Submission template

Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues

Your name and organisation

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Organisation/Iwi	

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Responses to questions in the discussion document

Treaty of Waitangi issues

1	**Definitions** Do you agree with our proposed definition of 'indigenous plant species'? If not, do you have an alternative to propose?
	[Insert response here]
2	**Definitions** Do you agree that 'non-indigenous species of significance' be listed in regulations and that the list reflect the table above? If not, why not? Are there species that should be on that list that are not?
	[Insert response here]
3	**Disclosure obligations and confidentiality** Are there any confidentiality considerations in relation to the additional information required under the new disclosure obligations? If so, how should this information be treated?
	[Insert response here]
4	**Māori Advisory Committee - appointments** Do you agree with the proposal to change the name of the Committee to the 'Māori PVR Committee'? If not, do you have any other recommendations?
	[Insert response here]
5	**Māori Advisory Committee - appointments** Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose?
	[Insert response here]
6	**Māori Advisory Committee - appointments** Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose?
	[Insert response here]
7	**Māori Advisory Committee – decision making processes** Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not?
	[Insert response here]

8	**Māori Advisory Committee – decision making processes** Are there any additional factors that should be added to the list of relevant considerations?
	[Insert response here]
9	**Māori Advisory Committee – decision making processes** Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not?
	[Insert response here]
10	**Māori Advisory Committee – decision making processes** Do you agree that the Committee should be required to reach a unanimous decision and only in the event that, despite all efforts, a decision cannot be reached can the Chair of the Committee allow a decision to be made by either a consensus or a vote (Option 3)? If not, why not?
	[Insert response here]
11	**Māori Advisory Committee – decision making processes** Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose?
	[Insert response here]
12	**Post-determination considerations** Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose?
	[Insert response here]
13	**Post-determination considerations** Do you have any thoughts about either the timeframe for initiating this first stage review or the proposal of adding a person to the Committee when they are reviewing a determination, and who might be appropriate?
	[Insert response here]
14	**Post-determination considerations** Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not?
	[Insert response here]
15	**Post-determination considerations** What do you think is an appropriate timeframe for an aggrieved party to notify Commissioner and the Committee of their intention to seek judicial review?
	[Insert response here]

16	**Post-determination considerations** Do you agree with our preferred option and process for objections after grant in relation to the kaitiaki condition (Option 2)? If not, why not? Is there an alternative you wish to propose?
	[Insert response here]

Operational issues

1	**Information available to the public** What are your views of the problem identified by MBIE?

109

Under UPOV Article 12 , the examining authority is obliged to examine for the cv. being Distinct, Uniform, and Stable.

*The requirement for providing information under this provision can only be when it is reasonably required to establish DUS.The wording used in UPOV Article 12 is "For the purposes of examination, the authority **may** require the breeder to furnish all the **necessary** information, documents or material."*

*There is **no** requirement under the UPOV convvention to provide the origin and breeding of a cultivar. Obviously it may be useful in some cases. In the particular case of tree fruit, most of which are heterozygous (e.g. avocado), the random genetic variability will cause obvious phenotypic and/or plant bioregulatory differences (e.g. time of flowering).*

Of course, this excludes the relatively few 'true' breeding self-fertile very homozygous species such as tamarillo.

*Section 8 is quite innocuous: "...the Commissioner shall hold [...] any document, instrument, or photograph accompanying it and any document or instrument supplied subsequently ". It refers back to section 5 and its subsections (2) and (3), where the Commissioner has the **discretion** to require or not require information"of the origin and breeding of the variety ".*

*Whats more, the **level** of detail is entirely at the Commissioners discretion.*

*But, again, these details will only be requested if they are **necessary** to help establish DUS.*

Given tree fruit heterozygosity, all the Commissioner needs to know is that the tree was grown from seed of a species which is ordinarilary heterozygous.

*In most cases, the actual cultivars used add nothing to distinguishing the subject cultivar, and **it is the examination of distinctive features which are soley determinative.***

110.

Agree. Gene editing is not relevant because it is the act of inserting a character into an existing cultivar, and therefore should come into the provisions for essentially derived varieties

114 & 115

While I am sympathetic to the Australian approach in 122, this is largely a non-problem for fruit & nut varieties. The 'problem' is created by the erroneous concept that information on parentage is 'required' by the UPOV Convention as part of examination of distinctness. Not for fruit. (For hybrid arable etc annual/biennual varieties, either 'sure' or 'maybe'.)

*See **109** above.*

119

A red herring. It is not up to third parties evaluate anything other than 'is a character or character suite distinctively different to any other cultivar of common knowledge'.

