adopt these terms as a minimum.	Scope of the right is clear to PVR owners and the public.	No evidence that investment is being adversely impacted under current terms. New Zealand must meet at least these minimum terms. No case for extending terms beyond these minima.
Option 2	Longer terms could incentivise increased investment through greater returns.	Increased terms could mean higher costs for growers/the public with the effect of restricting access.	Scope of the right is clear to PVR owners and the public.	No case for extending terms beyond the minima in Option 1.
Option 3	Longer terms for some plants could incentivise increased investment through greater returns.	Increased terms for some plants could mean higher costs for growers/the public with the effect of restricting access.	Scope of the right is clear to PVR owners and the public.	No case for extending terms beyond the minima in Option 1.

Option 1: Adopt the UPOV 91 minimum terms, with no provision for extension (preferred option)

203. Under this option, the term of a PVR would be set at the UPOV 91 minimum terms. There would be no provision to extend these terms.
204. The main advantage of this option would be simplicity. Once a PVR is granted, breeders and growers would know the latest date on which the term of the PVR would end.
205. A possible disadvantage of this option is that, for some species, the terms might be too short to allow breeders to make a reasonable return on their investment on developing new varieties. This might discourage the development of new varieties. However, with the possible exception of potatoes, we are not aware of any evidence that the UPOV 91 minimum terms would be too short. And, with the exception of the EU, we are not aware of any other UPOV 91 countries that have longer terms.
206. In the case of potatoes, one submitter, who is an importer of new potato varieties (as opposed to a breeder) argued that that the current PVR term of 20 years from grant for potatoes is too short. This submitter argued that, by the time a new potato variety is ready to go to market, there are only 8 – 10 years of the PVR term left. This, it is argued, is insufficient to provide an adequate return on the investment required to import and commercialise new potato varieties. The submitter also argued that the disparity with the 30 year EU term created an opportunity for local competitors in New Zealand.
207. On the other hand, the costs involved in importing new potato varieties are likely to be less than the costs of breeding a new potato variety. We are aware that there are locally bred varieties of potatoes. No local potato breeder suggested that the PVR term for potatoes be extended. This suggests that the current 20 year term is sufficient to provide an adequate incentive for the development and commercialisation of new potato varieties.

Option 2: Provide for longer minimum terms than the UPOV 91 minima, with no provision for extension

208. Under this option, the maximum term of a PVR would be set at some value that is higher than the UPOV 91 minimum terms. There would be no provision to extend these terms.
209. Extending the maximum PVR term beyond the UPOV 91 minima has the potential to increase the costs of protected varieties to growers and consumers compared with adopting UPOV 91 minimums. This is because a longer term would mean that PVR owners could collect royalties on their protected varieties for longer.
210. This additional cost might be justified if there was evidence that providing longer terms for all varieties would increase the incentive for local breeders to develop new varieties, or for foreign breeders to release their new varieties in New Zealand. None of the submitters on the Issues Paper provided any evidence that this might be the case. The economic analysis MBIE commissioned concluded that there was no current evidence of New Zealand missing out on new varieties.
211. That is, there appears to be no advantages, and potentially a cost in adopting a PVR term that is longer than the UPOV 91 minimums.

Option 3: Adopt either Option 1 or 2, but provide for extensions to the maximum term under specified conditions

212. This option involves providing for extensions to the maximum PVR term whichever of Options 1 or 2 is adopted. The extensions could be provided for particular genera or species.
213. The only justification for providing for extensions of term would be that the maximum terms specified in the PVR Act were not long enough to allow breeders to make an “adequate” return on their protected varieties (at least for some genera or species). Given that a similar provision has been in effect in the PVR Act for many years and never been used, and that we have heard no compelling evidence for longer terms for any specific genera or species in submissions or in the economic analysis, we do not favour this option.

Term of the right

- 11 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Essentially derived varieties (EDVs)

What is the issue?

UPOV 91	PVR Act
<p>Scope of the breeder’s right (Article 15)</p> <p>Article 14(5) provides that the rights which apply to protected varieties shall also apply to “varieties which are essentially derived from the protected variety”. Article 14(5)(b) provides that an essentially derived variety (EDV) is a variety derived from an initial variety which is not itself an EDV when:</p> <ul style="list-style-type: none"> (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety, (ii) it is clearly distinguishable from the initial variety, and (iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety. 	<p>There is no concept of an essentially derived variety in the PVR Act. If a new variety is “distinct’ from the protected variety it was derived from, the PVR owner has no rights over that new variety.</p>

214. If a variety is an EDV, and the initial variety it was derived from is protected by a PVR, then UPOV 91 requires that the EDV cannot be commercially exploited without the permission of the owner of the PVR in the initial variety. This will be the case regardless of whether or not the EDV is itself protected by a PVR, and it will require the PVR owner of the initial variety and the breeder of the EDV to come to an arrangement about the commercial exploitation of the EDV.

215. Under the PVR Act, a PVR owner does not have any rights over a variety derived from a protected variety, as long as the derived variety is distinct from the protected variety.

216. The definition of EDV that appears in UPOV 91 is not very precise. Important terms, such as “predominantly derived” and “essential features” are not defined.

217. The UPOV 91 definition of EDV does not provide a “bright line” test of what is, or is not, an EDV. In theory, the line between varieties that are EDVs and those that are not EDVs can be drawn on a continuum. At one end, very few derived varieties are EDVs, while at the other most derived varieties are EDVs. The wording of UPOV 91 means it is left to individual UPOV 91 members to determine where the boundary lies, in accordance with their own national interests. New Zealand therefore has some flexibility as to where we choose to draw the line.

What do other countries do?

218. The way in which UPOV 91 member states have implemented their EDV regimes may provide a starting point for thinking about how we should approach the issue. All UPOV 91 member

states have to provide for EDVs in their PVR legislation. Many, including the USA, Canada, Singapore and the United Kingdom, have simply transposed the wording of Article 14(5)(b) of UPOV 91 into their national legislation.

219. The EU definition retains most of the wording of UPOV 91 Article 14(5)(b), but omits that last part of Article 14(5)(b)(i).

220. Japan's legislation uses the following definition of EDVs:

“varieties which are bred by changing some of the expressions of the characteristics of the registered variety while retaining their essential expressions of the characteristics...”

221. The Australian *Plant Breeder's Rights Act 1994* does not simply transpose the wording of Article 14(5)(b). The Act's definition of an EDV is set out below (see section 4):

222. A plant variety is taken to be an essentially derived variety of another plant variety if:

(a) it is predominantly derived from that other plant variety; and

(b) it retains the essential characteristics that result from the genotype or combination of genotypes of that other variety;

and

(c) it does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety.

223. The Australian Act defines “essential characteristics” as:

essential characteristics, in relation to a plant variety, means heritable traits that are determined by the expression of one or more genes, or other heritable determinants, that contribute to the principal features, performance or value of the variety.

224. The Act also sets out a process whereby the owner of the initial variety can apply to IP Australia for a declaration that a derived variety is an EDV. As far as we know, Australia is the only UPOV member state that has this kind of process in relation to EDVs.

What submitters said

225. Twenty submissions addressed EDVs and they all supported extension of PVRs to EDVs derived from varieties protected by PVRs. The main arguments were that the current situation, where PVRs do not extend to EDVs, encouraged the development of “copycat” varieties.

226. This was described by submitters as the situation where a person takes an initial variety protected by a PVR and derives a new variety from it. The difference between the initial

variety and the derived variety makes no difference to the commercial value of the variety¹⁷. These will be referred to in this document as “copycat” varieties.

227. Under the PVR Act, commercial exploitation of a copycat variety does not infringe any PVR on the initial variety it was derived from because it is distinct from the initial variety. However, because it has the same commercially valuable characteristics as the initial variety, it competes with the initial variety in the marketplace. This has the potential to reduce the returns to the breeder of the initial variety.
228. Submitters considered that reduced returns from their protected varieties may discourage breeders from breeding new varieties with new, commercially valuable characteristics. It could also discourage foreign plant breeders from releasing their new varieties in New Zealand. Many submitters argued that these outcomes have actually happened, although no specific examples were given. It seemed clear from submissions that submitters considered that copycat varieties at least are EDVs.
229. However, some of the submitters who supported the extension of PVR rights to cover EDVs of protected varieties also sounded a note of caution. While recognising the benefits of such extension, they noted that it could discourage plant breeding activities if the definition of EDV was too broad.
230. These submitters were concerned that an overly broad definition of EDV might have the effect of discouraging investment in the development of new derived varieties that were more than just copycat varieties. As a result, new varieties that are genuine improvements of the varieties that they are developed from might not be developed. In this context a genuine improvement is a derived variety that has one or more commercially valuable characteristics that are superior to, or additional to, those in the variety it was developed from.
231. On the other hand, some submitters, mainly larger plant breeders, appeared to be in favour of a broad definition of EDV. They argue that any derived variety that includes the same commercially valuable characteristics as the initial variety it was developed from should be considered an EDV.
232. These submitters seemed to take the approach that this should be the case regardless of whether or not the derived variety is a “copycat variety”. They argued that in these circumstances, the breeder of the derived variety was benefiting from the work done by the breeder of the initial variety, and that the breeder of the initial variety should receive some compensation for that.

What the options are

233. There appear to be four viable options:

¹⁷ An example of this might be a derived apple variety where the only difference from the initial variety is in the shape of the leaves. Leaf shape makes no difference to the commercial value of an apple variety, which will generally lie in other characteristics such as fruit size or colour, or disease resistance.

Option 1: Adopt the UPOV 91 definition of EDV

Option 2: Define an EDV as a “copycat” variety

Option 3: Define an EDV as any derived variety which possesses all of the “essential features” of the initial variety

Option 4: Define an EDV by its “genetic distance” from the initial variety.

234. Option 2 is our preferred option.

235. No submitters raised the issue of a possible role for the PVR Office in assessing EDVs, as happens in Australia. Our view is that making such declarations is likely to require expertise that the PVR Office does not have, so the PVR Office would have to hire suitable experts. This would be costly. In a small country like New Zealand, it could also be difficult to find suitable experts who did not have a connection with one or other of the parties involved.

236. Furthermore, any declaration by the Commissioner of PVRs, regardless of which way it went, could be appealed to the courts, with the Commissioner being a party to any appeal. There could be substantial costs incurred by the Commissioner, particularly if the Commissioner’s decision was not upheld. These costs would have to be recovered from fees charged to PVR applicants by the PVR Office.

237. Given all these considerations, we are not advancing an option that gives the PVR Office a role in making determinations in relation to EDVs.

Options analysis

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1	Lack of clarity of definition risks hampering innovation.	Public access to new varieties could be impacted if innovation is impacted.	UPOV 91 definition of EDV is ambiguous. Does not provide certainty to breeders or the public.	This option is too uncertain and is not preferred.
Option 2	Breeders still incentivised to invest in developing varieties with commercially significant attributes. Reduces risk that varieties with no new commercial attributes will compete with initial varieties.	Maintains reasonable public access to new varieties.	Definition is clearer than Option 1, but some uncertainty will remain.	This option strikes the right balance between incentivising the development of new varieties while preserving return on investment for breeders of initial varieties.
Option 3	Breeders of new varieties with commercially significant attributes may choose not to invest if they have to share returns with breeders of initial varieties. Breeders of initial varieties will retain greater control over development of new varieties based on those initial varieties.	Concentration of rights with breeders of initial varieties could hamper public access.	Definition is clearer than Option 1, but some uncertainty will remain.	Breeders of initial varieties may have more incentive to invest, though other breeders who wish to build on that innovation may be discouraged from investing. Concentrates returns to those breeders of initial varieties as most new varieties build on the innovation of preceding varieties.

