# Submission template

## Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues

### Instructions

This is the template for those wanting to submit by Word document a response to the *Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues* discussion document.

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised by 5pm on Monday, 21 September 2020. Please make your submission as follows:

1. Fill out your name and organisation in the table, "Your name and organisation".
2. Fill out your responses to the discussion document questions in the table, "Responses to discussion document questions". Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. If you would like to make any other comments that are not covered by any of the questions, please provide these in the "Other comments" section.
4. When sending your submission, please:
    a. Delete this first page of instructions.
    b. Include your e-mail address and telephone number in the e-mail accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
    c. If your submission contains any confidential information:
        i. Please state this in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.
        ii. Indicate this on the front of your submission (eg the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).

    Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 1993 also applies.
5. Send your submission as a Microsoft Word document to ***PVRActReview@mbie.govt.nz***

Please direct any questions that you have in relation to the submissions process to ***PVRActReview@mbie.govt.nz***.

# Submission template

## Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues

### Your name and organisation

| | |
|---|---|
| [redacted] | [redacted] |
| [redacted] | [redacted] |
| **Organisation/Iwi** | AJ Park |

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

☒ The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at ***www.mbie.govt.nz***. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE's website because… [Insert text]

### Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because… [Insert text]

## Responses to questions in the discussion document

### Treaty of Waitangi issues

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| 1 | **Definitions**<br>Do you agree with our proposed definition of 'indigenous plant species'? If not, do you have an alternative to propose? |
| | *[Insert response here]* |
| 2 | **Definitions**<br>Do you agree that 'non-indigenous species of significance' be listed in regulations and that the list reflect the table above? If not, why not? Are there species that should be on that list that are not? |
| | *We agree that a list of non-indigenous species of significance should be included in the regulations. It will help to provide certainty for all participants.* |
| 3 | **Disclosure obligations and confidentiality**<br>Are there any confidentiality considerations in relation to the additional information required under the new disclosure obligations? If so, how should this information be treated? |
| | *Information provided by a breeder to the Māori PVR Committee (and anyone they consult with) must be treated as confidential. For some new plant varieties, this will be the first disclosure of the variety by the breeder. This is important because a prior public disclosure can prevent a new variety from being protected in some jurisdictions, e.g. the US.*<br>*Information regarding the variety must be kept confidential until an official application is lodged, and the new variety becomes a 'variety of common knowledge'. If, after engagement with the Māori PVR Committee, the breeder decides not to make a PVR application, details of engagement should be kept confidential to ensure the new variety does not become a variety of common knowledge.* |
| 4 | **Māori Advisory Committee - appointments**<br>Do you agree with the proposal to change the name of the Committee to the 'Māori PVR Committee'? If not, do you have any other recommendations? |
| | *[Insert response here]* |
| 5 | **Māori Advisory Committee - appointments**<br>Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose? |
| | *[Insert response here]* |

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| 6 | **Māori Advisory Committee - appointments**<br>Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose? |
| | *[Insert response here]* |
| 7 | **Māori Advisory Committee – decision making processes**<br>Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not? |
| | *[Insert response here]* |
| 8 | **Māori Advisory Committee – decision making processes**<br>Are there any additional factors that should be added to the list of relevant considerations? |
| | *[Insert response here]* |
| 9 | **Māori Advisory Committee – decision making processes**<br>Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not? |
| | *[Insert response here]* |
| 10 | **Māori Advisory Committee – decision making processes**<br>Do you agree that the Committee should be required to reach a unanimous decision and only in the event that, despite all efforts, a decision cannot be reached can the Chair of the Committee allow a decision to be made by either a consensus or a vote (Option 3)? If not, why not? |
| | *[Insert response here]* |
| 11 | **Māori Advisory Committee – decision making processes**<br>Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose? |
| | *[Insert response here]* |
| 12 | **Post-determination considerations**<br>Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose? |
| | *We support the inclusion of a review option that would be cheaper and quicker than judicial review by the High Court.* |
| 13 | **Post-determination considerations**<br>Do you have any thoughts about either the timeframe for initiating this first stage review or the proposal of adding a person to the Committee when they are reviewing a determination, and who might be appropriate? |

