

Coversheet: Review of the Plant Variety Rights Act 1987

Advising agencies	<i>Ministry of Business Innovation and Employment</i>
Decision sought	<i>Approve the drafting of a new Plant Variety Rights Act 1987 (the PVR Act) to implement New Zealand's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)</i>
Proposing Ministers	<i>Minister of Commerce and Consumer Affairs</i>

SUMMARY: RIS UPDATE 15 SEPTEMBER 2021

The Plant Variety Rights Bill was introduced to Parliament on 11 May. Following first reading, it was referred to the Economic Development, Science and Innovation Committee.

Following submissions made on the Bill, three amendments have been made to this RIS:

1. We originally advised that decisions of the Māori Plant Varieties Committee¹ would only be subject to judicial review. Following consideration of submissions on the Bill, we now consider that these decisions should be subject to appeal. This change is reflected in a wording change on page 17.
2. We originally advised that the term of a plant variety right should remain at 20 years for all plants other than woody plants. Following consideration of submissions on the Bill, we now consider that the term for potatoes should be extended to 25 years. This issue is **Issue 3A** in the RIS. This change is reflected in the discussion of Issue 3A on pages 17-19, and in the options analysis table on page 37.
3. We originally advised that an 'essentially derived variety (**EDV**)' should be defined as a 'copycat' variety. Following consideration of submissions on the Bill, we now consider that the definition of an EDV should follow the wording in Article 14(5) of the 1991 revision of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**). This issue is **Issue 3B** in the RIS. This change is reflected in the discussion of Issue 3A on pages 19-22, and in the options analysis table on page 38.

¹ This is referred to in this RIS as the Māori Advisory Committee. Its name has been changed in the Bill to reflect the fact that it has a decision-making function.

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

Summarise in one or two sentences

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**)², which entered into force for New Zealand on 30 December 2018, requires New Zealand to either (i) accede to the 1991 Revision of the UPOV³ Convention (**UPOV 91**), or (ii) implement a Plant Variety Rights (**PVR**) regime that “gives effect” to UPOV 91. Specifically New Zealand can adopt:

“any measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another party.”

New Zealand must meet its obligations under within three years of the entry into force for New Zealand of CPTPP, that is, by 30 December 2021.

The PVR Act gives effect to New Zealand’s obligations under the 1978 Revision of the UPOV Convention (**UPOV 78**). Most of New Zealand’s trading partners, including Australia, Japan, the United States and the European Union are members of UPOV 91.

The Plant Variety Rights Act 1987 (**PVR Act**) provides for the grant of an intellectual property right (Plant Variety Rights, **PVR**) over new varieties of plants. The grant of a PVR gives plant breeders the exclusive right to produce for sale, and sell, propagating material of their new varieties. This provides breeders with an opportunity to make a return on their investment in developing new plant varieties. PVRs are granted after an examination process conducted by the Plant Variety Rights Office (**PVRO**). The PVR Act is now more than 30 years old. Local plant breeders argue that the PVR Act no longer provides an adequate incentive for them to develop new plant varieties, as it does not reflect the significant changes in the plant breeding industry since it was passed. They also argue that New Zealand is disadvantaged because it is not a member of UPOV 91.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

Summarise in one or two sentences

² The CPTPP is a free trade agreement involving 11 Asia-Pacific countries, including New Zealand, Australia, Brunei Darrusalam, Canada, Chile, Japan, Malaysia, Peru, Singapore, and Vietnam. See <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/>

³UPOV (Union Internationale pour la protection des Obtentions Végétales) is the French Acronym for the International Union for the Protection of New Varieties of Plants. The UPOV convention provides for the protection of new varieties by an intellectual property right commonly referred to as Plant Breeder’s Rights or Plant Variety Rights.

The Plant Variety Rights Act 1987 is not consistent with New Zealand's obligations under the CPTPP and must be amended to make it consistent.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Monetised and non-monetised benefits

Taken from the CPTPP National Interest Analysis February 2018

The exclusive rights provided to PVR owners under the PVR ACT are relatively limited compared with the enhanced rights required to be provided under UPOV 91. Plant breeders argue that this reduces the incentive for local plant breeders to develop new varieties for the New Zealand market, or for foreign breeders to allow their new varieties to be exploited in New Zealand. Local plant breeders argue that because of the relatively limited protection provided for new plant varieties in New Zealand there is a possibility that some would reduce or cease their breeding activities in New Zealand, or move offshore to jurisdictions where greater protection is provided.

The enhanced rights provided by UPOV 91 for PVR owners over their protected varieties may provide increased revenue for plant breeders, and, at least for local plant breeders may encourage them to increase (or at least continue) their plant breeding activities. They may also provide foreign plant breeders with a greater incentive to release their new varieties in New Zealand.

As a result New Zealand growers may gain access to a greater range of new varieties than would otherwise be the case. This may assist in retaining New Zealand's competitive position in world agricultural markets and contribute to New Zealand's economic development. Consumers may benefit from a greater availability of improved varieties of fruit and vegetables. Home gardeners may also benefit from the availability of a wider range of ornamental plants.

Additional comments in relation to the proposals for Treaty of Waitangi compliance

The intent of the proposals in relation to Treaty compliance is to provide protection for kaitiaki relationships with taonga species consistent with the Crown's obligations under the Treaty. The proposals implement the recommendations of the Wai 262 report, but also go further than this. Through our engagement with Māori during the review, the consistent message we heard was that early engagement with kaitiaki by breeders was central to meeting our Treaty obligations. Giving the proposed Māori advisory committee a role in facilitating this engagement should mean that kaitiaki will have an opportunity to be involved early in the breeding process leading to better protection for taonga species.

Where do the costs fall?

Monetised and non-monetised costs; for example, to local government, to regulated parties

Taken from the CPTPP National Interest Analysis February 2018

UPOV 91 is more prescriptive than UPOV 78. Accession to UPOV 91 may reduce some of the options available to the Government when deciding how respond to the recommendations of the Waitangi Tribunal's report on the WAI 262 claim in respect of indigenous plant varieties. As outlined above, Annex 18-A ensures that these options are preserved.

The enhanced exclusive rights provided for PVR owners under UPOV 91 may result in some increased costs for growers as they may have to pay higher license fees than is currently the case in order to use protected varieties, which may be passed on to consumers. These additional costs are unlikely to be large, though, as protected varieties would be competing with other protected varieties, as well as varieties that are no longer protected.

The extension of PVR owners' exclusive rights under UPOV 91 to varieties 'essentially derived' from a protected variety may impose some additional costs on plant breeders and may discourage some plant breeding activities. This is because many new varieties are developed from existing protected varieties. Under the extended rights, where a new variety is developed from an existing protected variety, the breeder of the new variety may have to pay a license fee to the owner of the PVR in the protected variety if the new variety is commercialised. This is not required under UPOV 78, or the PVR Act.

One of the mandatory exceptions to PVR required by UPOV 91 is an exception that means that private and non-commercial use of a protected variety would not infringe PVR in that variety (Art.15(1)(i)). The PVR Act contains a similar exception, for 'non-commercial' uses. This is broader than the exception in UPOV 91 which limits the exception to uses that are private and non-commercial.

The narrower UPOV 91 exception may mean that some existing non-commercial uses of protected varieties that do not infringe PVR under the PVR Act may infringe under the UPOV 91 exception, as the uses may not meet the requirement of being 'private'. Examples of this could be the use of protected varieties in community gardens, botanic gardens, or on road median strips. Even though these uses may be non-commercial, if they were considered 'public', royalties may need to be paid for the use of the protected varieties.

Additional comments in relation to the proposals for Treaty of Waitangi compliance

Under the proposals for Treaty compliance, some indigenous plant varieties that might previously have been granted a PVR might not get one, and this could impact breeders working with those varieties (which are mostly found in the ornamental sector). It is hoped that early engagement will mean that the likely impacts of a breeding programme involving indigenous plant species will be known at stage before the breeder has incurred too many costs.

The proposals will also mean some compliance costs for both Māori (in terms of time involved in engagement) and breeders. The PVR regime is funded from fees paid by applicants, and, though these proposals are likely to result in increased costs for IPONZ, these are able, at least for now, to be funded from within current baselines.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

There are two main risks identified with the proposals in the Cabinet paper:

- (1) New Zealand's international reputation in the plant breeding community as a result of not acceding to UPOV 91 – while the resulting regime is closely aligned with UPOV 91, meeting our Treaty of Waitangi obligations prevents full accession. Formally we remain a member of UPOV 78. New Zealand is likely to receive questions from other UPOV members as to how we can even remain a member of UPOV 78. We will work closely with UPOV during the drafting of new legislation and make it clear (i) how the new regime is compliant with UPOV 78, and (ii) how the new regime “gives effect” to UPOV 91 (as per our CPTPP obligation). We are working closely with MFAT to develop consistent messaging should questions be raised. We will also take every opportunity to reiterate New Zealand's commitment to the UPOV system and the highest standards of plant variety protection.
- (2) The proposals implement new procedures when kaitiaki interests in taonga species may be involved. These include incentives for plant breeders to engage early with kaitiaki through new disclosure requirements to accompany an application, the establishment of a Māori advisory committee to advise both breeders and the Commissioner of PVRs on kaitiaki interests, and the power for a PVR grant to be refused if kaitiaki interests are affected. This is a significant change for breeders and it is unclear how this will work in practice. It is intended that the Māori advisory committee will play a significant role in assisting breeders, including in developing guidelines for engagement with kaitaki. However, these changes are in line with those recommended in the Wai 262 report and are considered necessary to meet our Treaty obligations in the PVR regime.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

N/A

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?
<i>How confident are you of the evidence base?</i>
<p>MBIE commissioned the Sapere Research Group to undertake an independent analysis of the current state of the plant varieties innovation system⁴. In addition stakeholders, including Māori, Plant breeders and growers were invited to provide evidence regarding the state of the plant varieties innovation system in New Zealand.</p> <p>Though the analysis was qualitative rather than quantitative,⁵ we are confident that the evidence gives a good picture of how the PVR Act is working.</p> <p>Sapere found that:</p> <p><i>“...the balance between providing an opportunity for a plant breeder to obtain a reward for their effort in developing a new plant variety, and the benefits to growers and society from having access to new and improved plant varieties, has been reasonably well set.”</i></p> <p>They also heard from stakeholders who:</p> <p><i>“emphasised that the PVR system is starting to fray at the seam. New Zealand’s legislative settings are starting to introduce uncertainty, which will affect innovation if not addressed soon.”</i></p> <p>We also note the proposals for Treaty compliance are likely to create some uncertainty for breeders (especially in the early years of implementation), though we are unable to quantify the impact of this uncertainty. Questions such as what happens if a breeder can’t identify kaitiaki, or more than one kaitiaki – perhaps with competing interests are identified – are not answered. As noted above, it is intended that the Māori advisory committee will assist with these kinds of questions.</p>

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
MBIE.
Quality Assurance Assessment:
MBIE’s Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.
Reviewer Comments and Recommendations:

⁴ This study can be found at <https://www.mbie.govt.nz/dmsdocument/5885-what-is-really-driving-innovation-in-our-plant-based-sectors>

⁵ A more rigorous quantitative analysis was not an option in the time we had available. In addition, our focus was more on the relationship between our legislative settings and the functioning of the innovation system, including identifying other factors driving innovation beyond our ‘control’ (e.g. changes in industry structure over the years).

Impact Statement: Review of the Plant Variety Rights Act 1987

Section 1: General information

Purpose

The Ministry of Business Innovation and Employment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.

Key Limitations or Constraints on Analysis

Describe any limitations or constraints, for example:

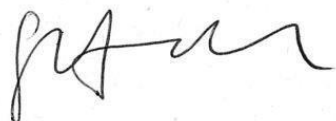
- *Scoping of the problem*
- *Evidence of the problem*
- *Range of options considered*
- *Criteria used to assess options*
- *Assumptions underpinning impact analysis*
- *Quality of data used for impact analysis*
- *Consultation and testing*

The content of this RIS has been informed by public consultation. This has included the release of an Issues Paper in September 2018, and an Options paper in July 2019. Regional hui, including both the public and iwi were held in October and November 2018 and two further hui held in April and August 2019.

