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?
	Zespri welcomes MBIE's suggestion to introduce into the objectives of the updated PVR Act: - the balance between encouraging innovation and ensuring breeders can get a reasonable return on their investment, and ensuring reasonable access to the outputs of innovation; and - the need for the PVR regime to be an efficient and effective system, to capture the importance of ensuring proportionate compliance costs and providing certainty to rights holders and the public (including growers). We also welcome steps to update the PVR Act to comply with the Crown's 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?

	Free trade agreements have brought enormous benefits to kiwifruit growers and the New Zealand economy, including through the elimination of approximately $30 million of tariffs by the CPTPP. While Zespri is generally of the view that accession to UPOV 91 is preferable for global consistency with other markets and trading territories, Zespri accepts that giving effect to UPOV 91 is appropriate in the context of Treaty obligations.
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?
	Maori make up around 10 percent of the NZ kiwifruit industry and are a vital and growing part of our growing industry. Maori growers set up the Maori Kiwifruit Growers Forum in 2017 to advocate for their interests and have set themselves the goal of doubling their share of the industry to 20 percent. This growth comes both from Maori-owned land being developed in orchards and iwi-organisations investing in existing kiwifruit orchards. Zespri is owned by NZ kiwifruit growers; only NZ producers (landowners and lessees) can own Zespri shares. Maori are a strong and vital part of our industry's balance of interests and Zespri supports the introduction of a Maori advisory committee as recommended in the MBIE Options Paper to update the Act and comply with the Treaty of Waitangi as outlined by the Waitangi Tribunal in its Wai 262 report.
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?
	Zespri supports the introduction of a Māori advisory committee to support the Commissioner, which would publish general principles about how the PVR regime should deal with taonga species and kaitiaki.
	We welcome greater clarity about particular plant material or species which is likely to be taonga, and that taonga is limited to either indigenous species or specified non-indigenous species of significance. The Māori engagement requirement should be limited to those species/plant material.
	We would also welcome clarification to ensure that taonga/kaitiaki rights do not arise in relation to any non-indigenous species by virtue of where or by whom they are planted/used, as we believe that this could introduce uncertainty and complexity into the PVR framework both for breeders and growers.
	We would also welcome clarification on whether there are any trading implications for NZ remaining a UPOV 78 signatory instead of being a UPOV 91 signatory, as recommended in the Options Paper.
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?

	No comment.
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?
	We agree that the three main issues raised by UPOV 91 to be considered here are covered: scope of rights over harvested material and Essentially Derived Varieties (EDV), compulsory licences and enforcement.
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?
	Zespri agrees with MBIE's option to define a breed "in relation to a variety, including the process of selection within the natural variation of a plant or plant population, together with the process of propagation and evaluation so as to enable the development of the variety". This ensures that breeding is an integral part of a PVR application and prevents someone from being able to claim a PVR on a plant which they found growing in the wild or which otherwise has not involved any kind of inventive step.
8	**Definitions – general** Do you have any comments on the definitional issues discussed in this Part?
	Zespri is generally of the view that the definitions from UPOV 91 should be used where possible, to align to parallel legislation in other jurisdictions.
9	**Scope of the breeder's right** Do you have any comments about these new rights required by UPOV 91?
	We acknowledge there is no policy flexibility in the adoption of the minimum scope of the breeder's right as set out in Article 14(1) of UPOV 91.
	MBIE states that UPOV Article 14(1) represents a "significant extension" of rights compared to the current PVR Act. In some respects, we agree that UPOV Article 14(1) represents an extension to those rights. We welcome in particular the extension of breeders' rights to cover all production or reproduction (even if the reproduced propagating material is not intended for sale), and import and export. Including exports in the scope of rights addresses the issues already faced by Zespri in relation to with the unauthorised export of PVR propagating material. This places PVR holders in the position of potentially falling into a jurisdictional gap between the protection afforded in New Zealand and the protection given in the country to which the material is exported.

However, it is important to note UPOV Article 14(1) does not replicate all of the existing rights of PVR holders. Specifically, it does not provide for the PVR owner to have the exclusive right to propagate the variety for commercial production of fruit (for vegetatively propagated fruit-producing varieties, such as kiwifruit). This right currently exists under section 17(1)(b) of the PVR Act 1987. There is no equivalent right in UPOV Article 14(1). Nor is the PVR Act section 17(1)(b) right covered by the proposed adoption of UPOV Article 14(2).