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| | *A fixed time frame for reviewing a decision would be desirable and would help applicants to meet the novelty requirement for PVR applications that are set by UPOV. This issue is expanded on below in the 'other comments' section. The suggested 14-day review period should be sufficient for initiating a non-Court review process.* |
| 14 | **Post-determination considerations**<br>Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not? |
| | *See answer to question 13.* |
| 15 | **Post-determination considerations**<br>What do you think is an appropriate timeframe for an aggrieved party to notify Commissioner and the Committee of their intention to seek judicial review? |
| | *20 working days from official notification of a decision would be appropriate timeframe.* |
| 16 | **Post-determination considerations**<br>Do you agree with our preferred option and process for objections after grant in relation to the kaitiaki condition (Option 2)? If not, why not? Is there an alternative you wish to propose? |

*We assume that grants made before the new Act comes into force will only be subject to challenge on the grounds set out in the PVR Act 1987.*

*While knowingly providing false information to the PVR Office to avoid having the application considered by the Committee should be a ground for cancellation, there may be occasions where a simple mistake or omission was made. In those circumstances cancellation would be a disproportionate penalty.*

*If the consequence of a mistake is cancellation of the right, applicants will be disincentivised from voluntarily providing additional/better information that may come to light after they file their application. This is especially true as the scope of information required for new applications may take some time to become standard practice for PVR applicants. For example, it can take several years to develop a new variety and the first applications to be filed under the new PVR Act are probably already in development. The breeders of these varieties will be collecting information about the parent varieties consistent with the current law and UPOV guidelines, but they may not have access to the historical breeding records of the parent varieties and so may not realise that an indigenous variety was involved in the development of the variety. It would seem in the interests of all parties to allow this information to be added if it later came to light.*

*We note that under the Patents Act applicants and patentees are able to correct a number of mistakes that are discovered after filing without automatically ending the grant, subject to the Commissioner's discretion. A similar approach could be taken with PVRs, e.g. the applicant must show no undue delay between discovering the error and correcting the mistake.*

*We strongly oppose introducing a process that involves cancelling and subsequently restoring a variety. A third party should be entitled to rely on the PVR Register, and under e.g. the Patents Act there is recognition of the rights of intervening users (see section 124(2)). This is of particular concern for PVRs because there are no rights in harvested material for legally obtained plants. This means that if plants were acquired by a third party during the period a PVR was cancelled, the owner of the PVR would have no ability to stop the sale of fruit of those varieties, even if the kaitiaki condition was met and the PVR was restored.*

*We suggest that a variety that was inadvertently not referred to the Committee could be marked as "under review" and only cancelled if the Committee decides the kaitiaki condition is not met. We note that similar statuses are used on the register to show patent applications that have been accepted but are under opposition.*

## Operational issues

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**Information available to the public**

What are your views of the problem identified by MBIE?

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| 18 | **Information available to the public**<br><br>What do you think about the options outlined by MBIE? What would be your preferred option and why? Are there other options that could be adopted? |
| | *We do not take a position on the options presented by MBIE. In general, we agree that each of options 1-3 has the advantages and disadvantages identified in paragraphs 118-127.*<br><br>*In addition to the points presented in the discussion paper, we note that having parent plants of new varieties identified would make it easier for the Commissioner and other PVR rights holders to monitor new varieties coming onto market and identify any essentially derived varieties.*<br><br>*We also consider that option 3 may encourage participation with the PVR process, as if an application is not successful, the breeding information will remain confidential and the breeder won't have risked disclosing confidential breeding information without receiving the corresponding IP protection.* |
| 19 | **Information available to the public**<br><br>If you support Option 3 what timeframe would you suggest for the information to be made public and why? |
| | *If option 3 is selected, we believe it would be appropriate to disclose the information only if a PVR is granted and the new variety is protected.]* |
| 20 | **Supply of plant material in relation to a specific application**<br><br>Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why? |

*Based on our interactions with our clients, there can be considerable problems with meeting a request to supply plant material. They key issue appears to be a lack of space in the New Zealand quarantine facilities. Applicants are regularly having to request 12-month extensions (sometimes multiple in a row) as they keep being told there is no space in quarantine for the plant material requested by the Commissioner. At the start of this year, the next available quarantine space was in 2025, and was severely limited. This leads to significant delays for both the DUS trial for that PVR application, and third party trials where the variety has been identified as a comparator plant.*

*This is especially a problem for vegetatively-propagated varieties, although supplying seed can also be difficult due to biosecurity requirements, and postal system issues, e.g. the Covid -19 situation has caused significant postal disruption worldwide.*

*We believe it should be possible to file all applications without plant or seeds, and only have to supply these upon request. Delaying filing of an application until plant material is available is not an option for many applicants due to the global novelty deadlines imposed by UPOV. These UPOV deadlines cannot be moved.*

*We would also like for the Commissioner to have flexibility to set a longer deadline for providing plant material given that there is currently no quarantine space available for several years.*

**Provision of propagating material for comparison and reference purposes**

What are your views of the problem identified by MBIE?