The content has also been informed by a study conducted by the Sapere Research Group and commissioned by MBIE, into the current state of the plant variety innovation system in New Zealand.

A major constraint on the options analysis is the need for options to be consistent with the provisions of UPOV 91, and New Zealand's obligations under the CPTPP.

Responsible Manager (signature and date):



Susan Hall
Corporate Governance and Intellectual Property Policy
Building, Resources, Markets
Ministry of Business Innovation and Employment

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

Set out the context, eg:

- Nature of the market
- Industry structure
- Social context
- Environmental state, etc.

How is the situation expected to develop if no further action is taken? (This is the Counterfactual against which you will compare possible policy interventions in sections 4 and 5).

PVRs are a form of intellectual property right granted under the PVR Act. They provide plant breeders with the exclusive right to sell, and produce for sale, reproductive material (e.g. seeds or cuttings) of the variety concerned. This means that anyone who wishes to do these things with the variety must get the PVR owner’s permission. A variety that is protected by a PVR is referred to as a “protected variety”. It is not about rights over the harvested material, or produce, grown from the reproductive material.

The development of new plant varieties can involve considerable time and cost. In the absence of any exclusive right, it would be possible for any person to reproduce and grow new varieties without providing any compensation to the plant breeder. As result, there would be little incentive for local plant breeders to develop new plant varieties or for foreign plant breeders to release their new varieties in New Zealand.

PVRs make a significant contribution to economic performance in some significant sectors in New Zealand – in particular horticulture and pastoral crops. The development of gold kiwifruit by Zespri is one high profile example. New Zealand is also a world leader in the development of ryegrasses for the pastoral sector.

The provision of PVRs provides plant breeders with an opportunity to make a reasonable return on their investment in plant breeding. This provides an incentive for breeders to invest in the development of new plant varieties and for foreign breeders to release their new varieties here. PVRs, like other intellectual property rights such as patents and copyright, must strike a balance between the interests of plant breeders and society as a whole, such that there is a net benefit to New Zealand. If PVRs are too weak, plant breeders will not have sufficient incentive to invest in the development of new, innovative varieties. Foreign breeders may be discouraged from releasing their innovative new varieties in New Zealand. As a result, new Zealand could lose out on the economic benefits that flow from this innovation. On the other hand, if rights are too strong, costs, such as reduced competition, higher costs to consumers for harvested produce such as fruit and vegetables, and reduced incentive for follow-on innovation can outweigh the benefits.

Currently, the PVR Act makes no reference to the Treaty of Waitangi. The Wai 262 concluded that the Treaty requires that legislation (including the PVR Act) provide protection for kaitiaki interests in taonga species. Nearly all taonga species will be indigenous to New Zealand (though there are a handful of species that are not, e.g. kumara, and these are sometimes thought of as species that were brought to New Zealand on the migrating waka).

2.2 What regulatory system, or systems, are already in place?

- *What are the key features of the regulatory system(s), including any existing regulation or government interventions/programmes? What are its objectives?*
- *Why is Government regulation preferable to private arrangements in this area?*
- *What other agencies, including local government and non-governmental organisations, have a role or other substantive interest in that system?*
- *Has the overall fitness-for-purpose of the system as a whole been assessed? When, and with what result?*

In New Zealand, PVRs are granted under the PVR Act, which is administered by the Plant Variety Rights Office (**PVRO**), which is part of the Intellectual Property Office of New Zealand (**IPONZ**). IPONZ is a business unit of the Ministry of Business innovation and Employment (**MBIE**).

To be granted a PVR, a new variety must be new, distinct, uniform and stable. Compliance with these criteria is determined through an examination conducted by the PVRO, which involves growing the new variety in a growing trial. Once a PVR is granted, it must be kept in force by payment of annual grant fees. The maximum term of a PVR is 23 years for woody plants and their rootstock, 20 years for all others. At the end of the PVR term, or if the annual fee is not paid, the variety concerned enters the public domain and can be used by anyone.

New Zealand is a party to UPOV 78, and so is obliged to have a PVR system consistent with UPOV 78. Article 18.7 (supplemented by Annex 18-A) of the CPTPP requires New Zealand to either accede to UPOV 91 or “give effect” to UPOV 91. If New Zealand chooses to “give effect” to UPOV 91, we may only depart from the provisions of UPOV 91 to the extent found necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi.

A review of the PVR Act was carried out in the early 2000s. Although the review got to the stage of a draft Bill, the then government decided to put the review on hold until the release of the Waitangi Tribunal report on the WAI262 claim. This report recommended reform of laws, policies or practices relating to, among other issues, intellectual property. Subsequently the review of the Act was delayed until negotiations on the Trans-Pacific Partnership Agreement had concluded.

2.3 What is the policy problem or opportunity?

- *Why does the Counterfactual constitute “a problem”?*
- *What is the nature, scope and scale of the loss or harm being experienced, or the opportunity for improvement? How important is this to the achievement (or not) of the overall system objectives?*
- *What is the underlying cause of the problem? Why cannot individuals or firms be expected to sort it out themselves under existing arrangements?*
- *How robust is the evidence supporting this assessment?*

New Zealand is a party to UPOV 78, and so is obliged to have a PVR system consistent with UPOV 78. Article 18.7 (supplemented by Annex 18-A) of the CPTPP requires New Zealand to either accede to UPOV 91 or “give effect” to UPOV 91. If New Zealand chooses to “give effect” to UPOV 91, we may only depart from the provisions of UPOV 91 to the extent found necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi.

There is currently no reference to the Treaty of Waitangi in the PVR Act. The Wai 262 report *Ko Aotearoa Tēnei* made four recommendations for reform to the PVR Act to better reflect Māori interests in taonga species.

In addition, the PVR Act is now more than 30 years old and is in need of modernisation to reflect the significant changes in the plant breeding industry over this time. The PVR Act gives effect to New Zealand’s obligations under the 1978 Revision of the UPOV Convention. Most of New Zealand’s trading partners, including Australia, Japan, the United States and the European Union are members of UPOV 91.

In changing our PVR regime to meet our CPTPP obligations, there are a number of issues which will need to be considered:

Issue 1: How do we meet our obligations under the CPTPP in relation to UPOV 91? The key question insofar as CPTPP is concerned is ‘what measures are deemed necessary to meet our obligations under the Treaty of Waitangi?’ Once these are established, the question then is ‘are these measures consistent with UPOV 91?’ If so, New Zealand can accede to UPOV 91, if not New Zealand can “give effect” to UPOV 91.

Issue 2: Treaty of Waitangi compliance. Cabinet agreed that the review of the PVR Act would include consideration of the four recommendations on PVRs in the Wai 262 report. We have taken these as starting point for considering Treaty compliance, but have been open throughout the review to additional issues raised by Māori. The four Wai 262 recommendations are:

- The Commissioner of PVRs be empowered to refuse a grant that would affect the kaitiaki relationship;
- The Commissioner of PVRs be supported by a Māori advisory committee;
- A definition of ‘breed’ be included to clarify that a plant simply discovered in the wild would not be eligible for a PVR;
- The Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community including Māori.

Aligning the regime with UPOV 91

Whether or not we choose to accede to UPOV 91, or “give effect” to it without accession, we are still required by the CPTPP to align our PVR legislation with UPOV 91. Some provisions of UPOV 91 give us little, if any flexibility as to how they are implemented (such as definitions of key terms and the exclusive rights granted to PVR owners in their new varieties). These provisions are not discussed in this RIS.

Other provisions of UPOV 91 give us some flexibility in how we implement them. Options to implement these provisions are set out below. For the purposes of this analysis, the PVR regime can be broken down into the following main components:

- a. **Scope of the right** – i.e. what acts does the right cover, and what acts are specifically excluded from coverage?
- b. **Compulsory licenses**- i.e. what protections are there for users of varieties protected by PVRs against unfair practices by PVR owners?
- c. **Enforcement**- i.e. how can PVR owners enforce their exclusive rights when they are infringed?

Issue 3: Scope of Rights. This sets out the extent of the exclusive rights granted to PVR owners. Some areas are prescribed by UPOV 91 and there is no flexibility about their implementation. There is policy flexibility around:

3A the term of the right – this refers to how long the right lasts

3B how to implement the provisions regarding “essentially derived varieties” (EDVs) – this is a new concept introduced in UPOV 91. This captures the situation where a breeder creates a new variety that retains the essential characteristics of the original variety, and provides the breeder of the original variety with some rights over the derived variety. The intent is to recognise the work of the breeder of the original variety. For example, a breeder may notice a mutation in an apple and develop a new variety from this mutation. The settings around EDVs will determine the circumstances under which the breeder of the initial apple variety will retain some rights over the new variety.

3C whether or not, and to what extent, to extend PVR owners’ exclusive rights to material harvested from their new varieties (and products made from this material) – this issue is about how far rights should extend to the products that are grown or derived from the original reproductive material. Should they extend to the apples grown? Or a pot pourri made from protected flower varieties? And, if so, under what circumstances?

3D how to address the use of saved seed of protected varieties to grow another crop (farm saved seed) – this issue concerns the traditional practice of farmers saving seed from one season’s crop to plant the next season’s crop. If the original crop is grown from a protected variety, should the owner of that variety have rights over the seed that farmers subsequently save?

Issue 4: Compulsory licenses. MBIE’s proposals relate primarily to clarifying the current provisions and aligning them as appropriate with compulsory license provisions in other intellectual property legislation, in particular the *Patents Act 2013*. Compulsory licences are a mechanism whereby the Commissioner can force a PVR owner to licence their protected variety to another party (under certain circumstances) if there is a public interest to do so. One example might be if the PVR owner is not making sufficient quantities of their protected variety available at a reasonable price.

There are two issues where options for change are considered:

4A The “grace period” – this is the period following grant of a PVR in which a compulsory license application cannot be filed.

4B Section 21(3) – this refers to the provision in the PVR Act that requires the Commissioner of Plant Variety Rights to ignore propagating material of a protected variety that was made available only on the condition that produce is sold to a specified person or entity.

Issue 5: Enforcement. There are two sub-issues:

5A Infringement provisions – Infringements of PVRs are considered a civil matter to be resolved directly between the parties. MBIE proposes a number of changes in address to issues around clarity of the current provisions raised by stakeholders.

5B Offences – the PVR Act provides for a number of offences (mainly relating to false representation, or provision of false or misleading information). The current framework is dated and not utilised.

2.4 Are there any constraints on the scope for decision making?

- *What constraints are there on the scope, or what is out of scope? For example, ministers may already have ruled out certain approaches.*
- *What interdependencies or connections are there to other existing issues or ongoing work?*

New Zealand is a party to UPOV 78, and so is obliged to have a PVR system consistent with UPOV 78. Article 18.7 (supplemented by Annex 18-A) of the CPTPP requires New Zealand to either accede to UPOV 91 or “give effect” to UPOV 91. If New Zealand chooses to “give effect” to UPOV 91, we may only depart from the provisions of UPOV 91 to the extent found necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi.

Cabinet also agreed that the review of the PVR Act would take account of the recommendations of the Waitangi Tribunal in its report on the Wai 262 claim [CAB-16-MIN-0423 refers].

2.5 What do stakeholders think?

- *Who are the stakeholders? What is the nature of their interest?*
- *Which stakeholders share the Agency’s view of the problem and its causes?*
- *Which stakeholders do not share the Agency’s view in this regard, and why?*
- *What consultation has already taken place and with whom?*
- *Does the issue affect Māori in particular? Have iwi/hapū been consulted, and if not,*

should they be?

