



Summary of submissions on the *Review of the Plant Variety Rights Act 1987: Issues Paper*

1. Consultation on the *Review of the Plant Variety Rights Act 1987: Issues Paper (Issues Paper)* closed on 21 December 2018 and the Ministry of Business, Innovation and Employment (**MBIE**) received 36 submissions.
2. Respondents included industry (including plant breeders, growers and research institutes), Māori (including Waitangi Tribunal claimants) and the legal sector.
3. We have provided a high-level summary of the submissions we received below.

Objectives of the Act

4. The proposed objectives of the *Plant Variety Rights Act 1987 (PVR Act)* as stated in the Issues Paper are:
 - 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
 - c. consistency with the Treaty of Waitangi.

There was general support for the proposed objectives

5. Most submitters supported the proposed objectives in the Issues Paper with minor changes. In particular, some noted that some terms should be changed or clarified (e.g. several submitters, including Zespri, Horticulture NZ, Plant and Food, commented that 'dissemination' should be changed to 'use').
6. Submitters also suggested that new objectives be added (e.g. providing certainty for users of the PVR regime, and more explicit reference to efficiency and effectiveness of the regime). Some submitters, including Federated Farmers and the New Zealand Plant Breeding & Research Association (**NZPBRA**), suggested that the objectives should be changed to reference specific industry sectors.
7. A majority of submitters noted that the current PVR Act does not meet the proposed objectives and that this should be remedied by a new Act.

Some submitters noted the importance for the Crown to protect Māori interest in the PVR regime

8. A number of submitters called for the Treaty of Waitangi objective to be strengthened. Many commented that it is important for the Crown to meet its obligations under the Treaty of Waitangi and that the Act's objectives should reflect this.
9. One submitter stressed the importance of honouring international agreements that protect indigenous rights and suggested that the objectives be changed to state this.

Acceding or giving effect to UPOV 91

10. Under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), New Zealand must either accede to **UPOV 91**¹ or give effect to it. New Zealand can take the latter option only if it is “necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi”.²

The majority of respondents were supportive of compliance with UPOV 91, but there are differing views on whether or not New Zealand should accede to UPOV 91

11. The majority of submissions from plant breeders and research institutes favoured acceding to UPOV 91.
12. In particular, plant breeders argued that acceding to UPOV 91 would be beneficial as it would help align New Zealand with its trading partners and could increase the incentive for foreign plant breeders to allow their new plant varieties to be exploited in New Zealand.
13. There was some confusion about what a standalone regime would entail and why this might be necessary to meet our Treaty of Waitangi obligations. Submitters were concerned that a standalone regime would be costly and time-consuming to implement. The submissions suggested that we may not have been made clear enough in the Issues paper that this regime would still meet the requirements of UPOV 91, and would only differ to the extent required to meet our Treaty of Waitangi obligations.

Other submitters opposed accession to UPOV 91

14. Federated Farmers questioned the benefits of UPOV 91. They noted that New Zealand already has a wide variety of plant varieties available.
15. Some submitters were of the view that acceding to UPOV 91 would not be compliant with the Treaty of Waitangi. A regime aligned with UPOV 91 without accession was preferred because it would allow for Māori rights and interests to be taken into account.
16. Some submitters also felt that if a new regime required heavy iwi involvement, such as the provision of advice, that appropriate funding be put in place to finance this advice.
17. A submitter commented that the exception should not be read narrowly and that whakapapa and the kaitiaki relationship with plants must also to be protected.
18. One submitter disagreed with the PVR regime itself and called for the provision of “Māori governance including the right of veto of proposals inconsistent with Te Tiriti as an essential aspect of the framework outcome”.