This is of serious concern to Zespri, and will be of similar concern to any other owner of a PVR of a vegetatively-propagated variety.

The legislative history of PVR Act section 17(1)(b) illustrates its importance to the plant varieties regime. The PVR Act 1973 contained exclusive rights equivalent to section 17(1)(a) of the current PVR Act. It was recognised that this did not provide an adequate reward for the breeders of new varieties of fruit, vegetable and flowers to invest in developing new varieties, because they didn't have rights over the produce of those varieties.

This was discussed in the Parliamentary debates before the PVR Act 1987 was passed, using the hypothetical example of a protected blackcurrant variety. The Rt Hon R J Tizard (the then Minister of Science and Technology, on behalf of the Minister of Agriculture) said, "It would be possible under the existing legislation for a commercial grower to buy one plant, or a small number of plants, which could then be planted out over an extensive area for the purpose of commercial fruit production.

"In such a position the protected varieties would be commercially exploited on a large scale, but because the exploitation did not involve the sale of reproductive material apart from the one or few plants originally purchased, the breeder would be denied a fair reward. If left uncorrected that deficiency in the 1973 Act would result in the New Zealand horticultural industry being denied the full potential benefit of plant variety rights. The Bill will correct that deficiency by appropriately extending the rights of breeders of fruit and ornamental varieties".[1]

Having now been in place for more than 30 years, the section 17(1)(b) right of the PVR Act is of fundamental importance to Zespri's business. It underpins our licensing arrangements with growers, under which growers pay a licence fee to be able to propagate the variety for the purposes of the commercial production of fruit.

Around 2800 NZ growers supply Zespri with premium quality kiwifruit - around 98 percent of the kiwifruit grown in NZ is exported. The kiwifruit industry has 10,000 permanent employees and up to 25,000 people at peak season. In 2018/19, sales returned $1.8 billion in direct returns to rural communities around NZ.

Zespri reported revenue of over $3 billion in 2018/19. This includes $2.94 billion fruit sales ($2.63 billion NZ kiwifruit and $311 million Northern Hemisphere grown fruit) and revenue from licensing, royalty streams and cofunded new cultivar research of $228 million (including $193 million of SunGold licence revenue). The median price paid in the 2019 SunGold licence release was $333k/hectare.

[1] (5 February 1986) NZPD 6860

	The industry is on track to achieve to grow global sales to $4.5 billion by 2025 driven by strong consumer liking for SunGold and its premium positioning in the marketplace. There are 14,000ha of kiwifruit orchard in NZ with around 7,400 ha licensed and 6,300ha producing with Zespri's PVR variety SunGold. Growers earn around twice as much growing SunGold as they do from growing the non-PVR green variety Hayward with an average Orchard Gate Return of $63,622/ha for Green in 2018/19 compared to $145,991/ha for SunGold. This season marks the first time in NZ where more SunGold is grown than Green.
	Zespri predicts that SunGold will generate around $40 billion in sales over the lifetime of the PVR. Research from the University of Waikato reports that without SunGold, the industry would be half its predicted size by 2030. The growth outlined above and its flow on benefits for the NZ economy is enabled by the certainty the PVR Act brings to the kiwifruit industry. The industry invests around $20 million each year in the Zespri-Plant & Food Research new varieties breeding programme and growers can choose to invest in PVR licence with the knowledge of the protections it brings.
	For these reasons it is imperative that an equivalent to PVR Act section 17(1)(b) be explicitly included in any new PVR legislation. This would preserve the interests not only of Zespri, its licensed growers and others in the kiwifruit industry, but the interests of all of those who grow fruit, flowers and other products from vegetatively-propagated varieties.
10	**Exceptions to the breeder's right** Do you have any comments about the exceptions required by UPOV 91?
	Zespri understands that New Zealand must, at a minimum, align the exceptions to PVR owners' rights with UPOV Article 15(1). We support any moves towards a clear and concise definition of the exceptions to those rights.
	We have no difficulty in principle with exceptions for acts done privately and for non-commercial purposes, and acts done to develop new varieties, as long as the exceptions are genuinely confined to those acts. However, we are unsure of what is intended by "acts done for experimental purposes". We observe that UPOV 91's Explanatory Note to The Breeder's Right does not illuminate the meaning of that phrase any further. It appears that most acts that ought to be permitted "experimental" exceptions would also relate to breeding new varieties. We would therefore be interested to hear more from MBIE about what it would consider to be covered by this exception.
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 the extension of the term of PVRs for woody plants/rootstock (which includes kiwifruit varieties) to align with UPOV 91. However, we support Option 2, under which the minimum term for kiwifruit varieties would be 30 years. This would align with the position in Japan, where the PVR term is 30 years for perennial plants (i.e. those that live for more than two years).

