

Submission template

Review of the Plant Variety Rights Act 1987: Proposed Regulations

Your name and organisation

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25 August 2021

Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
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Wellington 6140

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SUBMISSION ON THE CONSULTATION PAPER REVIEW OF THE PLANT VARIETY RIGHTS ACT 1987: PROPOSED REGULATIONS

About the submitters

- 1) The following is a joint submission from the New Zealand Plant Breeding & Research Association (NZPBRA) and the New Zealand Grain & Seed Trade Association (NZGSTA).
- 2) The NZPBRA represents a collective of the public and private organisations that are focused on seed trait development, seed varietal development and seed commercialisation which underpins NZ's agricultural sector including the arable (broad-acre cropping), pastoral (dairy and red meat production), livestock and horticulture (vegetable cropping) industries.
- 3) The NZGSTA represents the business, legislative and regulatory interests of over 85 member organisations who have activities covering research and develop, produce (multiply), process and distributes seeds – including grasses, forages, vegetables, and cereals.
- 4) Both Associations have members including breeders, distributors, and seed companies who are users of the plant variety rights IP protection system in New Zealand as applicants and or as right-holders.
- 5) MBIE's proposals around regulations to support the primary legislation is a significant move, one we are hoping will help bring greater legal certainty and clarity to plant breeders.

Other comments

Farm Saved Seed

- 6) Following the submission template and under the "*Other comments*" heading we wish to respond to the Consultation Paper with comments in relation to the Paper's section on "Farm Saved Seed" and in particular with paragraphs 15 and 16 (page 8).
- 7) In many countries who have adopted and operate under UPOV 91 intellectual property rights law the matter of farm saved seed has been legislated or agreed as to a mechanism and recognised the importance for the breeder to receive recognition for the IP rights they hold. We feel that there has never been a more critical time than now for MBIE to think of the big picture and ensure we align to UPOV 91 by having a clear acceptance that those farmers retaining farm saved seed of a protected variety must pay a royalty to the breeder for this privilege. If breeders can have an equitable remuneration system or a royalty fees regime for farm saved seed then work needs to start now to plan for how that system might be implemented.
- 8) In our opinion, the actioning of an equitable remuneration collection system and related matters, concurrent with the coming into force of the primary legislation at the end of the

year, would be timely and highly efficient. Overall, the speed and pace of the needed regulatory reforms must be maintained in all respects. Unnecessarily prolonging the regulation making process is unhelpful for plant breeders and rights holders as it extends the period of uncertainty. Uncertainty, especially in the cereal space, could lead to a reduction in investment and this will only have the flow on impact to farmers in the future.

- 9) Through the legislative framework, the Plant Variety Rights Act is to ensure that the legitimate interests of the breeder are safeguarded. Alignment with the UPOV 91 convention is required and in particular, compliance with Article 17(2). This requirement is the “case” or rationale for ensuring breeders can receive equitable remuneration.
- 10) As advised in our written submission to the *Economic Development, Science and Innovation Committee* in July 2021, we have been working closely with farmers’ representatives and have devised a set of royalty proposals.
- 11) We recognise the need to work proactively with interested stakeholders and through a working group have been talking with various farmer representatives for several years. To ensure we have an acceptable royalty collection system for farm saved seed we aim to conclude agreement and provide a workable system, which will align with the passing of the new legislation on plant variety rights.
- 12) One product from our continuing engagements with farming leadership bodies namely Federated Farmers Arable Industry Group^{1,2}, and United Wheatgrowers (NZ) Ltd is that they have both indicated their support of plant breeding in NZ through a royalty regime and we remain in discussions as to the mechanism. Specifically, we note that at the EDSI Select Committee hearings, under questioning, Federated Farmers’ representatives reaffirmed with the Committee that they were not against the payment of a royalty on farm saved seed. With this, it is our opinion that there is no good reason preventing MBIE from drafting regulations under clause 15 during this review process.
- 13) Unfortunately, MBIE has not explained why it needs to wait until the Bill has entered into force when it is not waiting or determining another timetable to make regulations on other matters. We seek in the new draft legislation that it be stated that “individual sector interests are given the mandate to proceed to develop and implement a royalty collection system where farmers/growers who save their own seed or bud wood for further propagation are legislated to pay an agreed royalty for such activities”.
- 14) The drafting of regulations for breeders to obtain equitable remuneration does not seem to be overly complicated and doing so would be consistent with the intent of the reform process.
- 15) We strongly urge MBIE to reconsider its stance and proceed to draft regulations for farm saved seed requirements now, instead of waiting for some other time in the future. This was the preference of the Minister in 2019³.