- *If consultation is planned, how will this take place, with whom and when? If is not intended, why is this?*

The main groups who have an interest in the PVR regime are:

- Iwi/hapū (Treaty of Waitangi issues)
- Plant breeders, both local and foreign
- Distributors of new plant varieties (both locally and foreign bred) and products harvested from them in New Zealand
- Users of new plant varieties protected by PVRs, including farmers, orchardists and growers.

All of these stakeholders agree that the PVR Act needs to be reviewed.

Iwi and hapū consider that the PVR regime should take account of their interests in taonga species, and provide them with some say in whether or not PVRs should be granted over new varieties developed from taonga plant species.

Plant breeders, and distributors of new varieties and their harvested produce advocate that New Zealand should at the very least align with, and preferably accede to, UPOV 91. They argue that, compared with the status quo, this will provide enhanced incentives for the development of new varieties, and for foreign breeders to release their new varieties in New Zealand.

Growers are not opposed to alignment or accession to UPOV 91. Some argue that there is no shortage of new varieties in New Zealand. Others have expressed concerns that alignment or accession to UPOV 91 may increase the costs to them of growing new varieties protected by PVRs, without necessarily providing them with offsetting benefits.

Consultation included the release of an Issues Paper in September 2018, and an Options paper in July 2019. Regional hui, were held in October and November 2018. These hui included sessions with plant breeders and with local iwi. Two further hui were held in April and August 2019.

Section 3: Options identification

3.1 What options are available to address the problem?

- *List and describe the key features of the options. Set out how each would address the problem or opportunity, and deliver the objectives, identified.*
- *How has consultation affected these options?*
- *Are the options mutually exclusive or do they, or some of them, work in combination?*
- *Have non-regulatory options been considered? If not, why not?*
- *What relevant experience from other countries has been considered?*

As per the outline in Section 2.3, we group the options under the following five high-level issues:

- Issue 1 – How do we meet our obligations under the CPTPP in relation to UPOV 91?
- Issue 2 – Treaty of Waitangi compliance
- Issue 3 – Scope of Rights
- Issue 4 – Compulsory licences
- Issue 5 – Enforcement.

Issue 1 – How do we meet our obligations under the CPTPP in relation to UPOV 91?

Annex 18-A of the CPTPP gives New Zealand two options as to how we meet our obligations in relation to UPOV 91. We can either accede to UPOV 91 or “give effect” to UPOV 91. If New Zealand chooses to “give effect” to UPOV 91, we may only depart from the provisions of UPOV 91 to the extent found necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi.

The options were negotiated to ensure that New Zealand had sufficient domestic policy flexibility to meet its obligations under the Treaty of Waitangi.

Issue 2 – Treaty of Waitangi compliance

There are three components to the package of proposals for Treaty of Waitangi compliance. As previously discussed, we started with the recommendations of the Wai 262 report, but were clear that this was only a starting point and that we would listen to the views of Māori on what Treaty compliance looked like. The two key Wai 262 recommendations relevant here are:

- That the Commissioner of PVRs be empowered to refuse a PVR grant if kaitiaki interests would be affected
- That the Commissioner be supported by a Māori advisory committee when considering the impact of a PVR on kaitiaki interests.

Disclosure requirements

A key message we heard in our hui and submissions from Māori was that there would be considerable value from early, meaningful and ongoing engagement with kaitiaki by plant breeders in their breeding programmes. This currently happens rarely if at all. This means that breeders are not considering the impact of their breeding programmes on kaitiaki relationships, and that kaitiaki have low or no awareness about breeding programmes that may affect their kaitiaki obligations.

If there is to be quality engagement between kaitiaki and breeders – and consideration of kaitiaki interests by the PVR Office this can only be achieved by adding new disclosure requirements to the PVR regime. This is the only option considered.

The proposed option would require breeders to first indicate whether their new variety is derived from plant material from either indigenous species or non-indigenous species of significance. If so, the breeder will also be required to disclose:

- a. If there are kaitiaki identified, who the kaitiaki are;
- b. A summary of their engagement with kaitiaki and the outcome of that engagement including, where relevant:
 - An assessment from kaitiaki of the potential impact if a PVR is granted;
 - Any consideration given to mitigating those impacts;
 - Whether or not agreement was reached on the grant of a PVR.

If an applicant does not provide information requested by the Commissioner within a specified period, the application will lapse. This means that no PVR would be granted on the application. Information provided by breeders would be made available on the PVR register, unless confidential.

These information disclosure requirements implicitly require breeders and kaitiaki to work together to understand and balance each other's interests, and decide how they might work together throughout a potential breeding programme and beyond.

Decision-making on kaitiaki interests

We envisage that over time, with sufficient guidance, advice from the proposed Māori advisory Committee (see discussion below) and goodwill from all parties, kaitiaki and breeders will be able to agree among themselves how their interests in relation to any new variety should be balanced and provided for, leading to a straight-forward grant process.

However, there will inevitably be situations where the engagement has not gone so well or perhaps not even happened at all. It is important that there is a genuine balancing of interests in the decisions on PVRs as a backstop measure for these situations where breeders and kaitiaki have been unable to work matters through themselves.

We have considered three options for achieving this:

Option 1: introduce a new power to limit the exercise of a PVR over a variety if the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee consider that kaitiaki interests are affected by the grant of the PVR

Option 2: introduce a new power to allow the refusal of a PVR by the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant

Option 3: introduce both of the Option 1 and Option 2 powers.

Options

Option 1

Option 1 is consistent. Under UPOV 91, a PVR must be granted if it meets the five criteria (the variety is new, distinct, uniform, stable, and has an acceptable name). UPOV 91 members cannot require additional criteria for a grant of a PVR.

UPOV 91 does, however, allow parties to restrict PVR owners' free exercise of their PVRs if this is in the public interest. We consider that protecting the kaitiaki relationship as an example of Treaty partnership is in the public interest.

Option 2 (recommended option)

Option 2 effectively adds a sixth condition for a grant of PVR. This is not permitted under UPOV 91. It is the first of the kaitiaki recommendations of the Waitangi Tribunal in the Wai 262 report.

Option 3

Option 3 combines both option 1 and option 2. This would give decision-makers the widest suite of options to balance the interests of kaitiaki with breeders, giving them the option of not granting a PVR and/or limiting the exercise of a PVR.

Decision makers and advisors

Currently, the PVRO does not have expertise in-house on te ao Māori or tikanga Māori, and would be ill-equipped to consider and advise on issues relating to kaitiaki relationships.

We recommend that a Māori advisory committee be formed to assist in these matters. In slight contrast to the Wai 262 recommendation, we recommend that a new committee is established for the PVR regime (rather than using the Māori Advisory Committee established under the *Patents Act 2013*). This reflects the nature of the role that we envisage for the committee. Roles that we consider the committee would do include:

- a. developing guidelines for breeders and kaitiaki on engagement;
- b. providing advice to, and working with, breeders and kaitiaki at the pre-application stage;
- c. providing advice to the PVR Office and decision-makers on PVR grant matters, including:
 - a. advice on whether variety names are likely to be offensive to Māori;
 - b. advice on:
 - i. whether the use or registration of a variety name is likely to be offensive to Māori
 - ii. varieties for which there are kaitiaki interests that might be relevant to the Commissioner's consideration of the five standard criteria
 - iii. whether kaitiaki relationships would be affected by the grant of a PVR over the relevant variety; and if so:
 1. for Option 1 above, advice on how the exercise of the PVR should be limited to protect kaitiaki interests;
 2. for Option 2 above, advice on whether kaitiaki interests would be adversely affected by the grant of a PVR and, if so, whether the impact can be mitigated to a reasonable extent such as to

allow the grant;

3. for Option 3 above, advice on whether grant of a PVR should be refused, and if not, how the exercise of the PVR should be limited to protect the kaitiaki relationship.

In the Options paper, it was proposed that the Chair of the Māori advisory committee would sit jointly with the Commissioner of PVRs when grants relating to taonga species were considered. This reflects feedback we have received through the hui and submissions process that the purely advisory role of any proposed Māori advisory committee may not adequately reflect the Treaty principle of partnership. While the Waitangi Tribunal was comfortable with an advisory role for the Committee it also recommended this stating that “a mechanism is needed to augment the commissioner’s expertise when dealing with applications raising Māori issues” ensuring that “a Māori voice is at the table when competing interests come to be balanced”.

Our view on this has changed. Granting PVRs is not a matter of “balancing competing interests”: either the conditions for the grant are met, or they are not. Just as the PVR examiners are the experts in determining whether the conditions are met (i.e. the variety is distinct, uniform and stable), so the Committee will be the experts in determining whether the kaitiaki condition is met. We also acknowledge the views of submitters and instead – in a procedural, rather than substantive, change to Option 2 – recommend that the Committee make a determination on the affect on the kaitiaki relationship. Assessment of this will include appropriate procedural safeguards, including the right to appeal a decision of the Committee.

What did submitters say?

Submitters were generally supportive of the package of proposals for Treaty compliance, though a number of Māori-identified submitters commented that the scope of the review was too narrow to sufficiently protect kaitiaki interests. (They commented, for example, that the development of a bioprospecting regime should be an essential component of any coherent approach to protecting kaitiaki relationships with taonga species.) There were mixed views about Options 2 and 3, with some preferring the stronger protection of Option 3. There were also a number of questions raised about the Māori advisory committee, e.g. how its members would be appointed and what powers it should have.

Issue 3A – Term of the Right

Article 19 of UPOV 91 specifies that the minimum term of a PVR shall be:

- for trees and vines, at least 25 years from the date of grant,
- for all others, at least 20 years from the date of grant.

Section 14 of the Plant Variety Rights Act 1987 sets out the term of a PVR. This is:

- 23 years from the date of grant for woody plants or their rootstock,
- 20 years for all other plants.

Our CPTPP obligations mean that we are required to provide the minimum PVR terms required by UPOV 91. This means, at least, extending the term for woody plants/rootstock to 25 years. The duration of the grant for other species is already in line with UPOV 91. New Zealand is not required, but can choose, to offer longer terms. That is, the status quo is not an option.

For comparison, Australia, the USA and Canada all provide the minimum PVR terms required by UPOV 91. The Australian Plant Breeder’s Rights Act 1994 also provides that regulations may be made to extend the term of a Plant Breeder’s Right within a specified taxon beyond the minimum terms provided for in the Act.

The EU provides a term of 30 years from grant for vine and tree species, and 25 years from grant for all other species. The term for specific genera or species can be extended for up to an additional five years. This provision has been used to extend the term for potato varieties to a maximum of 30 years from grant.

We have considered three options to address this:

Option 1: Adopt the UPOV 91 minimum terms, with no provision for extension

Option 2: Provide for longer minimum terms than the UPOV 91 minima, with no provision for extension

Option 3: Adopt either Option 1 or 2 but provide for extensions to the maximum term under specified conditions.

Options

Option 1: Adopt the UPOV 91 minimum terms, with no provision for extension

Under this option, the term of a PVR would be set at the UPOV 91 minimum terms. There would be no provision to extend these terms. The main advantage of this option would be simplicity. Once a PVR is granted, breeders and growers would know the latest date on which the term of the PVR would end.

A possible disadvantage of this option is that, for some species, the terms might be too short to allow breeders to make a reasonable return on their investment on developing new varieties. This might discourage the development of new varieties. However, with the possible exception of potatoes, we are not aware of any evidence that the UPOV 91 minimum terms would be too short. And, with the exception of the EU, we are not aware of any other UPOV 91 countries that have longer terms.

Option 2: Provide for longer minimum terms than the UPOV 91 minima, with no provision for extension

Under this option, the maximum term of a PVR would be set at some value that is higher than the UPOV 91 minimum terms. There would be no provision to extend these terms.

Extending the maximum PVR term beyond the UPOV 91 minima has the potential to increase the costs of protected varieties to growers and consumers compared with adopting UPOV 91 minima. This is because a longer term would mean that PVR owners could collect royalties on their protected varieties for longer.