If third parties can see with their eyes that a new variety has no characters that distinguish it from a specified cultivar 'of common knowledge', then they should tell the Commissioner. Simple

	the Commissioner. Simple. ----------
2	**Information available to the public** What do you think about the options outlined by MBIE? What would be your preferred option and why? Are there other options that could be adopted?
	*Of option presented, Option 1. For the reasons in **115***
3	**Information available to the public** If you support Option 3 what timeframe would you suggest for the information to be made public and why?
	N/A
4	**Supply of plant material in relation to a specific application** Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why?
	129 *In principle there is no problem in the procedural sense.* *But in a small country like NZ examiners are likely to be competitors. Pollen from cross breeding species is likely to accidentally or even 'accidentlly' fertilize flowers of comparator cvs, which may be competitors cvs. Thus they may gain time in using a new cv in their own program.* *There is everything **right** with 'new' cultivars being used in other breeders programs once the PVR cv is on the market.* *There is everything **wrong** with the cv. being tested in a competitors backyard, as they may gain 2-3 years 'jump start' on breeding a rival cv., even using their own unreased trial cvs as one parent. In this last case they have huge unfair advantage. Especially if they then refuse to publicy release breeding material of 'their' cv once the 3 year 'grace' period is up. And fall back on illegal contract law and political influence to 'justify' the unjustifiable (under UPOV article 15).* *The crossing is welcome – that's the basis of progress – but the jump-start is grossly unfair.*
5	**Provision of propagating material for comparison and reference purposes** What are your views of the problem identified by MBIE?

130-135

Overall, a good summary of the actual situation.

The concept that breeders 'should ' supply material for the Commissioner to use for the private interests of other breeders is wrong in principal, wrong in law, and outside the scope of the UPOV convention that NZ has signed up to.

It is an abuse of private rights under color of mis-applied law.

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However, descriptions of protected variety granted rights already exists, and these published descriptions can be used to exclude or include comparators. Use them.

"Varieties of common knowledge"
UPOV does not define this, saying only that it carries it's meaning in 'natural language'.

The net for varieties, admitted by UPOV, is huge – old cvs that may or may not exist, cvs in private collections, patented, unpatented etc.

For example, prior to the destruction of the larger part of the avocado germplasm colleection by NZ Avocado, there were around 80 avo cvs in or passing thru the collection. The journal of the Royal NZ Institute of Hort Vol 15, No 3, 1946 list 15 cultivars, most of which are likely no longer extant – but many of which are in overseas germplasm collections.

And there are very many more cvs in Indonesia, South America, Central America, Israel, Africa etc. It's impossible to run a cv against all these.

As avos are heterozygous, a statement a new cv was seed propagated (not a scion from a backyard tree – could be an old cv) would obviate the need to consider this vast array.

What's more, the most recent and detailed avo cv patent (for BL5-552), from the University of California program, traverses only 10 cvs (Harvest , BL516, Lamb, Hass, Gwen, Sir Prize, 3-29-5, Reed ,N4(-)5, and Ryan). Written descriptions for most of these is easily available, there is no point in physically requiring these cvs in a test.

And if a cv turns out to be identical to an existing cv – well the Commissioner can cancel the grant.

6	***136.*** *A can of worms. Why should the commissioner 'hold' a cv collection? See the avo example above. One existed, and was largely destroyed. Why the particular cvs selected, given the huge number of avo cvs in the world? Who pays? Why? Is it public good? Private good? Access? Why this crop and not others?* **Provision of propagating material for comparison and reference purposes** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	141 - 143 *Option 1. Anything else is 'mission creep', bureacracy, patch protecting. Its absurd – how many species are patented? How many cvs, old, new etc et c are there that 'need' to be collected and placed 'somewhere'? Where does the land come from. Who will keep the 'African Violet' cultivar collection, for example? The dahlia collection? The iceland poppy collection? Where are the boundaries? Who sets them? Why? And so on and so on.* *This is a public subsidy to commercial horticulture at taxpayer expense, nothing more. Expenses incurred by Govt. must be minimised as a principle, and especially post COVID – not increased.* ***<u>Strongly</u>** oppose Option 2.*
7	**Provision of propagating material for comparison and reference purposes** Do you agree that if material is not provided lapse or cancellation could occur? Can you think of other ways to enforce this requirement? What is the appropriate timeframe?
	*If the material is genuinely required for SIDE BY SIDE comparison where there is doubt of distinctiveness, and consensus is reached that it is genuine, then of course material of ONLY comparator cvs should be provided – **IF it is available in NZ!** That's the crux.*
8	**Should growing trials be optional or compulsory?** What are your views of the problem identified by MBIE?
	Compulsory. Some character states are so distinctive that insisting on a growing trial would seem to be an exercise in pedantry. The classic example is the feijoa cultivar 'Tharfiona'. It is a seed derived genetic dwarf. The tree, leaves, fruit, are all dwarf. At this time there are no other dwarf cultivars,so comparison is not only unnecessary, it is impossible. A 5 year old child could identify Tharfiona as distinctively different, and say why. BUT. There remains the issue of stability. ***UPOV, in their guidelines, say that if there are no off-types in propagules it can be assumed to be stable. So even 'slam dunk' extremely distinctive cultivars such as Tharfiona <u>still</u> need to be propogated to confirm there are no off-types, and therefore is stable.***
9	**Should growing trials be optional or compulsory?** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	Yes, as above.

