

Plant Variety Rights Act 1987 review: Issues Paper – Submission template

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| Name | |
| Email | |
| Organisation/iwi | Zespri Group Limited |
| Interest | <p>With global sales revenues of \$2.39 billion in 2017/2018, Zespri is one of the world’s most successful horticulture marketing companies. The Zespri brand is recognised as the world leader in premium quality kiwifruit. Based in Mount Maunganui, we are 100% owned by current or past kiwifruit growers, and employ around 500 people in New Zealand, Asia, Europe and the Americas. On behalf of our New Zealand and offshore growers, Zespri manages kiwifruit supply, export, market development, distribution and marketing of both non-proprietary kiwifruit varieties (Zespri Green and Zespri Organic Green Kiwifruit) and proprietary kiwifruit varieties (Zespri SunGold, Zespri Organic SunGold, Zespri Gold and Zespri Sweet Green Kiwifruit). The proprietary varieties are subject to plant variety rights (PVRs), or similar rights, held by Zespri in various places around the world.</p> <p>Zespri doesn’t own kiwifruit orchards but partners with local suppliers to grow its proprietary varieties under licence and procure high-quality non-proprietary varieties to meet market demand. In New Zealand, as at 31 March 2018, there were over 4,500 hectares producing licensed Zespri kiwifruit varieties. Over the five years from 2018 to 2022, Zespri plans to licence an additional 3,750 hectares by way of 700 hectares of Zespri SunGold Kiwifruit and 50 hectares of Zespri Organic SunGold Kiwifruit each year.</p> <p>As part of sourcing the kiwifruit, Zespri requires that its growers adhere to strict growing, quality, food safety and other standards. This “Zespri System” underpins our brand promise to consumers and customers, and supports the quality of every piece of fruit in every Zespri box.</p> <p>Innovation is fundamental to creating value and delivering Zespri’s strategy. More than half of Zespri’s innovation investment is in our joint programme for the breeding of new varieties with The New Zealand Institute for Plant and Food Research Limited (“Plant and Food Research”). This is the world’s largest kiwifruit breeding programme and aims to develop a differentiated portfolio of proprietary products to underpin our industry’s competitive advantage. We evaluate thousands of seedlings each year and now have more than promising varieties in stage 2 trials around New Zealand. Recently, we progressed two new red kiwifruit varieties into pre-commercial trials. New cultivar development is a long process, but an essential part of ensuring Zespri can continue to meet the needs of our consumers by delivering healthy, safe and delicious kiwifruit products.</p> <p>Against this background, Zespri appreciates the opportunity to submit on this Issues Paper.</p> |

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Release of information

For more detail on how MBIE proposes to release submissions, please see page ii of the Issues Paper.

I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons and grounds under the *Official Information Act 1982* that I believe apply, for consideration by MBIE.

Responses to Issues Paper questions

Your submission may respond to any or all of the questions from the Issues Paper. There is an additional box at the end for any other comments you may wish to make.

Text boxes will expand as you complete them.

Objectives of the PVR Act

1

Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?

Zespri supports a primary purpose of a modern, fit-for-purpose Plant Variety Rights Act (“Act”) being to promote innovation and economic growth by incentivising the development of new varieties. It is important that plant breeders have a regime robust enough to enjoy an appropriate return from the investment they risk in the development of new plant varieties.

The concept of “dissemination” needs some thought, however. This suggests widespread distribution and availability of a protected variety, whereas “use” of the variety in New Zealand by the plant breeder (or rights holders, including licensees) may be a better objective. In some instances, society may benefit more from the availability of products from a protected variety (fruit, flowers, other products) than from the availability of actual plants or reproductive material of the variety itself. Consideration should be given to the modern commercial models used by rights holders, such as providing for rights over harvested material of protected varieties. These models do ensure products from protected varieties are readily available, but also allow the rights holder to achieve an appropriate return on investment.

In addition, consideration should be given as to whether balancing the interests of “growers” should be specifically mentioned rather than including this group within society as a whole. The purpose of the regime is to provide for PVRs for plant breeders, who receive certain exclusive rights in return for sharing their new variety with society. It is not necessarily aimed at balancing the interests of growers of protected varieties. Growers could be recognised through a further purpose, as noted below, aimed at ensuring certainty for PVR users/growers.

Further purposes of the Act could be to:

- provide an efficient and effective PVR regime
- ensure greater certainty for PVR holders and users/growers of varieties protected by PVRs

Specifically highlighting these additional purposes shows that the Act is focused on making sure the regime is clear, certain and effective. As mentioned in the Issues Paper, and in this submission, some of the issues identified with the current Act stem from sections or requirements that are perceived to be unclear or not efficient. Examples are:

- The compulsory licensing provisions. The submissions that Zespri makes in this document about compulsory licensing (and sales orders) are based on Zespri's understanding of the policy intent and legislative effect of those provisions. However, we are aware that there are differing views about those provisions in the industry and they would benefit from further clarity.
- The enforcement options under the Act, which can be time consuming and costly.