Option 4	Depends on how “genetic distance” is determined.	Depends on how “genetic distance” is determined.	Could provide greater certainty than other options.	No other UPOV countries have adopted this. Many technical hurdles to overcome.
-----------------	--	--	---	--

Option 1: Adopt the UPOV 91 definition of EDV

238. This option involves transposing the wording of UPOV Article 14(5)(b) into the PVR Act. This approach, however, is problematic. The UPOV wording provides little guidance to either plant breeders or the courts as where the boundary between EDVs and non-EDVs should lie. This approach leaves it up to individual country’s courts to set the boundaries.
239. However, the boundary between EDVs and non-EDVs is a public policy issue as it affects the economic interests of breeders and growers and, ultimately, consumers. Courts are generally not well-equipped to deal with public policy issues, and there is a risk that the courts could set the line between EDVs and non-EDVs at a point which may not be in the best interests of society as a whole.
240. In any case, there appear to be very few court decisions from other countries regarding EDVs. This may be due to:
- a. the relatively small number of PVRs granted worldwide, compared with, for example, patents;
 - b. the high costs of litigation relative to the profits that PVR owners might make from their protected varieties;
 - c. possible reluctance to set a precedent.
241. In relation to point (c) above, in light of the lack of case law dealing with EDVs, parties to a dispute involving EDVs have little certainty regarding the outcome of any litigation. They may fear that resolving the dispute in court may result in a decision that may set the “wrong” precedent.
242. That is, the court might make a decision that one or both of the parties may not want, but would set a precedent that would be followed in subsequent court proceedings. As a result parties may prefer to settle “out of court”. Which way the settlement goes will likely be what the parties deem to be in their best interests, rather than what might be the best outcome for society as a whole.
243. Adopting this option would lead to uncertainty as to what derived varieties were or were not EDVs until such time as the issue was resolved the courts. It could be many years (if at all) before this occurs. Even if the courts were to be given the opportunity to rule on what is or is not an EDV, there is no guarantee that any decision would satisfy the public policy objectives set out above.

Option 2: Define an EDV as a “copycat variety” (preferred option)

244. This option involves defining an EDV as a variety where the difference between the initial variety and the derived variety is “trivial”. That is, the difference is in a characteristic that

makes no contribution to the commercial value of the variety. The effect of this is that only “copycat” varieties would be considered EDVs.

245. Although “copycat” varieties are “new” in the sense that they did not previously exist, they add little or nothing of value to society. Compared with the variety they are derived from they have no additional or improved characteristics of commercial or social value.
246. Taking this approach would mean that where the difference between a derived variety and the initial variety is one that contributes to the commercial value of the variety, the derived variety would not be an EDV¹⁸.
247. Adopting this option may discourage breeders from developing “copycat” varieties from protected varieties. This is because the breeders or growers of the “copycat” varieties would have to obtain a licence, and pay a royalty to, the owner of the PVR over the initial variety.
248. However, this option would still encourage breeders to develop derived varieties that are genuine improvements over initial varieties that are protected varieties. These derived varieties could be exploited without the need to seek the permission of, or make a payment to, the owner of the PVR in the initial variety.
249. A derived variety that is a genuine improvement may compete on the market with the initial variety, reducing the returns to the breeder of the initial variety. Some submitters to the Issues Paper argued that in these circumstances, the breeder of the derived variety was benefiting from the work done by the breeder of the initial variety, and that the breeder of the initial variety should receive some compensation for that. Failure to provide for such compensation could discourage investment in the development of genuine improvements.
250. However, whenever a breeder develops and commercialises a new variety, that new variety will be competing with existing varieties, and any other new varieties that might subsequently enter the market. In light of this, MBIE considers that limiting the definition of EDV to “copycat” varieties will not significantly discourage investment in the development of new varieties that are genuine improvements.
251. MBIE considers that, on balance, the benefits of limiting the definition of EDV to “copycat” varieties are likely to exceed any costs. For this reason, this is MBIE’s preferred option.
252. If we decide to take this approach, we will need to carefully consider the way we word the provision to ensure that it is workable and achieves the objective of limiting EDVs to copycat varieties. The Australian legislation is a good (though untested) starting point here as it seeks to achieve a similar outcome.
253. Whatever approach we take, it is unlikely that it will provide a “bright-line” definition of EDV. There will inevitably be some derived varieties which fall close to the boundary between EDVs

¹⁸ An example of this might be where an apple variety derived from an initial variety of apple differed from the initial variety in colour or size of the fruit. The colour or size of the fruit can contribute to the commercial value of an apple variety.

and non-EDVs. For some varieties the distinction between features that contribute to the commercial value of the variety and those that don't may be "blurred".

Option 3: Define an EDV as a derived variety that retains one or more of the commercially valuable characteristics of the initial variety

254. Under this option, any derived variety that retained all of the "essential characteristics" of the initial variety would be deemed to be an EDV. In this context, an "essential characteristic" could be defined as one that provides commercial value to the variety. This would be a broader definition of an EDV than under Option 2.
255. The effect of this approach would be that derived varieties that are "copycat" varieties and derived varieties that are genuine improvements would be deemed to be EDVs. For example, a derived variety that possessed all the essential characteristics of the initial variety would be an EDV even if it possessed one or more essential characteristics not present in the initial variety. On the other hand a derived variety where one or more of the essential features of the initial variety are not present would not be an EDV.
256. In effect, this option could mean that most varieties that are "genuine improvements" would be EDVs. If the PVR over an initial variety extends to derived varieties that are "genuine improvements" this could discourage breeders from using PVR protected varieties in their breeding programs, where they did not own the PVR in those varieties. This could unreasonably favour breeders who already own many PVRs, as they are free to use their own protected varieties in their breeding programs. They would not have to seek permission to commercialise any EDVs they develop from them.
257. Adopting this option could therefore actually reduce the incentive for some breeders to develop new varieties. It could potentially act as a barrier for entry to the plant breeding industry. New entrants would not own any PVRs, and may only be able to use varieties that are no longer, or were never protected by PVRs in their breeding programs.

Option 4: Define an EDV by its "genetic distance" from the initial variety

258. An alternative approach to EDVs, suggested by some submitters, is to use "genetic distance" to determine whether a derived variety is an EDV or not. The genetic distance is determined by comparing the genetic profile of the initial variety and a variety derived from it. If the genetic distance is less than a certain amount, the derived variety would be deemed to be an EDV.
259. A major problem with this is deciding how great the genetic distance would have to be before a derived variety is deemed not to be an EDV. It is likely that the appropriate genetic distance would vary depending on the species. Who would decide what the genetic distance should be? How would this be determined? Would the genetic distance be set in the Act or regulations, or would it be left to the courts?
260. Genetic distance might be seen to be a more reliable "bright-line" test for what is or is not an EDV. However, the difficulties involved in deciding how it should be measured, and what the distance should be for each species suggest that this is not a practical alternative for the time being.

261. As far as we are aware, no other UPOV 91 member state has adopted the concept of genetic distance as a means for determining whether or not a derived variety is an EDV.

Essentially derived varieties

- 12 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Rights over harvested material

262. The concept of “harvested material” is not used in the PVR Act, instead it refers to “produce”. The term “harvested material” does appear in UPOV 91, but it is not defined there. For the purposes of this Options Paper, the term “harvested material” includes entire plants and parts of plants, which have been grown and harvested, and:

- a. cannot be used for propagating the variety (for example fruit, cut flowers); or
- b. could be used for propagating the variety, but can also be used for some other purpose such as human or animal consumption (for example, grains or seeds).

What is the issue?

UPOV 91	PVR Act
<p>Rights over harvested material (Article 14(2)) Article 14(2) of UPOV 91 effectively requires that PVR owners be given rights to control the commercial exploitation of the harvested material when:</p> <ul style="list-style-type: none"> • the harvested material was obtained through use of the propagating material of a protected variety where that use was not authorised by the PVR owner, and • the PVR owner did not have a “reasonable opportunity” to assert their rights over the propagating material. 	<p>Section 17(6) of the PVR Act gives PVR owners only very limited rights over the harvested material of their protected varieties, referred to as “produce” in the PVR Act. These limited rights allow PVR owners to control the sale of produce of their protected varieties when:</p> <ul style="list-style-type: none"> • produce of a variety protected in New Zealand is imported into New Zealand, and • the country the produce is imported from is not a member of UPOV, or, if it is a member of UPOV, it does not grant PVRs over the variety concerned.

263. The effect of section 17(6) of the PVR Act is that if, say, a person wants to import apples of a variety protected in New Zealand from a country that is not a UPOV member, or that does not grant PVRs over apples, the PVR owner’s permission is required.

264. Harvested material is not protected in any other circumstance unless it is propagating material. However, many PVR owners use contracts to control the commercial exploitation of the harvested material of their protected varieties. This can be done, for example, by requiring growers to sell the produce to specified persons as a condition of supply of the propagating material of the variety.

265. If harvested material is also propagating material, for example cereal grains which can be used to sow a crop but which can also be used for human or animal consumption, the PVR owner's permission is not required to sell propagating material of a protected variety for purposes that do not involve propagation of the variety. So, for example, arable farmers are free to sell their wheat to a miller to produce flour. However, they are not free to sell the wheat to other farmers to sow another crop.
266. UPOV 91 requires that PVR owners be given rights to control the commercial exploitation of the harvested material when the material was obtained through the unauthorised use of the propagating material and the PVR owner did not have a "reasonable opportunity" to assert their rights over the propagating material. In practice, this allows PVR owners to control the exploitation of harvested material of a protected variety if it is imported from a country where the variety is not protectable.
267. In addition to the requirement in Article 14(2), UPOV 91 also allows members to:
- a. provide PVR owners with rights over products made from the harvested material, where Article 14(2) applies (Article 14(3));
 - b. provide additional exclusive rights in addition to those explicitly provided for in Article 14(1) (Article 14(4)).
268. As a result of our CPTPP obligations, New Zealand must provide PVR owners with the rights over harvested material set out in Article 14(2). We do not have to provide the rights provided for in Articles 14(3) or 14(4) of UPOV 91.
269. As far as we are aware, no UPOV 91 member state provides PVR owners with more than the minimum exclusive rights over harvested material provided by Article 14(2), or have implemented the additional optional provisions in Article 14(4). Australia has implemented Article 14(3) in its *Plant Breeders Rights Act* (section 15), extending the rights to cover, in certain circumstances, the products made from harvested material. The EU has left open the possibility of extending protection to products in this way.

What submitters said

270. Nineteen submitters commented on extending the rights in relation to harvested material as provided for by UPOV 91. Submitters expressed mixed views. Some considered that it was important for PVR owners to have control over the harvested material. They argued that this was necessary to maintain quality standards or to allow niche or speciality varieties to be marketed.
271. Two submitters considered that the provisions of UPOV 91 should be seen as the minimum requirement, and one of those also wanted to see the option in relation to the produce of harvested material implemented. One submitter questioned why the onus should fall on the PVR owner to demonstrate that they haven't had a "reasonable opportunity" to assert their rights. The submitter considered that the rights should automatically apply if the harvested material is the product of unauthorised use.

272. Other submitters considered that contractual arrangements between PVR owners were sufficient to allow PVR owners to maintain control over the harvested material of their protected varieties. One submitter expressed concern that New Zealand’s competition laws were not robust enough to protect growers and farmers from onerous contractual terms.

What the options are

273. There appear to be three main options here:

Option 1: Provide only the minimum rights over harvested material required by UPOV 91

Option 2: Extend the exclusive rights of PVR owners to harvested material resulting from unauthorised propagation of their protected varieties

Option 3: Extend the exclusive rights of PVR owners to include the harvested material of their protected varieties.

274. Option 1 is our preferred option.

275. No submitters commented on extending the rights to include the products of harvested material (as per Article 14(3) of UPOV 91) and we see no case for doing so. We have therefore not advanced an option that would implement this optional provision.

Options analysis

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1	Provides breeders another opportunity to assert their rights if they have been unable to do so in relation to propagating material. Unlikely to significantly increase investment.	Does not really impact access to new varieties.	Some uncertainty as retailers of harvested material may not be aware of whether the material comes from unauthorised use of propagating material.	There is no argument to extend rights to harvested material beyond the minimum required by UPOV 91.
Option 2	Provides breeders another opportunity to assert right (and they don’t have to show they had no previous opportunity). Unlikely to significantly increase investment.	Does not really impact access to new varieties.	Creates uncertainty for public (growers, retailers) as breeders essentially get a choice when to assert their rights.	Slight benefit for breeders, but not consistent with the focus of the PVR regime on propagating material.
Option 3	Significantly strengthens rights, so could incentivise more investment if breeders could get better returns.	Significantly increases market power of breeders, potentially impacting access to new varieties.	Scope of right is certain.	The PVR regime focuses on acts in relation to propagating material. This would be a significant departure from that and risks concentration of market power.

276. The Sapere report notes that the current PVR Act creates a risk of a potential “black market” in harvested material, because if the unauthorised use of the propagating material goes undetected, the harvested material derived from it can be “used legitimately without any

compensation or breach of PVR rights". Breeders see this as a "significant gap" in the current legislation that the UPOV 91 extension aims to address.

277. However, the report also identifies potential costs of extending the rights to harvested material further than the minimum required by UPOV 91. The main risk is that "PVR owners end up with excessive market power" with costs of defending rights being shifted "away from the beneficiaries of the PVR and onto consumers", undermining the "social bargain underpinning the PVR regime".