Farm-saved seed (FSS)

19. Farm-saved seed (FSS) refers to the seed that a farmer saves from one season to plant the following season’s crop on their own farm. Under the current legislation, the breeder’s right does not cover FSS, so a farmer is free to use FSS without any payments to the breeder.
20. The stronger rights in UPOV 91 would cover FSS, but the agreement includes an optional exception for FSS that parties can choose to invoke. Most parties to UPOV 91 exempt all varieties (i.e. they continue to permit farmers to save seed) and any royalty collection that exists on FSS is simply agreed between industry participants. The European Union only

¹ UPOV 91 is the 1991 revision of the International Convention for the Protection of New Varieties of Plants. New Zealand is a member of UPOV and has ratified the 1978 revision of the Convention.

² Annex 18-A, Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

exempts certain varieties, though still requires a small royalty to be paid by farms over a certain size for those varieties

21. For breeders of arable and pasture crops, this is one of the most significant issues of the review. Fifteen of the submissions commented on this issue, and they were predominantly from plant breeders and their representatives, foremost among them the NZPBRA and New Zealand Institute for Plant and Food Research. Only the submission from Federated Farmers covered the farmers' point of view.

Breeders argue that they are missing out on royalties and this is inhibiting innovation

22. Breeders all support the practice of farmers saving seed, though some commented that one issue with FSS is that the genetic integrity will degrade over successive generations, potentially affecting the quality of the product for the end user. However, they do not support FSS without royalties. They estimate that they are losing revenue of approximately \$2 million per annum through not receiving royalties when FSS is used. They argue that this loss of revenue impacts the funding for development of new, innovative varieties. However, we are unable to assess the accuracy or significance of this figure as we do not have details of how it was arrived at, or how it compares to overall revenue received from protected varieties.
23. Most breeders would like to see a mandatory royalty scheme for FSS, though some suggested that small farms could be exempted from this scheme. There were mixed views among breeders as to whether the express permission of the PVR owner should be sought.
24. Some breeders also raised a concern that farmers are illegally multiplying and selling seed. This would be an infringement of the current legislation, and we will consider this as part of the review of enforcement issues in the current regime.
25. Federated Farmers also wish the practice of FSS to continue as it gives farmers control over the replanting process (e.g. the seed is always available at the right time, the seed will only contain weeds that are already present on the farm, farmers can control the treatments applied to the seed, and it reduces costs). Farmers surveyed by Federated Farmers were unanimous in their opposition to the express permission of the PVR owner being required.

There has been some discussion between breeders and growers on introducing royalties for FSS

26. The NZPBRA noted that preliminary discussions have already taken place between plant breeders and Federated Farmers about implementing a royalty scheme for FSS. While Federated Farmers is happy with the current arrangements, they do acknowledge that there may be a justification for a royalty on FSS. We did not receive any other submissions from arable growers, so the extent of agreement across farmers on this point is not known.
27. However, there remain a number of issues to be resolved about the details of such a scheme, such as the point at which a royalty on FSS would be collected, how it would be collected, and how the level of the royalty would be set.

Scope of rights issues

Rights over harvested material

28. If a PVR is granted over a new variety under the PVR Act, the PVR owner does not have any rights over the harvested material of that variety except in very limited circumstances.
29. Examples of "harvested material" include fruit, cut flowers, cereal grains and vegetables. Harvested material includes material which:
 - a. is not normally used for propagating the variety; or

- b. could be used for propagating the variety, but is used for some other purpose, such as human or animal consumption.
- 30. The current PVR Act only gives PVR owners limited rights over harvested material, but some PVR owners use contractual arrangements to control the exploitation of the harvested material of their protected varieties.
- 31. UPOV 91 allows members to extend PVR rights to harvested material if they wish though, to our knowledge, no parties have done this.

There was no general consensus amongst submitters on whether rights over harvested material should be extended

- 32. Some submitters, including Zespri, the New Zealand Institute for Plant and Food Research and T & G Global, argued that PVR owners should be given full rights to control the commercial exploitation of the harvested material from their protected varieties.
- 33. Other submitters, including Horticulture NZ, Summerfruit NZ, Grasslanz and Freshco Varieties, did not support the extension of PVR rights to include harvested material. They argued that the current situation, where PVR owners can, if they wish, use contractual arrangements to control the exploitation of harvested material is sufficient.
- 34. Some submitters considered that the current regime fairly prevents non-approved sale of propagating material while allowing growers to sell the harvested material to whomever they like. Federated Farmers was concerned that if PVR rights were extended to harvested material, this would reduce the ability of farmers to make decisions in the best interests of their business.