When the Act does not meet these objectives, participants may be incentivised to use legal methods other than PVRs to protect their varieties - such as physically withholding the variety, confidentiality agreements or other contractual arrangements.

We support an objective of the regime being to ensure compliance with New Zealand’s international obligations. However, the proposed objective is quite broad. The more relevant international obligations within this context could be specifically mentioned – such as UPOV 91. Consideration should also be given to exceeding New Zealand’s international obligations, where there is good reasons for doing so. A world-leading PVR regime could incentivise the development of new varieties and importation of existing varieties within New Zealand in preference to other jurisdictions and create a competitive advantage for this country.

We support the objective of ensuring consistency with the Treaty of Waitangi as part of a modern PVR regime, provided this does not introduce further uncertainty into the regime and is in line with the other objectives of the regime.

At present, the PVR regime is not meeting New Zealand's international obligations as a signatory of UPOV 91. At a minimum, the Act needs to be updated to conform with UPOV 91.

Certain gaps in the Act, largely as a result of not being consistent with UPOV 91, do not always provide an incentive for a PVR holder to invest in the development of new varieties, or provide for a clear, certain and efficient regime within which to do so. These are outlined in more detail in the relevant sections below, but include:

- Limited rights over the harvested material of a protected variety. This can both make PVR enforcement difficult, and limit the return a PVR holder can achieve on its investment where it has no control over harvested material such as fruit, flowers and other products - particularly when the propagating material of a protected variety does not necessarily have much commercial value in and of itself.
- Minimal rights over varieties that are closely similar to the protected variety. This enables free-riding on investment as breeders can look to copy protected varieties.
- Uncertainty created by a broad compulsory licensing provision, with aspects not found in other comparative jurisdictions. These provisions create concern among PVR holders and could benefit from better certainty.
- Several elements which inherently disincentivise use of the regime, such as:
 1. Costly and time-consuming processes to enforce a PVR, which could potentially outweigh the effort and cost involved in filing and incentivise the use of other legal methods such as contracts to supplement gaps in the Act.
 2. No express recognition in the Act of the ability to use foreign test reports to prove a variety is new, distinct, uniform and stable. Where the perceived costs are too high, PVR holders are likely to file only for varieties that are perceived to have commercial benefits to them and will not release varieties which may not be of commercial benefit to them (but which could have benefits to others).
 3. Limited scope of rights, including no rights to prevent exporting, stockpiling or conditioning of propagating material, which are difficult to prosecute as infringement.

3

What are the costs and benefits of New Zealand's PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.

Some potential costs/disadvantages with New Zealand's PVR regime not being consistent with UPOV 91 are mentioned in question 1 and 2 above. Others are mentioned further below in the sections dealing with the specific issues.

4

Do you think there would be a material difference between implementing a sui generis regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

Our preference, as a multi-national organisation headquartered in New Zealand, would be for the New Zealand regime to be consistent with international best practice, which at a minimum should include compliance with UPOV 91. We would welcome the regime exceeding international best practice in areas where it makes sense to do so, such as providing longer terms of grant or extending rights further over harvested material.

If a sui generis regime were implemented, and this differed significantly in several aspects from either UPOV 78 or UPOV 91, there are likely to be costs involved for multi-national organisations to understand and apply the different regime. Internationally consistent regimes allows PVR holders to develop co-ordinated filing, protection and enforcement strategies. This assists with planning, both through the initial protection phase and then as commercial arrangements are put in place with licensees or nurseries. It is useful to be able to largely replicate such models in the various jurisdictions, and localise only where necessary to meet local requirements or practices.

Farm-saved seed

5 Are there important features of the current situation regarding farm-saved seed that we have not mentioned?

Zespri does not have a particular interest in farm-saved seed, as currently framed in the Issues Paper. Zespri's primary concern in respect of this issue is that the exclusive right in s 17(1)(b) of the current Act remain. This provides the PVR holder with the exclusive right to propagate the protected variety for the commercial production of fruit, flowers and other products. Without this, there would be much more limited ability to practically control the further propagation of varieties such as kiwifruit once reproductive material has been released/sold.

Generally, our PVR licensees pay a licence fee to commercially produce fruit from our protected kiwifruit varieties within a particular licensed area and a royalty on the fruit sold. Budwood is usually provided free of charge, but growers can choose to buy pre-grafted plants from licensed nurseries. Zespri does not charge a royalty per plant or per bud. Where kiwifruit plants need regrafting or replacing, licensed growers can source plants/budwood from licensed nurseries, properties owned by them or nearby properties of other licensees – subject to biosecurity protocols around production and transport of kiwifruit varieties.

