

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/lwi	T&G Global Limited

[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

1	Definitions
	Do you agree with our proposed definition of 'indigenous plant species'? If not, do you have an alternative to propose?
	<i>While the concept of what an indigenous plant species may be is understood, there is no clarity as to what it might be argued to include in the future. Like with 'non-indigenous species of significance', there should be a clear list.</i>
2	Definitions
	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?
	<i>Yes, there needs to be a list to provide any certainty regarding this. There must also be a clear basis for determining (and challenging the determination) of what gets added to the list]</i>
3	Disclosure obligations and confidentiality
	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?
	<i>Ultimately this turns on where the legislation lands on 'indigenous plant species' and 'non-indigenous species of significance' as the changes only relate to those categories. The confidentiality conditions / approach should be consistent. The Maori PVR Committee should be bound by the obligations.]</i>
4	Māori Advisory Committee - appointments
	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?
	<i>Yes</i>
5	Māori Advisory Committee - appointments
	Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose?
	<i>Yes</i>
6	Māori Advisory Committee - appointments
	Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose?
	<i>Yes]</i>

7	<p>Māori Advisory Committee – decision making processes</p> <p>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?</p>
	<p><i>The potential to review Māori Advisory Committee decisions should not be limited to judicial review – there should be a right of appeal on decisions</i></p>
8	<p>Māori Advisory Committee – decision making processes</p> <p>Are there any additional factors that should be added to the list of relevant considerations?</p>
	<p><i>The list should not be seen as exhaustive, all relevant considerations should be made as the context of each application is yet unknown</i></p>
9	<p>Māori Advisory Committee – decision making processes</p> <p>Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not?</p>
	<p><i>Yes support option 1</i></p>
10	<p>Māori Advisory Committee – decision making processes</p> <p>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?</p>
	<p><i>Given the potential significance of the resulting decision, it should be a unanimous vote. This is even more important if the decision is not open to appeal.</i></p>
11	<p>Māori Advisory Committee – decision making processes</p> <p>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?</p>
	<p><i>We support the principles behind Option 2 and note the concerns raised by MBIE related to this option in paragraph 74 of the Discussion Document.</i></p> <p><i>As worded, paragraph 74 appears to be legitimising the abandonment of intellectual property protection and kaitiaki engagement as an appropriate solution. We believe the legislation should not be drafted in a way that foresees or enables this type of outcome from the start, and should provide appropriate tools and mechanisms to enable Parties to come to an outcome that isn't simply 'walking away' or not securing PVR protection. Further to that, by legitimising the approach in paragraph 74 MBIE run the risk of undermining the Māori Advisory Committee from the outset.</i></p>
12	<p>Post-determination considerations</p> <p>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?</p>
	<p><i>Given the potential significance of the resulting decision, it should go to an IPONZ hearing</i></p>

13	Post-determination considerations
	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?
	<i>[The Māori Advisory Committee should have the ability to consider new information. There needs to be time limit on when a party can exercise the right to a first stage review also on when the party needs to supply the new information. We agree with the suggested 14 days to exercise the right to a stage review. In addition the Māori Advisory Committee should have a reasonable time limit on reporting their determination in order to give clarity to the Parties involved.</i>
	<i>We support the Māori Advisory Committee being empowered to have the right people on the committee to make appropriate decision.</i>
14	Post-determination considerations
	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?
	<i>Given the view that matters should go to a hearing, the timeline would be dictated by that process.</i>
15	Post-determination considerations
	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?
	<i>We would support a 20 working day period similar to Patents and other IP regimes.</i>
16	Post-determination considerations
	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?
	<i>[Option 3</i>

Operational issues

17	Information available to the public
	What are your views of the problem identified by MBIE?
	<i>As long as the information to be provided to public is in line with other jurisdiction's requirements then we do not see an issue. Being "different" would be a negative</i>
18	Information available to the public
	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?