Option 1: provide only the minimum rights over harvested material required by UPOV 91 (preferred option)

278. This option involves providing PVR owners with the right to control the exploitation of the harvested material of their protected varieties when:

- a. the harvested material was obtained through use of the propagating material of a protected variety where that use was not authorised by the PVR owner; and
- b. the PVR owner did not have a "reasonable opportunity" to assert their rights over the propagating material.

279. The main purpose of this provision is to give the PVR owner an opportunity to assert rights over harvested material if they have not had a reasonable opportunity to assert their rights over the propagating material at an earlier stage. The principle is that, ideally, the rights over propagating material should be asserted in relation to unauthorised use of that material. But, if for some reason this has not been possible, this extension provides an opportunity at a subsequent stage for the PVR owner to assert rights over the harvested material.

280. The most likely situation where this could occur is where harvested material of a variety protected in New Zealand is imported from a country where the variety is not, or cannot be protected.

281. As this option is the minimum required by CPTPP, and in light of the problems identified in relation to Options 2 and 3, this is MBIE's preferred option.

Option 2: Extend the exclusive rights of PVR owners to harvested material resulting from unauthorised propagation of their protected varieties

282. If this option was implemented, PVR owners would have rights over the harvested material of their protected varieties if the material was produced through the unauthorised propagation of their protected varieties. These rights would be provided regardless of whether or not the PVR owner had an opportunity to assert their rights over the propagating material of the protected variety.

283. For example, a PVR owner finds that produce (for example fruit) of one of its protected varieties was being sold by a retailer. The fruit has been bought from a grower who did not have the PVR owner's permission to grow the variety. In this situation, the retailer would be infringing the PVR by selling the fruit.

284. The PVR owner could sue the retailer (as well as the grower) for infringement, and might also be able to obtain a preliminary injunction preventing the retailer from selling the fruit. These actions would, however, require the PVR owner to be prepared to incur the cost of starting proceedings in the High Court, and gathering evidence in support.
285. One potential problem with this option is that it could be seen to be putting an onus on retailers or other sellers to enforce PVRs, rather than the PVR owner. This is because, to avoid the possibility of infringing a PVR, retailers would have to determine whether the harvested produce they were offered by a grower came from a protected variety, and, if so, whether the grower had the PVR owner's permission to grow the variety.
286. Many retailers and other sellers might lack the expertise to determine whether harvested produce came from a protected variety. Implementing this option might therefore be seen as imposing an unfair burden on retailers and sellers of harvested products.
287. Another problem is that it potentially creates a situation in which a PVR owner can choose at which point to assert their rights. The focus of the regime is rights in respect to propagating material and the intent of the UPOV provision is to provide an opportunity for a PVR owner to assert their rights over harvested material *only if* they have not previously had the opportunity to assert their rights in relation to the propagating material.
288. As far as MBIE is aware, no other UPOV 91 member state has put in place a provision along the lines of this option.
289. In light of the issues described above, and the fact that many submitters were happy to continue to use contractual arrangements, this option is not MBIE's preferred option.

Option 3: Extend the exclusive rights of PVR owners to include the harvested material of their protected varieties

290. Under this option, a PVR owner would have the right to control any commercial exploitation of the harvested material of a protected variety. This means that any person wishing to exploit harvested material of a protected variety regardless of the purpose to which it will be put must obtain the PVR owner's permission.
291. The effect would be to give PVR owners a monopoly on the supply of the harvested material of their protected varieties. This could assist PVR owners in maintaining the quality or reputation of the harvested material of their protected varieties.
292. However, while this option would provide greater certainty for PVR owners than the other two options, this approach may cause problems. Where one entity owns, or has the exclusive licence for, most of the PVRs of a particular species, this could have the effect of reducing competition for the harvested material of that species. This could drive up prices and/or reduce supply to consumers.
293. Growers would still be free to grow and sell harvested material of varieties of that species that were no longer (or never) protected. However, if the market demand was for harvested

material of protected varieties, it might not be worthwhile for growers to grow non-protected varieties.

294. Currently, PVR owners exercise control over the harvested material of their protected varieties using contractual arrangements. Any such arrangements are subject to section 36 of the *Commerce Act 1986* which relates to taking advantage of market power.
295. However, under section 36(3), actions to enforce a statutory intellectual property right (such as a PVR) are not considered to be taking advantage of market power. If PVR owners were given exclusive rights over harvested material, license agreements with growers that lessened competition in the market for harvested products might not be subject to scrutiny under the *Commerce Act 1986*.
296. It may well be that the competition issues mentioned above are a reason why no other UPOV member state has provided PVR owners with the exclusive right to exploit the harvested material of their protected varieties.
297. In light of the competition issues describe above, and the fact that many submitters were happy to continue to use contractual arrangements, this option is not MBIE's preferred option.

Rights over harvested material

- 13 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Farm saved seed

What is the issue?

UPOV 91	PVR Act
<p>Optional exception for farm saved seed (Article 15(2))</p> <p>Under the new exclusive rights afforded by UPOV 91, farmers would not be allowed to save seed without the authorisation of the PVR owner. However, UPOV 91 provides an exception that member states can choose to implement (and, if so, under what conditions):</p> <ul style="list-style-type: none"> • A Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety. 	<p>No restriction on farmers saving seed for use on their own holdings.</p>

298. It has long been traditional for farmers to save seed from their harvests for sowing future crops. This saved seed is often known as “farm saved seed”, and farmers’ entitlement to save this seed is often known as the “farmer’s privilege”. Farmers, in the past, have also exchanged their saved seed with, or sold it to, other farmers. Under the PVR Act, farmers in New Zealand may save seed of protected varieties for their own use, but they cannot sell it for the purposes of sowing another crop.

299. The expanded rights provided under Article 14 of UPOV 91 would not allow farmers to save seed of a protected variety without the plant breeder’s consent. For example, Article 14(1)(i) of UPOV 91 gives the plant breeder the exclusive right to propagate the protected variety. Article 15(2), however, does allow countries to make an exception to the plant breeders’ rights for farm saved seed. The effect of the exception would be to allow farmers to use saved seed of protected varieties for propagation on their own holdings without the authorisation of the PVR owner.

300. Farmers would also be free to sell harvested material from saved seed if it was not to be used for further propagation, as the exhaustion provision (Article 16 of UPOV 91) means that once propagating material has been sold with the consent of the PVR owner, the PVR owner has no further claim on that material, or any material derived from it, unless further propagation is involved.

301. The exception in UPOV 91 was aimed at crops where it is common practice to save seed for further propagation and was not intended to open the possibility of extending the practice to other varieties where is not already common practice. UPOV also considered a number of ways in which limits might be placed on the exception including:¹⁹

¹⁹ https://www.upov.int/edocs/infdocs/en/upov_inf_6.pdf (pages 74ff)

- a. differentiation according to farm size (e.g. a broader exception for “small farms”, different levels of remuneration);
 - b. specifying an amount of produce (e.g. percentage of overall harvest) to which the exception applies;
 - c. requirement to pay remuneration (e.g. through a royalty).
302. If UPOV 91 is implemented without invoking the exception in Article 15(2), then farmers may face higher costs, either because they would have to buy new seed for each year’s crop, or would have to pay royalties for using their own saved seed.
303. Plant breeders argue that farmers should not be free to save and re-sow their saved seed of protected varieties, without payment of a royalty on this seed. This reduces the return that the breeders can earn from their investment in developing new varieties. This may mean that breeders have less incentive to develop new varieties, and that fewer new varieties are developed. It may also mean that foreign breeders are more reluctant to bring their new varieties to New Zealand if they consider that they cannot get sufficient return on their investment.
304. Farmers argue that, aside from the tradition of saving seed, there are many other advantages, including cost and availability of seed.
305. In New Zealand, the issue of farm saved seed relates predominantly to wheat and barley in the cereals sector and ryegrass in the pastoral sector. For the cereals it is primarily their use as animal feed, as purchasers of milling wheat and malted barley generally require certified seed.

What do other countries do?

306. As far as we know, all UPOV 91 members have invoked the exception for at least certain species.
307. The EU lists the species that the exception applies to. Regulations then dictate that royalties should be paid that are “sensibly lower” than the royalty charged in relation to the initial propagating material of the protected variety. “Small farms” are exempt from the payment of a royalty.
308. The Australian exception applies to all plant varieties, though regulations can be made exempting a variety from the exception if a clear case of market failure is made by the breeder. The exception is implemented by specifying that the conditioning and reproduction of the material is not an infringement of the breeder’s right.
309. Canada has a similar approach to Australia (though without the regulation making power to exempt varieties from the exception), and also includes “stocking” insofar as it relates to the saved seed in the list of acts that are not an infringement. However, Canada is currently consulting on introducing royalties for saved seed of certain varieties.

Royalty collection

310. It is important to consider the issue of farm saved seed in the broader context of royalty payments in the PVR regime. There is nothing in the legislation that requires royalties to be paid. This is just the usual contractual arrangement by which the authorisation of the PVR owner is obtained for an act covered by the exclusive rights. Royalties are generally either “seed point”, i.e. paid at the point of sale of the proprietary seed, or “end point (**EPRs**)”, i.e. paid in relation to the amount of harvested material produced. This depends on the nature of the crop and its end user(s). It is also worth noting that EPRs are unlikely to distinguish between produce harvested from saved seed and produce harvested from the initial seed purchase of the proprietary variety, and so saved seed will already be attracting a royalty payment in some instances.
311. There is also nothing that would preclude a royalty being agreed in relation to an act not covered by the exclusive rights. So the farm saved seed exception could be invoked, but industry participants could still agree royalty payments in relation to farm saved seed.
312. Breeders have concerns about the royalties they are missing out on in relation to farm saved seed and have also raised concerns about growers avoiding royalty payments through mislabelling. Growers have also raised concerns about the current mechanisms for collecting royalties. They cite examples of royalties being charged for non-proprietary varieties, and comment on the lack of transparency in contracts leading to concerns of “double dipping” (royalties being charged at both seed point and end point).
313. MBIE understands that there have been initial conversations between the New Zealand Plant Breeding and Research Association (**NZPBRA**) and Federated Farmers on what a more formal royalty collection mechanism might look like, but that there remain many areas of disagreement, including on what basis royalties should be set (i.e. seed point or end point, what the level should be and how it should be set).
314. These issues suggest that a more transparent royalty regime, whether it includes farm saved seed or not, is likely to benefit all industry stakeholders.

What submitters said

315. Sixteen submitters commented on the farm saved seed issue. The majority of these (ten) were breeders or breeders’ representatives. There was only one submission representing growers/farmers (from Federated Farmers). We have heard that some farmers are concerned that expressing views on this issue could impact the contractual relationships they have with breeders/PVR owners (or their licensees, e.g. seed companies).
316. There is broad agreement across submitters that farmers should retain the right to save seed. The issue is what conditions this practice should continue under.
317. Most breeders support the ability for farmers to continue to save and use seed on their own holdings. However, they argue that farmers should have to pay a royalty when they use saved seed, and that there should be some statutory basis to this ability to collect a royalty.

318. The NZPBRA estimates that at least \$2million is “lost” annually through farmers not paying a royalty on saved seed. The estimates are based on assumptions of average yield compared to amount of seed sold. The figures suggest that use of saved seed in wheat is around 30%, and is over 50% for barley. For ryegrass, the estimate is that around 10% of proprietary ryegrass used is from saved seed.
319. The principle argument put forward by the breeders is that the lack of a royalty on farm saved seed is impacting investment in domestic plant breeding and is also discouraging overseas PVR owners from bringing their new varieties to New Zealand. One submitter commented that the “cost saving” argument that supports the use of saved seed for farmers needs to be weighed against the “increased value farming businesses capture from implementation of the improvements and technological advances achieved through plant breeding, and the flow-on benefits to the economic competitiveness of New Zealand primary industry”.
320. It is also argued that the current arrangements do not reflect the changes in farming practices, from smaller, family run farms, to large scale, vertically integrated farms. The consequence of this is that an unfair proportion of the value derived from the innovation is being retained by these large farming operations, rather than being returned to the breeder who invested in this innovation in the first place.
321. Breeders also raised concerns about illegal multiplication and selling of seed, the transfer of seeds within large corporate entities (e.g. farms that have both arable and dairy operations) and the consequences of loss of genetic integrity when seed is saved over successive seasons.
322. Federated Farmers submitted that there are many good reasons for the current saved seed arrangements to continue, but does accept that there may be justified reasons for a royalty on farm saved seed under certain circumstances. They commented that the advantages of being able to save seed include that it is a reliable way of getting seed into the ground in time (and they cited examples of PVR seeds not being available at optimal planting time or not supplied to required standard), the quality is assured, and the cost of seed is reduced. They have also commented that farmers are more likely to be open the idea of royalties being paid on farm saved seed if they can be assured that those royalties are being directed into breeding programmes that will benefit them.