6 Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.

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7 Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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8 Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

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9 Do PVR owners use mechanisms outside the PVR regime to control farmers' use or saving of the seeds of their protected varieties? What are these?

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10 Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?

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11 What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

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Rights over harvested material

12

Are there important features of the current situation regarding rights over harvested material that we have not mentioned?

One issue not clearly canvassed in the Issues Paper is that it generally sits with the PVR holder to assert its rights in situations where the PVR holder suspects unauthorised use of its protected variety. It can be difficult to track and monitor plant material once it has been sold/released unless a comprehensive auditing/monitoring programme is in place. This increases the cost to PVR holders of using the regime.

One way to assist with this, would be to comprehensively extend the PVR holder's rights over harvested material of a protected variety. The rights under UPOV 91 are a useful extension, but are not absolute and will likely continue to need to be supplemented by contractual protections in PVR licensing arrangements.

As part of this, consideration should be given as to why the PVR holder should be required to have had a reasonable opportunity to "assert" its rights. This can be time consuming and costly, as well as being inherently unfair as it effectively places the onus on the PVR holder to continually monitor and take action against infringers merely to preserve its existing rights. A PVR holder should have rights over harvested material simply where someone is producing harvested material obtained through unauthorised use of the propagating material of a protected variety. Whether or not the PVR holder has an opportunity, or chooses to, assert the rights could be a potential area for dispute and challenge, and may be impractical or uneconomical in some cases to do so; however, this should not prejudice the later ability to do so if circumstances change.

For example, in respect of vegetatively-propagated varieties, the PVR holder should have rights over harvested material produced through the unauthorised propagation of a protected variety for commercial purposes. However, where the harvested material is produced through a permitted activity (such as breeding or private, non-commercial use) then the PVR holder need not necessarily have rights over the harvested material. This enables the PVR holder to have certainty around its commercial position, but allow for others in society to use the variety in reasonable ways – this maintains the social bargain of receiving some exclusive rights in return for sharing of the protected variety with society in particular ways.

13

Do you agree with our definition of 'harvested material'? Why/why not?

We agree that it is important to widely define "harvested material". It is important that valuable products which are produced from protected varieties other than fruit and vegetables should be considered "harvested material". The concept of "produce" alone might not be sufficiently broad, as it may not factor in elements such as pollen or other plant material which may have commercial value but not meet the common understanding of "produce".

One particular issue is whether harvested pollen and flowers would be considered harvested material or reproductive material. For example, commercially valuable pollen is produced from male kiwifruit flowers, milled and sold to growers who require pollen to supplement their on-orchard male plants. As male kiwifruit plants do not produce fruit, their sole commercial value is for pollination, which might justify protection of the variety; however, rights over harvested fruit would be of no use to this PVR holder. Varieties such as this also provide material challenges in enforcement as there are typically few male plants in an orchard and they are interspersed with female plants (which do produce fruit), making them difficult to identify and administer from a PVR licensing perspective.

14

Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Zespri supports the extension of the PVR holders' rights over harvested material, at a minimum to the extent provided by UPOV 91. For vegetatively-propagated plants such as kiwifruit, the primary value of the plant is the harvested material – such as the fruit, flowers and other products. As part of this, for vegetatively-propagated varieties, it will be important to retain the exclusive right to propagate the protected variety for the purposes of commercial production of fruit, flowers and other products as provided for under s 17(1)(b) of the current Act.

The PVR regime would be of less value to owners of protected varieties of vegetatively-propagated plants if the PVR holders' right is simply limited to receiving a royalty / fee on the sale of the individual plants. Given the way such plants are propagated, a commercial grower would only need to purchase one or a handful of such plants to eventually produce enough propagating material to grow the plants on a commercial scale without providing any return to the PVR holder on subsequent plants grown or harvested material produced.

One of the problems with the current Act is that a PVR holder cannot take action against harvested material it identifies in the marketplace. Often the presence of unauthorised harvested material is the way in which the PVR holder first becomes aware of unauthorised use of its varieties; but, its legal options are then limited to tracking where the harvested material was produced and trying to prove the unauthorised sale or propagation of its varieties. This can be time intensive, costly and uncertain. By providing rights over harvested material, the Act would enable the PVR holder to take quick and certain action over harvested material it identifies in the marketplace through preventing the sale of the produce or requiring delivery up of information as to the source of the infringing product. These extended rights would act as a strong disincentive for growers/users to invest in the infringement of a PVR holder's right, as the cost of risking confiscation of harvested material once it has been produced and is in the marketplace is more significant. In addition, it would incentivise buyers and marketers to take active steps (such as requesting evidence from sellers) to identify the variety it is selling, validate its rights to distribute and verify the origin of the harvested material being supplied to them; helping the regime to be clearer and self-sustaining.