Essentially derived varieties (EDVs)

- 35. UPOV 91 introduces the concept of an EDV. An EDV is a variety that is “predominantly derived” from another variety (the initial variety) and that retains the “essential characteristics” of the initial variety.
- 36. If a variety is an EDV, and the initial variety is protected by a PVR, 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.
- 37. There is considerable policy freedom for how New Zealand defines EDVs.

All the submissions on EDVs supported the extension of PVR rights to EDVs

- 38. Submitters (e.g. Summerfruit NZ, T & G Global) argued that the current situation, where PVR rights do not extend to EDVs, encouraged the development of “copycat” varieties. These are new varieties derived from a protected variety, where the difference between the new variety and the protected variety makes no difference to the commercial value of the variety. The PVR owner of the initial variety (who may well have put considerable time and money into its development) could then lose out as the new variety goes into direct competition with the initial variety.
- 39. Some submitters were of the view that this discourages the development of innovative new varieties with commercially valuable characteristics because of the risk to the return on their investment.
- 40. Submitters (e.g. NZPBRA, Grasslanz) also commented that advancements in technology (e.g. gene editing) are likely to make this an increasingly important issue in the future and so this will need ongoing scrutiny and review.

At the same time, submitters were cautious that a broad definition of EDVs could discourage plant breeding activities

41. Some submitters (e.g. Zespri, Freshco Varieties, Grasslanz) 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.

On the other hand, some plant breeders appeared to be in favour of a broad definition of EDV

42. Some plant breeders 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.
43. 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.

Post-grant issues

Compulsory licences

44. Anyone who considers that a PVR owner is not making reasonable quantities of the protected variety available (at reasonable prices and on reasonable terms) may apply to the Commissioner for a compulsory licence, though not in the first three years of a PVR being granted.
45. This is to ensure that innovation is not unnecessarily restricted by the actions of the rights holder, and is part of the social contract under which rights holders are granted a temporary monopoly on the commercialisation of their innovation.
46. A compulsory licence requires a PVR owner to make propagating material (e.g. seeds, cuttings etc) available to the licence holder. It allows the licence holder to reproduce and sell propagating material of a protected variety on payment of a specified royalty set by the Commissioner of Plant Variety Rights (**the Commissioner**).

There was support for further guidance and clarification of the compulsory licence provisions from most submitters

47. Most submitters that commented on this issue said that the main problem with the current compulsory licence mechanism is that there is a lack of procedural guidance for prospective compulsory licence applicants and PVR owners. A few submissions (mostly from PVR owners) disagreed that the compulsory licence provisions should be retained. Instead, they stated that other existing mechanisms achieved similar purposes (e.g. breeders could access innovative varieties through the “breeder’s right”³).
48. There were also a number of submissions that called for the provisions to be clarified more (e.g. for the PVR Act to define terms like “public interest”, “reasonable quantities”, “reasonable prices” and “reasonable terms”).

³ The breeder’s right permits breeders to use protected varieties in their breeding programmes without the permission of the PVR owner.

Many submissions from plant breeders, investors and the legal sector felt that the current compulsory licence provisions are not fit-for-purpose

49. Many submitters called for New Zealand to align with “international best practice”. There was no consensus on what this meant, but many submitters noted that many UPOV 91 members had a “public interest test” in their compulsory licence provisions.
50. A number of plant breeders (e.g. NZ Plant and Food, T & G Global, NZ Plant Producers Inc.) investors and a member of the legal sector claimed that the three year period before a compulsory licence can be applied for is too short and effectively shortened the duration of a PVR to three years.
51. Some plant breeders commented that control over a protected variety is important. Compulsory licences can threaten this control, which could negatively impact the reputation of a variety’s brand.