10	**Who should conduct growing trials?** What are your views of the problem identified by MBIE?
	[Insert response here]
11	**Who should conduct growing trials?** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	186 to 199 *The crux is that competant fruit and nut breeders (specifically) should be able to conduct their own trials. All necessary information on design is on the UPOV website. Option 4 doesn't exclude this, but leaves a lot of discretionary power in the Commissioners hands.* *I guardedly support option 4, but am concerned that if the Commissioner may unreasonably force a trial on the property of competitors & their colluding agents. While material is nominally in the possession of the Commissioner, back in the real world, pollen can be used by the supposedly 'independent' test ground, and get a jump start (see above).* *Cost is a big factor. We have the Govt pushing the concept of NZ being innovative blah blah blah, when in fact costs kill innovation. Where self run trial can be done, and appropriate examinationand variety description completeed, private breeders should be given free rein to do it. If they stuff it up, it's on them. So what, they will have to pick up their game.*
12	**Trial and examination fees** What are your views of the problem identified by MBIE?
	No opinion
13	**Trial and examination fees** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	N/A
14	**Trial and examination fees** What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3?
	N/A
15	**Hearings and appeals relating to decisions of the Commissioner of PVRs** Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the *Patents Act 2013*. If not, why?
	Conceptually a good provision, but in practice, as always, only the rich can exploit it
16	**Hearings and appeals relating to decisions of the Commissioner of PVRs** What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why?

Neither. Hold a mediation meeting via Skype with a taxpayer funded mediator, no lawyers allowed.

Other comments

The annual fees are a rort.

Cost of Plant Varities Office contracted-out examining

Many plant inventions have a short 'in demand' shelf life – flower cultivars are a very good example, as they are fashion ephemera.

High fees simply kill any value in a newly invented variety if the market is small or changeable.

Innovation via plant invention should be widely nurtured, at all social levels in our society. This review is being done at the behest of the Minister of a Government Department whose name is the 'The Ministry of Business, Innovation and Employment'. Assuming the results delivered by the Ministry are to deliver an increase in innovation for the ultimate good of all New Zealanders, then the Ministry must work proactively to remove barriers to innovation.

Therefore it must allow breeder trials wherever possible, even if ultimately some non-corporate practical folk at first fail to provide all the info the Commissioner needs. Small guys have time on their side to correct mistakes in process, but what they don't have is money.

Illegal 'restraint-of-trade' contractual prohibition on use of corporate cultivars in further breeding

The UPOV/Plant Variety law in NZ really need to put an end to the farce of rights holders imposing extra conditions on top of the PVR/UPOV obligations via contract law.

Here I am referring specifically to contracts that prohibit the sowing of seed of (heterozygous) fruit and nut crops only.

Applicants should be told up front that if you sign up for PVR of your variety, you cannot 'contract out' of your obligation to allow others to breed new cultivars from your cultivar. (UPOV Article 15 (1) (iii).:

Article 15
Exceptions to the Breeder's Right
(1) [***Compulsory*** *exceptions*] The breeder's right shall **not** extend to
(i) acts done privately and for non-commercial purposes,
(ii) acts done for experimental purposes and
(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

Notice also in UPOV Publication no: 221(E) INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS March 19, 1991
Article 5 (2) Conditions of Protection says "(2) [Other conditions] ***The grant of the breeder's right shall not be subject to any further or different conditions****,"*

In 2008 the Japanese raised this issue at the SYMPOSIUM ON CONTRACTS IN RELATION TO PLANT BREEDERS' RIGHTS
Geneva, October 31, 2008
JAPANESE LEGAL SYSTEM RELATING TO PLANT BREEDERS'RIGHTS LICENSING CONTRACTS AND ITS CURRENT SITUATION
(https://www.upov.int/edocs/mdocs/upov/en/upov_sym_ge_08/upov_sym_ge_08_3.pdf)

“acts to limit research and development activities of licensees in principle fall within the scope of unfair trade practices, since such acts may, in general, undermine competition in future markets by affecting competition in the field of research and development, and thus have anticompetitive effect.