*We propose to answer Q20 and 21 together, across both boxes.*

*We understand that providing material for comparison trials is a fraught issue. We agree that IPONZ should have express powers to request plant material for the purpose of comparison trials. However, these powers need to balance the need for timely DUS trials with the challenges of quarantine space/working with live material. For example, when there is only limited quarantine space, is it fair to require applicants to prioritise bringing in plant material for a competitor's trial over the plant material they need for their own application?*

*As we discuss above, delaying making an application until plant material is available in New Zealand is not an option due to UPOV novelty requirements. However, as soon as an application has been filed, IPONZ is free to cite that variety as a variety of common knowledge and require it to be included in comparator trials. This results in a disconnect in the system as IPONZ can require an applicant to supply plant material for competitors trials years before that material will be available in NZ. This then delays the trials and grant of applications and frustrates all users of the system. This is compounded by IPONZ often requiring several comparator plants in a trial. In contrast, overseas trials often include only the closest variety as a comparator.*

*We believe some of the problems with the current system could be mitigated if IPONZ used photos and/or a written description of a comparator variety to complete their assessment. We suggest giving the Commissioner the power to ask for additional information about a comparator variety so enable "paper" assessments to take place. We also submit that if a provision requiring applicants to supply comparator plant material is included in the legislation, there should be a corresponding provision giving the owners of the comparator variety the option to distinguish their variety. i.e. to present information to IPONZ to show that it is not a relevant comparator. Growing under local conditions is becoming less relevant as e.g. greenhouse growing becomes common practice.*

*We acknowledge that some owners of comparator varieties can be reluctant to supply plant material to competitors, especially if it is of a variety without a granted PVR. If provision of plants is required, there must be clear legislative provisions setting out what the plant material will be used for, who will have access to it, how confidentiality will be maintained, and what will happen to it once the trial is over, and providing penalties for breaches. This would give parties confidence about what can happen with their material, especially as questions about the extent of provisional protection have been raised by the European Nadorcott decision.*

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| 22 | **Provision of propagating material for comparison and reference purposes**<br><br>Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why? |

*This is a continuation of our answer to Q21*

*[We have several concerns about requiring applicants to supply material for a reference collection.*

*We note that the New Zealand market is small and that the entities best placed to maintain a reference collection are also likely to be involved in commercial breeding activity. For example, we understand that IPONZ maintains an informal reference collection for some plant types, and that while this collection is nominally under IPONZ control, the physical collection is maintained by a third party that is also involved in commercial breeding activity. While there is no suggestion that this collection has been used inappropriately, this lack of independence has made other applicants reluctant to voluntarily supply reference material. If a reference collection is to be established, we submit it must be run by an independent party, in fact as well as in name.*

*Our experience with reference collections in other jurisdictions is that they require careful management to ensure that the plants appropriately express their distinguishing characteristics. There are also problems when reference plants die as the rights holder may need to re-import plant material. Sourcing appropriately secure land and maintaining the plants and facility will have associated long term costs. We question whether the additional costs and complexity introduced by a reference collection would be worthwhile.*

*For both reference collections and comparator varieties, we note that valuable proprietary information can be obtained by observing reference/comparator plants, for example, the grower could see which varieties are particularly suited to certain weather, or that display certain characteristics that are not in the UPOV technical questionnaire. It would also provide information about the commercial path a competitor is taking. In these circumstances, merely asserting that the plant material is under the control of IPONZ when used for trials/in a reference collection is not sufficient to safeguard the interests of the variety owner. In particular, we do not consider that the current IPONZ practice note provides sufficient protection for applicants. We comment on this further below.*