	Zespri runs a robust evaluation programme on potential new varieties due to the commercial consequences of releasing a commercially unviable new cultivar. This pre-commercial trial period can take between three and five years of PVR life before the variety is commercially released. Then it takes up to three to five years for newly-grafted vines to reach their full cropping potential. Kiwifruit budwood is grafted on to rootstock - this means Green vines can be cut off and the rootstock regrafted over to the new PVR-protected variety. PVR-protected varieties established on 'green fields' (no existing mature rootstock) need another two years to fully establish. Given that up to 10 years of the 23-year PVR can be taken up with evaluation and establishment, extending kiwifruit PVR to 30 years allows growers and wider industry time to recoup their investments. Extension of the PVR term would reflect the changes in the evaluation processes within a modern fruit cultivar development programme.
	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?
	Zespri supports Option 3 provided that the definition on page 69 is used (as opposed to the definition on page 67). We note that the definitions of "Option 3" differ between pages 67 and 69. The page 67 definition considers that an EDV must possess "all of the essential features of the initial variety". On page 69 however, the bold italicised words refer to Option 3 as the EDV retaining "one or more of the commercially valuable characteristics of the initial variety". The second definition is preferable as it would provide better protection over more derived varieties. For clarity, we do not support Options 1, 2 and 4.
	Zespri understands that a number of plant breeders have raised concerns with UPOV over the EDV definition in the UPOV 91 explanatory note on EDVs. In this regard it may be appropriate to consider the outcome of this discussion before finalising the proposing definition to be used in the Act.
	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?
	We have already submitted that the breeder's exclusive right in section 17(1)(b) to propagate the variety for the commercial production of fruit (for vegetatively propagated fruit-producing such as kiwifruit) should be explicitly retained. However, the PVR Act section 17(1)(b) right is limited in that it relates only to the propagation of the variety. It does not provide the PVR owner with any rights over the harvested material itself.

In practice, under the current PVR Act, if Zespri finds fruit for sale that we suspect was from an grower without a licence, our only course of action is to try and find the person who propagated the variety for commercial production of fruit without our authorisation. This has obvious practical difficulties, and tends to be a difficult, expensive, time-consuming and highly uncertain exercise. Zespri has little prospect of recourse against anyone selling the fruit because selling the fruit is not "propagation for the purposes of the commercial production of fruit".

We therefore see introducing breeder's rights over the harvested material as an important complement to PVR Act section 17(1)(b). This is especially important for vegetatively-propagated varieties such as kiwifruit, where the primary commercial value is in the fruit. Without any rights over the harvested material itself, the value of section 17(1)(b) is undermined. In this regard, it may be appropriate to consider a broader level of protection of harvested material for plant varieties where the commercial value is driven from the harvested material, rather than the reproductive material.

We note that Article 14(2) of UPOV 91 provides a minimum standard for rights over harvested material, and that New Zealand is free to provide for greater rights in its domestic law. We support introducing greater rights over harvested material than those provided for in UPOV Article 14(2). We set out below the implications of MBIE's options for dealing with harvested material.

Option 1 "adopting the minimum rights over harvested material as set out in Article 14(2)" would provide PVR owners like Zespri with only a marginally improved ability to take action over any fruit suspected of being produced from unauthorised propagation. It would allow Zespri to take action against the person selling the fruit (because they would be "commercially exploiting" the harvested material), as well as the person who propagated the variety for commercial production of fruit, and potentially others.