What the options are

323. There seem to be three broad options in response to the farm saved seed issue:
- Option 1:** Provide no exception for farm saved seed
 - Option 2:** Provide an exception for farm saved seed either **(i)** with limitations imposed in the primary legislation, or **(ii)** with a provision to impose limitations in regulations
 - Option 3:** Provide an exception for farm saved seed with no limitations.
324. Under Option 1, a farmer would have no automatic right to save seed. Any production, reproduction, condition or stocking of seed would require the authorisation of the PVR owner.

325. Options 2 and 3 would require invoking the exception in Article 15(2) of UPOV 91.
326. Under Option 2 limitations could be imposed on the exception either up front in the primary legislation or (if the case was made in relation to certain varieties later on) in regulations. These could include limitations on which varieties the exception applies to, what types/size of farm the exception applies to and what amount of produce the exception applies to, and could also include regulations relating to royalty payments for varieties that the exception applies to.
327. Option 3 is essentially the status quo.
328. Option 2(ii) is our preferred option.

Options analysis

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1	Extending rights to FSS could increase returns for breeders and so incentivise investment, though farmers could choose to buy non-proprietary varieties if they perceive costs are too high.	Increasing costs could have the effect of restricting public access to new varieties.	Provides certainty of scope of the right.	There is no current evidence that New Zealand is missing out on new varieties. This option would increase costs for farmers.
Option 2(i)	Extending rights to FSS on some varieties could increase returns for breeders and so incentivise investment, though farmers could choose to buy non-proprietary varieties if they perceive costs are too high.	Increasing costs could have the effect of restricting public access to new varieties.	Certainty depends on the nature of any limitations on the exception for FSS that are imposed.	There is no current evidence that New Zealand is missing out on new varieties, so no case for selecting certain varieties up front. This option would increase costs for farmers on those varieties.
Option 2(ii)	Extending rights to FSS on some varieties if a case has been made would help ensure breeders are getting sufficient return on their investment, and so encourage innovation.	Increasing costs could have the effect of restricting public access to new varieties.	Certainty depends on the nature of any limitations on the exception for FSS that are imposed.	This option acknowledges that, in the future, a case may be made to limit the exception for FSS in certain cases. It is the best balance between the interests of breeders and the interests of farmers.
Option 3	Could discourage innovation in the future if return on investment becomes insufficient for breeders.	Access to new varieties unaffected.	Provides certainty of scope of the right.	This option is essentially the status quo. With no ability to limit the exception in the future, it would make it harder to address issues if they arise.

Option 1: Provide no exception for farm saved seed

329. Under this option, there is no exception from the exclusive rights provided for in UPOV 91 for farm saved seed. This means that any of the acts that would be associated with saving seed and sowing it (production/reproduction/conditioning/stocking of propagating material) would require the authorisation of the breeder, usually by means of a royalty payment. Performing

any of these acts without that authorisation would be an infringement of the PVR owner's rights. No UPOV member states, as far as we know, have gone with this option. All invoke the exception, at least to some extent.

330. This option would increase royalty returns to PVR owners and this may encourage further investment in new varieties. This could benefit farmers and consumers. However, it would also impose additional costs on farmers, which they may struggle to pass on. Or they may simply choose not to purchase protected varieties, which could affect both PVR owners and the wider public.

331. A strong case would need to be made to proceed with this option and we do not think that case has been made. The argument that the "loss" of royalty income from the use of farm-saved seed is impacting the development and availability of new varieties is not borne out – at least currently – by the economic analysis MBIE commissioned (the Sapere report).

332. The report comments that there are many factors that influence the return that PVR owners get on their investment in new varieties, including industry structure, the contractual arrangements they enter into with growers and the legislative settings. It concludes that there is no strong evidence that the costs of the current arrangements are outweighing the benefits:

"If [farm saved seed] was causing significant problems in the innovation system one might expect to see evidence of local breeders developing fewer new varieties and reluctance in foreign plant breeders to allow their new varieties to be imported and grown in New Zealand. We might also expect to see farmers incurring very high or inequitable costs in obtaining seeds, or problems with supply.

We have found that in practice, neither scenario appeared to be happening. Applications for PVR for new varieties of agricultural and vegetable crops and pasture plants and amenity grasses have consistently grown, and the royalties received and returned back into R&D have been sufficient for large-scale breeding and testing programs to be maintained in multiple locations. International interest in New Zealand as a breeding destination has been demonstrated by new entrants like DLF entering and remaining in the market (using acquisition to acquire more rights over licensed products and breeding activities)."

333. However, the report does note that the future picture is not so clear. While some technological advances may be beneficial, e.g. advances in genetic testing making it easier to identify "cheating" and so reduce the risk of infringements, breeders expressed concerns that New Zealand could start to lag behind under the current legislative settings.

334. In response to this we note that, due to our CPTPP obligation to bring our regime in line with UPOV 91, the rights of PVR owners will already be strengthened in other ways, with the result that returns should increase regardless of whether or not farm saved seed attracts royalties. And in New Zealand (as opposed to other markets) breeding programmes are not predominantly funded by royalties due to the small size of the market. Even if no exception was made for farm saved seed, it is unlikely that the additional revenue gained would mean a significant increase in the returns breeders were getting (relative to overall R&D spend).

Option 2: Provide an exception for farm saved seed either (i) with limitations imposed in the primary legislation, or (ii) with a provision to impose limitations in regulations (2(ii) is our preferred option)

335. As we note above, other UPOV 91 members have gone with either Options 2 or 3. The EU would fall under Option 2(i), Australia under Option 2 (ii), and Canada (currently) and the US under Option 3.
336. As noted above, there is no clear evidence of current market failure in relation to the return on investment for any protected varieties. For this reason, we do not consider that Option 2(i) is appropriate. However, we cannot discount the possibility that a case may be made in the future, so providing the exception for farm saved seed combined with regulation-making provisions to limit this exception is our preferred option.
337. Limitations could include:
- a. exempting certain varieties from the exception (so the PVR owner's exclusive rights apply);
 - b. requiring a royalty to be paid in relation to certain specified varieties which, in turn, could be restricted by:
 - i. requiring that the royalty be lower than the royalty in relation to the purchase of the proprietary seed;
 - ii. exempting certain farming operations (e.g. small farms) from the royalty payment;
 - iii. exempting a certain percentage of the saved seed used (or harvested material derived from saved seed) from the royalty payment.
338. Australia allows for a variety to be exempted from the exception (i.e. so saving seed would be covered by the PVR owner's rights) in regulations if a case of market failure has been made by the breeder. To date no regulations have been made.
339. As already noted, some discussion has already taken place between plant breeders and farmers and we think this should continue. Having a regulation making provision means that, should it be decided that some formal regulation into farm saved seed is desirable on the basis of those discussions, this would be easy to implement.

Option 3: Provide an exception for farm saved seed with no limitations

340. Given the analysis in relation to the above options, this is not our preferred option. The future is uncertain, and any changes to address issues that may arise would be harder under this option as they would require change to the primary legislation.

Farm saved seed

- 14 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

10 Post-grant issues

341. This part covers what we have termed “post-grant issues”. These refer to issues in the regime that are only relevant after the grant of a PVR has been made. They are (i) compulsory licences, (ii) enforcement (infringements and offences), (iii) exhaustion of the right, and (iv) nullification and cancellation of the right.
342. Some of the policy considerations discussed in this part are requirements related to UPOV 91, and others are domestic policy matters. As with the discussion in Parts 7, 8 and 9, our CPTPP obligations in relation to UPOV 91 are always subject to the flexibility required to meet our Treaty of Waitangi obligations.

Compulsory licences

What is the issue?

UPOV 91	PVR Act
<p>Article 17 of UPOV 91 allows for the grant of compulsory licences “in the public interest”.</p> <p>If a compulsory licence is granted, the PVR owner must be paid “equitable remuneration”.</p>	<p>Section 21 of the PVR Act provides for the grant of compulsory licences over protected varieties. Any person may apply to the Commissioner of Plant Variety Rights for a compulsory licence. The Commissioner may grant a compulsory licence if the PVR owner has not made reasonable quantities of reproductive material of reasonable quality of the variety concerned available for purchase by members of the public at a reasonable price. The Commissioner will then consider application and if it meets the requirements set out in the PVR Act, a licence will be granted.</p>

343. The grant of a compulsory licence allows the licensee to reproduce and sell propagating material of the variety without the PVR owner’s permission. The licensee must pay a royalty set by the Commissioner of PVRs to the PVR owner.
344. The Commissioner may grant a compulsory licence over a protected variety if:
- a. the application for the licence was made at least three years after the PVR was granted; and
 - b. the PVR owner has not made reasonable quantities of propagating material of the variety available to the public at a reasonable price.
345. In deciding whether or not condition (b) above is met, the Commissioner must ignore propagating material that has been made available only subject to the condition that all or any

of the produce of that variety must be sold or offered to a specified person or group of persons (section 21(3) of the PVR Act).

346. If a compulsory licence is granted, the Commissioner can require the PVR owner to sell propagating material of the variety concerned to the licensee. This power is necessary, as the licensee will need propagating material to propagate the variety.
347. Only two compulsory licences over PVRs have been granted. These were in the early 1980s, under the predecessor to the PVR Act. In recent years there have been five applications for compulsory licences, all for hops varieties. These applications were resolved through negotiations between the parties involved, and no compulsory licences were issued.

What submitters said

348. In general, submitters accepted the need for some form of compulsory licence provision. However, they also considered that the current compulsory provisions were deficient to some extent. The main issues identified were:
 - a. lack of a clear procedure that the Commissioner must follow when considering applications for compulsory licences;
 - b. no requirement for an applicant for a compulsory licence to demonstrate that they had made reasonable efforts to obtain a licence from the PVR owner;
 - c. no restriction on compulsory licensees exporting propagating material of the variety concerned;
 - d. lack of a “public interest” test;
 - e. the three year “grace period” in section 21 is too short to allow PVR owners to bring a variety to market;
 - f. the requirement in section 21(3) of the PVR Act that the Commissioner must ignore propagating material that has been made available only subject to the condition that all or any of the produce of that variety must be sold or offered to a specified person or group of persons.

What are the options?

349. As discussed in detail in the Sapere report, PVRs are not a property right in the traditional sense, but are better characterised as a “conditional grant”. As with other intellectual property rights, they are based on a “social contract”. In return for being granted the exclusive rights associated with a PVR, the PVR owner undertakes to make the variety available so as to provide a benefit to society as a whole.
350. In most cases, PVR owners will make propagating material of their protected varieties available to the public on reasonable terms. It will usually be in their interests to do so, so as to

maximise their return from exploiting their protected varieties. There may, however, be situations where the PVR owner's interests lie in restricting access to a protected variety. In such cases, the social contract between the PVR owner and the public may not be fulfilled. It is in this situation that the grant of a compulsory licence is intended to remedy.

351. In light of the purpose of providing for compulsory licences, and the fact that submitters generally accepted the need for compulsory licence provisions, MBIE considers that the PVR Act must continue to make provision for compulsory licences.
352. If compulsory licence provisions are to be retained, it is clear that there are aspects of the current provisions which will need to be clarified regardless of whichever of the options set out later in this section is adopted. These are the issues listed as issues (a) – (d) above, and which are discussed in more detail below.
353. Issues (e) and (f) listed above are more “substantive” issues. These are discussed later in this section.

Clear procedure for compulsory licence applications

354. Neither the PVR Act nor the PVR regulations set out how the Commissioner must deal with an application for a compulsory licence. This lack of a prescribed procedure may have led to a perception that, if an application for a compulsory licence is filed, it will probably be granted, with the only cost to the applicant being the application fee.
355. **MBIE proposes that the PVR Act require that the application be dealt with in a manner prescribed in regulations, and that the parties be given a reasonable opportunity to be heard before making a decision on the application.**
356. It is not intended to look at possible procedures for dealing with compulsory licence applications in this Options Paper. This will be dealt with during the consultation on the regulations that will be required to support the new legislation. The *Patents Regulations 2014* and the *Trade Marks Regulations 2003* contain examples of procedures that could be adapted for use in applications for compulsory licences over protected varieties.
357. In the most recent compulsory licence applications, a procedure based on the opposition procedure in the *Trade Marks Act 2002* was used.

