Plant Variety Rights Act 1987 review: Issues Paper – Submission template

Name	Morgan Rogers
Email	
Organisation/iwi	T&G Global Limited
Interest	T&G is a significant participant in New Zealand's fresh produce industry, operating at different levels of the supply chain in respect of various fresh produce varieties. T&G is the largest exporter of apples from New Zealand, being involved with one third of New Zealand's apple crop. T&G also invests in new fresh produce varieties and is very focused on innovation and adding value. It is continually scouring the globe to discover new fresh produce varieties to bring reliability and excitement to the fresh produce sector.

☐ The *Privacy Act 1993* applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at ***www.mbie.govt.nz***. If you do not want your submission to be placed on our website, please check the box.

Release of information

For more detail on how MBIE proposes to release submissions, please see page ii of the Issues Paper.

☐ I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons and grounds under the *Official Information Act 1982* that I believe apply, for consideration by MBIE.

Responses to Issues Paper questions

Your submission may respond to any or all of the questions from the Issues Paper. There is an additional box at the end for any other comments you may wish to make.
Text boxes will expand as you complete them.

Objectives of the PVR Act	
1	Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?
T&G is supportive of the objectives and purpose of the PVR regime set out in paragraph 104 of the Issues Paper. We believe that a well-articulated, clear, transparent, accessible and enforceable PVR regime is both a necessary and valuable foundation to ensure that New Zealand has a fit for purpose commercial operating environment that fosters both investment and innovation in our economy. We believe objective (a) should be amended to adopt the word "use" in place of the word "disseminate" and that the word "balance" be defined or at least given some context / guidance as to how it is to be interpreted.	
2	Do you think the PVR regime is meeting these objectives? Why/why not?

T&G believes that the legislation / PVR regime in New Zealand has fallen behind those of the international community and is therefore falling short of those objectives. UPOV 91 should set the minimum standard for New Zealand and from there we should consider what other improvements would further support innovation and improvements within New Zealand, while at the same time keeping any eye towards trying to ensure a coherence and smooth coexistence with other international systems. Plant variety development is a competitive industry and, while we may enjoy some competitive advantages (such as climatic conditions), those advantages can quickly be diluted by a failure to underpin them with a PVR regime and legislation that gives investors' confidence when determining where, with who and how they will invest in their research and development.

3	What are the costs and benefits of New Zealand's PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.

We do not see any benefit in the New Zealand regime not being consistent with UPOV 91, other than where the chosen inconsistency is one identified to significantly benefit the New Zealand public interest and/or potential investors in plant varieties. UPOV 91 is an internationally recognised benchmark but, given the time that has passed since it was introduced, we should always also have an eye to the future and innovative differences that enhance the UPOV 91 regime. Not bringing the New Zealand regime at least up to the UPOV 91 benchmark may result in lost investment / development opportunities in New Zealand, as investors and innovators look elsewhere. A well-articulated, clear, transparent, accessible and enforceable PVR regime will put us in good standing in the international arena and will attract innovation and investment in this area leading to better access to new varieties.

4	Do you think there would be a material difference between implementing a sui generis regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

Ultimately it depends on what is implemented. To the extent that it provides the desired / necessary safeguards to plant variety owners and licensees, at least along the lines of what is found under UPOV 91, it is probably academic as to whether that is achieved through adoption of UPOV 91 or the creation of a separate regime. One consideration should be whether there is any benefit in trying to recreate an acceptable "base", where a suitable base (UPOV 91) has already been created. It may better to start with that existing base and focus the effort more on what enhancements could be made to better align it with the public interests of New Zealand and what will encourage further investment and innovation in our country.

Farm-saved seed

5	Are there important features of the current situation regarding farm-saved seed that we have not mentioned?

No comment

6	Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.

As with various other aspects of the Act, further clarity around the wording used would provide a better understanding of the anticipated application of the provisions. Given the potential significance of the farm-saved seed exception, further clarity on what it is intended to cover would be useful. For example, is the phrase expected to cover the pruning's from a deciduous fruit tree? In earlier years, this exception was seen as key to ensure the ongoing survival and development of smaller / single farms, where the individuals had little bargaining power.

A lot has happened within the economy since this concept was introduced and the exemption needs to take into account (and consider the appropriate balance in the light of) the impact of such exemptions when used by vertically integrated / large scale farming activities.

The fact that growers are entitled to save seed of a protected variety without paying royalties to the PVR owner is not in line with the modern approach to innovation. Currently this can occur without the need for consent from the PVR owner or payment of any compensation to them.

7	Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

With the growth and vertical integration of a number of the farming ventures in NZ, the farm-saved seed exemptions are now available and used in a manner that was not originally contemplated by the existing provisions. This is to the detriment of those who look to invest in and/or bring new varieties to New Zealand – questioning whether the balance of interests needs to be reassessed and/or the provisions modified. The access by home gardeners and the general public to seed (for private purposes) is already sufficiently catered for in s.18 of the Act.