However, for Zespri to take action against anyone for infringing the UPOV 91 Article 14(2) right, we would have to show that "the harvested material was obtained through use of propagating material" that Zespri did not authorise. We would also have to show we didn't have a "reasonable opportunity" to assert rights over the propagating material. The effect of having to meet those two conditions is that Zespri would still need to try to identify the person who propagated the variety to sell the fruit, as the current law requires. This would require the same difficult, expensive, time-consuming and highly uncertain exercise as the current law requires. We do not therefore support option 1.

The only difference between options 1 and 2 is that the need for the PVR owner to show they did not have a "reasonable opportunity to assert their rights over the propagating material" is omitted under option 2. However, that does not address Zespri's concerns about the problems with attempting to identify the person who propagated the variety to commercially produce fruit. Both options 1 and 2 put an undue onus on the PVR owner in cases where third parties have infringed the PVR owner's rights.

Zespri submits that, given the importance of section 17(1)(b) varieties to the wider industry, it is critical that PVR owners of section 17(1)(b) varieties have more direct rights over harvested material. Option 3 is therefore the best option for section 17(1)(b) varieties. We do not support Options 1 and 2.

We submit that the concerns discussed in the options paper about extending rights over harvested material are overstated.

First, MBIE suggests that options 2 and 3 could be seen as imposing an unfair burden on retailers and sellers of harvested products. However, given that retailers of harvested material will be subject to a "burden" with the introduction of Article 14(2) in the PVR Act (and that is the minimum standard that must be adopted), the issue is whether the additional "burden" between option 1 and option 3 is unfair.

Practically speaking, retailers and wholesalers of fresh produce are likely to be aware of which produce is subject to proprietary rights, as those products will typically be known by a proprietary name (either the PVR denomination or a trademark) and often command a premium price at retail. Zespri would be willing to work with MBIE and retailers to develop a framework to allow retailers of fresh produce to ascertain and demonstrate the legitimate origin of their produce.

Second, MBIE suggests that providing PVR owners with greater rights over harvested material may give rise to competition issues. MBIE refers to the fact that under section 36(3) of the Commerce Act 1986, actions to enforce a statutory intellectual property right (such as a PVR) are not considered to be taking advantage of power in contravention of section 36(1) of the same Act which prohibits taking advantage of power in a market for a proscribed anti-competitive purpose. MBIE's comments about these matters overlook the fact that:

- the exception in section 36(3) has been the subject of separate consultation by MBIE, under which the exception is proposed to be removed from the law; and

- as part of the same consultation, MBIE has consulted on other changes to the prohibition in section 36(1) which could significantly broaden its scope, and which are intended to ensure that it is a more effective tool to guard against the misuse of market power.

It must also be borne in mind that the Commerce Act section 36(3) exception, even if retained in its current form, is narrow in scope. Regardless of any changes made to section 36, there are other provisions of the Commerce Act which could effectively deal with attempted anticompetitive conduct by PVR owners. An important one is section 27, which prohibits a person from entering into any contract, arrangement or understanding with the purpose, effect or likely effect of substantially lessening competition in any market.

- MBIE also suggests that it's enough to have harvested material continue to be dealt with by PVR owners in contracts. It is true that many PVR owners use contracts to control the commercial exploitation of the harvested material of their protected varieties, as Zespri does. This is based on the fact that the current PVR Act provides for the exclusive right in section 17(1)(b), which allows a PVR owner to authorise others to propagate the relevant variety for commercial production of fruit. We note this comes with its own cost and complexity in terms of monitoring and enforcement.

However if someone grows a PVR variety without a contract then the PVR owner doesn't have control over the harvested material they grow. Zespri submits that where there is no contract, the PVR owner's commercial position should be maintained under the PVR Act.

As mentioned in our submission on the issues paper, giving PVR owners rights over the harvested material would mean they could take quick and certain action over any harvested material they identify. This would be a strong disincentive for third parties to infringe the PVR holder's right, and support the integrity of the PVR regime.