As the current Act provides limited rights over harvested material of protected varieties, many commercial PVR holders have developed licensing arrangements that supplement the Act via contractual protections – such as requiring harvested material produced from the protected variety to be sold back to the PVR holder or other nominated person. However, the monitoring and enforcement of those commercial rights creates cost and complexity in and of itself.

Further submissions on the current difficulties faced in enforcing PVRs, in part given the limited scope of rights over harvested material, is set out further below in sections 28-32.

15 Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

Given the effort involved in breeding a new plant variety, it is justifiable for the PVR holder to have certain exclusive rights over the harvested material of the protected variety. As noted above, s 17(1)(b) of the current Act already does this to some extent in respect of certain vegetatively-propagated plants - extending the PVR holder's exclusive right to include propagating the variety for the purposes of commercial production of fruit, flowers and other products. This is a significant benefit for such PVR holders and should be retained. This exclusive right allows the relevant PVR holder to have confidence in licensing and providing its varieties to growers and the public; thus, incentivising use of the PVR regime and supporting the use/dissemination of protected varieties.

Rights over similar varieties

16 Are there other important features of the current situation regarding distinctness that we have not mentioned?

One practical issue with the current approach to distinctness, is that while grants are made on the basis of phenotypical characteristics most enforcement activities are done based on DNA testing. This means that the basis for determining whether a variety is distinct is not always the same as the process used for determining whether there has been an infringement of rights. Consideration should be given as to whether there should be greater alignment between the processes, with a view to ensuring that the degree of distinctness is material from a genetic perspective.

For instance, potentially the PVR Office might require a genetic test for all protected varieties and keep central records of all protected varieties and those under application. Alternatively, the PVR Office could be responsible for developing and maintaining a central repository of plant material of every protected variety. Some jurisdictions require the deposit of plant material with the central authority before a grant is made. Retaining such records enables ready access to plant material in the event an infringement is suspected, and could also preserve a central source of known varieties for the purposes of testing against. The current situation whereby the PVR Office identifies known varieties and it falls to the PVR holder to identify the holders of those known varieties, negotiate for their use in DUS testing and source plant material is a barrier to use of the PVR regime – especially for businesses not adequately resourced to undertake some of these steps. Holding a central repository of known plant material would be a practical way for the PVR Office to facilitate PVR holders’ testing and enforcement activities.

17 Are there other important features of the concept of EDVs that we have not mentioned?

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18 Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Under the current PVR Act, small changes that are of no commercial consequence can currently be used to claim a new variety irrelevant of the fact that the variety is not materially different from an existing cultivar in the market. This is of particular issue when the cultivar is identified as a sport from an existing commercial cultivar. This allows an applicant to claim rights over a new variety based on an immaterial trait and could even lead to abuse of the regime in the event that a breeder bred an almost identical variety with minor variances.

Zespri is generally supportive of the principle that the difference between a new and existing variety should be more than minor. The policy should be to prevent people free-riding on the innovative efforts of others. For instance, where the essential characteristics of a variety are the same as an existing protected variety then the new variety might be refused protection even if it has other distinct characteristics.

Zespri is generally supportive of providing a PVR holder with some protection for varieties that are “essentially derived” from a protected variety.

19 Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

In respect of kiwifruit at least, the current approach to assessing distinctness, as implemented by the PVR Office, is relatively robust. This means that all new variety applications are carefully considered and DUS testing or comparative reports required before a grant will be made. This provides PVR holders and users with good confidence in the regime.

As a multinational organisation, there is significant cost associated with arranging for DUS testing to occur in multiple jurisdictions. This process is materially easier in jurisdictions which have centralised testing agencies as the PVR applicant merely delivers the plant material and the testing is conducted independently by the testing agency. This not only provides an objective and consistent testing regime, which promotes confidence in the testing, but also eliminates the difficulties and cost involved with developing and managing test sites in multiple jurisdictions, overseeing service providers and arranging for comparative material to be provided. It also means that once the PVR is granted, the PVR office already has a ready source of plant material which can be made available for DUS testing of new varieties or enforcement activities if required.

It is important that provisional protection remains under the Act while varieties are in the application phase. In the case of ZESY002 (Zespri SunGold Kiwifruit) for instance, this variety was commercialised while the application was still under consideration by the PVR Office, in part due to the PSA disease which affected the New Zealand kiwifruit industry. The disease subsequently eliminated the previous centralised test site, leaving all kiwifruit PVR applicants to start from scratch in developing test sites, sourcing comparative material and identifying service providers. Without provisional protection, the release of this variety might have had to be delayed at significant cost to the New Zealand kiwifruit industry; or released without protection at significant cost to the PVR holder and its growers/licensees. It is important that the same protections as for a granted variety apply while the application is considered, to encourage PVR holders to commercialise with confidence and certainty. Kiwifruit PVRs applied for prior to 2010 (when PSA was identified in New Zealand) seem to have taken a minimum of 6 years to complete DUS testing and proceed to grant; while having provisional protection provides some ability to release with comfort, the regime should ensure the PVR holder has the ability to confidently enforce the PVR during such provisional protection period as in this case

20

How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?

