



SUBMISSION

TO THE

**MINISTRY OF BUSINESS, INNOVATION &
EMPLOYMENT**

ON THE

**OPTIONS PAPER-
REVIEW OF THE PLANT VARIETY RIGHTS ACT
1987**

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Jointly prepared by the
New Zealand Plant Breeding & Research Association and the
New Zealand Grain and Seed Trade Association
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RESPONSE TO THE ISSUES PAPER

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SUBMISSION ON THE PLANT VARIETY RIGHTS ACT 1987 REVIEW - OPTIONS PAPER

ABOUT THE SUBMITTERS

The following is a joint submission from the New Zealand Plant Breeding & Research Association (NZPBRA) and the New Zealand Grain & Seed Trade Association (NZGSTA).

The NZPBRA represents a group of seed and research companies engaged in the development and marketing of plant intellectual property which underpins several vital New Zealand industry sectors: Arable farming (broad-acre cropping); pastoral farming (dairy and red meat production), and horticulture (vegetable cropping).

The NZGSTA represents members who produce, process and market the nation's grain and seed outputs.

Both trade bodies have a keen interest in following and contributing to the MBIE review of the Plant Variety Rights (PVR) Act.

PREFACE

We welcome the Options Paper as the next phase in the reform of the Plant Variety Rights Act 1997.

We remain optimistic that a fit for purpose regime, in conformity with UPOV 91 requirements, is enabled that protects PVR holder interests, and provides them confidence and incentive to continue with long term breeding programs and deliver improved seeds to help increase the productivity, sustainability and profitability of the NZ agriculture sector, in line with the Government's export growth agenda.

EXECUTIVE SUMMARY

We support:

- "Definition": "breed" and "variety" which is consistent with UPOV91
- "Breeders rights": The inclusion of Articles 15 of UPOV 91
- "Term of the right": Option 1 - adoption of UPOV 91 minimum terms
- "Essentially derived varieties": Option 2 – Define an EDV as a "copycat" variety
- "Rights over harvested material": Option 1 – Provide rights as required by IPOV 91
- "Farm saved seed": Option 2(ii) – Provision to impose limitations
- "Infringement": Exclusive rights as set out in Article 14(1) of UPOV 91
- "Remedies for infringements": PVR Act provide remedies including damages or an injunction
- "Extending coverage to algae": - That algae be included in the definition of a plant

We have concerns about:

- "Maori advisory committee" – MAC should influence and relate only to indigenous plants

- “Treaty of Waitangi”: Option 2 – “giving effect to UPOV 91” (rather than full ratification)
- “Treaty of Waitangi obligation”: We disagree with MBIE’s proposal to not define key terms
- “Cost of enforcement”: MBIE’s proposal to do nothing in regards to enforcement
- “Enforcement: offences”: We DO NOT support MBIEs preferred Option 3 – repeal of offence provisions
- “Provisional protection”: We disagree with MBIEs preferred approach - that action for infringement cannot be commenced until after a grant is made

We recommend:

- “Treaty compliance – criteria for analysis”: that the Maori Advisory Committee role should influence and relate only to indigenous plants
- NZ ratify UPOV 91 and conform to its requirements
 - In the event the approach is to “give effect” to UPOV91...
 - MBIE define key terms – e.g. “taonga species” to differentiate and rule out non-native plant species
- “Farm saved seed”: That UPOV 91 Article 17 (2) [Equitable remuneration] is invoked in the PVR Act with details to be prescribed in regulations
- “Cost of enforcement”: MBIE further explore all possible strategies to assist plant breeder rights
- “Enforcement: offences”: We support Option 2 – Retain current offences
 - With the retention of the offences in the PVR Act there is a need to ensure the current maximum penalty of \$1000 is modernised and set at a level that provides sufficient deterrence
- “Provisional protection”: That there be flexibility to cover an alleged infringement once an application has been applied for
- NZ Customs have powers to seize illegal seed exports

JOINT NZPBRA AND NZGSTA SUBMISSION

The following joint submission provides comment on some selected questions within MBIE’s question set and on those issues which are important to the Associations.

1) Objectives of the PVR Act

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

We consider that it is appropriate to state upfront and clearly the objective of the legislation. Specifically, the goal of plant variety rights is to encourage investment in NZ to make sure the very best cultivars are available for all users and ensure breeders receive appropriate financial recompense for their investment.

2) Meeting our CPTPP obligations

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

Throughout Part 4 of the Options Paper MBIE states the preferred approach is to "give effect" to UPOV 91 which means NZ remains a member of UPOV 78. This is not the expectation of PVR owners and accordingly MBIE’s commentary and Option 2 is not accepted by the Association.