This additional cost might be justified if there was evidence that providing longer terms for all varieties would increase the incentive for local breeders to develop new varieties, or for foreign breeders to release their new varieties in New Zealand. None of the submitters on the Issues Paper provided any evidence that this might be the case. The economic analysis MBIE commissioned concluded that there was no current evidence of New Zealand missing out on new varieties because the term was considered to be too short.

That is, there appears to be no advantages over option 1, and potentially a cost in adopting a PVR term that is longer than the UPOV 91 minima.

Option 3: Adopt either Option 1 or 2 but provide for extensions to the maximum term under specified conditions.

This option involves providing for extensions to the maximum PVR term whichever of Options 1 or 2 is adopted. The extensions could be provided for particular genera or species.

The only justification for providing for extensions of term would be that the maximum terms specified in the PVR Act were not long enough to allow breeders to make an “adequate” return on their protected varieties (at least for some genera or species). We consider that there is a case for extending the term specifically for potatoes for three reasons:

- The demise of the potato breeding industry has left New Zealand increasingly reliant on importing new varieties of potatoes. Imported potato genetics now account for around 85% of the potato crop in New Zealand.
- Potatoes are unique to the extent that they take considerably more time than other varieties to ‘bulk up’ (from the originally imported tissue culture) to quantities ready for commercialisation.
- Other jurisdictions recognise this. For example the EU provides a 30 year term to align with the 30 year term for woody plants (as opposed to the 25 years for other plants).

The combination of time related to important quarantine requirements and time for ‘bulking up’ can significantly reduce the time available to capitalise on the investment made (if the 20 year term is retained). This has the potential to harm the future importation of potato genetics and we consider that the term for potatoes should be aligned with the longer term currently provided for woody plants, namely 25 years.

What did submitters say?

Most submitters on the Options Paper supported implementing the UPOV 91 minimum terms. Some argued in favour of longer terms, arguing that longer terms would provide PVR owners with a greater opportunity to make an adequate return on their investment in developing new varieties. However, they did not provide any evidence that society that longer terms would provide benefits to society that might exceed the costs, such as encouraging greater investment in developing new varieties.

At the time, one submitter argued that potatoes should be considered as a special case meriting a longer term for a PVR. This submission has since been supplemented with further information accompanying their submission on the PVR Bill, particularly on the issue of ‘bulking up’.

The options have not changed as a result of submissions on the Options paper (and subsequent submission on the PVR Bill). However our analysis has changed in the light of further information provided and Option 3 is now our recommended option, with provision for a term of 25 years for potatoes alongside the UPOV minimum terms for all other plant varieties.

Issue 3B – Essentially Derived Varieties (EDVs)

Article 14(5) of UPOV 91 requires the exclusive rights that PVR owners have over their protected varieties to be extended to varieties that are “essentially derived” from them. These varieties are known as “essentially derived varieties” (**EDVs**). If a variety is an EDV, and the variety the EDV was derived from is a protected variety then UPOV 91 requires that commercial exploitation of the EDV requires the permission of the person who owns the PVR in the protected variety. Under the PVR Act, a PVR owner does not have any rights over a variety derived from a protected variety, as long as the derived variety is distinct from the protected variety.

Article 14(5)(b) provides that an essentially derived variety (EDV) is a variety derived from an initial variety which is not itself an EDV when:

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety, and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

We have considered four options to address this:

Option 1: Adopt the UPOV 91 definition of EDV

Option 2: Define an EDV as a “copycat” variety

Option 3: Define an EDV as any derived variety which possesses all of the “essential features” of the initial variety

Option 4: Define an EDV by its “genetic distance” from the initial variety.

Option 2 was indicated as the preferred option in the Options paper.

Options

Option 1: Adopt the UPOV 91 definition of EDV (recommended option)

This option involves transposing the wording of UPOV Article 14(5)(b) into the PVR Act. There are some issues with this approach. The UPOV wording provides little guidance to either plant breeders or the courts as where the boundary between EDVs and non-EDVs should lie.

This is reflected in the fact that UPOV has recently established a working group to recommend revisions to the current (2017) Explanatory Note that provides guidance on EDVs. The new (draft) Explanatory Note takes a much broader view on what an EDV is, and yet both notes are, apparently, consistent with the wording in the Convention itself.

Having said that, while they are not legally binding, we would expect the current (2017) UPOV Explanatory note to provide some guidance to breeders seeking to establish whether a new variety is an EDV or not. We do, however, express some concern at the current drafting of the revised Explanatory note⁶. In an effort to try and provide more certainty, we are concerned that it supports an overly broad definition of an EDV which could have an impact on downstream innovation.

This option effectively leaves it up to (at first) the parties concerned to determine whether a variety is an EDV (and, if so, on what basis it can be commercialised), within the parameters set by the UPOV definition. Failing that, it would be up to the individual country’s courts to set the boundaries. This is a similar approach to that taken in relation to infringements in intellectual property regimes, namely the issue of whether an infringement has taken place is a matter to be determined between the parties.

⁶ There is no guarantee that this new Explanatory Note will be adopted. UPOV is a consensus organisation and the revised note has not yet been agreed on by the Working Group, let alone put to the wider UPOV membership.

In general, a broader provision for EDVs will favour established breeders and could impact downstream innovation. A narrower definition could mean that newer varieties enter the market more easily – and the advent of modern genetic breeding techniques makes this more likely – reducing the ability for the breeders of the initial varieties who have used conventional breeding techniques to get an adequate return on their investment. While this option may create some uncertainty for breeders, it also provides a framework within which breeders can seek agreement reflecting the relative merits and attributes of the varieties in question.

Most other UPOV 91 members have followed this approach of simply transposing the UPOV 91 definition of EDV into their legislation. Despite this, there have been very few court decisions from these countries that might give guidance to the New Zealand courts as to what is or is not an EDV.

We acknowledge that it is a ‘close call’ between Options 1 and 2, but on the basis of this discussion we recommend Option 1.

Option 2: Define an EDV as a “copycat variety”

This option involves defining an EDV as a variety where the difference between the initial variety and the derived variety is “trivial”. That is, the difference is in a characteristic that makes no contribution to the commercial value of the variety. The effect of this is that only “copycat” varieties would be considered EDVs.

An example of a “copycat” variety might be a new variety of apple that differs from the initial variety only in the shape of its leaves. Leaf shape does not affect the commercial value of the variety. Under this option, such a variety would be an EDV of the initial variety.

While it is still consistent with the wording in UPOV 91, this is likely a slightly narrower definition of an EDV than intended by that wording. The advantage is that it will provide greater certainty to breeders. It means that no derived variety that adds some commercially valuable features to the initial variety – even if it still retained all the features of the initial variety – would be considered an EDV. It could therefore be commercialised without the permission of the owner of the initial variety.

There is some risk that this narrow approach – particularly as modern genetic breeding techniques may make it easier and quicker to make changes to existing varieties – could impact the returns that breeders using conventional breeding techniques make on their investment.

Since our consideration of submissions on the Options paper, we have been advised by our Australian colleagues that they are now consulting on changing the EDV definition in their legislation. Option 2 below follows the current approach in the Australian Plant Breeder’s Rights Act. However, since this provision has been in force in Australia, there have only been three applications for a new variety to be deemed an EDV and all have been rejected. This suggests that this approach is too narrow to provide a meaningful definition of an EDV.

Option 3: Define an EDV as a derived variety that retains all of the essential characteristics of the initial variety

Under this option, any derived variety that retained all of the “essential characteristics” of the initial variety would be deemed to be an EDV. In this context, an “essential characteristic” could be defined as one that provides commercial value to the variety. This would be a

broader definition of an EDV than under Option 2.

The effect of this approach would be that derived varieties that are “copycat” varieties and derived varieties that are genuine improvements would be deemed to be EDVs. For example, a derived variety that possessed all the essential characteristics of the initial variety would be an EDV even if it possessed one or more essential characteristics not present in the initial variety. On the other hand a derived variety where one or more of the essential features of the initial variety are not present would not be an EDV.

For example, a new variety of apple that had all the commercially valuable properties of the initial variety, but differed from it in the colour or size of the fruit. The colour or size of the fruit can contribute to the commercial value of the variety.

In effect, this option could mean that most varieties that are “genuine improvements” would be EDVs. If the PVR over an initial variety extends to derived varieties that are “genuine improvements” this could discourage breeders from using PVR protected varieties in their breeding programs, where they did not own the PVR in those varieties. This could unreasonably favour breeders who already own many PVRs, as they are free to use their own protected varieties in their breeding programs. They would not have to seek permission to commercialise any EDVs they develop from them.

Adopting this option could therefore actually reduce the incentive for some breeders to develop new varieties. It could potentially act as a barrier for entry to the plant breeding industry. New entrants would not own any PVRs, and may only be able to use varieties that are no longer, or were never protected by PVRs in their breeding programs.

Option 4: Define an EDV by its “genetic distance” from the initial variety

An alternative approach to EDVs, suggested by some submitters, is to use “genetic distance” to determine whether a derived variety is an EDV or not. The genetic distance is determined by comparing the genetic profile of the initial variety and a variety derived from it. If the genetic distance is less than a certain amount, the derived variety would be deemed to be an EDV. However, the difficulties involved in deciding how it should be measured, and what the distance should be for each species suggest that this is not a practical alternative for the time being.

As far as we are aware, no other UPOV 91 member state has adopted the concept of genetic distance as a means for determining whether or not a derived variety is an EDV.

What did submitters say?

Submissions to the Options paper were evenly divided between those who supported the recommended option, and those who supported options 1, 3, or 4. Those submitters who did not support the preferred option argued that extending the definition of EDV to cover more than just ‘copycat’ varieties would potentially increase the return that PVR owners could derive from their protected varieties. This, it was argued, would encourage innovation. Some also argued EDVs “piggy-backed” on the efforts of the breeder of the initial variety, and that it was unfair” if the breeder of the initial variety was not compensated for this. Others commented that Option 2 could end up just as ambiguous as the UPOV wording.

The options have not changed as a result of submissions on the Options paper (and subsequent submission on the PVR Bill). However our analysis has changed in the light of further information received since the Options paper, and Option 1 is now our recommended option.

Issue 3C: Rights over harvested material

Article 14(2) of UPOV 91 requires member states to provide PVR owners with some very limited rights over the harvested material of their protected varieties. It effectively requires that PVR owners be given rights to control the commercial exploitation of the harvested material only when:

- the harvested material was obtained through use of the propagating material of a protected variety where that use was not authorised by the PVR owner, and
- the PVR owner did not have a “reasonable opportunity” to assert their rights over the propagating material.

In addition to the requirement in Article 14(2), Articles 14(3) and 14(4) of UPOV 91 also allows members to provide for some additional rights exclusive rights if they wish:

- Article 14(3) allows member to provide PVR owners with rights over products made from the harvested material, where Article 14(2) applies
- Article 14(4) allows members to provide exclusive rights in addition to those explicitly provided for in Article 14(1)

As a result of our CPTPP obligations, New Zealand must, as a minimum, provide PVR owners with the rights over harvested material set out in Article 14(2). We do not have to provide the rights provided for in Articles 14(3) or 14(4) of UPOV 91. As far as we are aware, no UPOV 91 member state provides PVR owners with more than the minimum exclusive rights over harvested material provided by Article 14(2), or have implemented the additional optional provisions in Article 14(4). Australia has implemented Article 14(3) in its Plant Breeders Rights Act (section 15), extending the rights to cover, in certain circumstances, the products made from harvested material. The EU has left open the possibility of extending protection to products in this way.

We have considered three options to address this:

Option 1: Provide only the minimum rights over harvested material required by UPOV 91

Option 2: Extend the exclusive rights of PVR owners to harvested material resulting from unauthorised propagation of their protected varieties

Option 3: Extend the exclusive rights of PVR owners to include the harvested material of their protected varieties.