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| 23 | **Provision of propagating material for comparison and reference purposes**<br><br>Do you agree that if material is not provided lapse or cancellation could occur? Can you think of other ways to enforce this requirement? What is the appropriate timeframe? |
| | *We believe that identifying an appropriate time frame is currently difficult, due to the ongoing issues with quarantine space. If an applicant has not yet managed to get quarantine space for their variety to begin their own trial, penalising them for failure to provide comparator plant material of the same variety seems unfair.*<br><br>*If the plant material is already in the country then providing material will be less of an issue. But again, we point out that plants are living things, and factors such as plant type and seasonal growing requirements are relevant. It is unreasonable to require applicants to grow physical plants for all their varieties for the life of the PVR in case they may be required to supply propagating material at short notice.*<br><br>*We also note that note that storage and supply of plant material is not necessarily a simple exercise. For example if seed is required, it may be necessary to grow plants and harvest more seed. Vegetatively propagated varieties are often stored as tissue culture and again it can take considerable time and expense to propagate plants for supplying to third party trials. Combine these circumstances with the need to grow plants in a particular season and the possibility that, even with due care, plants may become infected or infested with parasites or die due to weather events, and it becomes clear that a high degree of flexibility is required when it comes to deadlines, especially if cancellation is the price for failure to comply.*<br><br>*We note that jurisdictions that do require plant material to be kept for the life of the PVR allow it to be stored as e.g. tissue culture, and accept that there will costs and delays associated with preparing propagating material from the tissue culture.* |
| 24 | **Should growing trials be optional or compulsory?**<br><br>What are your views of the problem identified by MBIE? |

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| | *We have not noticed the problem identified by IPONZ. We agree that the current wording implies that growing trials may be optional, and we think that the status quo should remain to provide the office with flexibility.* |
| 25 | **Should growing trials be optional or compulsory?**<br>Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why? |
| | *We think that in cases where the applicant can provide information that satisfies the Commissioner that a variety meets DUS requirements, then the Commissioner should have the discretion to grant the PVR without a growing trial. We acknowledge that these circumstances may be limited, but in cases where the legal tests are met, the system should be sufficiently flexible.* |
| 26 | **Who should conduct growing trials?**<br>What are your views of the problem identified by MBIE? |
| | *[Insert response here]* |
| 27 | **Who should conduct growing trials?**<br>Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why? |
| | *[Insert response here]* |
| 28 | **Trial and examination fees**<br>What are your views of the problem identified by MBIE? |
| | *[Insert response here]* |
| 29 | **Trial and examination fees**<br>Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why? |
| | *We agree that the payment of trial and examination fees should be linked to the timing of the trial.* |

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| 30 | **Trial and examination fees**<br>What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3? |
| | *Two months, this would be consistent with the time provided to patent applicants after a direction to request examination is issued.* |
| 31 | **Hearings and appeals relating to decisions of the Commissioner of PVRs**<br>Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the *Patents Act 2013*. If not, why? |
| | *Yes, we agree.* |
| 32 | **Hearings and appeals relating to decisions of the Commissioner of PVRs**<br>What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why? |
| | *For consistency with other IP regimes, we consider that appeals to decisions of the Commissioner should be to the High Court.* |

## Other comments

We have a few additional points we would like to make in response to the discussion document.

### International novelty requirements

Firstly, we want to reiterate the significance of the novelty requirements set by UPOV. These require applications to be **filed** within 12 months of the first commercial use of a variety in New Zealand or within four years of the first commercial use overseas (six years for trees/vines). If this filing deadline is not met, then an application can be rejected by IPONZ for lack of novelty. Lack of novelty is also a ground for challenging a grant. Separate to the UPOV novelty requirements, to obtain a US plant patent for a vegetatively propagated variety, the US patent application must be filed prior to any disclosure of the variety or claim priority to an earlier application that predates the disclosure.

These strict novelty requirements must be kept in mind when setting other deadlines and timeframes. For example, when setting deadlines for providing plant material for comparator trials or for engagement with the Māori PVR Committee. Overall, New Zealand is required to align with UPOV91 as much as possible. Unless MBIE wishes to introduce changes to the novelty requirements to allow for possible delays caused by the required engagement process, a time frame for decisions from the Māori PVR committee

should be provided, alongside options for progression when a decision is not reached within the required period. This will give applicants more certainty about when they must initiate engagement to allow them to still meet novelty requirements for their variety.

We consider that applicants should be allowed to submit their application to IPONZ before engaging with the Māori PVR Committee and have the kaitiaki condition assessed once a filing date has been established. This would ensure that an application falls within the deadlines for novelty and keep our system consistent with UPOV91. While we recognise that early engagement would be preferable, there are good reasons why an application may need to be filed pre-engagement, e.g. the filing date provides priority for assessing distinctiveness. Any delay in obtaining a New Zealand filing date means the PVR may ultimately be invalid if a third party variety with the same characteristics is filed in the intervening period.