As far as we are aware, no other UPOV member state has adopted a status of "giving effect" to UPOV 91. If NZ was to go down this route, it would be the glaring global outlier.

We are concerned that overseas breeders, our key trading partners (including the USA and the EU), fellow CPTPP signatory parties¹, the UPOV 91 signatory community and other jurisdictions NZ often compares itself to see the NZ IP environment as not being strong enough by remaining under the old UPOV 78 regime. Staying with the 1978 regime continues to undermine this country's credibility and overall standing on protecting IP rights.

Critically and without full UPOV 91 conformity, some overseas breeders may remain hesitant to invest new capital in plant breeding in NZ and or to make available to NZ farmers their very best and most innovative varieties. In turn, the absence of UPOV 91 conformity could potentially mean end-user specification and consumer requirements are not met with the very best varieties to utilise in local food processing and beverage production.

At para 40 of the Options Paper MBIE wrongly states and repeats the line: *"There is no clear evidence that NZ is currently missing out on new plant varieties ..."*.

This statement is wrong. NZ has indeed missed out on new and diverse varieties.

In the 1990s Venture Southland² identified 'Meadowfoam' as a new crop for Southland. Its seeds would yield oil that could be used in a wide range of applications from lubricating jet engines through to the manufacture of leather and pharmaceutical goods. The main use currently is in the cosmetic industry, where it is used in a range of top quality skin care products.

One cultivar was available for planting, however the US owners refused to make the cultivar available as they felt their IP could not be effectively protected in NZ.

We have also previously pointed out that the NZ brewing industry does not have access to the highest quality malting barley cultivars as used in Europe and around the world. It is true NZ does have some cultivars, however they are up to 2 to 3 generations behind the Europeans. This has an impact on farmer and brewing industry productivity and profitability.

At para 41 the Options Paper quotes the Sapare Report again which asserts that they "observed a relatively healthy, dynamic system for generating new cultivars in NZ" and "we did not see evidence that imports...are being dissuaded from bringing propagating material into NZ..."

This takes the simplistic view that because something didn't happen and the current system isn't totally broken down, change is not needed. Farmers can get new varieties (although not the most novel generations as used in other parts of the world) but what happens when new varieties are not developed and made available? Regrettably, there was no evaluation of this potential outcome.

Currently R&D is getting by but when it is no longer viable or there is insufficient incentive for breeders to continue, NZ farmers could face reduced access to the best varieties and there may be reduced yields, crops with less resistance to pest and diseases, and crop production with problematic quality specifications.

¹ Australia, Canada, Singapore, Vietnam, Japan & Mexico soon to be UPOV 91 compliant as required under CPTPP (and USMC

² <https://venturesouthland.co.nz/resources/land-use-information/crop-data-sheets>

Further, future plant breeding to combat the effects of climate change, environmental pressures and the increasing prevalence of pest and diseases will require a much greater, more costly breeding effort and the breeders will require the robust protections and assurances offered by UPOV 91. For NZ to have access to these global plant breeding solutions it will be imperative we have highly robust IP laws in place.

Our preferred approach is for NZ to accede to UPOV 91 and for the Government to find other ways to meet its Treaty obligations on plants with kaitiaki or taonga species status. This is still a practical and possible option as the Government has not yet made a final decision on accession to UPOV 91. We are encouraged by para 43 which infers that acceding to UPOV 91 could be Treaty-compliant. We urge a review of the “giving effect” option.

Case Study – Disrespecting IP rights³

Many foreign breeders are hesitant to introduce new ornamental varieties into the China market. The issue in China is the lack of respect of IP rights which is holding back industry growth.

2 key points:

- The good growers are hit as the current situation is limiting access to new and improved varieties
- The quality of products in general is decreasing

Case Study – Ratification of UPOV 91

Readers of the Options Paper should not underestimate the importance and benefits of acceding to UPOV 91. The experience of two recent CPTPP signatory countries show there are clear benefits.

Vietnam

“After joining UPOV, Vietnamese farmers had benefits through new varieties with higher yields, increased quality and better resistance to pests and diseases.”

“More R&D investment by the private sector.”

“Vietnam’s PVP system ensured that plant breeders felt confident about their investments.”

Source: Nguyen Thanh Minh, Director of Plant Variety Protection in Vietnam – 18 April, 2019⁴

Canada

The strengthening of Canadian IP law has increased opportunities for new foreign companies to invest in the country.

Canada⁵ has seen a significant number of new products going through the applications and approval registration system for uptake by growers.

Between 2012-2017 there has been a 237% increase in wheat breeding and \$13.2m investment in pulses.