	In addition, Zespri would welcome greater clarity in the definition of "harvested material" and suggests that, although UPOV 91 does not define that term, it would be useful to define it in any amendments to the PVR Act. Specifically, we wish to ensure that the meaning includes pollen. The definition used by MBIE for the purposes of the options paper (at paragraph 262) appears to include pollen. We request that the question be put beyond doubt by a specific reference in the statutory definition. The pollen of kiwifruit varieties is of significant commercial value and it is appropriate that it be covered by the protections given to breeders' rights.
	A broad definition of "harvested material" would also be consistent with the Explanatory Notes on Acts in Respect of Harvested Material under UPOV 91 (UPOV/EXN/HRV/1), paragraphs 2 and 3, which discusses the phrase "harvested material, including entire plants and parts of plants" in very broad terms. This suggests that the two qualifiers, (a) and (b), in MBIE's definition are potentially not needed.
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?
	Nothing to add.
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?
	One major substantive issue not included in the options paper is that - as previously submitted - is clarification that a compulsory sales order/licence does not take away from the exclusive right of the PVR owner to propagate the variety to commercially produce fruit under section 17(1)(b) of the PVR Act. As mentioned, section 17(1)(b) is fundamentally important to Zespri's business model, and underpins the economic success of the wider kiwifruit industry (as well as other producers of similar plant species).
	We encourage an approach which promotes fair and reasonable engagement for applicant and rights holder so that granting of compulsory licences is regarded an exception not an open door policy.
	The focus of the compulsory licence/sales order regime is on propagating material. This is reflected in the fact that the threshold for the grant of a licence relates to the availability of propagating material. In particular, it is important that it be made explicit that a compulsory licence cannot be granted to permit the propagation of the variety for the commercial production of fruit for section 17(1)(b) varieties.
	In principle, we support the proposal that the PVR Act require that an applicant for a compulsory licence or sales order be dealt with in a manner prescribed in regulations, and that the parties be given a reasonable opportunity to be heard before the Commissioner makes a decision on an application. We look forward to hearing further from MBIE about the detail of any such regulations.

	We also support the proposal that the PVR Act provide that a compulsory licence must not be granted unless the applicant can show that: (a) they have made reasonable efforts to obtain a licence over the variety concerned for the PVR owner on reasonable terms and conditions; and (b) they have not been able to obtain such a licence within a reasonable period of time.
	We support the proposal that the PVR Act be amended to clarify that any compulsory licence is limited to the use of the propagating material to propagate the variety in New Zealand.
	We disagree with MBIE's view that there is no need for an explicit "public interest" test. Such a test would provide that a compulsory licence should only be granted if it is in the public interest to do so.
	As previously submitted, this is now the test for considering the grant of a compulsory licence in modern legislation in other jurisdictions compliant with UPOV 91, such as the EU, Japan and Singapore. MBIE states in the options paper that the wording in section 21 reflects the public interest in ensuring that propagating material of protected varieties should be available in reasonable quantities on reasonable terms. Zespri acknowledges that, given the social bargain underlying the grant of PVRs, the availability of propagating material is an important aspect of the public interest. However, the public interest is much broader than that.
	As we submitted on this issues paper, the plant varieties industry has a much more sophisticated commercial approach now than it did in 1987. Given the importance of the value of varieties like kiwifruit to New Zealand's export receipts and overall economy, it is important that the threshold at which compulsory licences are granted can take into account of the need to continue incentivising new varieties breeding. A "public interest" test would better take account of these considerations. MBIE's discussion also overlooks the fact that the meaning of the three "reasonable" thresholds in section 21(2) is far from clear. This presents problems for PVR owners, potential applicants, other industry participants and the Commissioner alike.
	If a public interest test was adopted, then guidance akin to the guidance provided in EU regulation could also be provided. The EU concept of "public interest" includes the need to maintain the incentive for continued breeding of improved varieties. All parties would benefit from greater clarity as to when a compulsory licence (or sales order) may be granted.
	We agree with the proposal that compulsory licences must be non-exclusive. As MBIE points out, if the Commissioner granted an exclusive compulsory licence, that would lead to the extraordinary result that a PVR owner could not licence the reproductive material to any third party without permission from the compulsory licensee. That would seriously undermine our business model. We suggest that explicitly excluding that possibility is therefore useful.
	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?