¹ PVR Bill – hearing of evidence 12 August 2021 at the Economic Development, Science & Innovation Committee [https://www.facebook.com/EDSISCNZ/videos/1162043970941909/?hc_ref=ARQj3eIXmzYJFkNLTfIX9qGZe_dDuDSqd4c4Sjq4CTqnDepiFjHA99tskUXIXUDhx&_xts__\[0\]=68.ARBmqAJG3AVp2EUdnFzyYQIDNWsIjJiMc-QYtSPuX29hTR_wqUbxXbObYPUbOts8mTTqRrGliWMwkJTj17WeZYYaTv8Y154NIawXwwJguaLL3OPcrrP6TOuFp4Gj5XvK3siAQ5fHlr2-FCpxM33UK-Qd6989x7F7MXO5IDVSSQqC4BBZTpcwlgpyWGGJTSau4bhoP1vnuum0U1EDsPG-2aekfYWFMXfnCAul2YTH4n-gksbcZChoqV31LqQNNQuaRvR3i7WuBgCICZgZRPm63UBKIT1HFtOolNE8697HoiBLrJkMbptXUI3ZS8FA&_tn_ =kC-R](https://www.facebook.com/EDSISCNZ/videos/1162043970941909/?hc_ref=ARQj3eIXmzYJFkNLTfIX9qGZe_dDuDSqd4c4Sjq4CTqnDepiFjHA99tskUXIXUDhx&_xts__[0]=68.ARBmqAJG3AVp2EUdnFzyYQIDNWsIjJiMc-QYtSPuX29hTR_wqUbxXbObYPUbOts8mTTqRrGliWMwkJTj17WeZYYaTv8Y154NIawXwwJguaLL3OPcrrP6TOuFp4Gj5XvK3siAQ5fHlr2-FCpxM33UK-Qd6989x7F7MXO5IDVSSQqC4BBZTpcwlgpyWGGJTSau4bhoP1vnuum0U1EDsPG-2aekfYWFMXfnCAul2YTH4n-gksbcZChoqV31LqQNNQuaRvR3i7WuBgCICZgZRPm63UBKIT1HFtOolNE8697HoiBLrJkMbptXUI3ZS8FA&_tn_ =kC-R)

² Personal communication dated 30 July 2021

³ Cabinet Paper, 27 November 2019, para 117-118

Paragraph 16

- 16) The consultation paper in Paragraph 16 states that it is MBIEs intention to “*only consider recommending making regulations under clause 15 if the case for this is made in the future (eg if growers and PVR owners approach MBIE with an agreed proposal for such regulations after the Bill has entered into force)*”.
- 17) In terms of process and procedure to be followed, the statement is ambiguous and vague about how relevant parties can make representations that may apply through the regulations. In addition, it is nonsensical that we do not have both new IP rights and collection/administrative processes all in place at the same time that it comes into force. Otherwise, breeders will again forfeit royalties unnecessarily.
- 18) Without any detail as to what is meant by making a “case” we remain uneasy as this effectively leaves it to MBIE’s discretion. In this case, who is MBIE, the Commissioner? This uncertainty for plant breeders is not a satisfactory or desirable situation; especially given MBIEs approach is for the regulations to “*be clear and understandable*”.
- 19) We suggest that the “case” does not need to be re-made or litigated, as our legislation is required to comply with the UPOV 91 convention and its requirements. As stated above all aspects of the new legislation should be in place and implementable from the outset.
- 20) Another flaw with MBIEs overall statement is its use of the words “*an agreed proposal*”. We submit that there will always be a degree of negativity and objection to any proposal by some farmers, simply because they do not wish to pay equitable remuneration and they are happy to free ride on the quality and innovation investment of others. Clearly, there remains an element who have incentive to disagree and delay. A better choice of phraseology and course of action would be for MBIE to consider “*an appropriate proposal*”, a “*common-sense proposal*” or a “*pragmatic proposal*”.
- 21) To assist users of the regulations we suggest that a new section be added, immediately following section 9 of the current regulations, to enable matters on which written representations may be made, thus a new section 10:

10 Matters on which written representations may be made

A person or their representative likely to be substantially affected shall be entitled to make written representations to the Commissioner and be heard by him in relation to matters specified in Section 15 Exception to PVR: farm saved seed.