As noted above in question 16, the development of more efficient and widely accepted genetic testing techniques could assist with identifying protected varieties and proving their infringement.

21

Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.

the PVR regime is in many ways self-policing in that PVR offices cannot necessarily have the full understanding of all new varieties across all species at all times and the regime inherently relies on the honesty of the applicant.

22

Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Without an EDV regime, PVR holders accept the risk that a third party will develop a variety slightly different to their own (but with the same valuable commercial characteristics) and receive a grant of PVR. This risks a potential loss or reduction of the investment put into developing and commercialising the initial variety.

Significant time and investment goes into many plant breeding programmes. The Zespri / Plant and Food Research kiwifruit new cultivar breeding programme invests _____ million per year. This involves significant investment in a number of stages before commercial release – from the crossing of parental selections, to clonal trials then pre-commercial block trials. Each of these stages takes a number of years, with the typical process from seedling through to consideration of commercial release taking around 14 years.

It requires expertise, investment and persistence to identify and successfully commercialise a new variety. Zespri last successfully commercialised a variety in 2010 - being ZESY002 (Zespri SunGold Kiwifruit). This was the first commercial release of a variety by Zespri since the release of Hort16A in the late 1990s. It followed a significant number of years of breeding and pre-commercial trials on other varieties. Further in that same year, two other varieties (ZESY003 (Zespri Charm Kiwifruit) and ZESH004 (Zespri Sweet Green Kiwifruit)) were released, one of which was decommercialized due to supply chain challenges and the other which

As is often the case in research and development, the successful developments often are far fewer than the unsuccessful attempts, and must fund not only their own lifecycle and development, but also effectively under-write the investments made in unsuccessful varieties.

It would be against the objectives of the Act, which looks to incentivise innovation, for someone to 'free-ride' on the success of Zespri SunGold Kiwifruit by developing a variety which was only slightly different but retained the most commercially valuable characteristics given the time, energy and resources put into the variety.

23 Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

Zespri supports an EDV regime, but the Act must be careful to continue to incentivise investment in the research and development of new varieties. Any EDV regime must be balanced, so that the protections extend only so far enough to secure the investment in the initial variety but not lock away multiple generations of varieties that are significantly different. The Act should protect the ability for any breeder to access plant material for research and development, and to successfully breed valuable new varieties for the benefit of New Zealand.

Consideration should be given as to whether protection over EDVs should run from when the EDV is developed rather than from when the initial variety is developed. Potentially, the EDV itself could have a timeframe for protection (e.g., 10 years) in addition to the protection conferred by the protected variety on the EDV – i.e., whichever period is longer prevails. This would mean that if an EDV is developed just prior to the PVR for the initial variety expiring, the EDV would remain protected for some additional time (e.g., 10 years) rather than being unprotected as soon as the initial variety's grant expires.

24 How might technological change affect the problems/benefits of not having an EDV regime that you have identified?

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Compulsory licences

25 Are there important features of the current situation regarding compulsory licences that we have not mentioned?

An important aspect not mentioned in the Issues Paper is that – based on Zespri’s understanding of the policy intent and legislative effect of relevant provisions - the compulsory licensing provisions do not affect the exclusive right to propagate a protected variety for the commercial production of fruit, flowers and other products (s 17(1)(b) of the current Act). This right remains reserved to the PVR holder, notwithstanding the issue of any compulsory licence or sales order. Zespri is aware that there are views in the industry to the effect that a compulsory licence or sales order is a mechanism to obtain a licence allowing for the commercial production of fruit, flowers and other products without specific reference to the holder of the PVR. Given the lack of clarity in the wording of the legislation, and the lack of relevant precedent,

Compulsory licences and sales orders should be considered as mechanisms to ensure the public can access varieties for the purposes of developing new plant varieties for the permitted purposes set out in s 18 of the current Act. Enabling others to carry out these permitted purposes (such as breeding, human consumption and non-commercial use) is part of the social bargain of the PVR holder being granted other exclusive rights. In particular, sales orders are intended to assist with ensuring that third parties have physical access to the reproductive material for those purposes (including if a compulsory licence is granted).