Option 1 is our recommended option.

No submitters commented on extending the rights to include the products of harvested material (as per Article 14(3) of UPOV 91) and we see no case for doing so. We have therefore not advanced an option that would implement this optional provision.

The PVR Act provides PVR owners with some rights over harvested material, but these are more limited than that provided for in UPOV 91. As a result, the status quo was not considered as a viable option.

Options

Option 1: provide only the minimum rights over harvested material required by UPOV 91 preferred option)

This option involves providing PVR owners with the right to control the exploitation of the harvested material of their protected varieties when:

- the harvested material was obtained through use of the propagating material of a protected variety where that use was not authorised by the PVR owner; and
- the PVR owner did not have a “reasonable opportunity” to assert their rights over the propagating material.

The main purpose of this provision is to give the PVR owner an opportunity to assert rights over harvested material if they have not had a reasonable opportunity to assert their rights over the propagating material at an earlier stage. The principle is that, ideally, the rights over propagating material should be asserted in relation to unauthorised use of that material. But, if for some reason this has not been possible, this extension provides an opportunity at a subsequent stage for the PVR owner to assert rights over the harvested material.

The most likely situation where this could occur is where harvested material of a variety protected in New Zealand is imported from a country where the variety is not, or cannot be protected.

This option is the minimum required by CPTPP.

Option 2: Extend the exclusive rights of PVR owners to harvested material resulting from unauthorised propagation of their protected varieties

If this option was implemented, PVR owners would have rights over the harvested material of their protected varieties if the material was produced through the unauthorised propagation of their protected varieties. These rights would be provided regardless of whether or not the PVR owner had an opportunity to assert their rights over the propagating material of the protected variety.

This option puts (arguably) an unfair onus of responsibility on retailers and also potentially creates a situation in which a PVR owner can choose at which point to assert their rights.

The focus of the regime is rights in respect to propagating material and the intent of the UPOV provision is to provide an opportunity for a PVR owner to assert their rights over harvested material only if they have not previously had the opportunity to assert their rights in relation to the propagating material.

Option 3: Extend the exclusive rights of PVR owners to include the harvested material of their protected varieties

Under this option, a PVR owner would have the right to control any commercial exploitation of the harvested material of a protected variety. This means that any person wishing to exploit harvested material of a protected variety regardless of the purpose to which it will be put must obtain the PVR owner’s permission.

The effect would be to give PVR owners a monopoly on the supply of the harvested material of their protected varieties. This could assist PVR owners in maintaining the quality or

reputation of the harvested material of their protected varieties.

However, while this option would provide greater certainty (and returns) for PVR owners than the other two options, this approach may cause problems. Where one entity owns, or has the exclusive licence for, most of the PVRs of a particular species, this could have the effect of reducing competition for the harvested material of that species. This could drive up prices and/or reduce supply to consumers.

Currently, PVR owners exercise control over the harvested material of their protected varieties using contractual arrangements. Any such arrangements are subject to section 36 of the Commerce Act 1986 which relates to taking advantage of market power. Section 36 is currently being reviewed, and proposals have been made to amend section 36. It is possible that, under the proposed amendments to section 36, some current contractual arrangements, which might not be found to be anti-competitive under current section 36, might be considered anticompetitive under amended section 36.

What did submitters say?

Submissions were divided on this issue. Some considered that the current approach of relying on contractual provisions in relation to harvested material was sufficient. Others considered that it was essential that they were able to have control over harvested material. Concerns were expressed that proposed changes to the *Commerce Act 1986* might mean that some contractual arrangements by which PVR owners exercised control over the harvested material of their protected varieties might be deemed anti-competitive.

The options, including our preferred option, and our analysis have not changed as a result of submissions on the Options paper.

Issue 3D: Farm Saved Seed

It has long been traditional for farmers to save seed from their harvests for sowing future crops. This saved seed is often known as “farm saved seed”, and farmers’ entitlement to save this seed is often known as the “farmer’s privilege”. Farmers, in the past, have also exchanged their saved seed with, or sold it to, other farmers. Under the PVR Act, farmers in New Zealand may save seed of protected varieties for their own use, but they cannot sell it or exchange it for the purposes of sowing another crop.

The expanded rights that New Zealand is required to provide under Article 14 of UPOV 91 would not allow farmers to save seed of a protected variety without the plant breeder’s consent. For example, Article 14(1)(i) of UPOV 91 gives the plant breeder the exclusive right to propagate the protected variety.

Article 15(2) of UPOV 91, however, does allow member states to make an exception to the plant breeders’ rights for farm saved seed. The effect of the exception would be to allow farmers to use saved seed of protected varieties for propagation on their own holdings without the authorisation of the PVR owner.

The exception in UPOV 91 was aimed at crops where it is common practice to save seed for further propagation and was not intended to open the possibility of extending the practice to other varieties where it is not already common practice. UPOV also considered a number of ways in which limits might be placed on the exception including:

- a. differentiation according to farm size (e.g. a broader exception for “small farms”,

different levels of remuneration);

- b. specifying an amount of produce (e.g. percentage of overall harvest) to which the exception applies;
- c. requirement to pay remuneration (e.g. through a royalty).

If UPOV 91 is implemented without invoking the exception in Article 15(2), then farmers may face higher costs, either because they would have to buy new seed for each year's crop, or would have to pay royalties for using their own saved seed.

We considered three options to address this issue:

Option 1: Provide no exception for farm saved seed

Option 2: Provide an exception for farm saved seed either (i) with limitations imposed in the primary legislation, or (ii) with a provision to impose limitations in regulations

Option 3: Provide an exception for farm saved seed with no limitations.

No UPOV members as far as we know have gone with Option 1. Other UPOV 91 members have gone with either Options 2 or 3. The EU would fall under Option 2(i), Australia under Option 2 (ii), and Canada (currently) and the US under Option 3.

Options

Option 1: Provide no exception for farm saved seed

Under this option, there is no exception from the exclusive rights provided for in UPOV 91 for farm saved seed. This means that any of the acts that would be associated with saving seed and sowing it (production/reproduction/conditioning/stocking of propagating material) would require the authorisation of the breeder, usually by means of a royalty payment. Performing any of these acts without that authorisation would be an infringement of the PVR owner's rights.

This option would increase royalty returns to PVR owners and this may encourage further investment in new varieties. This could benefit farmers and consumers. However, it would also impose additional costs on farmers, which they may struggle to pass on. Or they may simply choose not to purchase protected varieties, which could affect both PVR owners and the wider public.

A strong case would need to be made to proceed with this option and we do not think that case has been made. The argument that the "loss" of royalty income from the use of farm saved seed is impacting the development and availability of new varieties is not borne out – at least currently – by the economic analysis MBIE commissioned (the Sapere report).

Option 2: Provide an exception for farm saved seed either (i) with limitations imposed in the primary legislation, or (ii) with a provision to impose limitations in regulations (2(ii) is our recommended option)

As noted above, there is no clear evidence of current market failure in relation to the return on investment for any protected varieties. For this reason, we do not consider that Option 2(i) is appropriate. However, we cannot discount the possibility that a case may be made in the future, so providing the exception for farm saved seed combined with regulation-making

provisions to limit this exception is our preferred option.

Australia allows for a variety to be exempted from the exception (i.e. so saving seed would be covered by the PVR owner's rights) in regulations if a case of market failure has been made by the breeder. To date no regulations have been made.

As already noted, some discussion has already taken place between plant breeders and farmers and we think this should continue. We would like to see (and facilitate if necessary) an industry-led agreement on how farm saved seed should be considered, including whether royalties should be paid and, if so, under what conditions. Having a regulation making provision means that, should it be decided that some formal regulation into farm saved seed is desirable on the basis of those discussions, this would be easy to implement.

Option 3: Provide an exception for farm saved seed with no limitations

Given the analysis in relation to the above options, this is not our preferred option. The future is uncertain, and any changes to address issues that may arise would be harder under this option as they would require change to the primary legislation.

What did submitters say?

There is broad agreement across submitters that farmers should retain the right to save seed. The issue is what conditions this practice should continue under.

Most breeders support the ability for farmers to continue to save and use seed on their own holdings. However, they argue that farmers should have to pay a royalty when they use saved seed (and that there should be some statutory basis to this ability to collect a royalty) as the lack of a royalty on farm saved seed is impacting investment in domestic plant breeding and is also discouraging overseas PVR owners from bringing their new varieties to New Zealand. However, the economic study carried out by Sapere did not find any evidence that New Zealand was missing out on new plant varieties as a result of the current PVR regime.

Federated Farmers submitted that there are many good reasons for the current saved seed arrangements to continue, but does accept that there may be justified reasons for a royalty on farm saved seed under certain circumstances. They commented that the advantages of being able to save seed include that it is a reliable way of getting seed into the ground in time (and they cited examples of PVR seeds not being available at optimal planting time or not supplied to required standard), the quality is assured, and the cost of seed is reduced. They have also commented that farmers are more likely to be open the idea of royalties being paid on farm saved seed if they can be assured that those royalties are being directed into breeding programmes that will benefit them. The possibility of making the payment of royalties on saved seed contingent on them being spent solely on plant breeding programmes was not considered. It would be difficult and costly to attempt to track how PVR owners were spending any royalties, particularly for those varieties where the PVR owners, and their plant breeding programs were located overseas. Concern was raised that the farm saved seed exception could apply to varieties where it was not a traditional practice, eg. for vegetatively reproduced crops. We do not share this concern as, by definition, these crops are not grown from seed.

The options, including our preferred option, and our analysis have not changed as a result of submissions on the Options paper.

Issue 4: Compulsory Licenses

PVR owners usually exploit their varieties by granting a license to a grower or other third party (**licensee**). In granting a license, the PVR owner is giving their permission to the licensee to produce for sale, or to sell, propagating material of their protected varieties.

Intellectual property (IP) rights are not like full property rights, but are, instead, more akin to a conditional grant. They are based on a social contract whereby the IP owner is granted a temporary statutory monopoly (in order that they may get a return on their investment in creating that IP), and, in return they must make that innovation available so that society as a whole can benefit from it.

A compulsory licence is a mechanism whereby if the Commissioner considers that a PVR owner is not (broadly speaking) fulfilling that social contract, he/she can force the PVR owner to licence their variety. The grant of a compulsory licence over a protected variety allows the licensee to produce for sale, and sell, propagating material of the variety without the PVR owner's permission. Compulsory licenses can be granted by the Commissioner of Plant Variety Rights (**the Commissioner**) following an application from a third party. The licensee must pay a royalty set by the Commissioner to the PVR owner.

The Commissioner may grant a compulsory licence over a protected variety if:

- a. the application for the licence was made at least three years after the PVR was granted; and
- b. the PVR owner has not made reasonable quantities of propagating material of the variety available to the public at a reasonable price.

In deciding whether or not condition (b) above is met, section 21(3) of the PVR Act provides that the Commissioner must ignore propagating material that has been made available only subject to the condition that all or any of the produce of that variety must be sold or offered to a specified person or group of persons

If a compulsory licence is granted, the Commissioner can require the PVR owner to sell propagating material of the variety concerned to the licensee. This power is necessary, as the licensee will need propagating material to propagate the variety.

MBIE has proposed a number of technical amendments to the compulsory license provisions to clarify them and provide more certainty to third parties and the public regarding the process to be followed when an application for a compulsory license is made. These are not discussed in this Regulatory Impact Analysis.

There are, however, two substantive areas where submitters have expressed concern, and where options have been considered. These are:

- a. the "grace period" during which a compulsory license application cannot be filed; and
- b. section 21(3) of the PVR Act.

Issue 4A: Grace Period for Compulsory Licence Applications

The "grace period" is the period after grant of a PVR during which a compulsory licence application cannot be filed. The grace period reflects the fact that many PVR owners will not begin to exploit their protected variety until after a PVR is granted. It can take time to produce

sufficient propagating material to place on the market. During this time the PVR owner may be unable to provide propagating material to the public.

