Plant Variety Rights Act 1987 review: Options Paper

Your name and organisation

Name	Laurie Meadows
Email	[redacted]
Organisation/Iwi	

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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?
	[Insert response here]
2	**Meeting our CPTPP obligations** Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?
	[Insert response here]
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?
	[Insert response here]

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?
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
8	**Definitions – general** Do you have any comments on the definitional issues discussed in this Part?
	[Insert response here]
9	**Scope of the breeder's right** Do you have any comments about these new rights required by UPOV 91?
	[Insert response here]
10	**Exceptions to the breeder's right** Do you have any comments about the exceptions required by UPOV 91?
	[Insert response here]
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?
	[Insert response here]

	Essentially derived varieties
12	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?
	[Insert response here]
	Rights over harvested material
13	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?
	[Insert response here]
	Farm saved seed
14	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?
	[Insert response here]
	Compulsory licences – general issues
15	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?

	You have missed entirely a situation where a grant is made, but the rights holder does not release the cultivar to the public for some reason, for example because they are in some commercial dispute with the overseas patent holder. *For example, in the case of avocado cv. 'Lamb Hass' no licence to propagate exists beyond an arrangement to test the cultivar commercially in the 'grace period'. Avocado cv. 'Lamb Hass' grant number 1911 was 4 Oct 2001 but has never been made available to the public.* *The next step for the rights holder will probably be to either 'bin' the cv. or surrender the rights and release it as a 'club fruit' in limited numbers to contractually limited growers.* *Thus denying the public access to an improved late season avo.* *Commercially, there are said to be problems Lamb Hass with storage and ripening (pers comm. Philip West, NZ Avocado). So commercial interests won't press for propagation to happen.* *What about the public? After all, commercial considerations don't apply.What are the public remedies?* *It is prohibitively expensive – and absurd – for a member of the public to obtain a compulsory licence to propagate simply to obtain one tree!* *There should be a mechanism where after the 'grace' period the rights holder should present a 'notice of compliance' outlining how they have made the cv. available to the public. Any witholding should be punished by both cancelling their grant and enforcing compulsory handover of propagating material to all and any member of the public that wants it, subject to reasonable time/materials recompense .*
	Compulsory licences – grace period
16	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?
	[Insert response here]
	Compulsory licences – section 21(3)
17	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?

	I agree with the proposed option. What is ommitted from your analysis is the fact that some fruit breeders by-pass PVR in favor of 'club fruit' system using commercial contractual law, in conjunction with criminal law where propagatable material is stolen. *So anyone wanting to use exclusive limiting contracts can do so under the 'club' model. This model contains all the elements of interest – particularly vertical integration. This is the model of the future for high value fruit and maybe a few other products (hops is a good example, marijuana – ironically a hop relative - will likely be another).* *But the 'club' concept is a waste of time and energy for lower value bulk commidity type plants – so PVR is imperative for this class.* *But if you want the inter-country fruit-sale protection of UPOV, you may not contractually exclude others from access to a cultivar, whether for home garden or commercial use.* *You can't have it both ways – which some attempt to do at the moment.*
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?
	As above, side-stepping PVR entirely and contractually stopping growers from releasing propagatable material allows the owner to (1) sue the contractee for specified departure from the contract (2) in the case of theft of material, to retrieve the stolen goods and apply to police for criminal proceedings. *The analysis that the cost of Court action for PVR infringements well exceeds any benefits is spot on. Further, your comment on the small size of the NZ market is also true -an MPI document on the contribution of plants to NZ GDP has one estimate of annual sales of feijoa plants at 6,000 p.a. (Waimea Nursery). This would include probably half a dozen cultivars at least. So potentially 1,000 plants of a given cultivar (broadly).* *If infringment recourses are expensive, it would be very useful to embed in legislation a provision that action can be taken at the Small Claims Tribunal. This has a very low barrier to entry as lawyers are excluded and the fee low.* *In addition, if the claim is not resolved, the matter can be referred to a District Court (as far as I know).*
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?

	Agree with the analysis and conclusion regarding enforcement. *In relation to use of cultivar name - Note that using the PVR Distinct. Uniform, Stable descriptive requirement 'attachs' and 'proves' that description to a particular form of cultivated plant with an unique cultivar name.* *Thus, even if the onerous fees of PVR prevent carrying the right forward in time, it is a relatively 'cheap' form of branding in perpetuity, and therefore a valuable 'good' not extinguished by time.*
20	**Exhaustion of the breeder's right** Do you have any comments about the exhaustion provision required by UPOV 91?
	[Insert response here]
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?
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?
	[Insert response here]
23	**Provisional protection** Do you agree with our preferred option for dealing with provisional protection? If not, why not?
	[Insert response here]
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?
	[Insert response here]

Other comments

The largest barrier to innovation is the very large fee structure imposed by the PVR Office.

Plant breeding can be done by anyone at home, and while almost all small efforts have little or no commercial value, the odd one does.

This aligns with the so-called digital start-up concept, where most efforst fail, but the odd one can be very valuable indeed.

The on-going PVR fees cripple smaller scale initiatives before they even begin. Why bother if an advance you make can't be economically secured by a PVR due to fees, and if you propagate and release some plants, the cultivar can be quickly picked-up and ramped up by a commercial nursery?

It is ironic that the PVR process, designed to supposedly facilitate innovation, actually suppresses all the small players.

The PVR initial DUSA trial costs are fair enough, so long as breeders can conduct their own trials and have them reviewed only if necessary, but this is a 'sunk cost'. Once the Patent Office has been paid, the cost of future administration is utterly trivial.

So there should be NO fees at all over the life of the rights.

The on-going fees are both a monopoly 'protection-racket' and a positive discincentive to innovation.

So much for the TRUE 'digital' economy – the biological 'digits' that form genes, agtcu.