

## Submission to MBIE on the New Zealand Plant Variety Rights Act 1987 review

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I have spent more than 25 years working in the field of plant variety product development, intellectual property protection, and licensing in New Zealand and internationally. My engagement has been in the capacity of chief executive officer of the Fruit Industry Plant Improvement Agency, as founding member of the plant varieties business unit in HortResearch and subsequently Plant & Food Research, and in an independent consulting capacity.

During this time I have worked with plant varieties that have been key intellectual assets in generating literally billions of dollars in new revenues to the productive sectors of New Zealand. The millions of dollars returned as a share of that benefit in the form of royalties and licence fees, has funded further innovation, and crucially, built the research capacity and resilience to meet new production challenges head on (eg PSA disease in Kiwifruit).

All of these business growth initiatives have been founded on the premise that such varieties may be commercialised, managed, and protected in a proprietary manner for the benefit of their stakeholders.

In this field I have utilised a range of legislative and contractual intellectual property tools internationally including the New Zealand PVRA. I have also worked to ensure that the shortcomings in New Zealand's PVR legislation (compared to the rights afforded elsewhere) are not readily apparent to those parties internationally who might wish to undermine or circumvent the legitimate rights of the holders of grants of New Zealand Plant Variety Rights.

Notwithstanding the positive incentive provided by New Zealand's obligations under the CPTPP, the MBIE issues paper and consultation process have placed the gaps in our PVRA into the public domain, so that Government must now act with urgency to address these shortcomings and update the PVRA.

The compulsory licensing provisions of the current PVRA are a prime example of a deficiency in the legislation that opens the door to opportunistic actions to undermine the rights holder and their licensees. This is a fundamental undermining of the grant of rights, and reduces the effective term of grant to as little as three years.

The rationale for exceptions of this type are to provide some notional "balance" and satisfy the "public good", however the social contract associated with any grant of intellectual property rights is well satisfied in that the protected subject matter generally enters the public domain at the end of the term of protection. During the term of Plant Variety Rights this need is further satisfied with additional privileges shared, such as the breeder's right, enabling other breeders to utilise a protected variety for plant breeding purposes - in order to further advance the art of plant genetic improvement for the benefit of humanity.

In a modern context the worst case scenario for commercial growers, marketers, and breeders in New Zealand is for commercially significant plant varieties to end up in garden centres, available on TradeMe, or otherwise distributed to the general public. From there plant material may be (and is) freely exported to countries beyond the gambit of PVR and then freely grown in competition with those New Zealand investors and stakeholders, undermining their significant financial investment into the development of unique and proprietary value propositions.

Compulsory licensing in my opinion must go - or if vestiges of it do remain, then compulsory licences should only be considered in cases where human health, animal welfare, biodiversity, or food security in New Zealand are at stake.

I have similarly strong views on the farm saved seed exemption as applied, not by subsistence farmers, but by large scale industrial farming companies to reduce their input costs and avoid payment for the innovation from which they benefit commercially. The illicit trade in farm saved seed also undermines the drive toward supply chain transparency and the clear provenance of food ingredients for consumers.

I am a strong proponent of New Zealand adopting the extensions to the breeder's right as set out in the 1991 UPOV Convention. In fact I see those as simply the basic requirements.

Of particular importance are the inclusion of rights over harvested material and to essential derivations of protected varieties.

Rights over the harvested material provide a mechanism to tackle counterfeit produce in international markets, where that produce may have been grown in territories where the breeder has not had a reasonable opportunity to protect, or to enforce, their proprietary rights in the country of origin.

Rights over essential derivations mitigate the risk that readily developed variants (such as sports and mutations, back crosses, GMO's, gene edited varieties etc) will dramatically reduce the opportunity to recoup an often 20 year plus investment in the development of the initial variety. This impact is evidenced by the rapid proliferation of mutants of 'Gala', 'Braeburn', 'Fuji', and other apple varieties.

During my career I have had the privilege of working with our productive sectors, plant breeders, licensing professionals, nurseries, growers, scientists, and marketers who are at the leading edge of innovation and customer engagement globally. They have the vision and energy to go global and delight the Worlds consumers with new products. This is surely the opportunity for Government to now match and support that innovation with some leading edge legislation.

The 1978 UPOV Convention on which our PVRA is based is now 40 years old. Acceding to UPOV1991 will be a good starting point and begin to restore New Zealand's credibility in the field of plant variety intellectual property protection internationally. It is time to acknowledge and back the plant breeding efforts that contribute to improving our lives and growing the New Zealand economy.

Let us choose to avoid the temptation to simply do the minimum required to meet our CPTPP obligations - and instead address the task with the courage and foresight that New Zealand is known for.

Yours sincerely,



Andrew J Mackenzie