Farm saved seed – Proposed Regulations

- 22) Considering our collective understanding and agreement as outlined in paragraph 12 of this response and taking a proactive approach we believe regulations should be developed now to allow for a royalties administration and collection system once the Act comes into force .
- 23) Firstly, it would provide clarity for all stakeholders on the legal processes and expectations to be followed. In addition, it sends a very positive signal to breeders and rights holders to make available to growers, earlier access, to new and innovative cultivars. Thirdly, it will allow the plant breeding industry in NZ to build to a higher level as well as provide the incentives for overseas plant breeders to commercialise their new varieties in NZ.

24) In light of this, we propose the following indicative regulations relating to the practical steps for implementation:

Plant Variety Rights Regulations

Part xx

Farm saved seed

1) Information to be supplied by the farmer

- a. Name and address of the farmer
- b. Farmer to provide information of seed variety retained and replanted or proof of purchase of planting seed
- c. The amount of farm saved seed used to be informed to the rights holder or an appointed representative

2) Information to be supplied by the relevant rights holder

- a. Name and address of the relevant rights holder
- b. The amount of equitable remuneration to be charged
- c. Confirmation of whether the variety royalty will be collected on the seed sown or as an end point royalty on the resultant crop

3) Confidentiality

- a. A person who obtains information pursuant to this section shall keep all the information confidentially

4) Formalities

- a. All information requested under this Part shall be provided in a time period set out in the request

5) Offence and penalties

- a. No person shall, in response to the request made pursuant to this Part
 - i. Intentionally fail to provide information
 - ii. Refuse to provide information or
 - iii. Knowingly or recklessly provide false information
- b. A person guilty of an offence under paragraph 5a shall incur a fine (to be specified) . We believe a clear penalty schedule should be set out as part of the new legislation being drafted.

6) Specification of species and groups

- a. The species and groups list in the **Schedule x** are specified for the purposes of this Part

7) Equitable remuneration

- a. The level of the equitable remuneration is the responsibility of the rights holder or an appointed representative and has been published and updated annually as part of the administration collection process

Schedule x
Farm saved seed species and groups

Common name	Botanical name
<i>Fodder/forage plants</i>	
Ryegrass	Lolium
Clover	Trifolium
Lucerne	Medicago sativa
Cocksfoot	Dactylis glomerata
Tall fescue	Festuca arundinacea
Brome	Bromus
Brassicas	Brassicaceae
Fodder beet	Beta vulgaris
Chicory	Cichorium intybus
Timothy	Phleum
Plantain	Plantago
Meadow fescue	Festuca pratensis
<i>Cereals</i>	
Wheat	Triticum
Barley	Hordeum
Oats	Avena sativa
Triticale	Triticosecale
Ryecorn	Secale cereale
<i>Pulses</i>	
Peas	Pisum
Beans	Phaseolus vulgaris

Explanatory Note: The list of farm saved seed species and groups are subject to PVR protection and equitable remuneration if saved and replanted by a farmer.

Conclusion

- 25) There is consensus that NZ agriculture will continue to benefit from new plant varieties by providing farmers with technological advancements to help combat changing economic and climatic conditions. Typically, it takes around a decade and millions of dollars to develop a new cultivar for commercial release. New cultivars would bring increased productivity and profitability to farmers, as well as increased GDP for NZ.
- 26) For plant breeders the ability to secure equitable remuneration, or a royalty scheme from farmers who save seed of a protected variety, mandated in the regulations, would significantly incentivise further investment in breeding and innovative solutions for farmers.
- 27) Implementing regulations for plant breeders to secure equitable remuneration from farm saved seed, as required under the UPOV 91 convention, would accelerate the plant breeding industry's growth and would make NZ consistent with other major seed trading countries

including Australia, France, Denmark, UK, USA and others. It is evident that these country's farmers remain viable and competitive.

28) In addition, it would provide the clear legal framework for plant breeders from around the world to be comforted that they will be recognised for the IP they have developed.

29) We look forward to a continued collaboration with MBIE towards the implementation of a system for equitable remuneration for plant breeders. We stand ready to assist MBIE on this matter.

Yours sincerely

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