Zespri’s submissions are based on the above understanding of the compulsory licence and sale order provisions. As the PVR regime review progresses, it may be appropriate to clarify the purposes for which reproductive material obtained through a compulsory licence or sales order can be used and provide an opportunity to make submissions on it. The current Issues Paper implies there is no restriction around the use of such reproductive material, which is not supported by statutory interpretation, nor the inherent objectives of the PVR regime of rewarding innovation through the social bargain.

If MBIE considers that our understanding of the effect of the compulsory licensing provisions is not correct, or that from a policy perspective the holder of a compulsory licence or sales order should be entitled to propagate the relevant variety for the purposes of the commercial production of fruit, flowers and other products, Zespri would have objections to that.

26

Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

PVRs are intended to encourage innovation and investment in plant breeding. In return for that investment, the PVR holder deserves a reasonable commercial return. Typically, in the fruit industry, this is earned by the PVR holder exploiting its PVRs through commercial licencing arrangements arranging for the commercial production of fruit, in return for a fee or royalty. However, if the compulsory licensing provisions were interpreted as conferring broader rights than Zespri considers are contemplated by the current Act, the ability under the Act for a compulsory licence to be granted could undermine the return for both the PVR holder and its licensees.

By way of example, in the 2018 release of 700 hectares of Zespri SunGold Kiwifruit licence, the average successful tender price was _____ per hectare. The price is for the licence to commercially produce fruit from the defined area, and does not include the further significant investment required to covert or establish orchards to successfully grow the licensed variety.

Growers expect that Zespri SunGold Kiwifruit will be a high returning variety, and are investing on that basis. Part of the reason for the high returning nature of Zespri SunGold Kiwifruit is that, as a PVR protected variety, Zespri is able to manage the amount of hectares released to ensure demand can continue to grow ahead of supply. This controlled release is one of the factors growers take into account when making their investment decisions. Were the compulsory licensing provisions interpreted to allow release of licences for commercial fruit production outside the existing commercial arrangements agreed with the PVR holder and its licensees,

Interpreting the provision in this manner could undermine the exclusive rights granted to PVR holders through enabling others to obtain the benefit of the variety without reference to the PVR holder, or indeed, by circumventing the holder of the rights. Zespri agrees that the compulsory licensing provisions should preserve the ability of third parties to access propagating material for the permitted purposes in s 18 of the current Act, but is of the view that the provisions must be clarified to make it clear that authorisation for commercial production of fruit, flowers and other products remains within the scope of the exclusive rights granted to the PVR holder.

The primary problem with the existing compulsory licensing provision is the uncertainty created through the lack of clarity in the statutory wording. There are a number of other improvements that could be made to the existing section 21, including:

1. Making it explicit that a compulsory licence or sales order cannot infringe the PVR holder's rights under existing s 17(1)(b).
2. Requiring a compulsory licensing applicant, before being permitted to apply for a compulsory licence or sales order, to demonstrate that they have first approached the PVR holder for a licence or physical access to the protected variety and been unreasonably rejected – i.e., made a reasonable attempt to agree on the terms of a licence or sale on reasonable commercial terms and conditions. This would incentivise both the applicant and the PVR holder to genuinely attempt to reach a sensible agreement around access and, where the licence or access is refused, provide evidence in support of the proposition that the variety is potentially not being "made available". Section 176 of the Patents Act 2013 provide a good example of this.
3. Generally clarifying what it means to be making reproductive material available in reasonable quantities, of reasonable quality and at reasonable prices. For example, if the available quantity is small, then it should arguably still be the case that it is "reasonably available" if there is no evidence that the demand outstrips the supply. Similarly, the material that is available should be of "reasonable quality" if there is no evidence that any person to whom reproductive material has been provided by way of sale or licence has raised any concerns about the quality of that material

4. A comparative study has found sub-section 21(3) is not found in any other comparable country. The purpose of this sub-section could be clarified and clearly articulated. It appears that, where access to reproductive material is being provided only on the condition that the produce is sold to a particular person, it is likely to follow that no material is able to be used for the purposes of developing new varieties of plants (or for the purposes of any of the s 18 activities). Accordingly, those quantities are not "available" to third parties for these purposes. If that is a correct articulation of the purpose of s 21(3), that purpose should expressly and explicitly be included in the legislation.

Given the myriad of contractual frameworks that exist relating to plant varieties, which are often driven by the nature of the plant material/species being protected, it would seem appropriate to consider aligning with international convention by removing this requirement, and thereby preserving freedom of contract for the PVR holder and its licensees.