	We previously submitted, along with others, that the three-year grace period for the issue of a compulsory licence is too short. For varieties such as kiwifruit, it may take approximately three to five years of pre-commercial testing and a further three to five years before PVR owners are realising the commercial benefit of the variety. The options paper does not respond to these submissions directly, other than to suggest that the Commissioner may refuse to grant a compulsory licence if he or she is satisfied that the PVR owner was unable to make reasonable quantities of propagating material available for purchase. That may be so, but we submit that greater certainty in the law would prevent the applicant, Commissioner and PVR owner from incurring unnecessary expense on compulsory licence application in this kind of situation. Relying on the Commissioner's discretion, particularly in circumstances where the Commissioner is given no guidance whatsoever as to the kinds of considerations that should be taken into account and the weighting that should be given, is not a sufficient answer to submitters' concerns. Zespri supports Option 2 and submits that five years is more appropriate given the development lifecycles of kiwifruit cultivars. We do not support Options 1 or 3. While Option 3 would allow appropriate consideration for reasonable development times, we acknowledge this would introduce a high degree of complexity for variety owners and the PVR Office.
	If a "public interest" test was adopted for the issue of compulsory licences — which could be adopted alongside a longer or more flexible grace period — this would allow considerations such as the time and resources involved in breeding, commercialising and exploiting the relevant variety to be taken into account in the decision. This would overcome the issues that MBIE identifies with having different grace periods for different species and the lack of clarity about how they should be determined.
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 MBIE's analysis and conclusions in respect of section 21(3). This provision is inconsistent with PVR legislation in other jurisdictions, as well as the social contract which forms the underlying purpose of the PVR Act. Zespri submits that if compulsory licensing provisions are retained, they should be limited to activities which form the basis of exceptions to the exclusive rights granted to PVR owners - i.e. those exceptions set out in section 18 of the PVR Act. If the compulsory licensing provisions are interpreted as providing an alternative mechanism to obtain identical rights that the PVR owner is granting to others but on more favourable terms for the licensee, then there is a risk that parties would choose not to apply for PVR protection and therefore not become subject to compulsory licensing provisions at all.

	Further, the compulsory licence (or sales order) regime focuses on propagating material only. A compulsory licence can only allow a licensee to reproduce and sell the reproductive material of that variety (in addition to the rights that any person has in relation to any PVR variety under the current section 18). There are no rights to use the propagating material for any other purpose. Paragraph 393 of the options paper seems to suggest that section 21(3) could be responding to a public interest purpose as it potentially prevents growers of a variety from being "locked out" and/or that a PVR owner could potentially drive higher prices for consumers. However, section 21(3) contemplates only one narrowly defined circumstance which might result in one of those outcomes. Zespri submits that the inclusion of a broader public interest test in the compulsory licensing provision as suggested above would be preferable to retaining section 21(3), as it would provide a more flexible approach to be taken by the Commissioner in considering applications for compulsory licences.
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?
	Zespri submits that the Act should also provide that the PVR owner's rights are infringed if, without the authority of the owner, a person authorises or purports to authorise another person to exercise any of the owner's exclusive rights.
	This would carry over the protection currently provided for in section 17(1)(c) of the Act and would be in keeping with the Patents Act 2013 (section 18(1)), the Copyright Act 1994 (section 16(1)(i)) and the Trade Marks Act 2002 (section 10(1)(b)), all of which provide for infringement by authorisation. Section 53 of the Australian Plant Breeder's Rights Act 1994 (Cth) provides that PVRs in a plant variety are infringed not only by the unauthorized exercise of an exclusive right but also by: - (A) a person claiming without authority the right to exercise one of the exclusive rights; and - (B) a person using the name of a registered variety in relation to another plant variety of the same plant class or a plant of any other variety of the same plant class.
	Zespri considers that NZ's PVR Act should also provide for the acts referred to in (A) and (B) above to amount to infringement, as they materially diminish a PVR owner's enjoyment of its exclusive rights.

Zespri submits that the Act should include a "catch-all" infringement provision to reflect the broad protection to PVR owners that is currently afforded by the Court of Appeal's case law on infringement[2]. This is that any conduct which diminishes a PVR owner's enjoyment of its exclusive rights amounts to infringement and PVR owners have relied on upon that case law. In the context of the importance of primary produce (and the underlying PVRs) to the New Zealand economy and growers, this support extending at least the same protections for PVR owners as currently exist in the Act.

