Plant Variety Rights Act 1987 review: Options Paper

Your name and organisation

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Responses to questions in the Options Paper

1	**Objectives of the PVR Act** Do you have any further comment to make on the objectives of the PVR Act?
	We support the objectives to encourage investment and have an up to date regime including accession to UPOV 91 with Treaty of Waitangi provisions.
2	**Meeting our CPTPP obligations** Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?

	We disagree with the idea of option 2 and only " giving effect " to UPOV91. MBIE and the Sapere report have failed to investigate the views of offshore plant breeders to the NZ regime and jumped to conclusions regarding the efficacy of current arrangements based on "observations" without any reference point. The exercise seems to be a case of comparing ourselves with ourselves. Sapere did note that this was difficult to assess quantitatively but it seems no attempt was made by conducting offshore research and interviews to even obtain qualitative conclusions. The Sapere reports " observations" and MBIE's statement at para 40 of the options paper that we are not missing out on new varieties is , regrettably, not supported by evidence. On the contrary you only need to look at the brewing industry where NZ is missing out on high quality malting barley cultivars . Or take a proper look at the kiwifruit industry where NZ growers are missing out on significant new kiwifruit varieties including the red kiwifruit variety that won the premier innovation award at Berlin Fruit Logistica in February this year - this is the World's largest and premier show. MBIE needs to seek the views of the world's innovative and leading plant breeders before drawing conclusions that cannot be substantiated in any way. Perceptions do not make evidence or reality . The objectives of the review cannot be met if MBIE is using a perceptions index on this critical matter. There has also been no consideration or comment on the impact of equivalent national treatment / most favoured nation rules in current and pending trade agreements and how they impact decisions around 78 or 91 of UPOV. Our view is that to maintain integrity as a trading nation in line with these treaty commitments we have no option but to adopt UPOV 91 . The CPTPP has explicitly addressed the matter but it may well be the case that existing commitments mandate accession if we are pressed on it by a breeder in a country where we have an existing FTA. What do MFAT say ?
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?
	The committee role should be limited to NZ indigenous species and essentially derived varieties from those species.
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?
	In order to differentiate between indigenous and introduced species definitions are critical. Look at what happened with swamp kauri and the definition of " finished product".There is enough kete o te wananga in existence surely for this to be achieved in terms of what is taonga and what is " katiaki" .
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?

	We are concerned that in a country with 2 degrees of separation and a revolving door between the public and private sectors that there could be issues with the composition and independence of the proposed Council . There is no indication of how costs will be met and how compliance will be properly policed. Breeders may choose to not disclose any derivations or links to significant species to avoid the complications of compliance with disclosure obligations. We do not share the optimism expressed in paragraph 110. Parliaments and governments have a long history of " setting and forgetting" when legislating and regulating leaving those affected by lack of clarity with expensive litigation and added cost. There is little clarity in the proposals. It is an invitation to litigation and cost. This could have the perverse effect of disadvantaging Maori by reducing opportunities for wealth creation and employment on their land by impeding access to new varieties.
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?
	No Comment to make
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?
	Agree with definition of " breed"and " breeder" consistent with UPOV 91 .
8	**Definitions – general** Do you have any comments on the definitional issues discussed in this Part?
	They should be consistent with UPOV 91.
9	**Scope of the breeder’s right** Do you have any comments about these new rights required by UPOV 91?
	We support the inclusion of UPOV 91 Article 14.
10	**Exceptions to the breeder’s right** Do you have any comments about the exceptions required by UPOV 91?
	We support the inclusion of UPOV 91 Article 15.
11	**Term of the right** 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?
	We support option 1.

12	**Essentially derived varieties** 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?
	We support option 2
13	**Rights over harvested material** 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?
	We support option 1.
14	**Farm saved seed** 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?
	We support Option 2 (ii) and suggest that there should be an examination of a practical royalty regime for using farm saved seed " on site" . Conceptually this could be by way of a regime similar to that for playing music in public where a café , for example, pays an annual licence fee. .
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?
	See the comments we made in sections 25-27 of our submissions on the issues paper in terms of matters to be addressed. We see no need for a public interest test which would only create uncertainty. Certainty would be created with clear rules of procedure as was evidenced by the compulsory licencing applications filed by Hop Revolution Ltd. The inclusion of requirements to make reasonable efforts to obtain a voluntary licence would need clear definition or it could create an onerous burden on applicants to engage an army of lawyers against well funded opponents. The proposals to make a compulsory licence expressly non - exclusive and for domestic use only lend themselves to a shifting of the burden of proof onto the variety owner to establish by reference to comparators that they are making reasonable quantities available at a reasonable price . Consideration should also be given to imposing a restriction on exclusive licences to entities that are only going to exploit varieties for their own particular enterprises. The Hop Revolution applications have not achieved the outcome that should have resulted had there been a compulsory licence issued on a non-exclusive basis. It appears that Hop Revolution achieved exclusivity in relation to certain hop varieties by using this process to force a negotiated outcome. Further consideration needs to be given to how to make compulsory licencing achieve the common good objectives that lie within the concept. Making procedure easier is part of the answer but not the whole.

16	**Compulsory licences – grace period** 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?
	Three years may be too short and we would support 5 years under option 2.
17	**Compulsory licences – section 21(3)** 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?
	We support option 1 to retain section 21 (3) and the analysis that has been provided. We would add that in a small economy with a tendency to unhealthy concentrations of market power, robust compulsory licencing provisions assume greater importance. UPOV 91 cements in the control of the produce of varieties so compulsory licencing also assumes greater significance if UPOV 91 is adopted.
18	**Enforcement – infringements** 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?
	We support enforcement and infringement regime that aligns with other IP legislation such as the Trade Marks Act and Patents Act We do not think enough consideration has been given to the idea of a specialist tribunal to reduce cost and time delays in the District Court. The analysis lacks evidence or substantive research or comparisons with other tribunals. There are all sorts of compulsory levies that fund other tribunals and given royalty streams available it does not seem that it would be that difficult to fund and resource a specialist tribunal to deal with enforcement issues and perhaps other matters such as compulsory licence applications.
19	**Enforcement – offences** 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?
	We support enforcement and infringement regime that aligns with other IP legislation such as the Trade Marks Act and Patents Act. Option 2 is our preference.
20	**Exhaustion of the breeder's right** Do you have any comments about the exhaustion provision required by UPOV 91?
	UPOV 91 provisions are acceptable.
21	**Cancellation and nullification of the breeder's right** Do you have any comments about the cancellation and nullification provisions required by UPOV 91, and MBIE's additional proposals discussed in this section?

	UPOV 91 provisions are acceptable
22	**Extending coverage to algae** 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?
	Agree that this should be covered in order to encourage research investment
23	**Provisional protection** Do you agree with our preferred option for dealing with provisional protection? If not, why not?
	We disagree. An applicant for a PVR should be able to commence an action for infringement and not have to wait for a final determination. Costs awards are available in the courts for any capricious action by a PVR applicant .
24	**Transitional provisions** 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?
	We support option 3 with a carve out for EDV's from existing grants..

Other comments

We reiterate our view that UPOV 91 is key to ensuring access to the best varieties.

We do not believe that significant reliance can be placed on the Sapere report. Further economic analysis is required in our view before drawing any conclusions about the state of breeding in NZ.