³ <https://www.floraldaily.com/article/9107362/respecting-ip-rights-still-an-issue-in-china/>

⁴ <https://european-seed.com/2019/04/the-tremendous-impact-of-upov-membership-in-vietnam/>

See also: https://www.upov.int/edocs/pubdocs/en/upov_pub_357_4.pdf

⁵ <https://germination.ca/canadian-pbr-is-a-model-for-the-world/>

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 believe that the Maori Advisory Committee role should influence and relate only to indigenous plants.

4) Treaty compliance key terms

We disagree with MBIE's proposal to not define key terms.

We think it is necessary for terms like "*taonga species*" to be defined as including "*native plants*" (as suggested in the Options Paper glossary).

In doing so, it would clearly differentiate between native plants as different to those introduced plant species which did not exist in NZ prior to the Treaty of Waitangi. This would provide clarity and certainty to those breeders who are involved in the development of new agricultural and horticultural cultivars from non-native plant species. Moreover, there would be no new costs e.g. DNA finger-printing etc, added to these plant breeders seeking PVR.

To avoid any doubt, we are referring to non-native plant species such as pasture cultivars e.g. ryegrass and clover; cereal cultivars e.g. wheat, barley and oats; and vegetables e.g. onions, pumpkins, etc. These introduced plant species are not taonga species and therefore should not fall under any proposed Treaty of Waitangi obligations. This should be made explicitly clear in the Act.

New information disclosure

On the above basis that non-native plant species e.g. ryegrass, wheat and barley etc are not taonga species the proposed addition of new disclosure requirements should not apply in the application for a PVR.

7) Definitions - breed

We agree with the proposed definition of "breeder" which is consistent with UPOV91 requirements.

8) Definitions - general

We agree with the proposed definition of "variety" which is consistent with UPOV 91 requirements.

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 Articles 15 of UPOV 91.

10) Exceptions to the breeder's right

We support the inclusion of Articles 15 of UPOV 91.

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 – adopt the UPOV 91 minimum terms; 25 years for trees and vines and for all others, 20 years.

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 – define an EDV as a “copycat” variety.

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 as required by UPOV 91.

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?

Whilst there is a longstanding and traditional practice of farmers saving seed to sow future crops, the Association thinks this privilege, with conditions, should be reflected in the PVR Act.

To that end, UPOV 91 Article 15 (2) provides for farmers to save seed for use on their own holdings.

We support the invoking of Article 15 (2) into the PVR Act which permits farmers to save seed for use on their own property. This move is a significant legal upgrade for farmers.

Our support is conditional that the seed saved must be used on the farm on which it was produced and that varieties used for multiplication and re-export CAN NOT be saved.

Paralleling the above, UPOV 91 Article 17 (2) specifically provides for breeders to receive equitable remuneration (i.e. through a royalty at different points along the value chain) and this Article needs to be invoked⁶.

Specifically, Article 17 (2) states:

- 2) *[Equitable remuneration] When any such restriction has the effect of authorizing a third party to perform any act for which the breeder's authorization is required, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.*

It is worth noting that many farmers accept that a royalty on farm saved seed is justified.

To be clear, the Association is seeking the payment of a royalty to the PVR owner only on seed saved of a protected variety.

The advantage of this is that it requires royalty payment compliance and industry participants can best determine the formal royalty mechanisms, namely the need to have a flexible system whereby the collection point is determined by the seed type. This system has operated effectively in NZ across all cereal species for decades and it has general industry acceptance.

Flexibility on the collection point is needed because more than 20 different crop kinds would be covered.

As covered in para 313 of the Options Paper, the Association is committed to a royalty collection system on farm saved seed. Therefore the Act must provide for the provision of such regulation.

We are confident as an industry that we can achieve a fair mechanism for all parties based on all discussions held to date.

The Options Paper preferred approach is Option 2(ii) which provides an exception for farm saved seed with a provision to impose limitations in regulations.

The Association supports Option 2(ii).

We recommend the invoking of Article 17 (2) into the PVR Act to enable breeders to receive equitable remuneration.

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?

The action of unscrupulous players violating the rights of PVR owners needs to be deterred with meaningful consequences. Affected PVR owners also need to be able to be appropriately compensated for their losses. Enforcement is fundamental for the breeding industry.

⁶ As is the case for: Australia – Plant Breeder’s Rights Act 1994 clause 18(1), the UK – Plant Variety Act 1997 clause 9(3) and Canada – Plant Breeder’s Rights Act clause 5(2)

Infringements (para 413)

We agree with MBIE that the exclusive rights as set out in Article 14(1) of UPOV 91 is infringed if the person does not have the PVR owner's permission.