5. Alternatively, if s 21(3) were not removed, the purpose of this sub-section should be clarified, as preserving only permitted uses of protected varieties for the purposes allowed to any person by s. 18.
6. Introducing a "public interest" test. This is now the test for considering the grant of a compulsory licence in modern legislation in other jurisdictions compliant with UPOV 91. This should be the case with New Zealand too. "Public interest" is a broad, sophisticated concept that can be tailored to the requirements of the particular PVR and each individual compulsory licence application. It can include factors such as the need to continue incentivising the breeding of new varieties. A more nuanced test would better suit the more sophisticated commercial approach of the plant varieties industry, which has evolved significantly since the 1987 test.
7. The three-year grace period after the making of a grant within which an application cannot be brought is too short. Any compulsory licence regime needs to provide for a longer exclusivity period to appropriately recognise the long time it takes to breed, commercialise and exploit a plant variety. Further, in many crops, including kiwifruit, full commercial production will not be obtained in the first year of planting, and thus the PVR holder may only just be starting to realise the benefits of making their variety available when the compulsory licensing application period opens.
8. Identifying particular statutory terms that will or could apply to all compulsory licences. This would provide further certainty to PVR holders and users as to the nature of the licence that would be granted. Such statutory terms could include that the licence:
 - a. does not extend to propagation of the variety for the commercial production of fruit (by both the licence holder and any person to whom it sells reproductive material);
 - b. is non-exclusive, non-assignable and cannot be sub-licensed; and
 - c. confers no right to export reproductive material of the protected variety.

Zespri considers, on the basis that the scope of a compulsory licence or sales order is as set out in Zespri's responses to section 25 above, that the compulsory licensing provisions do have benefits in ensuring the availability of reproductive material of protected varieties for the purposes set out in s 18 of the current Act including for the purpose of plant breeding on a commercial scale:

- Ensuring availability to propagate, grow or use for non-commercial purposes means that home gardeners can privately enjoy the benefits of the protected variety.
- Ensuring availability for breeding means more advanced varieties can be produced to the benefit of New Zealand as a whole.
- Ensuring availability of reproductive material for human consumption and other non-commercial purposes, provides certainty to the public that they may use reproductive material for these purposes without being concerned about accidentally infringing the PVR holder's rights.

The ability to obtain a separate sales order enables the public to physically access reproductive material of protected varieties. Physical access to plant material is critical to s 18; without this the permitted activities cannot be carried out and the general public and plant breeders will be denied some of the benefits of the PVR regime.

As mentioned in question 25 above, if MBIE considers that our understanding of the effect of the compulsory licensing provisions is not correct, or that from a policy perspective the holder of a compulsory licence or sales order should be entitled to propagate the relevant variety for the purposes of the commercial production of fruit, flowers and other products, then Zespri would have objections to that and seek to make submissions on it.

Enforcement: infringements and offences

28

Are there important features of the current situation regarding infringements and offences that we have not mentioned?

[Click here to enter text.](#)

29

Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?

Zespri has been involved in several disputes relating to the infringement of its PVRs in multiple jurisdictions, including New Zealand. The vast majority of these occur as a result of unauthorised plantings or over-plantings of its protected varieties. Zespri spends significant time and resources monitoring all areas under licence to grow its protected varieties. This includes grower liaison manager visits, GPS mapping / orchard inspections by GPS mappers and general feedback from others in the industry. All of this requires significant cost and effort, but is the only way to maintain a degree of comfort that its varieties are being used in accordance with its licenses. Typically, many of the smaller disputes relate to “creep” of the licence area and are resolved through discussion and the availability of a correction mechanism for overplanted areas.

These costs are estimated to rise in coming seasons. It is important to note that not all PVR holders would have the resources to be able to operate such a robust monitoring regime.

Recently, Zespri has taken court proceedings against an individual for an alleged breach of both its licence agreement and the PVR Act.

These costs and effort would likely be prohibitive for many PVR holders, particularly in the event that the alleged infringer has limited assets with which to repay any judgment.

30 How prevalent are PVR infringements and offences?

Zespri audits its licenced areas on an annual basis, with GPS maps provided and orchard inspections undertaken.

See figures in section 29 above.

31

Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

The taking of action by a PVR holder is costly, time consuming and uncertain. MBIE should explore whether there is a more cost-effective and efficient method for resolving PVR disputes in the first instance. This could be through use of the PVR Office or a specialist independent tribunal or body set up to hear PVR related disputes. At present, PVR holders must rely on general remedies in contract and at law, which ultimately require recourse to the New Zealand courts.

Some thought should be given to whether it is appropriate to introduce criminal offences for PVR related infringements - similar to those relating to the infringement of copyright works and counterfeiting of registered trademarks for commercial gain – for instance, the intentional unauthorised export of a protected variety to an unprotected country for commercial exploitation. Such actions work against the New Zealand economy as a whole, by risking the loss or unprotected spread of valuable new varieties to competitor countries.

See figures in 29 above.

32

Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

The \$1000 maximum penalty under s 37 of the current Act is too low, considering many infringement offences are intentional or fraudulent offences. MBIE should give consideration to raising the level of fine to underline the importance of PVRs to the New Zealand economy.