Requirement to make reasonable efforts to obtain a voluntary licence

358. There is no requirement in the PVR Act that an applicant must have made reasonable efforts to obtain a licence from the PVR owner, on reasonable terms and conditions. In practice any person who applies for a compulsory licence is likely to have attempted to negotiate a licence on reasonable terms and conditions before making an application.
359. Nevertheless, there would be value in making this a requirement so as ensure that a compulsory licence can be granted only if the PVR owner has unreasonably refused to grant a licence.

360. **MBIE proposes that the PVR Act provide that a compulsory licence must not be granted unless the applicant can show that:**
- a. **They have made reasonable efforts to obtain a licence over the variety concerned from the PVR owner on reasonable terms and conditions; and**
 - b. **Has not been able to obtain such a licence within a reasonable period of time²⁰.**

Restrictions on export

361. There is nothing in section 21 of the PVR Act that would require compulsory licences to be granted subject to a condition that propagating material of the variety concerned must not be exported if it is to be used for the purposes of propagation. The Commissioner has the power to include such a condition if a compulsory licence is granted. However, there is no guarantee that such a condition would be imposed.
362. The compulsory licence provisions are concerned with the supply of propagating material to the New Zealand market. Allowing compulsory licensees to export propagating material for the purposes of propagating the variety concerned could unreasonably prejudice the interests of the PVR owner. This could occur if the propagating material was exported to a country where the variety concerned was not protectable. The PVR owner would not be able to obtain royalties on any sale or use of the propagating material in such a country.
363. **MBIE proposes that the compulsory licence provisions in the PVR Act be amended to make it clear that the licence is limited to the use of the propagating material to propagate the variety in New Zealand. This is consistent with the approach taken in section 170 of the *Patents Act 2013*.**

Public interest test

364. Some submitters on the Issues Paper argued that the compulsory licence provisions in the PVR Act should contain a “public interest” test. That is, the Act would provide that a compulsory licence should only be granted if it is in the “public interest” to do so. This argument appeared to be based on the fact that some other countries do have an explicit “public interest” test in their PVR compulsory licence provisions.
365. However, MBIE notes that many countries, including Australia, Canada and the United Kingdom do not have a “public interest” test. Singapore and the EU do have such a test, and EU regulation does provide some guidelines as to what might constitute the “public interest”.
366. **MBIE considers that there is no need for an explicit “public interest” test.**
367. Merely providing for such a test would, in itself, give no guidance to the Commissioner as to what the public interest is. We consider that the wording in section 21 of the PVR Act reflects

²⁰ These conditions are based on section 176 of the *Patents Act 2013*.

the public interest in ensuring that propagating material of protected varieties should be available in reasonable quantities on reasonable terms.

Compulsory licences to be non-exclusive

368. **MBIE also proposes that compulsory licences must be non-exclusive.**
369. If a compulsory licence was exclusive, this would prevent the PVR owner or anyone else from exploiting the variety concerned without the permission of the compulsory licensee. This would be unfair to the PVR owner, and to any other person who had obtained a voluntary licence from the PVR owner.
370. While it is unlikely that the Commissioner would grant an exclusive compulsory licence, there is nothing in the PVR Act that prevents the Commissioner from doing so. Including an explicit provision that a compulsory licence must not be exclusive, will make it clear that exclusive compulsory licences cannot be granted.

15

Compulsory licences – general issues

Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?

Other than the two substantive issues below, are there other issues we have missed?

Options for substantive issues

371. As described above, there appear to be two “substantive” issues where there are viable options to be considered:
- a. the “grace period”;
 - b. the condition set out in section 21(3) of the PVR Act.

Options analysis

372. Our criteria for our options analysis are the same as those used for the scope of the right options (with the necessary amendment to the third criterion), namely:
- a. incentivises the development of new varieties, and encourages foreign breeders to release their new varieties in New Zealand, by providing sufficient opportunity for rights holders to get a reasonable return on their investment;
 - b. ensures that the public has reasonable access to new varieties so as to meet public demand for the varieties and the products derived from them;
 - c. provides certainty to rights holders and the public about compulsory licences.

Grace period

373. The “grace period” is the period after grant of a PVR during which a compulsory licence application cannot be filed. The grace period reflects the fact that many PVR owners will not begin to exploit their protected variety until after a PVR is granted. It can take time to produce sufficient propagating material to place on the market. During this time the PVR owner may be unable to provide propagating material to the public.

374. There appear to be three viable options:

Option 1: Retain a three year grace period (the status quo)

Option 2: Provide for a grace period of more than three years

Option 3: Provide for different grace periods for different varieties.

375. Option 1 is our preferred option.

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1	There is no evidence that the length of the grace period impacts investment.	It is important that the public has an opportunity to make the case that the breeder has not made reasonable quantities of material available.	Provides certainty.	There is no compelling argument for changing the status quo.
Option 2	There is no evidence that the length of the grace period impacts investment.	The longer the grace period, the longer a breeder can potentially abuse their monopoly position and restrict public access.	Provides certainty.	Firstly it is not clear what a longer period should be. Secondly, a longer period has some risk associated with it and there are no clear benefits.
Option 3	There is no evidence that the length of the grace period impacts investment.	The longer the grace period, the longer a breeder can potentially abuse their monopoly position and restrict public access.	Provides certainty.	The main argument here is that some varieties may take longer to be commercially viable, but the Commissioner is highly unlikely to grant a compulsory licence if the breeder is unable to make a reasonable quantity available because it does not yet exist.

Option 1: Retain the status quo (preferred option)

376. This option involves retaining the three year grace period provided for in section 21 of the PVR Act.

377. Some submitters have argued that this is too short, as for some varieties at least, PVR owners may not be able to put reasonable quantities of propagating material on the market within three years of grant. They argue it would be unfair to grant a compulsory licence when it had not been possible for the PVR owner to produce sufficient propagating material to serve the market.

378. We note that in Australia and the UK, the grace period is two years. Canada and Singapore appear to have no grace period.
379. If an application for a compulsory licence was filed more than three years from grant, it would likely be refused if the Commissioner was satisfied that the PVR owner was unable to make reasonable quantities of propagating material available for purchase. For example, this could be because the PVR owner had not had sufficient time to produce the material following grant of the PVR.
380. In light of the points made above, MBIE considers that the three year grace period is not unreasonable.

Option 2: Provide for a grace period of more than three years

381. Under this option, the grace period would be fixed at some period longer than three years. However, in light of the discussion on Option 1, it is not clear that a grace period of longer than three years would be justified.

Option 3: Provide for different grace periods for different species

382. This option would mean that different plant species would have different grace periods before a compulsory licence could be applied for. This could reflect the fact that the time required to get reasonable quantities of propagating material to market differs for different species.
383. This would mean listing the grace periods in the PVR Act or regulations. It is not clear how the grace periods would be determined, or what criteria would be used.
384. In any case, as noted in the discussion of Option 1, applications for compulsory licences would likely be refused if the Commissioner was satisfied that the PVR owner was unable to make reasonable quantities of propagating material available for purchase. This suggests that there is no justification for providing different grace periods for different species.

Compulsory licences – grace period

- 16 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Section 21(3) of the PVR Act

385. Section 21(3) of the PVR Act provides a condition that the Commissioner must take into account when deciding whether or not reasonable quantities of propagating material of a protected variety have been made available at a reasonable price. This condition is:

“... the Commissioner shall not take into account any reproductive material that is available only subject to the condition that any or all of the produce from that material must be offered or sold to a particular person, or to one of a specified group of persons, or to a member of a specified class or description of person.”

386. Some submitters on the Issues Paper argued that this provision be repealed. It appears to be common for PVR owners to use contractual arrangements to require persons growing their protected varieties to sell or offer to sell the produce to a person specified in the contract. These submitters argue that this is important to enable PVR owners to maintain quality and brand reputation for the varieties²¹.

387. There appear to be two viable options:

Option 1: Retain section 21(3) (the status quo)

Option 2: Repeal section 21(3).

388. Option 1 is our preferred option.

Analysis summary	Incentivise investment	Ensure public access	Provide certainty	Comment
Option 1	There is no evidence that this provision impacts investment in new varieties, or that current contractual arrangements are not working.	This provision ensures that the public has the opportunity to challenge a breeder who is restricting access by requiring growers to sell their produce to specified persons.	May create some uncertainty for breeders as to how the Commissioner may apply this provision.	Applications for compulsory licences are rare which suggests that the concerns of breeders are unfounded. It remains important that the public retains this ability to challenge breeders.
Option 2	Removing this provision open the possibility of breeders increasing market power. This could mean bigger returns and so more investment in new varieties, but could also lead to rent seeking behaviour.	Removing this provision would leave breeders free to dictate who they make their propagating material available to, potentially limiting public access to the new varieties.	Would remove that uncertainty.	The potential costs of removing this provision outweigh any potential benefits.

Option 1: Retain section 21(3) (preferred option)

389. This option involves retaining section 21(3) in the PVR Act. This would mean that where a PVR owner requires all or most growers of a protected variety to sell, or offer to sell, the produce of that variety to a specified person (as opposed to, say, the general public), it would be possible for a compulsory licence to be granted.

390. For most PVRs, there may not be a problem if PVR owners require growers to sell, or offer to sell, their produce to a specified person. Growers may have sufficient choice about the varieties they grow to ensure that if PVR owners require growers to sell their produce to specified persons, PVR owners must offer terms that growers will find acceptable. It will usually be in the interests of PVR owners to license their varieties as widely as possible to maximise the return they receive.

²¹ Note that grant of a compulsory licence will not enable the licensee to use any trade marks used by the PVR owner to market their produce.

391. In these circumstances, compulsory licence applications are unlikely. The lack of compulsory licence applications since the PVR Act came into force suggests that in most cases, growers find the contractual conditions imposed on them by PVR owners acceptable.
392. There may, however, be cases where one PVR owner or exclusive licensee controls all or nearly all of the PVRs for a particular species. Where market demand is largely for produce of protected varieties of that species, the PVR owner or exclusive licensee may be able to impose terms which some growers may be unable or unwilling to comply with.
393. In such cases this could lead to higher prices for consumers (because one seller may have an effective monopoly over produce of that species). It could also mean that some intending growers are “locked out” of the market for produce of that species. This is not in the public interest.
394. This was the situation that arose in the most recent compulsory licence application in relation to hop varieties. Although no licence was issued as the parties involved negotiated a settlement, the application has enabled the establishment of hop growing and breeding activities that are not controlled by the exclusive licensee concerned. This has led to economic activity and potentially increased exports of hops that might not otherwise have occurred.
395. So, while we acknowledge that retaining this provision also retains a degree of uncertainty for breeders as to how it is applied, MBIE considers that section 21(3) be retained.

Option 2: Repeal section 21(3)

396. This option would involve repeal of section 21(3). This would mean that if PVR owners make their varieties available to growers on the condition that the produce be sold back to a specified person, then this could be considered making reasonable quantities of propagating material available to the public at a reasonable price. This could mean that no compulsory licence could be granted under such circumstances.
397. As noted in the discussion on Option 1, there may be occasions when making a protected variety available on such terms may not be in the public interest. While these may be rare, it would be desirable that the possibility of grant of a compulsory licence be available to ensure that the public interest is protected. For this reason, MBIE does not favour Option 2.

Compulsory licences – section 21(3)

- 17 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Enforcement: infringements

398. This section looks at infringement of PVR owners' rights over protected varieties, and how they are enforced.

What is infringement of a PVR?

399. Section 17 of the PVR Act provides that the following actions are infringements of a PVR:

- a. import of propagating material of the protected variety into New Zealand for use in propagating the variety;
- b. import of produce of a protected variety into New Zealand from a UPOV member state where it is not possible to obtain PVR protection for that variety;
- c. import the produce of a protected variety into New Zealand from a country that is not a member state of UPOV;
- d. sale under the denomination of a protected variety of propagating material of some other variety, unless the groups of plants to which those varieties belong are internationally recognised as being distinct for the purposes of denomination.

400. Section 17 also provides that PVR owners have the exclusive right²² to:

- a. sell, or offer for sale, propagating material of a protected variety;
- b. produce propagating material of the protected variety for sale as propagating material.

401. The use of the term "exclusive right" in section 17 implies that if a person does these things without the PVR owner's permission, this would be infringement of the PVR owner's rights, although this is not explicitly stated.