8	Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

As mentioned above, the provisions need to be considered in the context of the scale and vertical integration of some of the "farms". High volume retention by farmers may be benefiting a few at the expense of many. Cost savings for those farmers may be resulting in less enthusiasm for breeders and innovators to bring their new varieties to New Zealand – which in turn may be to the greater detriment of all involved.

9	Do PVR owners use mechanisms outside the PVR regime to control farmers' use or saving of the seeds of their protected varieties? What are these?

No comment

10	Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?

No comment

11	What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

Payment of royalties by those using and benefiting from the variety should be mandatory so that the breeder benefits from the innovation they have brought to the table.

Rights over harvested material

12	Are there important features of the current situation regarding rights over harvested material that we have not mentioned?

The UPOV 91 approach of extending the rights to harvested material is strongly supported. There needs to be adequate and clear rights over harvested material to help minimise the potential for illegal propagation occurring and going unpunished (the lack of any real opportunity to pursue enforcement undermines the desirability of bringing the relevant plant varieties to New Zealand).

13	Do you agree with our definition of 'harvested material'? Why/why not?

We agree with the proposed definition of harvested material. However, an additional level of challenge and complexity is introduced where any user of the regime is required to consider intent or "normal use" when implementing their operation in compliance with the PVR regime, or in making judgements (e.g. within an enforcement context).

14	Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Given the current lack of any meaningful rights over "harvested material", the PVR rights holder can be left in an invidious position where it is solely reliant on contractual rights [restrictions] in relation to dealing with the harvested material. This issue is further exacerbated where the PVR protection periods differ in different jurisdictions. A more meaningful statutory approach to dealing with "harvested material" will at least reduce some of the exposure that currently exists. Another problem lies more in the practical hurdles around enforcing the PVR rights. Given the nature of harvested material (being material that can quickly be disposed of / decompose etc), the time and costs associated with enforcement is a real impediment to effective enforcement. Introducing a clear and quick enforcement regime, as part of the changes to the Act, would give greater comfort to those looking to invest in plant varieties as well as potentially deter those who may look to use the harvested material to illegally propagate.

15	Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

The current benefits probably represent the minimum, in terms of rights that a PVR owner needs, to underpin its view of the robustness of the New Zealand regime. From an overall value perspective (both for the PVR Owner and the New Zealand public), there needs to be an eye to ensuring the maintenance (or improvement) of the standards associated with the harvested material. While an aspect (or portion) of this can be managed contractually, without sufficient rights in respect of harvested material, under the Act, there is a risk that this value will be undermined.

Rights over similar varieties

16	Are there other important features of the current situation regarding distinctness that we have not mentioned?

No comment

17	Are there other important features of the concept of EDVs that we have not mentioned?

No comment

18	Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Under the PVR Act, a variety can be considered distinct even if the difference between the new variety and existing varieties is minor and/or distinctness is assessed on the basis of a trait that is not of commercial significance.

The current situation creates real risk and uncertainty for users of the NZ PVR regime, bringing with it the potential of reducing confidence for those breeding or bringing varieties to NZ. Genuine investors in innovative plant breeding and development run the risk that other parties will quickly meet or supersede the innovation of their plant breeding, diminishing the ability to recoup return on what can be significant financial and time invested.

Confusingly similar products in a market can significantly impact the reputation of the product and the low threshold for distinctiveness allows for coat-tailing breeding – diminishing the PVR owners reasonable opportunity to achieve a fair return on investment.

19	Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

No comment

20	How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?

No comment

21	Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.

No comment

22	Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Yes, we believe that it is problematic not having an EDV regime. We suggest that an EDV concept is established and implemented through an objective approach and a clear and self-evident definition. We support that the EDV concept should establish dependency for varieties, which are phenotypically distinct and predominantly derived from the initial variety (i.e. the protected variety).

23	Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

No comment

24	How might technological change affect the problems/benefits of not having an EDV regime that you have identified?

No comment

Compulsory licences

25	Are there important features of the current situation regarding compulsory licences that we have not mentioned?

In our view the compulsory licencing provisions significantly reduce the benefit of the NZ PVR regime – as it significantly increases the risks for breeders by creating real uncertainty as to who and on what terms a third party may get access to the relevant variety. The value of the PVR, as a useful and reliable IP tool and as a key component of many commercialisation models, becomes questionable through the lack of certainty created by this section. Effectively, this section of the Act creates a three-year term as opposed to 20-23 years envisaged by the PVRA. More commentary on this aspect is provided in response 26 below.

26	Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

There are a number of concerning issues with the current compulsory licensing regime, which we address below.

As a starting proposition, there appears to be little if any historic cost benefit analysis to underpin the justification for the compulsory licensing regime. In that regard, it is hard to justify generally, let alone in its current form.

Recent applications have not gone unnoticed and analysis of that situation highlights that the current regime poses a significant impediment to future investment in plant variety rights in New Zealand.