In principle we support option 1, subject to understanding how and what information is planned to be made available. Absent that understanding, we would support Option 3, where information was kept confidential until grant. Ultimately it depends on what information is to be made available.

While currently this information is available to the public, it is not published, and only available through the Official Information Act 1982. This practice negates the potential advantage highlighted by MBIE in paragraph 119 of the Discussion Document.

In practice, Australia does not operate as outlined in paragraph 122

A potential issue is that 'Breeding history' can be interpreted to mean the parents and timing of breeding of the new candidate variety or it can be interpreted as the entire process, potentially including multiple generations, the latter often being considered trade secret. This trade secret information is of higher significance for some species than others, e.g. seed propagated species, and is part of the valuable intellectual property of those companies. Therefore, as MBIE have noted, could provide competitors with advantages that would otherwise not exist if the information was not made public. This would be a disincentive to parties bringing technology to NZ.

Information available to the public

19 If you support Option 3 what timeframe would you suggest for the information to be made public and why?

[If implemented, noting our above reservations relating to the depth and method of information to be made public, we would support the origin and breeding history being made public at the time of grant. This is in line with to several other countries e.g. in the Canada and Australia where the origin and breeding history information is included in the published description of the variety.

Supply of plant material in relation to a specific application

20 Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why?

We support the status quo.]

Provision of propagating material for comparison and reference purposes

21 What are your views of the problem identified by MBIE?

[Refer 22]

Provision of propagating material for comparison and reference purposes

22 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

[Broadly, we support Option 2 but that is dependent on what safeguards are put in place to protect the interests of the relevant parties.

Provision of propagating material for comparison and reference purposes

23 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?

[In principle T&G agrees. Given the high variability of plant material and many other factors outside the grant holders control, appropriate timeframes will need to be equally flexible to enable this approach to succeed.

T&G believes that parties who are compelled by the Office to provide plant material should be afforded the right to enter into an agreement with the party (including potential business competitors) receiving the plant material on behalf of the Office. Importantly, if an agreement is reasonably required by the variety owner to supply plant material to a third party under the provision, failure to agree to terms on the agreement should not be grounds to lapse or cancel the grant/application.]

24 **Should growing trials be optional or compulsory?**

What are your views of the problem identified by MBIE?

[We support Option 2]

25 **Should growing trials be optional or compulsory?**

Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

[We support option 2 but believe there should be an option for having the trials conducted elsewhere in the world.]

26 **Who should conduct growing trials?**

What are your views of the problem identified by MBIE?

We support the CPVO model. This would negate a number of the concerns raised in item 22 above

27 **Who should conduct growing trials?**

Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

[Option 4 IF trusted parties are used]

28 **Trial and examination fees**

What are your views of the problem identified by MBIE?

[See below]

29 **Trial and examination fees**

Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

[We support Option 3]

30 **Trial and examination fees**

What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3?

	<i>[We would support trial fees being paid before the start of the years' trial. If the trial is conducted over several years, we would support trial fees being paid each year before the trial for that season. We would support the examination fee being paid before the examination is carried out. We support the model under which the PVR Office currently operates]</i>
31	Hearings and appeals relating to decisions of the Commissioner of PVRs
	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 <i>Patents Act 2013</i> . If not, why?
	<i>Yes. This provides a consistency in approach.]</i>
32	Hearings and appeals relating to decisions of the Commissioner of PVRs
	What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why?
	<i>[High Court due to the potential significance of the outcome.]</i>

Other comments

It is very disappointing, particularly in this Covid environment and when there is a need and desire to make New Zealand (particularly primary industries) more attractive to investment in businesses that will help underpin the recovery of our economy, that previous submissions on other parts of the Plant Variety Rights Act have been all but ignored. The result is that other jurisdictions become more attractive to that investment and potentially increased reluctance to bring new varieties to New Zealand where the protections, for breeders and investors in those varieties, have been eroded further.