402. In other intellectual property regimes, such as patents and trade marks, the nature and scope of what actions would infringe an intellectual property right is often clarified by the courts. However, we are aware of only two PVR infringement cases that have gone to court. These are *Winchester International Ltd v Cropmark Seeds Ltd*²³ and *Cropmark v Southern Grain and Seed*.

403. In the *Winchester* case, Winchester arranged for the sale of seeds of a protected variety without the PVR owner's permission. However, Winchester had not actually grown the seed for sale, or sold the seed. The courts determined that this conduct constituted infringement because it "diminished the [PVR owner's] enjoyment of its exclusive right", even though arranging sale is not explicitly mentioned as an exclusive right in the PVR Act.

²²In this context, an "exclusive right" gives the owner of the right the ability to prevent others performing certain actions without the rights owner's permission. It does not give the rights owner a positive right to perform those actions.

²³Court of Appeal [2005] NZCA 301 (5 December 2005) <http://www.nzlii.org/nz/cases/NZCA/2005/301.html>

Enforcement of PVR owner's rights

404. As with other intellectual property rights, the onus is on the rights owners to enforce their rights through civil actions in the courts. Infringement of a PVR is not a criminal offence. This means that if a PVR owner thinks another person is infringing their rights in a protected variety, the PVR owner can start (or threaten to start) infringement proceedings in the courts.
405. The PVR Act provides that, in awarding damages (including exemplary damages) or any other relief, the Court shall consider:
- a. any loss suffered, or likely to be suffered, by the grantee;
 - b. any profits or other benefits derived by the infringer;
 - c. the flagrancy of the infringement.
406. The PVR Act does not specify where PVR infringement proceedings must be heard. Infringements involving other intellectual property rights such as patents, trade marks and patents are heard in the High Court. The two PVR infringement cases that MBIE is aware of were both heard in the High Court. The *Winchester* case went on to the Court of Appeal.
407. The PVR Act does contain some criminal offences (see section 37), but as these do not deal with infringement of a PVR, they will be dealt with later in this document.

What did submitters say?

408. There were a number of themes that were common to many of the submissions that mentioned enforcement:
- a. it is unclear what constitutes infringement;
 - b. costs of enforcement are seen as too high compared with the potential damages that might be awarded;
 - c. it is unclear where disputes involving infringement should be heard;
 - d. there should be some form of specialised tribunal to deal with disputes, infringements and offences;
 - e. it is not clear what remedies are available where infringement is proved.
409. In addition, a number of submitters appeared to be under the impression that infringement was a criminal offence, and argued that the penalties for infringement were too low. As mentioned earlier, PVR infringement is not a criminal offence.

What are the options?

Infringement

410. A number of submitters noted that there is a lack of clarity in the PVR Act as to what constitutes infringement of a PVR. There was also concern that some acts, such as unauthorised export of propagating material of a protected variety were not infringements.
411. The approach taken in other intellectual property legislation, such as the *Patents Act 2013* and the *Copyright Act 1994*, is to provide that the relevant intellectual property right is infringed if a person does any of the acts over which the rights owner has exclusive rights, without the rights owner's permission.
412. Our CPTPP obligations mean that the minimum exclusive rights that we must provide over protected varieties, and EDVs of protected varieties, are those set out in Article 14(1) of UPOV 91. These are the exclusive right to:
- a. produce or reproduce the propagating material;
 - b. condition the propagating material for the purpose of propagation;
 - c. offer the propagating material for sale;
 - d. selling or other marketing²⁴ of the propagating material;
 - e. export the propagating material;
 - f. import the propagating material;
 - g. stock the propagating material for any of the purposes mentioned above.
413. **MBIE proposes that we take the same approach as in other intellectual property legislation and provide that the PVR owner's right is infringed if a person does any of the acts over which the PVR owner has exclusive rights, without the PVR owner's permission.**

Costs of enforcement

414. A common theme among submitters who commented on enforcement was the high costs involved in enforcing a PVR. Enforcing a PVR is likely to involve significant costs, particularly if this involves starting infringement proceedings in a court. Submitters considered that these costs were too high, and in many cases the costs might exceed any damages that the PVR owner might obtain from an infringer.

²⁴ In this context "other marketing" could include "arranging the sale of seed" which was at issue in *Winchester International Ltd v Cropmark Seeds Ltd*

415. Issues surrounding the high costs of enforcement are not confined to PVRs. Owners of other intellectual property rights, such as patents and copyrights also argue that the costs of enforcement are too high in relation to the damages that might be awarded.
416. There is no easy solution to the high costs of enforcing intellectual property rights. The problem is made worse by the small size of the New Zealand market. Because the market is so small, the losses that an intellectual property rights owner might suffer as the result of an infringement are also going to be small. In many cases the losses may be less than the cost of taking action against an infringer.
417. Some disputes involving alleged infringement can be resolved by negotiation between the parties involved, or through alternative dispute resolution. These are likely to be cheaper than going to court. However, there will still be costs, for example, in gathering evidence and obtaining legal advice.
418. Some submitters advocated for a cheaper way of resolving disputes involving PVRs, such as through the PVR Office or a specialist tribunal. However, at present, this seems impractical. Neither the PVR Office nor IPONZ has the resources to deal with disputes involving infringement of PVRs.
419. While the idea of a specialist tribunal may sound attractive, who should pay for it? Should such a tribunal be paid for by the government, or out of PVR Office fees, or by those who use it? As PVRs are private rights, it may be difficult to justify using government funding, or money raised through PVR fees to fund it. A “user pays” tribunal might not be much cheaper than the courts.
420. It is also unlikely that there would be sufficient work to support a full-time tribunal dealing with PVR disputes. The members would therefore have to be part-time, and tribunal work would be in addition to their “day job” which would be likely to take priority. This may lead to long delays in conducting hearings and producing decisions.
421. If tribunal members had to have specialist skills relating to plant breeding, there may be difficulties finding suitably skilled members who did not have a connection with at least one of the parties to a dispute.
422. Another problem may be that the amount of damages that such a tribunal could award may be too small to make using such a tribunal worthwhile for PVR owners. For example, the Copyright Tribunal established under the *Copyright Act 1994* has jurisdiction to deal with people who infringe copyright through file sharing. The maximum amount that the Copyright Tribunal can award in damages is \$15,000. The Disputes Tribunals established under the *Disputes Tribunals Act 1988* can make a maximum award of \$20,000 if both parties agree²⁵.
423. **MBIE acknowledges the issues relating to cost of enforcement, but does not see any cost effective means of addressing it, and so does not propose any change to the status quo.**

²⁵ The Disputes Tribunal cannot hear disputes involving intellectual property.

Who should deal with disputes involving infringement of PVRs?

424. The PVR Act is silent on where disputes involving infringement of PVRs should be heard. Disputes involving infringement of other IP rights such as patents, copyright and trade marks are dealt with in the High Court. The *Patents Act 2013* and the *Trade Marks Act 2002* both provide for the High Court to hear infringement disputes.
425. As mentioned earlier, the two PVR infringement cases that we are aware of were both adjudicated in the High Court.
426. The District Court has jurisdiction to hear civil disputes involving amounts between \$15,000 and \$200,000. The potential awards in many PVR infringement cases are likely to fall within this range. District Court proceedings may be cheaper and quicker than High Court proceedings.

Remedies for infringement

427. The PVR Act is unclear about what remedies a court can award if it finds that a PVR is infringed. Section 17(4) of the PVR Act provides that a court can award damages or other relief. This section specifies what factors a court must take into account when granting relief, but does not specify the nature of the damages.
428. Both the *Patents Act 2013* and the *Trade Marks Act 2002* provide that a court can award damages, or an account of profits, and/or grant an injunction. An injunction could, for example, require the infringer to cease their infringing activities.
429. MBIE considers that the PVR Act should take the same approach to remedies for infringement as the *Patents Act 2013* or the *Trade Marks Act 2002*. There does not seem to be any justification for going beyond those remedies.
430. **MBIE proposes that the PVR Act should provide that the remedies for infringement of a PVR include:**
- a. an award of damages; or
 - b. an account of profits; and/or
 - c. an injunction.

Enforcement – infringements

18

Do you agree with the discussion and the proposals in relation to the four issues discussed above? If not, why not?

Should the PVR Act provide that infringement disputes be heard in the District Court?

Are there other issues relating to infringements that we have missed?

Enforcement: offences

431. This section looks at the offence provisions in the PVR Act.
432. Infringement of a PVR is not a criminal offence, However, section 37 of the PVR Act makes it an offence to:
- a. supply, with intent to deceive, false or misleading information in connection with an application for a PVR;
 - b. falsely represent that a person is a PVR owner or that a person has applied for a PVR;
 - c. falsely represent that a variety is a protected variety or that a PVR application has been made in respect of that variety;
 - d. falsely represent that a variety is some other variety which is protected by a PVR or that is the subject of a PVR application;
 - e. sell a variety that is a protected variety, or that was a protected variety (because the PVR has been surrendered or expired), without using the denomination (variety name) approved with it when the PVR was granted;
 - f. represent yourself as the PVR Office or to suggest that you or your business is officially connected to the PVR Office.
433. It is also an offence for a person to apply for a PVR, or acquire an interest in a PVR, if that person is a PVR Office employee, or for 12 months after they have left the PVR Office.
434. The maximum penalty for any of the offences is a fine of \$1000.
435. The PVR Act is silent as to who should enforce these offence provisions. Normally such criminal offence provisions would be dealt with by the police, after receiving a complaint from a member of the public or another agency, such as the PVR Office, which had become aware of the offending behaviour. Neither the PVR Office nor IPONZ has any enforcement powers under the PVR Act.
436. As far as MBIE is aware, there have been no prosecutions under the offence provisions since the mid-1990s. It is likely that any complaint to the police made under the offence provisions would be given a low priority.
437. UPOV 91 does not require member states to prohibit the activities referred to in the list above, with the exception of activity (e). Article 20(7) of UPOV 91 provides that persons who sell propagating material of protected varieties must be required to use the variety denomination, even after the PVR has expired or lapsed.

What did submitters say?

438. Those submitters who commented on the offence provisions considered that the penalties were too low, and did not act as a deterrent. Some submitters appeared to be under the impression that infringement was an offence. One submitter queried whether the offence provisions served any real purpose, especially as some of the activities involved may be already captured by provisions in the *Fair Trading Act 1986*.

What are the options?

439. There appear to be three viable options:

Option 1: Retain the current offences and penalties (the status quo)

Option 2: Retain the current offences, but provide the PVR Office or IPONZ with the power to enforce the offence provisions

Option 3: Repeal the offence provisions.

440. Option 3 is our preferred option.

Criteria for assessing the options

441. Most of the offence provisions appear to be aimed at deterring misleading and deceptive behaviour on the part of persons dealing in plant varieties. These persons may, or may not be, PVR owners or breeders. For example, the person could be the owner of a garden centre or nursery rather than a plant breeder.

442. MBIE considers that the following criteria are relevant when assessing the options set out above:

- a. the extent to which the option deters misleading and deceptive behaviour in relation to protected varieties;
- b. proportionality: is the nature of the misleading or deceptive behaviour sufficient to justify making it a criminal offence in the PVR Act?
- c. is the misleading or deceptive behaviour dealt with in other legislative provisions?

Analysis summary	Deterrence	Proportionality	Addressed in other legislation	Comment
Option 1	Police are unlikely to prioritise prosecution of these offences, so minimal deterrent effect.	Many of these offences are not offences in other IP legislation, but would potentially be offences under other legislations, e.g. the Fair Trading Act.	Most of these offences could be addressed in other legislation (e.g. the Fair Trading Act) or by other sanction (e.g. cancellation or nullification of the grant).	It is not consistent with other IP legislation to keep these offences in the PVR Act.
Option 2	Might increase deterrent if IPONZ can take prosecutions, though still unlikely to be invoked often.	Many of these offences are not offences in other IP legislation, but would potentially be offences under other legislations, e.g. the Fair Trading Act.	Most of these offences could be addressed in other legislation (e.g. the Fair Trading Act) or by other sanction (e.g. cancellation or nullification of the grant)	It is not consistent with other IP legislation to keep these offences in the PVR Act.
Option 3	Deterrent is unlikely to be less than the status quo.	Many of these offences are offences under the Fair Trading Act. Persons impacted by these breaches can also take civil actions.	Most of these offences could be addressed in other legislation (e.g. the Fair Trading Act) or by other sanction (e.g. cancellation of the grant)	It is not consistent with other IP legislation to keep these offences in the PVR Act. Most of them are adequately dealt with in the Fair Trading Act.

