Plant Variety Rights Act 1987 review: Options Paper Submission

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1. Objectives of the PVR Act

Do you have any further comment to make on the objectives of the PVR Act?

It would have been useful to have the amended version of the objectives included in the Options paper rather than simply referencing the changes or whether MBIE agrees with comments in the submissions i.e. what is the reference to having an efficient and effective system going to be?

We agree that amending the wording to "Treaty compliance" improves clarity over the intention to meet Crown obligations under the Treaty of Waitangi.

2. Meeting our CPTPP obligations

Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?

We are now required by the CPTPP to accede or "give effect to" UPOV 91. However, if there is no clear evidence that New Zealand is currently missing out on new varieties either through foreign breeders not bringing their intellectual property here, or through domestic R&D being hampered by insufficient return on investment in breeding programmes, what was the logic behind the PVR Act review that led to the 2005 draft Plant Variety Rights Amendment Bill? There must have been some shortcomings seen in the current PVR Act that were significant enough for MBIE to begin a review and propose amendments to the Act. Therefore, we are unsure whether the reasoning in paragraphs 40 and 41 are accurate and some of the conclusions made based on this analysis.

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?

We agree with the criteria identified and the weighting given.

4. Treaty compliance – key terms

Do you agree with our proposed approach to these key terms?

Yes.

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?

We think it would be useful to specifically list non-indigenous species of significance in any new legislation.

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 support the implementation of Option 2.

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?

This process appears to have been approached back to front – in that the options were decided before the criteria for assessment were outlined. This is evident in paragraph 147 where no criteria is set out for the infringement provisions because no "significant" changes are being proposed. Therefore, the proposed options and preferred choice's may have biased the criteria for assessment.

We think that the three criteria for the scope of rights provision should be weighted accordingly. Many of the submissions talk about lack of clarity for a variety of provisions in the current PVR Act. MBIE is proposing to make changes to the infringement provisions in order to provide clarity which in turn provides certainty. It is important that any new changes to the PVR Act are clear and provide certainty so we believe this should be just as important as the other two criteria.

It is unclear to us how the third criterion for Compulsory Licenses was amended. It would have been useful to see the criterion set out for this provision.

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?

We agree with the preferred option of using the definition of "breed" considered in the previous review.

8. Definitions – general

Do you have any comments on the definitional issues discussed in this Part?

We should utilise or align with the UPOV 91 definitions as closely as possible in order to provide clarity to all users including breeders from other UPOV 91 states.

9. Scope of the breeder's right

Do you have any comments about these new rights required by UPOV 91?

No

10. Exceptions to the breeder's right

Do you have any comments about the exceptions required by UPOV 91?

No

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 agree that option 1 should be implemented.

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 agree with the proposal to implement 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 agree with implementing 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 implementation of the proposed Option 2(ii).

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?

We support improving clarity around the procedure of dealing with an application for a compulsory license, including giving both parties the opportunity to be heard before a decision is made. We also strongly support introducing the requirement that the applicant must have made reasonable efforts to obtain a license from the PVR owner before applying for a compulsory license.

We disagree with the analysis around the "public interest" test. We believe there is a need for a "public interest" test. Furthermore, such a test *would* in itself give guidance to the Commissioner as to what the public interest is. The whole purpose of such a test is to provide parameters/questions that the Commissioner can answer which will assist in guiding them to a conclusion on whether the grant of a compulsory license is in the public interest. The fact that some countries have not introduced such a test should not be the deciding factor here. Introducing such a test would provide more clarity and therefore more certainty to rights holders and the public as required in MBIE's criteria for options analysis.

We agree that compulsory licenses should be non-exclusive.

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?

We disagree that an option should be preferred because of what the Commissioner would "likely" do in a particular situation. We have almost no compulsory licence cases which set any form of

precedent for this. Option 2 has not been considered at all, there is no outline of any benefits this option may bring it is simply rejected as a result of the conclusion reached for option 1. The conclusion for option 3 again appears to be based on an assumption that it is not guaranteed and rejected because it is too complicated to implement.

Option 3 however, would be beneficial to growers and the public of specific *species* for which it is difficult to commercialise within three years. Removing the restriction and in turn the uncertainty or concern that a compulsory license may be unfairly given would likely encourage breeding and availability of a greater variety of cultivars to the public.

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 disagree with the analysis for Option 1. It is incorrect to conclude that the hops compulsory license application supports retaining section 21(3) especially when the outcome was not decided by the Commissioner and was instead settled between the parties. Most likely as a result of the lack of clarity around the current compulsory license provisions. It is also inappropriate to imply that the PVR owner of the hop varieties was imposing terms which some growers may be unable or unwilling to comply with. It cannot be known whether the PVR owner was approached for a license or whether they would have voluntarily licensed without the threat of a compulsory license application. There is a possibility that had this case come before the Commissioner it would have been a perfect example of why section 21(3) should be repealed when taking into consideration that the licensee was a co-operative company and the nature of how such a company operates means that they could unintentionally fall foul of section 21(3).

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 other issues relating to infringements that we have missed?

Clarity around infringement, procedures, costs and remedies needs to be improved and brought more into line with other intellectual property rights.

It is stated that some submitters were under the impression that PVR infringement is not an offence, and that this was incorrect. However, Section 17 provides that sale under the denomination of a protected variety of propagating material of some other variety constitutes infringement. Section 37 of the PVR Act makes it an offence to falsely represent that a variety is some other variety which is protected by a PVR or that is the subject of a PVR application. Some acts can both constitute infringement and be an offence.

The PVR Act should provide that infringement disputes be heard in the District Court in the first instance.

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 disagree that option 3 is the best option. It is stated in the Options paper that the offence provisions are not a deterrent however, there is no way to truly determine this. It is possible that these provisions are acting as a deterrent, and repealing such provisions is certain to remove any form of deterrent effect.

Either way, if something is not acting as a deterrent the logical action is to take steps to increase the deterrent effect, not to get rid of it altogether.

Therefore, out of the options proposed either option 1 or 2 would be more preferable because they provide clarity and certainty to all and sends the message that PVR rights are taken seriously. Option 2 would be most preferable. However, an alternative option would be to increase the fine value so that the cost of enforcement is higher than the benefit of carrying out the offence. Many seed companies are aware that their protected varieties are deliberately being mislabelled or not labelled at all when being sold. The fine amount is not high enough to deter this activity, it is less than the amount of royalties that would have to be paid. MBIE should be looking to strengthen the enforcement provisions not get rid of them all together. Repealing the enforcement provisions sends the message that such activities can continue unchecked and even increase because there are no repercussions.

It is incorrect to compare an act that would be considered an offence under the PVR Act with an equivalent act with a patented invention. Patents and PVRs protect two totally different things, the subject of protection and its use/purpose are not comparable. We therefore disagree that because a certain act is not an offence under the Patents Act neither should it be in the PVR Act.

20. Exhaustion of the breeder's right

Do you have any comments about the exhaustion provision required by UPOV 91?

No

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?

We agree with the additions proposals discussed.

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 purpose of the PVR regime?

We believe algae should be included within the definition of "plant" for the PVR regime.

23. Provisional protection

Do you agree with our preferred option for dealing with provisional protection? If not, why not?

We agree with MBIE's preferred approach.

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 believe Option 3 would be the best option. As an exception the EDV regime should only come into force for applications filed after the new provisions come into force.