Zespri does not support any conferral of exclusive jurisdiction or otherwise on either the District or High Court, to the extent that MBIE's option paper may suggest either of those proposals. Proceedings which fall within the jurisdiction of the District Court should continue to be able to be brought in the District Court, as District Court cases tend to be less expensive, and potentially faster, than those in the High Court. Meanwhile, the High Court should continue to hear those cases not appropriate for the District Court, either because of their content or complexity.

A key issue in enforcement is the difficulty and cost involved in collecting evidence of infringement.

In the UK, this issue is addressed in part under the Plant Varieties Act 1997 (UK) through the use of an "information notice" system for proceedings over harvested material. Under sections 14 and 15 of the UK Act, if a PVR owner suspects an infringement and has not started infringement proceedings, they can serve an information notice seeking confirmation of the source of the harvested material and products made from harvested material on a suspected infringer.

If the suspected infringer does not provide the information within 21 days, infringement proceedings may begin. Unless the suspected infringer can prove to the contrary or demonstrate a reasonable excuse for not supplying the information, it is presumed by the courts that:

- the material was obtained through unauthorised use of propagating material; and

- the PVR owner did not have a reasonable opportunity to exercise its rights in relation to the material.

Zespri submits that it is appropriate to consider introducing a similar system into the NZ Act. This would act as a disincentive to potential infringers and mitigate against the prohibitive costs currently experienced by PVR owners through the lack of any kind of "interim step" between suspected infringement and launching civil proceedings.

As set out below, Zespri supports retaining and expanding criminal liability under the Act.

Greater involvement by the New Zealand Police in carrying out investigations and pressing charges under the Act could potentially address some of the access to justice issues posed by the high costs of civil enforcement.

One of the critical challenges to enforcement of PVRs is being able to access the locations on which protected varieties may be located. Having access to some kind of investigative assistance through appropriate evidence-based submissions to the New Zealand Police would be of great help in resolving this issue.

[2] Winchester International Ltd v Cropmark Seeds Ltd [2005] NZCA 301.

	In principle, Zespri supports establishing a specialist tribunal but recognises that the staffing and resourcing issues identified by MBIE are a practical impediment to this option. Recognising however that the limited number of PVR cases leads to a corollary limitation in understanding of PVR laws and issues among the judiciary, it may be appropriate to consider whether some form of advisory committee involving qualified legal advisors and potentially PVR owners could be formed to support decision-makers where cases do arise.
	As noted above, Zespri considers it appropriate for both the District and High Courts to have jurisdiction to hear infringement proceedings (in the case of the District Court, where the quantum at issue is within the statutory threshold).
	Zespri agrees that the available remedies should include those proposed by MBIE. There is no reason, however, to restrict the remedies to those suggested, and the Act should continue to include the "granting of any other relief" as outlined in (section 17(4)). This ensures that the relief available under the Act can adapt to changing circumstances and that it will be effective in a wide range of cases.
	The Act should also continue to require the Court to take the following factors into account when awarding damages (including exemplary damages) or granting other relief (section 17(4)(b)) as outlined below: - any loss suffered or likely to be suffered by the PVR owner as a result of that infringement; and - any profits or other benefits derived by any other person from that infringement; and - the flagrancy of that infringement.
	Zespri also considers that the Act should explicitly provide for the Court to make orders regarding the destruction or disposal of goods/material resulting from or used in infringing activity, which is the case under the Canadian Plant Breeders Rights Act SC 1990 c 10.
	Enforcement – offences
19	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?
	Zespri does not support the repeal of the offence provisions. Such a repeal would send the wrong message to potential infringers and greatly reduce the deterrent power of the Act. It would also bring New Zealand out of line with the UK, Australia and Canada, all of which have offence provisions in their PVR legislation.
	Rather, Zespri supports the adoption of the approach taken by the Australian Plant Breeders' Rights Act 1994 (Cth), which: - provides that the unauthorised exercise of a PVR owner's exclusive rights amounts to an infringement offence, punishable by a fine (section 74); and - provides for various offences other than infringement offences, punishable by fines and/or terms of imprisonment (section 75).
	That the same conduct may give rise to either civil or criminal liability is an established principle of New Zealand law, reflected in (amongst others) the Fair Trading Act 1986.