The comments below focus on changes needed to at least bring our PVR regime closer to international best practice. Compulsory licensing regimes, in themselves, can clearly detract from the attractiveness of jurisdiction as an investment / research destination.

We strongly endorse consideration of the following factors:

1. *Public interest criteria for grant of compulsory licence*

   a. Public interest is now the principal test for considering the grant of a compulsory licence in modern legislation concerning this issue. This reflects a refinement in thinking in the relevant international PVR convention[1] i.e. between UPOV 78 and UPOV 91. UPOV 91 moved away from the "widespread distribution" test for compulsory licences to a criterion of *public interest*.

   b. For example, in the EU, "public interest" is defined as including:
      i. the protection of life or health of animals or plants;
      ii. the need to supply the market with material offering specific features; and
      iii. the need to maintain the incentive for continued breeding of improved varieties.

   c. Because *public interest* is a broad and sophisticated concept, it is able to be tailored to the requirements of the particular PVR and each individual compulsory licence application. The test allows for a more nuanced consideration of the reasons that might justify a compulsory licence.

   d. The inclusion of a "public interest" criterion will therefore modernise New Zealand's test for compulsory licensing to better suit the more sophisticated commercial approach of the plant varieties industry which has evolved since the PVR Act.

2. *Requirements for applicant to meet in making application*

   a. In comparison with the other countries, an applicant for a compulsory licence in New Zealand has a very low threshold to meet. It therefore suggests that a compulsory licence would be easier to obtain in New Zealand than in other trading partner countries which weakens New Zealand's economic standing compared with those trading partners.

   b. In some countries, commercial dealing takes precedence over regulatory intervention. For example, in the UK, Singapore, Japan and the EU, an applicant must have first sought a licence from the rights holder but been unreasonably refused. This would be consistent with New Zealand's principles of an open economy.

c. The applicant should be required to effectively demonstrate that they intend to exploit the licence and be in a position and have the capacity to do so. This is a sensible and necessary safeguard against vexatious applications.

3. *Rights licensed to the successful applicant - terms of licence as dictated by legislation*

a. The terms of any licence granted should be non-exclusive, include provision for reasonable/equitable remuneration and should take into account the interests of any rights holder who would be affected by the grant of a licence.

27	Do you think there are benefits with the current compulsory licence regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

As mentioned in 26 above, we are not aware of any historic cost benefit or other analysis to underpin the justification for the compulsory licensing regime.

Enforcement: infringements and offences

28	Are there important features of the current situation regarding infringements and offences that we have not mentioned?

The current Act lacks transparency and clear guidance on what recourses, for actions and remedies/penalties, a party can expect in the case of infringements of rights. The upper limit of potential penalties for infringement of a PVR are low and out of step with the business environment and, as a result, are not an effective deterrent to infringement. The lack of definition in some areas of the Act together with the high costs associated with enforcement, when added to some of the practical difficulties associated with the subject matter (plant material / harvested material) are all impediments to PVR holders taking enforcement action. This does reflect a bigger enforcement issue in New Zealand, given the current backlog of cases in the courts. An easier and speedier enforcement regime could significantly enhance the attractiveness of New Zealand as a research and investment destination. In addition, amending the Customs and Excise Act 1996 to expressly exclude the export of propagated material of a protected variety would be both an easy and beneficial change to the current environment.

29	Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?

Historically, the threat of litigation has generally resolved infringement issues that we have become aware of. That said, the offender will often recognize that any enforcement will be time consuming and costly, so they often have less fear of actually suffering any consequences.

30	How prevalent are PVR infringements and offences?

We have no comment on how prevalent infringement may be as its visibility may itself be a product of the lack of any meaningful ability to bring infringement actions against the infringer.

31	Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

See the response to 28 above.

32	Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
See the response to 28 above.	

The kaitiaki relationship and the PVR Act

33	How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?
We are supportive of the approach of a better kaitiaki relationship with the PVR Act.	
34	What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.
No comment	
35	What role could a Māori advisory committee play in supporting the Commissioner of PVRs?
No comment	
36	How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?
No comment	

'Discovered' varieties

37	Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?
No comment	

Offensive names

38	What characteristics might make a variety name offensive to a significant section of the community, including Māori?
No comment	

Transparency and participation in the PVR regime

39	What information do you think should/should not be accessible on the PVR register? Why?
No comment	

40	As a plant breeder, do you gather information on the origin of genetic material used in plant breeding?
No comment	

Other Treaty of Waitangi considerations	
41	What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?
No comment	

Additional issues	
42	Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?
No comment	

Other comments

43	Are there any additional comments you wish to make about the PVR Act review Issues Paper?
Broadly, better clarification of what are key definitions used would be beneficial – e.g. what is reasonable / appropriate. We support the view that the term "PVR owner" be replaced with "rights holder" as that better reflects the aim of the regime.	