Submissions from growers noted that although the process might not be working efficiently at present, the mechanism should still be retained

52. Federated Farmers noted that there have been instances where they have considered applying for a compulsory licence but, as the process is complex and not well understood, this has deterred potential users of the mechanism.
53. Despite this, many growers felt that the process should be improved, not removed, because it provides an important process by which they can challenge unreasonable behaviour on the part of the PVR owner.

Enforcement: infringement and offences

54. The PVR regime has enforcement mechanisms that are generally consistent with other intellectual property regimes. PVR owners enjoy most of the benefits from a PVR and are responsible for enforcing these private property rights (including any associated costs) when they believe those rights have been infringed.
55. Infringements can be addressed through private negotiations, legal proceedings and alternative dispute resolution services. In the PVR regime, infringement is predominately addressed through private negotiations.
56. The PVR Act also contains a number of offences (such as provision of false or misleading information to the PVR office and false representation) which are subject to a \$1,000 fine.

Most submissions from plant breeders, the legal sector and research institutes stated that current enforcement mechanisms are too weak to deter infringement

57. Most submitters commented that the enforcement regime was confusing and difficult to understand, and that clarification of the enforcement process as a whole would be beneficial to potential users.
58. Submissions from plant breeders, the legal sector and research institutes also commented that a fine of \$1000 was too low to deter offenders. Some PVR owners, including Zespri, talked about the difficulties they faced when trying to enforce their rights. This included the cost associated with enforcing the rights (going to court), and the difficulty of collecting evidence, especially given the nature of the evidence required (e.g. harvested material can be disposed of quickly, or decompose). Some submissions suggested that a special inspectorate, assistance from the Plant Variety Rights Office or an alternate mechanism to the courts (such as a specialist Tribunal) might be ways of addressing these issues.

59. The New Zealand Law Society submitted that uncertainty around the PVR Act's enforcement could be decreased by codifying existing case law. They also noted that the purpose of the offence provisions are unclear and may be covered by existing law (such as the *Fair Trading Act 1986*).

Other submitters expressed differing opinions – some were happy with the current mechanisms, while Māori had concerns about the enforcement mechanisms for other reasons

60. Federated Farmers submitted that they had no issues with the current situation.

61. The submissions from Māori on this issue called for Māori interests to be better incorporated into the PVR Act. Submitters said the enforcement regime needed to recognise Māori as Treaty partners in a mana enhancing way. For Māori to only be able to object to a PVR after a grant has been awarded places Māori on the back foot as the onus is on Māori to object to the status quo. It was noted by Te Rūnanga o Ngāi Tahu that UPOV 91 allows restrictions on PVRs if it is in the public interest. However, this would still only consider Māori interest in the regime post-grant, not pre-grant.

62. Some Māori submissions commented that Māori interests should be identified before a PVR is granted, and that the PVR regime could look at other legislation like the *Resource Management Act 1991* on how Māori interests can be incorporated.

Treaty of Waitangi obligations

63. The Crown's obligations to Māori under the Treaty of Waitangi in the PVR regime are a key component of this review. The Waitangi Tribunal's Wai 262 report provides a useful starting point for considering the PVR regime.

64. The kaitiaki relationship as explained in the Wai 262 report is an important element in this review. Submitters were invited to comment on some of the Tribunal's recommendations in relation to kaitiaki relationships. These were: empowering the Commissioner to refuse a PVR that would affect the kaitiaki relationship, empowering the Commissioner to refuse a PVR name if it would be offensive to a significant section of the community, including Māori, enabling a Māori Advisory Committee (**MAC**) to advise the Commissioner on the kaitiaki interest, and clarifying the level of human input into the development of a plant variety for the purposes of PVR protection.