	As to the nature of the "other" offences (i.e. beyond the infringement of exclusive rights), Zespri supports the retention of those listed in current section 37, which are similar (and in many cases identical) to the offences provided for under the UK, Australian and Canadian PVR legislation.
	While, potentially, proceedings in respect of the offences could be brought under the Fair Trading Act 1986, Zespri considers that the existence of a specific criminal liability regime under the Act, with high minimum penalties (discussed below) is likely to have a far greater deterrent effect, and increase the likelihood of prosecution. Parliament frequently enacts criminal prohibitions in similar circumstances (see, for instance, section 19 of the Financial Markets Conduct Act 2013).
	As to penalties, Zespri considers that they should be equivalent to those contained in the Australian Plant Breeders' Act 1994 (Cth) which range from fines of around AU$12,000 to terms of six months' imprisonment. Such penalties reflect the serious nature of the offending and are more likely to have a deterrent effect. The Court should also have the power to order delivery and destruction of infringing material in criminal proceedings under the Act.
	Zespri supports the introduction of border enforcement measures similar to those available under the Trade Marks Act 2002 and the Copyright Act 1994. These allow owners to file notices with NZ Customs requesting the detention of potentially infringing material at the border.
20	**Exhaustion of the breeder's right** Do you have any comments about the exhaustion provision required by UPOV 91?
	Zespri supports the inclusion of the exhaustion provision, subject to the comments above in relation to harvested material.
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?
	Zespri supports the proposals in respect of cancellation and nullification of the breeder's right.
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?
	Nothing to add.
23	**Provisional protection** Do you agree with our preferred option for dealing with provisional protection? If not, why not?

	Zespri submits that the status quo is appropriate, as there can be lengthy timeframes between the time of application and the time of grant which could leave a PVR owner unprotected for a period of time. As an example, the destruction of the central kiwifruit testing site by Psa in 2011 resulted in all kiwifruit PVR applicants having to re-establish test sites and start over with DUS (Distinctness Uniformity and Stability) trials. This resulted in a five-year window between the time of application and the eventual grant of PVR for kiwifruit varieties, during which some of those varieties were extensively planted in New Zealand.
	Similarly, Zespri has from time to time experienced delays in being able to conduct DUS testing in other overseas jurisdictions due to factors out of Zespri's control (some examples include test material which has been affected by climatic conditions or quarantine periods for test material or required comparators affecting the timing of commencement of testing). Further, being unable to enforce the PVR rights could leave a PVR owner vulnerable to significant loss of rights through infringing activity which ceases before the grant. For example, where protected plant material is misappropriated or disseminated offshore at a scale which significantly complicate enforcement for the PVR owner at the time of grant. Recognising that an alleged infringer could have to fund a defence to a potentially unsuccessful claim, this is no different from the situation that currently exists in all litigation where a defendant has to expend resource to defend a claim even where they know it is unfounded. Further, as the PVR owner would also have to incur cost to take the action, Zespri submits that most PVR owners are unlikely to launch speculative infringement proceedings.
	It is not clear why in the case of PVRs, the position of a potential infringer should be preferred over a legitimate rights holder in the absence of significant evidence that (a) many PVR applications are made which subsequently don't get granted; or (b) many PVR owners take spurious claims against potential infringers.
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?
	Zespri supports Option 1 for the transitional provisions. This is on the basis that having different rights and obligations applying to different varieties would create material complexity for breeders and confusion for the users of those varieties. In the case of kiwifruit, Options 2 or 3 could result in a grower having different licence terms and PVR rules applying to different parts of their orchard which would create complexity both for growers and Zespri.
	Zespri submits that any complexity associated with activity which could "become" infringing on introduction of the new Act could be managed through a transitional grace period. This would allow the relevant activity to become subject to a licence and/or cease. An alternative may be to have some kind of grandfathering provision that applies to activities which were already underway at the time of the transition, as occurred with the Kiwifruit Export Regulations when they were amended in 2017.

Other comments