Costs of enforcement (para 423)

We disagree with MBIE's proposal to do nothing in regards to enforcement.

It is our preference that enforcement actions are aligned with similar intellectual property Acts, eg Patent and Trade Marks Act

Dealing with infringements (paras 424-426)

We consider that it would be useful if the PVR Act were to specify the District/High Court, in the first instance, as the jurisdiction to hear infringement cases as this would provide clarity of approach for those who intend taking any infringement matters further. By doing this, it would also clearly demonstrate that there was an established judicial process and regime which protects PVR owners.

It is worth highlighting that the Options Paper points out there have been only two infringement cases going to court. The low number of cases does not mean there are few or no problems or violations. In fact, the low number of cases actually illustrates the difficulty PVR owners face with taking action to safeguard their rights. They are constrained by a number of factors including high legal costs, challenging evidential requirements and uncertainty of size of the redress or compensation.

Remedies for infringements (para 430)

We agree with MBIE that the remedies for infringement of a PVR should include awards for damages and or injunction proceedings. This would be consistent with the approach taken for infringements of other key pieces of NZ IP law.

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 understand that the Act is to provide protection for plant varieties. We interpret this to mean that it is not the purpose of other legislation to provide the primary protection.

What are the options? (para 440)

We disagree with MBIE's Option 3 – “repeal of offence provisions and use other provisions under different legislation”.

The proposal downgrades and devalues the seriousness of the current infringements against PVR owners and conveniently offloads them to a general and non-specialised jurisdiction.

In our view Option 3 would not engender much confidence amongst PVR owners that the government was serious in protecting their interests.

We prefer Option 2 “Retain the current offences, but provide the PVR Office or IPONZ with the power to enforce provisions”.

We view Option 2 as sending a stronger and clearer message to PVR owners, here and abroad, that when they make their cultivars available to NZ that their rights are important and will be protected. PVR owners are simply seeking confidence that the system has their rights in mind and there is a system focused on plant variety rights matters. For offenders, it sends the message that the law does take seriously violations of PVR owners' rights.

Having the offences detailed directly in the PVR Act fosters clarity, legal certainty and ensures a predictable environment for PVR owners.

Moreover, for the PVR Act there is comparability and consistency with NZ's other key IP legislation namely the Patents Act and Copyright Act.

As further precedent for retaining current offences in the Act, we note for example that the Australian Plant Breeder's Rights Act 1994 and the Canadian Plant Breeders' Rights Act both detail various offences in their respective legislation.

With the retention of the offences in the PVR Act there is a need to ensure the maximum fine of \$1000 (prescribed in 1987), which can be regarded as a slap on the wrist, having little practical consequence, is modernised and set at a level that provides sufficient deterrence.

The current maximum fine is akin to the ineffectual fine for breaching NZ's Easter trading laws. Perhaps it is best summed up by an MP⁷ saying: *"These businesses take the resulting fine on the chin, as we have so often seen, because the income they make exceeds that fine."*

Also the current fine quantum is not comparable to the value of the IPR that maybe infringed upon. If anything, the current penalty setting enhances the violation of the law because the fine is so low.

We feel a fine and penalty consistent with other IP legislation e.g. the Trade Marks Act 2002, should be applied, namely a maximum fine of \$150,000 and or imprisonment for a term not exceeding 5 years. The magnitude of the penalties underscores the severity for offending against the Act.

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?

We support the inclusion of algae and fungi as part of the definition on plant in the PVR Act.

For precedence, we note that the Hong Kong and Chinese jurisdictions have recently provided PVRs for algae⁸.

23) Provisional protection

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

⁷ <https://i.stuff.co.nz/business/112292810/easter-trading-laws-continue-to-confuse-and-divide>

⁸ <http://www.mondaq.com/hongkong/x/826512/Trademark/Mutual+Recognition+Of+Awards+Hong+Kong+An+d+Mainland+China+For+Intellectual+Property+Rights>

We disagree with MBEs preferred approach - that action for infringement cannot be commenced until after a grant is made.

We believe there needs to be flexibility to cover an alleged infringement once an application has been applied for.

Other comments

Prevent high value seeds, & other varieties from being taken out of country

The Options Paper did not investigate or analyse the policy options related to stopping the illegal export of high value seeds (and other varieties) to other countries.

There has been a recent case of high end fruit varieties taken out of country without permission and grown abroad.

There should be stricter regulations to protect NZ breeders, perhaps enforced by NZ Customs equipped with seizure powers, as unauthorised export of seed and other varieties to foreign countries can hinder growth in exports of NZ agricultural and food products.

Yours sincerely

Thomas Chin
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NZPBRA & NZGSTA