Option 1: Retain the current offences and penalties

443. This would involve retaining the current offences and penalties. As discussed below, this is not preferred by MBIE.
444. As noted earlier, there appear to have been no prosecutions under the offence provisions since the mid-1990s. Only the police have the power to take prosecutions, as neither the PVR Office nor IPONZ has the authority to initiate prosecutions other than by making a complaint to the police.
445. Given that the police are likely to give offences under the PVR Office a low priority, the likelihood of prosecution is low. In light of this, the offence provisions are unlikely to be a deterrent, even if the penalties were significantly increased.
446. Although the behaviour that is the subject of the offence provisions is clearly undesirable, similar behaviour in respect of other intellectual property rights is not a specific offence in the relevant intellectual property statute. For example, there is no provision in the *Patents Act 2013* that makes it an offence to falsely claim that a product is the subject of a New Zealand patent, or that a patent has been applied for. Such behaviour may however, be actionable under other legislation, such as the *Fair Trading Act 1986*.
447. The behaviours (b) – (d) and (f) in the list above could be considered breaches of the *Fair Trading Act 1986* as they involve false or misleading behaviour in relation to the provision of goods or services that of the sort that this Act was intended to deal with. Both the Commerce Commission and legal persons have the power to take prosecutions under the *Fair Trading Act*. The maximum fines for this behaviour are \$200,000 for an individual and \$600,000 for a body corporate. It is also possible for civil action to be taken by persons who are adversely affected by these activities.

Provision of false or misleading information to the PVR Office

448. Activity (a) in the list above makes the supply of false or misleading information in connection with an application for a PVR an offence. The supply of false or misleading information in connection with an application is not an offence under other intellectual property legislation, such as the *Patents Act 2013* or the *Trade Marks Act 2002*.
449. However, section 16 of the PVR Act provides that if incorrect information is provided to the PVR Office in connection with an application, and a PVR was granted on the basis of that information, the PVR can be cancelled. The *Patents Act 2013* and the *Trade Marks Act 2002* provide that if the rights were obtained through fraud or other misrepresentation, the right can be revoked or invalidated.
450. MBIE considers that the possibility that PVR could be revoked if the applicant has obtained it through the provision of false or misleading information to the PVR Office is likely to be a more powerful deterrent to the provision of such information than an offence provision.
451. **In light of this, and for consistency with other intellectual property legislation, MBIE considers that there is no need to provide that the provision of false or misleading information to the PVR Office should be an offence. Instead the PVR Act should provide that the right would be nullified.**

Use of variety denomination

452. As noted earlier, UPOV 91 provides that persons who sell propagating material of protected varieties must be required to use the variety denomination, even after the PVR has expired or lapsed. The PVR Act makes it an offence to sell a protected variety without using the denomination, even if the PVR has expired (activity (e) in the list above).
453. MBIE considers that failure to use a variety denomination is not sufficiently egregious to justify a separate offence provision in the PVR Act. In many cases failure to use a variety denomination when selling material of a protected or previously protected variety will not disadvantage purchasers.
454. There may be cases where failure to use a variety denomination could be considered misleading or deceptive. In such cases purchasers may be able to seek remedies under the *Fair Trading Act 1986* or in contract law.

Officers of the PVR Office not to apply for, or acquire an interest in, a PVR

455. The purpose of this provision is to ensure that there is no conflict between an officer's official duties and any commercial interests they may have. MBIE considers that such conflicts are more appropriately dealt with through the public service code of conduct, and the provisions of section 105A of the *Crimes Act 1961*. Section 105A makes corrupt use of official information an offence carrying a penalty of up to seven years imprisonment.

Option 2: Retain the offences, but provide the PVR Office or IPONZ with enforcement powers

456. Under this option, the offence provisions would be retained, with the PVR Office or IPONZ being given the authority to investigate offences. The powers could be similar to those of enforcement officers appointed under the *Copyright Act 1994* or the *Trade Marks Act 2002*.
457. This might increase the deterrent effect of the offence provisions if the PVR Office or IPONZ were seen to be actively investigating offences and taking prosecutions. In practice, however the PVR Office or IPONZ are only likely to take action if there is a compelling public interest in taking a prosecution (and only if they are sufficiently resourced to carry out this enforcement activity). This is the approach under the *Copyright Act 1994* and the *Trade Marks Act 2002*.
458. As a result it is likely that the power to investigate and prosecute an offence will be rarely invoked. This suggests that providing the PVR Office or IPONZ with the authority to investigate offences will not significantly increase the deterrent effect of the offence provisions.
459. In addition, as discussed under Option 1 other intellectual property statutes do not contain similar offence provisions. The behaviours referred to in the offence provisions appear to fall within the scope of other legislation, such as the *Fair Trading Act 1986*.

Option 3: Repeal the offence provisions (preferred option)

460. This option involves repealing the offence provisions. As discussed under Option 1, the current offence provisions do not appear to be acting as a deterrent to the behaviours concerned.
461. Also, similar activities in respect of other intellectual property rights are not offences. For example, it is not an offence to represent an invention as being patented, when it is not patented. On this basis, MBIE considers that there is no reason why these behaviours should be offences under the PVR Act.
462. MBIE also considers that, because the activities that are treated as offences in the PVR Act are adequately dealt with elsewhere (see discussion in Option 1), there is no reason for these activities to be treated as offences in the PVR Act.

Enforcement – offences

- 19 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Exhaustion of the breeder's right

UPOV 91	PVR Act
<p>Article 16 of UPOV 91 relates to “exhaustion” of PVRs. This means that the exclusive rights of PVR owners over the propagating material of a protected variety does not extend to acts involving any material of the protected variety, or material derived from that material, unless such acts involve:</p> <ul style="list-style-type: none"> • further propagation of the variety, or • export of propagating material to a country where protection for the species or genus to which the protected variety belongs, unless such export is for purposes that do not involve propagation of the variety. 	<p>The PVR Act has no specific provision dealing with “exhaustion” of PVRs. However section 18(c) provides that it is not an infringement of a PVR for any person to use propagating material of a protected variety for human consumption or other non-propagating purposes.</p>

463. In line with New Zealand’s CPTPP obligations, we must, as a minimum, align our PVR legislation with UPOV 91. This section looks at the UPOV 91 provisions relating to exhaustion of PVR rights.
464. The principle of “exhaustion” or rights in the PVR context means that PVR owner’s ability to control the use of any material of a protected variety is limited once that material has been placed on the market by or with the consent of the PVR owner.
465. The PVR Act does not explicitly provide for “exhaustion” of rights. However, section 18 of the PVR Act does provide for what is effectively a form of exhaustion. This section provides an exception that allows any person to use propagating material of a protected variety for purposes that do not involve propagating the variety, for example for human or animal consumption, without the PVR owner’s permission.
466. Article 16 of UPOV 91 provides for exhaustion of PVRs. This provision requires that PVR rights shall not extend to acts involving protected varieties, or materials derived from them that are placed on the market by or with the consent of the PVR owner unless these acts:
- a. involve further propagation of the variety; or
 - b. involve export of propagating material of the variety to a country which does not protect varieties of the species of genus to which the variety belongs, except where the exported material is for final consumption purposes.
467. For the purposes of Article 16, “material” means:
- a. any form of propagating material;
 - b. harvested material, including entire plants and parts of plants;
 - c. any product made directly from the harvested material.

What did submitters say?

468. No submitters mentioned exhaustion of rights.

What does MBIE propose?

469. **MBIE proposes that the PVR Act be amended to incorporate the provisions of Article 16 of UPOV 91. This is required by UPOV 91, there is little or no flexibility in how we implement it.**

470. The effect of implementing Article 16 of UPOV 91 is that once material of a protected variety (as defined above) is placed on the market in New Zealand by or with the consent of the PVR owner, the PVR owner has no rights to control the further exploitation of that material. The only exception to this is where the material is used to further propagate the variety. Any rights that the PVR owner has in that material are said to be “exhausted” if it is not used to propagate the variety.

471. The principle of exhaustion set out in Article 16 also applies to any material derived from the material originally placed on the market.

20

Exhaustion of the breeder’s right

Do you have any comments about the exhaustion provision required by UPOV 91?

Cancellation and nullification of the breeder’s right

UPOV 91	PVR Act
<p>Article 21 of UPOV 91 allows for PVRs to be “nullified” if it is established that:</p> <ul style="list-style-type: none"> the variety concerned was not new or distinct at the time of grant, or that where the PVR grant was based on documents provided by the applicant, the variety concerned was not stable or uniform, or the PVR was granted to a person who was not entitled to it, unless the PVR is transferred to a person who is entitled. <p>Article 22 of UPOV 91 allows for cancellation of a PVR if:</p> <ul style="list-style-type: none"> the variety concerned is no longer stable or uniform, the PVR owner does not provide the relevant authority with material for verifying the maintenance of the variety, the PVR owner has not paid any annual 	<p>Section 15 of the PVR Act provides for “Objections after grant”. Any person may make an objection to the continuation of the grant on the grounds that:</p> <ul style="list-style-type: none"> the variety concerned was not new, distinct, stable, or uniform at the time of grant, or the PVR was granted to a person who was not the owner of that variety. <p>Section 16 of the PVR Act permits a PVR to be cancelled if:</p> <ul style="list-style-type: none"> the applicant supplied incorrect information to the Commissioner, the variety was not new and distinct at the time the application was made, the variety is not stable and uniform, the PVR owner is not the owner of the variety, the PVR owner has not provided the Commissioner with reproductive material of the variety when requested to do so, the PVR owner has failed to provide the

<p>maintenance fee,</p> <ul style="list-style-type: none"> the PVR owner does not propose a new denomination if the original denomination is cancelled after grant. 	<p>Commissioner with information about measures to maintain the variety,</p> <ul style="list-style-type: none"> the PVR owner has failed to pay the annual grant fee.
--	--

472. In line with New Zealand’s CPTPP obligations, we must, as a minimum, align our PVR legislation with UPOV 91. This section looks at the UPOV 91 provisions relating to nullity and cancellation of a PVR.

473. The PVR Act currently provides for “objections after grant” (section 15) and cancellation of grant (section 16). Sections 15 and 16 are similar to, but not completely consistent with, Articles 21 and 22 of UPOV 91, which deal with “nullification” and “cancellation” of a PVR respectively. It will therefore be necessary to amend the PVR Act so that it is consistent with Articles 21 and 22 of UPOV 91.

474. Under Article 21 of UPOV 91 a PVR can be nullified if it is established that the variety concerned should not have been granted a PVR. This may be because, at the time of grant:

- a. the variety was not new or distinct;
- b. where the PVR was granted on the basis of information supplied by the applicant, that the variety was not stable or uniform;
- c. the person to whom the PVR was granted was not entitled to be granted the PVR (for example, the person was not the breeder or anyone deriving title from the breeder).

475. Nullification is analogous to the revocation of a patent. That is, if a PVR is nullified, it is effectively deemed never to have been granted. Once a PVR has been nullified, it is not possible to start infringement proceedings for acts that took place before the PVR was nullified.

476. Article 22 of UPOV 91 provides for cancellation of a PVR. A PVR can be cancelled because the variety is no longer stable or uniform, even though it was stable or uniform at the time of grant. Alternatively, a grant may be cancelled if the PVR owner has not paid a renewal fee, or provided the relevant authority with information about maintenance of the variety, or not proposed a new denomination if the original one has been cancelled.

477. If a PVR is cancelled, the PVR ceases to be in force, but it may still be possible to take action for infringements that took place before the PVR was cancelled.

What did submitters say?

478. The main points made in submissions were that the relationship between sections 15 and 16 is unclear. In particular, there is some overlap between the two sections. While section 15 allows any person to make an objection after grant, section 16 is unclear about who can start proceedings for cancellation of grant.

479. One submitter noted that it is unclear how the Commissioner should deal with cases where the annual grant fee is not paid on time. Section 16(3) provides that the Commissioner must give notice to the PVR owner. If the PVR owner cannot provide good reason for not cancelling the grant within 28 days of receiving the notice, the PVR will be cancelled.
480. However, the PVR Act is silent on what criteria the Commissioner should apply when making a decision on whether or not to cancel a PVR. It was suggested that there should be a procedure for restoration of a PVR where it has been cancelled due to non-payment of the annual grant fee.
481. Another deficiency noted by submitters is the lack of clear procedures for dealing with objections after grant or cancellation of grant. Another issue identified was that there is no power for a court to nullify or cancel a PVR.