In our experience applicants, especially those overseas who will be unfamiliar with the new PVR system proposed for New Zealand, diary the UPOV convention four/six year deadline. They typically instruct us very close to these deadlines. Adding in the additional time required for consultation with a Māori PVR Committee could cause applicants to miss these novelty deadlines and therefore prevent them from obtaining a PVR in New Zealand. In the absence of a PVR, those applicants are unlikely to go to the time and expense of importing the variety into New Zealand (a result of our strict biosecurity requirements). New Zealand will therefore miss out on the benefits of these varieties.

Any deadlines regarding the supply of plant material should also not disadvantage applicants that need to import plant material. As noted above in the section relating to trials and reference collections, applicants are required by the novelty requirement to file in New Zealand several years before they will be able to obtain space in quarantine to import their variety. While we understand the resulting delays are frustrating for IPONZ and New Zealand based applicants, the cause of this problem, and the solution, primarily lies with MPI.

Costs

It is widely accepted that the fees charged by the PVR office will need to be increased to allow them to cover their operating costs. Our concern is how the operating costs of the new Māori PVR Committee will be covered. At the time of this submission, it is unclear how this additional consultation is to be funded.

We do not support the extra cost of applications concerning taonga species being included in the fees for applications where the kaitiaki condition is not at issue. If the costs for this extra consultation process are applied to all applications, we believe this will act as a deterrent for breeders to engage with the PVR system.

A further issue we have identified is around when payments or fees relating to taonga species should be made. If breeders are encouraged to engage with the Māori PVR Committee and kaitiaki before filing, will there be a pre-filing fee to cover this consultation process? It is possible that a breeder may not seek a PVR after engaging with the Committee, so relying on application fees alone is unlikely to fairly allocate the costs of the system.

**Triggers for assessment by the Māori PVR Committee**

One issue that has been raised in various PVR review forums, but not addressed in any of the official discussion documents, is the scope of the terms indigenous species and non-indigenous species of significance. Two particular circumstances may raise issues, these are applications from overseas applicants for indigenous varieties that are not endemic to New Zealand, and hybridised varieties.

As an example of the first situation, consider Ti pore, which is listed as a non-indigenous species of significance. However, *Cordyline fruticosa* are native to several Pacific and Southeast Asian countries. Would an application for a *Cordyline fruticosa* from Australia, developed using plant material from the Philippines, be referred to the Māori PVR Committee because of the variety type? What if a New Zealand based breeder imported *Cordyline fruticosa* plant material from overseas and used that imported plant material to create a new variety?

For the second situation, an example would be if a taonga species is used to create a new variety (variety 1) and then this new variety is used to create a further variety (variety 2) by crossing with a non-taonga species, will variety 2 be a taonga species? We understand that some participants in the recent hui consider that once a taonga species has been involved in the creation of a variety, all subsequent varieties using that hybrid are also taonga species. If this view is adopted for the PVR Act we think additional consideration will need to be given the disclosure requirements in the PVR Act. There is a long history of breeding using plant material from New Zealand and it is not uncommon for breeders to have limited information about the parent varieties, let alone be able to trace the pedigree of the variety back several generations. This is an important issue given that MBIE currently proposes that failure to provide information sufficient to identify a taonga species will result in the cancellation of the grant.

We take no position on whether it would be appropriate for these types of varieties to be subject to review by the Māori PVR Committee. However, we think all users of the PVR system would benefit from clarity around the approach IPONZ will take in these circumstances, especially as cancellation is being proposed as a consequence for failure to have an application approved by the Māori PVR Committee.

## IPONZ policy on plant material ownership

We note that the discussion document refers to the current IPONZ policy on plant material ownership. While this is IPONZ policy, we do not believe that this policy is sufficient for protecting the interests of users. As discussed above in the section on comparators and reference collections, there is a significant difference between IPONZ saying "the plant material is ours, third parties are merely custodians" and the reality of providing plant material to competitors. Even incorporating this policy into the legislation would not resolve the underlying concerns of applicants. In particular, there is no protection for the information that a competitor is able to obtain by observing a comparator variety.

If IPONZ wishes to continue with the current policy of being an absentee "custodian", we strongly believe there is a need to strengthen the pre-grant rights available to applicants and extend protection to cover harvested material.