A common comment among the submissions was the fact that the review is an opportunity for the Crown to explicitly acknowledge Māori as kaitiaki

65. Many submitters were concerned with the lack of recognition given to tikanga, mātauranga and te ao Māori in the current Act. Most submissions on the Treaty of Waitangi aspects of the PVR review were supportive of the Wai 262 recommendations, and agreed that there was a need for better recognition and protection of kaitiaki rights and interests overall.

66. Several submissions identified the incorporation of a MAC into the regime as a key tool to facilitate protection of kaitiaki rights and interests. There was a range of views about the potential scope of such a committee's role in the PVR regime, and particularly in the grant decision-making process.

67. Some submitters representing iwi, hapū and whānau also noted that the definition of 'taonga species' was important and should be considered as part of the review.

68. Other key considerations raised included the interface between the PVR regime and other policy areas – for example, bioprospecting; the need for differences among iwi and hapū kaitiaki relationships and mātauranga Māori to be taken into account; and the need for early consideration of the kaitiaki relationship in the plant variety development process.

Submitters also discussed a number of points which go beyond the Wai 262 recommendations

69. The Issues paper was clear that the Wai 262 recommendations were only a starting point for a discussion about the Crown's Treaty of Waitangi obligations in the PVR regime. The paper also covered some issues that had been raised during its development and submitters commented on these too.
70. The key theme of these additional issues was the need for greater transparency and participation in the regime. This included:
 - a. the introduction of a disclosure of origin requirement in the PVR regime
 - b. more information of importance to Māori available on the PVR register
 - c. the need for early engagement with kaitiaki when indigenous plant species were involved in developing new varieties.

Additional issues

71. A number of submitters agreed that they would welcome more consistency with other intellectual property legislation (e.g. replacing the term "PVR owner" with "rights holder"). This would also help people to better understand the PVR Act.
72. There was also agreement amongst some submitters that clarity over key definitions would be helpful.

Term

73. PVRs are only granted for a limited period. Under the current PVR Act, the maximum term of a PVR is 23 years from the date of grant, in the case of a woody plant, or 20 years for all other plants. UPOV 91 requires a minimum of 25 years for trees and vines, and 20 years for all other plants.

Five submitters gave differing views on the term of PVRs

74. The NZPBRA supported the current term, while others (including Zespri) supported increasing the term to align with international best practice and to take account of the time taken to commercialise new varieties.
75. Federated Farmers said they would be concerned if the term was lengthened.
76. One submitter argued that the PVR term for potatoes should be extended to 30 years, as in the EU. This was because the time taken to commercialise new potato varieties was 10-15 years from the grant of a PVR and that the current term provided too little time to make a return on new potato varieties.

Procedural issues

77. Submitters highlighted a number of procedural issues with the current regime. Some plant breeders commented that the process of applying for a PVR is complicated, long and expensive. Summerfruit NZ, which represents an industry predominantly comprised of SMEs, commented on the costs associated with PVR regime, particularly when a number of new varieties which may only be being developed for the domestic market need to be tested. They noted that there would be consequences for the regime if the high costs turned breeders away from using it. The NZPPI added that changes to the PVR Act should provide greater certainty about the costs associated with PVR applications.
78. The New Zealand Law Society made a number of technical submissions on procedural issues. These included discrepancies between the PVR Act and other intellectual property

legislation and for the relationship between two sections of the Act (objections after grant and cancellation of grants) to be clarified.

Miscellaneous issues

79. Other miscellaneous points of note included:

- a. DNA should be considered when determining distinctness. Blind testing could also be used to confirm whether varieties are distinct.
- b. Tissue culture mutations should be considered by the review. Mutations in production are now more common.
- c. The PVR regime needs to consider the implications of patenting genes.
- d. PVRs should be extended to cover algae.
- e. The PVR Act should be clear about the expertise and skills provided by the PVRO.
- f. The PVR regime should be carefully calibrated to benefit all parties to ensure that innovative varieties are able to be commercialised.
- g. The PVR regime acts within the broader New Zealand context which lacks meaningful competition policy.
- h. The review should consider the impact that the uncertainty of the review has on existing PVR holders.