What does MBIE propose?

482. **MBIE proposes that the PVR Act be amended to include provisions for nullification and cancellation of a PVR consistent with Articles 21 and 22 of UPOV 91. It will be possible for any person to apply to have a PVR nullified or cancelled. We also propose to amend the PVR Act to provide for:**
- a. **Explicit procedures to be followed by the Commissioner when considering applications for nullification or cancellation of a PVR. These could be modelled on the provisions for revocation of a patent in the *Patents Act 2013* and the *Patents Regulations 2014*;**
 - b. **Procedures to be followed for restoring a PVR that has been cancelled due to non-payment of a renewal fee (or any other reason). We propose that these could be modelled on the provisions for restoration of a lapsed patent in the *Patents Act 2013*;**
 - c. **Nullification or cancellation of PVRs by the courts (as is the case with patents).**

Nullification or cancellation as a counterclaim to infringement

483. The PVR Act is silent on whether a person who is accused of infringing a PVR can counterclaim that the PVR is invalid; that is, that the PVR should be nullified or cancelled. If the counterclaim is successful, and the PVR is nullified or cancelled the person would not be liable for infringement.
484. The *Patents Act 2013* allows alleged infringers to counterclaim for revocation of the patent concerned. There seems to be no reason why persons accused of infringing a PVR should not be able to make a similar counterclaim in respect of the PVR(s) they are alleged to have infringed.
485. **MBIE proposes that the PVR Act be amended to provide that alleged infringers can counterclaim that a PVR should be nullified or cancelled.**

Cancellation and nullification of the breeder's right

21

Do you have any comments about the cancellation and nullification provisions required by UPOV 91, and MBIE's additional proposals discussed in this section?

11 Additional issues

Algae

486. In the Issues Paper, we asked for views on whether the PVR regime should be extended to include algae. Currently algae and bacteria are excluded from the definition of “plant” in the PVR Act. Two submitters responded to this, both saying algae should be included and referencing the inclusion of algae in the Australian legislation. One commented that this would remove the anomaly that, whereas microscopic and macroscopic fungi are eligible for protection, this is not the case for algae. This submitter also noted a number of US patents for algae.
487. The Sapere report also commented on this issue, including that:
- a. algae can be cultivated like any other plant;
 - b. there is no in principle reason that algae should not be included (both microscopic and macroscopic algae can be shown to be distinct, uniform and stable);
 - c. the aquaculture industry is growing quickly and is focusing a lot of attention on new forms of marine-based food production and nutraceuticals. Basic research for algae is dominated by the Crown Research Institute, the Cawthron Institute.
488. With the exception of Australia (and there have been no applications for algae there as yet), other countries do not provide PVRs for algae. This raises the question of whether there is any benefit to New Zealand of extending protection to algae. There may also be practical issues relating to testing whether an alga meets the criteria for a grant of a PVR. There will also be Treaty of Waitangi considerations.

Extending coverage to algae

- 22 Do you have any comments to make about whether or not algae should be included within the definition of “plant” for the purposes of the PVR regime?

Provisional protection

489. Section 9 of the PVR Act provides for provisional protection. The effect of provisional protection is that:
- a. if an application for PVR over a new variety is filed; and

- b. a person produces for sale or sells propagating material of the variety without the applicant's permission;
 - c. the applicant can start proceedings for PVR infringement against that person before a PVR is granted on the application, provide that the application has not been withdrawn, lapsed or refused.
490. The main reason for providing provisional protection is because there can be a substantial time period between filing a PVR application and grant of a PVR. This raises the risk that other people may grow and sell the variety or its harvested material without the applicant's permission. If this happens, the returns that the applicant could make from the new variety if a PVR is granted could be significantly reduced if there were no provisional protection. This could reduce the incentives to develop or import new varieties.

UPOV 91

491. Article 13 of UPOV 91 requires member states to provide provisional protection for a variety during the period between the time that a PVR application is filed, and the date a PVR on the variety is granted. At a minimum, any person who exploits the variety during that period without the applicant's permission must pay "equitable remuneration" to the applicant. This only applies if the PVR is eventually granted.
492. In line with New Zealand's obligations under the CPTPP, we must provide the minimum level of provisional protection required by UPOV 91.

Options

493. The issue with the current situation in the PVR Act is that, because a breeder can commence infringement proceedings during the period of provisional protection, it is unclear what happens if the application subsequently lapsed, was withdrawn or was refused. The alleged infringer could suffer significant commercial losses, and the breeder could make significant commercial gains, even though the variety developed by the applicant may not have been a new variety, and should have been free for anyone to exploit.
494. There appear to be two viable options for dealing with the problem described above:
- Option 1:** a compensation approach
 - Option 2:** provide that PVR applicants can only start proceedings for infringements that occur before grant after a PVR has been granted.
495. Option 2 is our preferred option.

Option 1: a compensation approach

496. Under this option, the breeder must agree to compensate the alleged infringer for any losses they have suffered if and when the PVR application subsequently lapses, or is withdrawn or refused.
497. This option could deter abuse of the provisional protection provisions. However, where a breeder takes action against in good faith, it could expose the alleged infringer to unnecessary hardship, as they would still have to incur the costs of a court action, an account of profits or damages, and any losses resulting from being unable to exploit the variety. Any compensation due would not be paid until sometime later.
498. For this reason, this is not MBIE's preferred option.

Option 2: provide that PVR applicants can only start proceedings for infringements that occur before grant after a PVR has been granted.

499. Under this option, a breeder who files an application for a PVR over a variety could only take action against an alleged infringer if and when a PVR has been granted. However, this action would still include alleged infringements that took place between the date of application and grant.
500. This option would prevent abuse of provisional protection. Since the breeder can only take action after grant of a PVR, the alleged infringer is not exposed to unnecessary hardship.
501. This approach is similar to that taken in the *Patents Act 2013* and in the *Australian Plant Breeders' Rights Act*. This is MBIE's preferred option.

Provisional protection

- 23 Do you agree with our preferred option for dealing with provisional protection? If not, why not?

Transitional provisions

502. The main effect of bringing our regime in line with UPOV 91 is the expansion of the exclusive rights a PVR owner has over their protected variety. The purpose of transitional provisions is to set out how the changes to the PVR Act apply to PVRs that have been granted or applied for before the date that the changes enter into force.
503. There are three broad options for transitional provisions relating to how the new exclusive rights will apply to grants and applications that are current before the changes come into force:

Option 1: new rights apply to all existing grants and applications when the changes come into force

Option 2: new rights apply to applications filed (and, therefore, grants made) after the changes come into effect

Option 3: new rights apply to applications filed before the changes come into effect, but only to grants made after the changes come into effect.

504. We do not indicate a preferred option here (though we do not support Option 1), so we seek your views on the workability of each. Option 3 could be modified so as to apply only to applications filed after a certain date, albeit a date before the changes come into effect.

Discussion

505. While Option 1 has the advantage of simplicity, a consequence would be that certain acts in respect of a specific proprietary variety that would not be an infringement before the changes came into effect would become an infringement after. This is undesirable from both a principled and practical point of view.

506. For example, a person conditioning seed of a protected variety would be free to do so before the changes came into effect, but after would be required to seek a licence to perform the same act on the same variety. We consider this unfair. And while it would increase revenues for PVR owners, we note that these varieties have been developed under the current regime, and so do not see a benefit to society from allowing those PVR owners to extract these additional revenues.

507. Option 2 is more consistent with the idea that varieties developed under the current regime should not attract higher revenues than the current regime offers as breeders would have made a choice to invest based on the current settings and decided they were sufficient.

508. However, it could cause administrative problems for the PVR Office as breeders would be likely to withhold applications until the new regime comes into force, leading to a spike in applications filed after this date. This could result in delays in examination and grant of PVRs. These delays could impose significant additional costs and uncertainties on PVR applicants.

509. Option 3 mostly avoids the issues of Options 1 and 2 (depending on the details) but also has some issues. For example, for the period between the application being filed and the new rights coming to force, what infringements would be covered by provisional protection? The PVR Office could also come under pressure to delay the granting of a PVR until after the changes come into effect.

Essentially derived varieties

510. A related issue is what should happen in relation to the new provisions concerning essentially derived varieties. We would want to avoid a situation in which a variety that was already legitimately on the market became an EDV on commencement of the new legislation.

511. This situation is somewhat dependent on what option is chosen above, but perhaps one possible solution is that any derived variety put on the market after an application that will be considered under the new legislation is made, could potentially be considered an EDV once the

new legislation comes into effect. The rationale here is that the breeder of the derived variety should be aware that the application had been made and that their variety could be an EDV.

Transitional provisions

24

What is your view on the options presented here in relation to this issue? Are there alternatives we have missed?

How should transitional provisions apply to EDVs?

Administrative/process issues

512. MBIE is running a parallel process to review administrative and procedural issues relating to the grant process, as well as a PVR fees review. For example, we have heard that:
- a. the costs associated with PVR applications, including testing, can be prohibitive, especially for SMEs, and this can lead to breeders operating outside the PVR system;
 - b. the PVR Office should be able to require breeders to provide propagating material for PVR trial comparison;
 - c. there are no procedures for hearings either in relation to objections before grant or compulsory licences;
 - d. the relationship between the provisions relating to objections after grant and cancellation of grants are unclear;
 - e. the electronic format of the PVR Journal is not helpful.
513. This review is likely to identify proposals for change to the PVR Act, though these will primarily be the concern of breeders. It will also help us identify what regulations will need to be amended or developed to support the changes to the PVR Act discussed in this Options Paper (and ensure that we have appropriate regulation making powers in the legislation).
514. For example, we anticipate:
- a. changes to the *Plant Variety Rights Regulations 1988* to update and modernise administrative and procedural requirements;
 - b. changes to the *Plant Variety Rights (Fees) Order 1999* as a result of the fees review;
 - c. new regulations setting out a processes for applications and (where relevant) hearings in relation to objections before/after grants, cancellation/nullification of grants and compulsory licences;
 - d. new regulations (or possible guidelines) to support the Treaty of Waitangi provisions.
515. The development of regulations will commence once policy decisions have been made in relation to amendments to the PVR Act.

12 Recap of questions

1	Objectives of the PVR Act Do you have any further comment to make on the objectives of the PVR Act?
2	Meeting our CPTPP obligations Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?
3	Treaty compliance – criteria for analysis Do you agree with the criteria that we have identified? Do you agree with the weighting we have given the criteria? If not, why not?
4	Treaty compliance – key terms Do you agree with our proposed approach to these key terms? Do you have any comments on the principles listed above and how they might apply in practice? For example, would it be useful to specifically list non-indigenous species of significance?
5	Treaty compliance – options analysis Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
6	UPOV 91 alignment – criteria for analysis Do you have any comment to make about our approach to, and criteria for, the preliminary options analysis in this paper?
7	Definitions – breed Our preferred option is to incorporate the definition of “breed” that was considered in the previous review to address concerns around discovery of varieties in the wild. Do you agree? If not, why not?
8	Definitions – general Do you have any comments on the definitional issues discussed in this Part?
9	Scope of the breeder’s right Do you have any comments about these new rights required by UPOV 91?
10	Exceptions to the breeder’s right Do you have any comments about the exceptions required by UPOV 91?

	Term of the right
11	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Essentially derived varieties
12	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Rights over harvested material
13	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Farm saved seed
14	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Compulsory licences – general issues
15	Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not? Other than the two substantive issues below, are there other issues we have missed?
	Compulsory licences – grace period
16	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Compulsory licences – section 21(3)
17	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Enforcement – infringements
18	Do you agree with the discussion and the proposals in relation to the four issues discussed above? If not, why not? Should the PVR Act provide that infringement disputes be heard in the District Court? Are there others issues relating to infringements that we have missed?
	Enforcement – offences
19	Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions? If not, why not?
	Exhaustion of the breeder’s right
20	Do you have any comments about the exhaustion provision required by UPOV 91?

	Cancellation and nullification of the breeder's right
21	Do you have any comments about the cancellation and nullification provisions required by UPOV 91, and MBIE's additional proposals discussed in this section?
	Extending coverage to algae
22	Do you have any comments to make about whether or not algae should be included within the definition of "plant" for the purposes of the PVR regime?
	Provisional protection
23	Do you agree with our preferred option for dealing with provisional protection? If not, why not?
	Transitional provisions
24	What is your view on the options presented here in relation to this issue? Are there alternatives we have missed? How should transitional provisions apply to EDVs?