It is important that most of these offence provisions remain. Coupled with a higher maximum fine, they disincentive the making of mischievous or unfounded applications.

It is important for New Zealand to retain statutory provisions which dissuade applicants from taking chances on the PVR regime.

Further, it would be of assistance if there were some mechanism to provide assistance to PVR holders in enforcing their rights. Rights holders are currently largely left unsupported in enforcing their rights and have challenges ranging from the inability to access private property to the costs and effort required to adequately investigate an alleged infringement.

In our view, it is appropriate that the offences generally require a high degree of offending.

The kaitiaki relationship and the PVR Act

33

How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?

[Click here to enter text.](#)

34

What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.

[Click here to enter text.](#)

35

What role could a Māori advisory committee play in supporting the Commissioner of PVRs?

Zespri is supportive of having a Maori advisory committee to support the Commissioner, provided the committee's roles and functions are clearly defined in the Act. A recent development in the New Zealand kiwifruit industry has been to establish a Maori Kiwifruit Growers Forum. As Maori have become significant investors and growers in the industry, the forum helps to add value to the wider industry by providing unique input to the broader kiwifruit grower representative body. In light of this, we feel a specific body focussed on things important to Maori could assist the Commissioner in appropriately carrying out particular functions under the Act.

- 36 How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?

[Click here to enter text.](#)

'Discovered' varieties

- 37 Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?

[Click here to enter text.](#)

Offensive names

- 38 What characteristics might make a variety name offensive to a significant section of the community, including Māori?

[Click here to enter text.](#)

Transparency and participation in the PVR regime

- 39 What information do you think should/should not be accessible on the PVR register? Why?

[Click here to enter text.](#)

- 40 As a plant breeder, do you gather information on the origin of genetic material used in plant breeding?

[Click here to enter text.](#)

Other Treaty of Waitangi considerations

- 41 What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?

Zespri's New Zealand kiwifruit supply chain includes many Maori-owned developments and organisations. Many of these organisations are benefitting from the recent growth in the New Zealand kiwifruit industry driven largely by the success of Zespri SunGold Kiwifruit. Such development and growth would likely not have been achieved, or have been more difficult, were only the non-proprietary varieties (such as the Hayward (green) kiwifruit variety) available. The success of Zespri SunGold Kiwifruit in regional or under-developed regions of New Zealand, demonstrates the wider societal benefits that can be achieved through the development and protection of new plant varieties.

Such economic development was well highlighted in a February 2017 report prepared by the Institute for Business Research, University of Waikato entitled The Economic Contribution of Kiwifruit Industry Expansion to the Bay of Plenty, Northland and New Zealand Economies.

Key highlights of the report, of specific relevance to Maori, included that:

- The kiwifruit industry generates 2,475 FTE for Maori today.
- Maori grower revenue is estimated to increase from \$271 million to \$638 million per year by 2030.
- Bay of Plenty Maori wages and salary are set to double from \$22.1 million to \$52 million (+135 percent).
- Zespri SunGold Kiwifruit is expected to create an additional \$310 million revenue per year for iwi across New Zealand by 2030.
- Without Zespri SunGold Kiwifruit, the New Zealand industry would be less than half the size of its 2030 projections.

The full University of Waikato report can be accessed here:

https://www.waikato.ac.nz/data/assets/pdf_file/0004/343813/IBR-Report-on-Kiwifruit.pdf

Additional issues

42

Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?

Export of Propagating Material - Zespri generally supports extending the PVR scope of rights to prohibit the export from New Zealand of propagating material (and harvested material in appropriate cases, if adopted) of a protected variety without the permission of the PVR holder.

Further, we are of the understanding that the scope of rights provided by the PVR Act will continue to remain subject to the general law including specific legislation around exporting and trade – such as market-specific requirements or industry-specific export restrictions such as the Kiwifruit Export Regulations 1999. We consider that is appropriate. If this is to change, Zespri would appreciate the opportunity to make submissions on that.

Term of Grant - Zespri is generally comfortable with the existing term of grant, but would like to see this increased if appropriate to align with international best practice. A longer term of grant provides the PVR holder with certainty around the commercialisation of its protected varieties.

Procedures - Generally, Zespri would welcome greater clarity and certainty around the procedural provisions in the Act. This may be best done by way of regulation. In particular, the processes for applying for and determining a compulsory licence or sales order under s 21 could be clarified thereby reducing the uncertainty over the process, time and costs involved. It is especially important that both the PVR holder and applicant be given a fair opportunity to be heard.

Other comments

43

Are there any additional comments you wish to make about the PVR Act review Issues Paper?

Thank you for the opportunity to provide submissions on this Issues Paper. Zespri welcomes the opportunity to continue to contribute to this process as the review moves forward.