We considered three options to address this issue:

Option 1: Retain a three year grace period (the status quo)

Option 2: Provide for a grace period of more than three years

Option 3: Provide for different grace periods for different varieties.

Option 1 is our recommended option.

Options

Option 1: Retain the status quo (recommended option)

This option involves retaining the three year grace period provided for in section 21 of the PVR Act. Some submitters have argued that this is too short, as for some varieties at least, PVR owners may not be able to put reasonable quantities of propagating material on the market within three years of grant. They argue it would be unfair to grant a compulsory licence when it had not been possible for the PVR owner to produce sufficient propagating material to serve the market.

If an application for a compulsory licence was filed more than three years from grant, it would likely be refused if the Commissioner was satisfied that the PVR owner was unable to make reasonable quantities of propagating material available for purchase. For example, this could be because the PVR owner had not had sufficient time to produce the material following grant of the PVR. However, this is not explicit in the Act.

In light of the points made above, MBIE considers that the three year grace period is not unreasonable. However, MBIE considers that it would be useful to make it clear that a compulsory license application could be refused if the PVR owner concerned could show that they had been unable to produce sufficient quantities of propagating material to meet market demand. This would provide more certainty for PVR owners.

Option 2: Provide for a grace period of more than three years

Under this option, the grace period would be fixed at some period longer than three years. However, in light of the discussion on Option 1, it is not clear that a grace period of longer than three years would be justified.

Option 3: Provide for different grace periods for different species

This option would mean that different plant species would have different grace periods before a compulsory licence could be applied for. This could reflect the fact that the time required to get reasonable quantities of propagating material to market differs for different species. This would mean listing the grace periods in the PVR Act or regulations. It is not clear how the grace periods would be determined, or what criteria would be used.

In any case, as noted in the discussion of Option 1, applications for compulsory licences would likely be refused if the Commissioner was satisfied that the PVR owner was unable to make reasonable quantities of propagating material available for purchase. This suggests that there is no justification for providing different grace periods for different species.

What did submitters say?

Submitters had mixed views on the grace period. While some were comfortable with it, others commented that it is too short for a new variety to be successfully commercialise and it should be extended to, say, 5 years, or be variable across crop types.

There is variability across UPOV members on this with some having no grace period at all.

With one small exception, the options, including our preferred option, and our analysis have not changed as a result of submissions on the Options paper. To meet the concerns discussed above, we propose that it be made explicit that Commissioner be required to consider whether the PVR owner has had sufficient time to make reasonable quantities of material available.

Issue 4B: Compulsory Licenses – Section 21(3) PVR Act

When considering whether or not the conditions set out in section 21 of the PVR Act for granting a compulsory license are met, the Commissioner must decide whether or not reasonable quantities of propagating material have been made available to the public at a reasonable price. In determining this, section 21(3) of the PVR Act provides that:

“... the Commissioner shall not take into account any reproductive material that is available only subject to the condition that any or all of the produce from that material must be offered or sold to a particular person, or to one of a specified group of persons, or to a member of a specified class or description of person.”

We considered three options to address this issue:

Option 1: Retain section 21(3) (the status quo)

Option 2: Repeal section 21(3)

Option 3: Replace 21(3) with a “public interest” test which reflects the need for reasonable quantities of material being available to the market, while also continuing to incentivise innovation

Option 3 is our recommended option.

Options

Option 1: Retain section 21(3)

This option involves retaining section 21(3) in the PVR Act. This would mean that where a PVR owner requires all or most growers of a protected variety to sell, or offer to sell, the produce of that variety to a specified person (as opposed to, say, the general public), it would be possible for a compulsory licence to be granted.

However, this option is unable to take into account how well the market (whether that be growers or the general public) is supplied with reasonable quantities of material (whether that be propagating material or harvested material) at a reasonable price. It may well be that, despite contractual arrangements meaning that the produce is to be sold to specified

persons, the market is, nonetheless, well supplied.

Option 2: Repeal section 21(3)

This option would involve repeal of section 21(3). This would mean that if PVR owners make their varieties available to growers on the condition that the produce be sold back to a specified person, then this could be considered making reasonable quantities of propagating material available to the public at a reasonable price. This could mean that no compulsory licence could be granted under such circumstances.

This is the other end of the spectrum from Option 1 and could mean compulsory licences not being issued in situations where the market was not well supplied (eg. when the PVR owner has sufficient control over the availability of propagating material).

Option 3: Replace 21(3) with a “public interest” test which reflects the need for reasonable quantities of material being available to the market, while also continuing to incentivise innovation

Under Option 3, a compulsory licence will only be granted when it is in the public interest to do so, and the matters that constitute the public interest will include (but not necessarily be limited to):

- Whether the market was being supplied with reasonable quantities of propagating material of a reasonable quality of the variety concerned at a reasonable price
- Whether the market was being supplied with reasonable quantities of harvested produce of the variety concerned of a reasonable quality and at a reasonable price
- The need to ensure that innovation in plant breeding is encouraged
- The need to protect the life or health of humans, animals or plants.

What did submitters say?

Some submitters argued that this provision be repealed, or at least significantly amended. A common suggestion was to frame the grounds for a compulsory licence as a “public interest” test. The concerns came particularly from the horticulture sector where ‘closed loop’ business models are more common.

These are models where the PVR owners use contractual arrangements to require persons growing their protected varieties to sell or offer to sell the produce to a person specified in the contract, often the PVR owner. These submitters argue that this is important to enable PVR owners to maintain quality and brand reputation for the varieties. However they also potentially raise competition issues as it gives the PVR owner control over supply and demand, and therefore risks prices being kept high (especially if there are no substitutable alternatives available).

Submitters are concerned that, as currently framed, even though the market may well be well supplied with propagating material, the Commissioner may nonetheless be obliged to issue a compulsory licence as s21(3) would require him/her to discount material in a ‘closed loop’.

While we consider the intent of s21(3) still valid, we acknowledge that a more nuanced approach may be necessary to better reflect current commercial practices.

Issue 5 – Enforcement

There are two sub-issues that fall under enforcement: (i) civil infringements of PVR owners' rights, and (ii) the offences in the PVR Act.

Issue 5A: Infringements

The use of the term “exclusive right” in section 17 of the PVR implies that if a person does the acts defined as exclusive rights, without the PVR owner's permission, this would be infringement of the PVR owner's rights, although this is not explicitly stated.

This has led to uncertainty as to what constitutes infringement. MBIE proposes a number of changes in address to issues around clarity of the current provisions raised by stakeholders. These are intended to clarify the provisions and align the infringement provisions with those in other IP legislation, such as the *Patents Act 2013* and the *Trade Marks Act 2002*. These amendments do not significantly change existing arrangements and are not discussed in this Regulatory Impact Analysis.

Another key issue raised by stakeholders was the cost of enforcement of PVRs – in a small market such as New Zealand, the cost of taking a civil action through the Courts can outweigh the loss incurred from an infringement. Many submitters wanted to see a lower cost option, such as a Tribunal, to address this. We noted that this issue is not constrained just to the PVR regime (or even the intellectual property system as a whole) and that there is no obvious cost-effective means to address it. We have, therefore, not proposed options on this issue.

Issue 5B: Offences

There are a number of offence provisions in the PVR Act:

- a. supply, with intent to deceive, false or misleading information in connection with an application for a PVR;
- b. falsely represent that a person is a PVR owner or that a person has applied for a PVR;
- c. falsely represent that a variety is a protected variety or that a PVR application has been made in respect of that variety;
- d. falsely represent that a variety is some other variety which is protected by a PVR or that is the subject of a PVR application;
- e. sell a variety that is a protected variety, or that was a protected variety (because the PVR has been surrendered or expired), without using the denomination (variety name);
- f. approved with it when the PVR was granted;
- g. represent yourself as the PVR Office or to suggest that you or your business is officially connected to the PVR Office;
- h. for a person to apply for a PVR, or acquire an interest in a PVR, if that person is a

PVR Office employee, or for 12 months after they have left the PVR Office.

The maximum penalty for any of the offences is a fine of \$1000.

As far as MBIE is aware, there have been no prosecutions under the offence provisions since the mid-1990s. It is likely that any complaint to the police made under the offence provisions would be given a low priority. These kinds of offence provisions are also out of step with other IP legislation, which generally take the view that they are already covered in other pieces of legislation (such as the Fair Trading Act).

UPOV 91 does not require member states to prohibit the activities referred to in the list above, with the exception of activity (e). Article 20(7) of UPOV 91 provides that persons who sell propagating material of protected varieties must be required to use the variety denomination, even after the PVR has expired or lapsed.

We considered three options to address this issue:

Option 1: Retain the current offences and penalties (the status quo)

Option 2: Retain the current offences, but provide the PVR Office or IPONZ with the power to enforce the offence provisions

Option 3: Repeal the offence provisions.

Option 3 is our recommended option.

Options

Option 1: Retain the current offences and penalties

This would involve retaining the current offences and penalties. As discussed below, this is not preferred by MBIE. There appear to have been no prosecutions under the offence provisions since the mid-1990s, and, given that the police are likely to give offences under the PVR Office a low priority, the likelihood of prosecution is low. In light of this, the offence provisions are unlikely to be a deterrent, even if the penalties were significantly increased.

Option 2: Retain the offences, but provide the PVR Office or IPONZ with enforcement powers

Under this option, the offence provisions would be retained, with the PVR Office or IPONZ being given the authority to investigate offences. The powers could be similar to those of enforcement officers appointed under the Copyright Act 1994 or the Trade Marks Act 2002. This might increase the deterrent effect of the offence provisions if the PVR Office or IPONZ were seen to be actively investigating offences and taking prosecutions. In practice, however the PVR Office or IPONZ are only likely to take action if there is a compelling public interest in taking a prosecution (and only if they are sufficiently resourced to carry out this enforcement activity). This is the approach under the Copyright Act 1994 and the Trade Marks Act 2002.

As a result it is likely that the power to investigate and prosecute an offence will be rarely invoked. This suggests that providing the PVR Office or IPONZ with the authority to investigate offences will not significantly increase the deterrent effect of the offence

provisions.

Option 3: Repeal the offence provisions (recommended option)

Although the behaviour that is the subject of the offence provisions is clearly undesirable, similar behaviour in respect of other intellectual property rights is not a specific offence in the relevant intellectual property statute.

The behaviours (b) – (d) and (f)-(g) in the list above could be considered breaches of the Fair Trading Act 1986 as they involve false or misleading behaviour in relation to the provision of goods or services that of the sort that this Act was intended to deal with.

Activity (a) in the list above makes the supply of false or misleading information in connection with an application for a PVR an offence. The supply of false or misleading information in connection with an application is not an offence under other intellectual property legislation, such as the Patents Act 2013 or the Trade Marks Act 2002. However, they do provide that if the rights were obtained through fraud or other misrepresentation, the right can be revoked or invalidated.

MBIE considers that the possibility that PVR could be revoked if the applicant has obtained it through the provision of false or misleading information to the PVR Office is likely to be a more powerful deterrent to the provision of such information than an offence provision.

In light of this, and for consistency with other intellectual property legislation, MBIE considers that there is no need to provide that the provision of false or misleading information to the PVR Office should be an offence. Instead the PVR Act should provide that the right would be nullified.

Activity (e) – MBIE considers that failure to use a variety denomination is not sufficiently egregious to justify a separate offence provision in the PVR Act. In many cases failure to use a variety denomination when selling material of a protected or previously protected variety will not disadvantage purchasers. If there is any disadvantage it would likely be because purchasers were being deceived or misled about the nature of the material they were buying. In this case there are remedies (both criminal and civil) available under the *Fair Trading Act 1986*. We consider that this is sufficient to meet our obligations under Article 20(7) of UPOV 91.

There may be cases where failure to use a variety denomination could be considered misleading or deceptive. In such cases purchasers may be able to seek remedies under the Fair Trading Act 1986 or in contract law.