For these reasons, provisions in the contract for limiting the use of registered varieties for the purpose of breeding of new varieties may fall within the scope of unfair trade practices and be regarded as illegal.”

The time to emphasize such contractual documents that directly fly in the face of obligations under article 15 will be regarded as null and void is when someone applies for PVR. Then the applicant can choose whether or not to go ahead with a PVR application.

*The choice is always commercial – **EITHER** PVR Act allowing further breeding work but no contractural restriction on others using your variety for further breeding, **OR** a restricted 'club' contract preventing signatories from using the variety in breeding, with all Intellectual Property protected by contract law and not by PVR legislation.*

Both protection systems have their place, but, in the context of breeding, you can only have one.

Access to genetic material of varieties protected both by PVR and Club Contract

PVR Remedies
In PVR law, rights holders must make their cultivars publicly available after 3 years of exclusivity. If they don't, anyone can apply to the Commissioner for a compulsory licence under Section 21 of the Act.
http://www.legislation.govt.nz/act/public/1987/0005/latest/whole.html#DLM101066

In practice, I doubt anyone does this, due to cost. Corporate lawyers could drag the matter into the High Court, knowing they will lose, but also knowing the costs will bankrupt the average person long before it gets to judicial review.

The law, in other words, is in most cases for the rich (only).

Contract Law Remedies
There are none.

Club contracts are by their nature exclusive. They define who may have plant material, where it is to be grown, include rights of entry to property to check, control in many cases matters such as production, distribution, braning, quality standards and so on.

The material is treated as an exclusive private goods, and the terms specify material cannot be passed on to anyone for any purpose. Fruit (or nuts) are the general end product of the grower/breeder/middleman 'club. These fruit are put on the market for sale to the general public, and the public are under no contractual obligation to the variety 'club' whatever.

o the public can sow and grow the apple or kiwifruit or whatever seed, but the grower of the fruit may not.

This is not public access to the variety. True, seedlings may carry the parental gene, but most certainly will not re-produce the parental type (excluding homozygous fruit, e.g. tamarillo). Taking a somewhat simplistic view, characters will likely revert to the mean of character expression of the parents.

Perspective on Contract Law

Highly restrictive contract law has excellent outcomes for institutional breeders, well funded corporate breeders, nursery trade, growers, and fruit marketers. With the advent of the revolutionary gene insert technology, contract law will dominate commercial fruit breeding.

So long as it doesn't destroy innovation by small scale poorly funded (or unfunded) plant innovators, it is a good thing.

My major concern with the move to contract breeding is that 'old' cultivars that are publicly available will disappear. This has already happened. As house lot sizes shrink, so to does space for trees, so older varieties, particualrly bigger trees, will again come under pressure, eroding genetic diversity available to small breeders.

Those that make the mega-money from fruit supply may sequester all genetic resources, even wild types, in which may repose a treasure house of un-exploited character-states. This is already the case with kiwifruit genetic resources.

There may be very good practical reasons for this, (including terms of foreign germplasm swaps) and one might imagine that large industry-funded SOE's will at least conserve cultivars for use in some future 'dreamland' New Zealand where reasonable access is assured.

As seen in the avocado case (above), you would be wrong.

Is the Commissioner and the PVR Office the person and the mechanism to establish and run meg-germplasm repositories on behalf of future New Zealand breeders and the New Zealand taxpayer?

Is a Margot Forde-like sweeping germplasm repository even physically and financially possible for perennial plants?

Should taxpayers pay for cultivar collections maintained by the commissioner under the trojan-horse pretext of the Commissioner 'wanting' a collection of some select list of species to make future examinations of distinctivness “robust”?

These are huge societal questions, and cut across the Ministry for Agriculture (which has very little practical 'hands on' experience of agriculture and horticulture), Ministry of Business, Innovation and Employment, Treasury, Institutes of higher learning, and more.

Climate change, ultimate phosphate depletion, heavy metal accumulation in pastures: inescapable pressures are very slowly building.

PVR office can make a framework for flowering of plant innovation. Or, unwittingly, administratively stifle it.

Look to Australia's system for low-cost improvement for the wider public good.