Activity (h) – The purpose of this provision is to ensure that there is no conflict between an officer's official duties and any commercial interests they may have. MBIE considers that such conflicts are more appropriately dealt with through the public service code of conduct, and the provisions of section 105A of the Crimes Act 1961. (Section 105A makes corrupt use of official information an offence carrying a penalty of up to seven years imprisonment.)

What did submitters say?

Submitters were generally comfortable with repealing the offence provisions on the grounds that they were either already covered under other legislation, could attract alternative

sanctions, or were not sufficiently egregious to merit criminal sanction.

IPONZ expressed concern at the repeal of the offence related to activity (e) on the grounds that the denomination is the primary identifier of the variety and is one of the five conditions on which a grant of a PVR is made.

The options, including our preferred option, and our analysis have not changed as a result of submissions on the Options paper.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

- *Comment on relationships between the criteria, for example where meeting one criterion can only be achieved at the expense of another (trade-offs)*

Issue 1 – CPTPP and UPOV 91

The sole issue in determining how we meet our CPTPP obligations in relation to UPOV 91 is what measures we “deem necessary” to meet our Treaty of Waitangi obligations and whether these measures are compatible with acceding to UPOV 91 or not.

Based on the discussion in Chapter 2 of the Wai 262 report and everything we heard during our engagement with Māori as part of the review (whether from written submissions or from discussions at the hui we held), it is our view that the Treaty of Waitangi requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in the PVR regime. This requires a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR.

Issue 2 – Treaty of Waitangi compliance

Three criteria were used in considering the three options for considering the kaitiaki relationship in the decision-making. They were:

- Meaningful and mana-enhancing consideration of kaitiaki interests
- Clarity for plant breeders
- Minimise additional compliance costs

We assigned a double weighting to the first criterion as it directly responds to the problem definition (refer discussion under Issue 1 above).

Issues 3 – 4 (Scope of the right and compulsory licences)

Three criteria were used in considering the options in issues 2A – 3B. They were:

- Incentivise investment in plant breeding
- Ensure public access to new varieties
- Provide certainty for the PVR owners and the public.

The criteria were given equal weighting.

Issue 5 (Offences)

Three criteria were used in considering the options in relation to offences in Issue 5B:

- The extent to which the option deters misleading and deceptive behaviour in relation to protected varieties;
- Proportionality: is the nature of the misleading or deceptive behaviour sufficient to justify making it a criminal offence in the PVR Act?
- Is the misleading or deceptive behaviour dealt with in other legislative provisions?

3.3 What other options have been ruled out of scope, or not considered, and why?

• *List the options and briefly explain why they were ruled out of scope or not given further consideration.*

- Issue 2: Many submitters wanted to see broader protections put in place for taonga species as part of this review (eg, in relation to bioprospecting activities). These are out of scope of the review which was purely focussed on reviewing the Plant Variety Rights Act. It is possible they will be addressed as part of the whole-of-government response to Wai 262 recently announced by Minister Mahuta.
- Issues 3-5: Options that were inconsistent with UPOV 91 were not considered, as such options would not be consistent with our obligations under CPTPP. For most of these issues, this means that the status quo is not a viable option.

Section 4: Impact Analysis for Issue 2 – decision making in relation to kaitiaki interests

	Status quo	Option 1 Limit the exercise of a PVR over variety if kaitiaki interest affected by PVR grant	Option 2 Allow refusal of a PVR if kaitiaki interests would be negatively affected (preferred option)	Option 3 Combine both options 1 and 2
Meaningful and mana-enhancing consideration of kaitiaki interests	Currently no recognition of kaitiaki interests	Does not allow a genuine balancing of the kaitiaki interest with that of the breeder, but could allow limited control if decisionmakers felt so minded.	Aligns with existing IP settings to consider kaitiaki interests; is mana-enhancing for all parties.	Provides widest suite of options for considering and protecting the kaitiaki interest.
Clarity for plant breeders	Clear, because no obligations on breeders in relation to protecting kaitiaki interests	Middle option in terms of uncertainty.	More uncertain than the status quo, but two clear outcomes of grant (rather than multiple possibilities under Option 1 and 3) makes it the most certain option.	Most uncertain. Two layers of uncertainty apply for breeders: whether they will be granted the right, and whether there will be limits if a grant is made. Likely to introduce too much uncertainty for breeders, who may opt out from the regime.
Minimise additional compliance costs	No current additional costs because no obligations on breeders in relation to kaitiaki interests	All participants will experience some increase in costs. Likely to be equal in all three packages.	As above	As above
Overall assessment	The current PVR Act currently does not provide explicit recognition of kaitiaki interests.	This option is not Treaty compliant. It does not allow the consideration of kaitiaki interests in a mana-enhancing way (though the outcome of decision-making may be similar to option 2).	This option is Treaty compliant. It strikes the best balance between facilitating mana-enhancing consideration of kaitiaki interests and ensuring certainty for breeders.	This option is Treaty of Waitangi compliant. However, if the uncertainty disincentivises breeder engagement with the PVR regime, this may be equivalent to the status quo in terms of actual protection for kaitiaki interests.

Section 4: Impact Analysis for Issue 3A – term of the right

	Option 1 Adopt UPOV 91 minimum terms	Option 2 Provide longer terms than UPOV 91 minima, with no extension	Option 3 Adopt either options 1 or 2 but provide for extensions (preferred option)
Incentivise investment in plant breeding	Investment could be impacted if term is too short to get reasonable return. There is a risk that this could be the case for potatoes as they take longer to bulk up for commercialisation. This option increases term for woody plants (keeps term the same for other plants).	Longer terms could incentivise increased investment through greater returns, and ensure breeders get a sufficient return on their investment.	Longer terms for some plants could incentivise increased investment through greater returns. This is the case for potatoes which take longer to bulk up for commercialisation. There is a risk that, with the standard term, New Zealand could begin to lose out as 85% of our potato genetics are imported.
Ensure public access	Increase in term for woody plants could increase costs, but New Zealand must adopt these terms as a minimum.	Increased terms could mean higher costs for growers/the public with the effect of restricting access. However, access to potatoes could reduce if returns are not sufficient.	Increased terms for some plants could mean higher costs for growers/the public with the effect of restricting access.
Provide certainty for PVR owners and the public	Scope of the right is clear to PVR owners and the public.	Scope of the right is clear to PVR owners and the public.	Scope of the right is clear to PVR owners and the public.
Overall assessment	No evidence that investment is being adversely impacted under current terms, though there is a risk in relation to potatoes. New Zealand must meet at least these minimum terms. No case for extending terms beyond these minima, other than for potatoes.	No case for extending terms beyond the minima, other than for potatoes.	Case is made to extend term of potatoes to 25 years to match the longer term for woody plants, while keeping the UPOV minima (of 20 and 25 years) for all other plants.

Section 4: Impact Analysis for Issue 3B – EDVs

	Option 1 UPOV definition (preferred option)	Option 2 Copycat varieties	Option 3 Retain all essential characteristics	Option 4 Genetic distance
Incentivise investment in plant breeding	There is some risk that the lack of clarity of definition risks hampering innovation. However, this option creates a framework in which the breeders of the initial variety and the EDV can determine between themselves the conditions under which the EDV can be commercialised.	A narrow definition of an EDV combined with the development of new breeding techniques could lead to lower cost new varieties entering the market, reducing the returns to breeders of the initial varieties. This could impact innovation in conventional breeding.	This is a broad definition of an EDV and risks hampering downstream innovation. Breeders of new varieties with commercially significant attributes may choose not to invest if they have to share returns with breeders of initial varieties. Breeders of initial varieties will retain greater control over development of new varieties based on those initial varieties.	Depends on how “genetic distance” is determined.
Ensure public access	Agreement between breeders will find the right balance between the respective innovation they have contributed. This should maintain reasonable public access to new varieties.	Concern that impact on conventional breeding could reduce public access to new varieties.	Concentration of rights with breeders of initial varieties could hamper public access.	Depends on how “genetic distance” is determined.
Provide certainty for PVR owners and the public	UPOV 91 definition of EDV is ambiguous. Does not provide certainty to breeders or the public, though the 2017 UPOV Explanatory Note provides some guidance.	Definition is clearer than option 1, but some uncertainty will remain.	Definition is clearer than Option 1, but some uncertainty will remain	Could provide greater certainty than other options in the future, but currently not feasible.
Overall assessment	There are potentially some risk either way with EDVs. Too narrow a definition could impact conventional breeding and too broad a definition could impact downstream innovation. This option is preferred as it provides parameters within which the parties can reach agreement between themselves.	This option is too narrow a definition of EDVs and presents risks to innovation in conventional breeding.	Breeders of initial varieties may have more incentive to invest, though other breeders who wish to build on that innovation may be discouraged from investing. Concentrates returns to those breeders of initial varieties as most new varieties build on the innovation of preceding varieties.	No other UPOV countries have adopted this. Many technical hurdles to overcome.

Section 4: Impact Analysis for Issue 3C – rights over harvested material

	Option 1 Adopt UPOV minimum (preferred option)	Option 2 Extend rights when use of propagating material was unauthorised	Option 3 Extend rights to harvested material in all circumstances
Incentivise investment in plant breeding	Provides breeders another opportunity to assert their rights if they have been unable to do so in relation to propagating material. Unlikely to significantly increase investment.	Provides breeders another opportunity to assert right (and they don't have to show they had no previous opportunity). Unlikely to significantly increase investment.	Significantly strengthens rights, so could incentivise more investment if breeders could get better returns.
Ensure public access	Does not really impact access to new varieties.	Does not really impact access to new varieties.	Significantly increases market power of breeders, potentially impacting access to new varieties.
Provide certainty for PVR owners and the public	Some uncertainty as retailers of harvested material may not be aware of whether the material comes from unauthorised use of propagating material.	Creates uncertainty for public (growers, retailers) as breeders essentially get a choice when to assert their rights.	Scope of right is certain.
Overall assessment	There is no argument to extend rights to harvested material beyond the minimum required by UPOV 91.	Slight benefit for breeders, but not consistent with the focus of the PVR regime on propagating material.	The PVR regime focuses on acts in relation to propagating material. This would be a significant departure from that and risks concentration of market power.

Section 4: Impact Analysis Issue 3D – Farm Saved Seed (FSS)

	Option 1 No exception for FSS	Option 2(i) Limit exception in primary legislation	Option 2(ii) Limit exception in regulations (preferred option)	Option 3 Do not limit exception
Incentivise investment in plant breeding	Extending rights to FSS could increase returns for breeders and so incentivise investment, though farmers could choose to buy non-proprietary varieties if they perceive costs are too high.	Extending rights to FSS on some varieties could increase returns for breeders and so incentivise investment, though farmers could choose to buy non-proprietary varieties if they perceive costs are too high	Extending rights to FSS on some varieties if a case has been made would help ensure breeders are getting sufficient return on their investment, and so encourage innovation	Could discourage innovation in the future if return on investment becomes insufficient for breeders.
Ensure public access	Increasing costs could have the effect of restricting public access to new varieties.	Increasing costs could have the effect of restricting public access to new varieties.	Increasing costs could have the effect of restricting public access to new varieties	Access to new varieties unaffected.
Provide certainty for PVR owners and the public	Provides certainty of scope of the right.	Access to new varieties unaffected.	Certainty depends on the nature of any limitations on the exception for FSS that are imposed	Provides certainty of scope of the right.
Overall assessment	There is no current evidence that New Zealand is missing out on new varieties. This option would increase costs for farmers.	There is no current evidence that New Zealand is missing out on new varieties, so no case for selecting certain varieties up front. This option would increase costs for farmers on those varieties.	This option acknowledges that, in the future, a case may be made to limit the exception for FSS in certain cases. It is the best balance between the interests of breeders and the interests of farmers.	This option is essentially the status quo. With no ability to limit the exception in the future, it would make it harder to address issues if they arise.

Section 4: Impact Analysis for Issue 4A – Grace Period for Compulsory License Applications

	Option 1 Status quo (preferred option)	Option 2 Grace period longer than three years	Option 3 Different grace periods for different varieties
Incentivise investment in plant breeding	There is no evidence that the length of the grace period impacts investment.	There is no evidence that the length of the grace period impacts investment.	There is no evidence that the length of the grace period impacts investment.
Ensure public access	It is important that the public has an opportunity to make the case that the breeder has not made reasonable quantities of material available	The longer the grace period, the longer a breeder can potentially abuse their monopoly position and restrict public access.	The longer the grace period, the longer a breeder can potentially abuse their monopoly position and restrict public access.
Provide certainty for PVR owners and the public	Provides certainty.	Provides certainty.	Provides certainty.
Overall assessment	There is no compelling argument for changing the status quo.	Firstly it is not clear what a longer period should be. Secondly, a longer period has some risk associated with it and there are no clear benefits.	The main argument here is that some varieties may take longer to be commercially viable, but the Commissioner is highly unlikely to grant a compulsory licence if the breeder is unable to make a reasonable quantity available because it does not yet exist.

Section 4: Impact analysis for Issue 4B – Compulsory Licenses – Section 21(3)

	Option 1 Status quo	Option 2 Repeal s 21(3)	Option 3 Replace s21(3) with public interest test (preferred option)
Incentivise investment in plant breeding	There is no evidence that this provision impacts investment in new varieties, or that current contractual arrangements are not working. However, this options does not sufficiently take into account how well the market is supplied, and creates a risk of oversupply. This could impact investment decisions.	Removing this provision open the possibility of breeders increasing market power. This could mean bigger returns and so more investment in new varieties, but could also lead to rent seeking behaviour.	This is a more nuanced version of the status quo which focuses on how well the market is supplied. Breeders who have raised concerns about s21(3) prefer this option on the grounds that it better reflects the rationale for compulsory licences, and reduces the risks associated with the status quo.
Ensure public access	This provision ensures that the public has the opportunity to challenge a breeder who is restricting access by requiring growers to sell their produce to specified persons.	Removing this provision would leave breeders free to dictate who they make their propagating material available to, potentially limiting public access to the new varieties.	The public retain the opportunity to challenge a breeder who may be restricting access to their new varieties. It is just the grounds against which this is considered that are different.
Provide certainty for PVR owners and the public	May create some uncertainty for breeders as to how the Commissioner may apply this provision.	Would remove that uncertainty	May create some uncertainty for breeders as to how the Commissioner may apply this provision.
Overall assessment	Applications for compulsory licences are rare which suggests that the concerns of breeders are largely unfounded. It remains important that the public retains this ability to challenge breeders. However, we do acknowledge the risks raised by breeders in their submissions and consider that the status quo is not sufficiently nuanced to provide the outcomes we seek.	The potential costs of removing this provision outweigh any potential benefits.	This option modifies the status quo. The ability for the public to challenge breeders remains, but the grounds for such a challenge are now more responsive to market conditions and so better reflect the intent of the compulsory licence provisions. For this reason, this is our preferred option.

Section 4: Impact Analysis for Issue 5B – Offence Provisions

	Option 1 Status quo	Option 2 Give IPONZ enforcement powers	Option 3 Repeal provisions (preferred option)
Deterrence	Police are unlikely to prioritise prosecution of these offences, so minimal deterrent effect.	Might increase deterrent if IPONZ can take prosecutions, though still unlikely to be invoked often.	It is not consistent with other IP legislation to keep these offences in the PVR Act.
Proportionality	Many of these offences are not offences in other IP legislation, but would potentially be offences under other legislations, e.g. the Fair Trading Act.	Many of these offences are not offences in other IP legislation, but would potentially be offences under other legislations, e.g. the Fair Trading Act.	It is not consistent with other IP legislation to keep these offences in the PVR Act.
Addressed in Other Legislation	Most of these offences could be addressed in other legislation (e.g. the Fair Trading Act) or by other sanction (e.g. cancellation or nullification of the grant).	Most of these offences could be addressed in other legislation (e.g. the Fair Trading Act) or by other sanction (e.g. cancellation or nullification of the grant).	It is not consistent with other IP legislation to keep these offences in the PVR Act. Most of them are adequately dealt with in the Fair Trading Act.
Overall assessment	It is not consistent with other IP legislation to keep these offences in the PVR Act.	It is not consistent with other IP legislation to keep these offences in the PVR Act.	It is not consistent with other IP legislation to keep these offences in the PVR Act. Most of them are adequately dealt with in the Fair Trading Act.

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

- *Where a conclusion as to preferred option is reached, identify it and set out reasons for considering it to be the best approach (by reference to the assessment criteria).*
- *If no conclusion as to preferred option is reached, identify the judgement (eg, which stakeholders, or which criteria, are the most important) or the additional information that is needed, to enable a decision to be made*
- *How much confidence do you have in the assumptions and evidence?*
- *What do stakeholders think - in particular, those opposed? Why are they concerned, and why has it not been possible to accommodate their concerns?*

We have indicated our recommended options in relation to each issue in the Impact Analysis tables in Section 4.

Broadly speaking we anticipate that stakeholders will be comfortable with the package of proposals presented in the Cabinet paper.

In any intellectual property legislation, rights holders will always argue for stronger rights, while rights users (in this case growers, the public etc) will be wary of rent seeking behaviour. Our CPTPP obligations already require significant strengthening of our current PVR regime.

We also think that, on the whole, Māori will be comfortable with the proposals for Treaty compliance. While there are many who consider these reforms do not go far enough, the majority of the issues they wish to see addressed are outside of the scope of the review.

5.2 Summary table of costs and benefits of the preferred approach

Summarise the expected costs and benefits of the proposed approach in the form below. Add more rows if necessary.

*Give monetised values where possible. Note that only the **marginal** costs and benefits of the option should be counted, ie, costs or benefits additional to what would happen if no action were taken. Note that “wider government” may include local government as well as other agencies and non-departmental Crown entities.*

See <http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/x/x-guide-oct15.pdf> and <http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis> for further guidance.

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts	Evidence certainty (High, medium or low)
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Additional costs of proposed approach, compared to taking no action			
Regulated parties	Ongoing: Potential increase in application fees if PVRO incurs more costs (see below)	IPONZ considers that, at present, these can be funded within baselines.	Low
Regulators	Ongoing: Additional processes for PVRO relating to PVRs for taonga species, financing the Māori advisory committee.	IPONZ considers that, at present, these can be funded within baselines.	Low
Wider government	Ongoing: Removal of exception for public, non-commercial use of new varieties may mean local government paying royalties for public planting	Unknown at this stage	Medium
Other parties	Ongoing: Some increase in costs for rights users (through increased royalty payments)	Unknown at this stage	Medium
Total Monetised Cost		Unknown at this stage	
Non-monetised costs		Low	

Expected benefits of proposed approach, compared to taking no action			
Regulated parties	Increased return on investment in breeding	Unknown at this stage	Medium
Regulators	n/a		
Wider government	n/a		
Other parties	Greater availability of innovative plant varieties	Unknown at this stage	Medium
Total Monetised Benefit		Unknown at this stage	
Non-monetised benefits		Medium	

5.3 What other impacts is this approach likely to have?

- *Other likely impacts which cannot be included in the table above, eg because they cannot readily be assigned to a specific stakeholder group, or they cannot clearly be described as costs or benefits*
- *Potential risks and uncertainties*

There are potential risks to New Zealand's international reputation in the plant breeding industry – and the potential for some economic impact – from not acceding to UPOV 91.

While we consider that we are unable to accede UPOV 91, we will be aligning our domestic regime with UPOV 91. Plant breeders – both foreign and domestic – stand to benefit from this. It is possible that, nonetheless, some foreign investors will see that we are not a “UPOV 91” country and choose not to invest on that basis. However, we think the risk of this is low, and the potential impact small, especially when compared to the gains of strengthening our regime so that it aligns with UPOV 91.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

- *Identify and explain any areas of incompatibility with the Government's 'Expectations for the design of regulatory systems'. See <http://www.treasury.govt.nz/regulation/expectations>*

Yes.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

- *How could the preferred option be given effect? Eg,*
 - *legislative vehicle*
 - *communications*
 - *transitional arrangements.*
- *Once implemented, who will be responsible for ongoing operation and enforcement of the new arrangements? Will there be a role for local government?*
- *Have the responsible parties confirmed, or identified any concerns with, their ability to implement it in a manner consistent with the Government’s ‘Expectations for regulatory stewardship by government agencies’? See <http://www.treasury.govt.nz/regulation/expectations>*
- *When will the arrangements come into effect? Does this allow sufficient preparation time for regulated parties?*
- *How will other agencies with a substantive interest in the relevant regulatory system or stakeholders be involved in the implementation and/or operation?*

The recommended package of options will be given effect through a new Plant Variety Rights Act.

The PVR Office will be the main party implementing the new regime, particularly in relation to the new processes required by meeting our Treaty obligations. IPONZ will be required to establish a Māori advisory committee to advise the Commissioner of PVRs on grants that may impact kaitiaki relationships with taonga species. (IPONZ already has experience here as there are already two Māori advisory committees in operation in other IP regimes.)

The CPTPP requires the new regime to be in place by 30 December 2021. This provides adequate implementation time for all parties.

6.2 What are the implementation risks?

- *What issues concerning implementation have been raised through consultation and how will these be addressed?*
- *What are the underlying assumptions or uncertainties, for example about stakeholder motivations and capabilities?*
- *How will risks be mitigated?*

The main implementation risks are concerned with how the new provisions relating to Treaty compliance will actually work in practice. Most breeders we spoke with recognise the importance of fulfilling our obligations under the Treaty. Their main concern is the uncertainty generated by these new provisions.

How easy will it be for breeders to identify kaitiaki to engage with? What happens if more than one kaitiaki are involved and they have conflicting views on the impacts of the breeding programme and the grant of a PVR?

The Māori advisory committee will have a more proactive role than in the other IP regimes, providing guidance and advice to breeders – including in developing guidelines – as well as the Commissioner. It is anticipated that breeders will be able to seek advice from the Committee at an early stage of a breeding programme.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

- *How will you know whether the impacts anticipated actually materialise?*
- *System-level monitoring and evaluation*
- *Are there already monitoring and evaluation provisions in place for the system as a whole (ie, the broader legislation within which this arrangement sits)? If so, what are they?*
- *Are data on system-level impacts already being collected?*
- *Are data on implementation and operational issues, including enforcement, already being collected?*
- *New data collection*
- *Will you need to collect extra data that is not already being collected? Please specify.*

There are already very strong relationship in place between the PVR Office and plant breeders and between the PVR Office/IPONZ and the intellectual property policy team at MBIE.

The main channel for monitoring how these changes are working in practice will be through the PVR Office. They have regular and ongoing engagement with plant breeders, both as applications are in train, and through regular “Technical Focus Group” meetings, which bring together representatives (include lawyers) from across the plant breeding and PVR sector.

MBIE also has regular engagements with IPONZ/PVRO and any issues that arise with the new regime will soon become apparent.

The PVRO is also required to maintain a register of all PVR applications and grants and changes are proposed to this to assist with the collecting of information relevant to Māori/kaitiaki interests (eg, recording the Māori names for plants as well as the usual botanical names).

7.2 When and how will the new arrangements be reviewed?

- *How will the arrangements be reviewed? How often will this happen and by whom will it be done? If there are no plans for review, state so and explain why.*
- *What sort of results (that may become apparent from the monitoring or feedback) might prompt an earlier review of this legislation?*
- *What opportunities will stakeholders have to raise concerns?*

There are no specific arrangements proposed for a formal review of the new regime.

The regular and well-established relationships described above will provide ample opportunity for stakeholders (including the PVR Office) to raise concerns with how the new regime is working out.