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

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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?

No. There is not enough emphasis on the balance between commercial considerations and public benefit. These rights do not exist without the benefit of legislation and PVR owners have to accept that with the grant of monopoly rights there are limitations. Similarly, farmers, growers and consumers cannot expect to benefit from better varieties unless there is a fair return for breeders and we have a regime which is similar to our trading partners.

The discussion seems to be dominated by and weighted in favour of solely commercial considerations without looking more broadly at the NZ context . By that I refer to a small economy with high market concentration levels , high entry barriers and a productivity issue.. We also have :

1. Significant taxpayer involvement in breeding through PFR and PGP funding etc,
2. Government departments(MPI in particular) performing industry good and advocacy functions as well as regulatory functions (contrary to OECD best practice recommendations).
3. No compulsory stand down periods in the State Sector (or for MP's for that matter) required for people leaving the public service and working for enterprises within industries they were regulating and working with while in the public sector.
4. A blurring of lines between the public and private sector(SSC report on Thompson & Clarke a clear indicator of this) – refer 2 above..
5. "2 degrees of separation" leading , in my view, to inadequate separation between private vested interests and the public sector in decision making.
6. Import Health Standards for importing breeding material that are not consistent with trading partners and were the subject of criticism by the WTO Trade Policy review on NZ from 29 June to 1 July 2015. Some would say that some current Import Health Standards and the lack of available quarantine facilities constitute non tariff trade barriers and are illegal under our WTO committtments.

Added to the above mix is the view of some that successive NZ governments have not had any sense of a strong competiton policy(or any competition policy for that matter) and the fact that section 36 of the Commerce Act (taking advantage of Market Power) remains, in the words of Dr Mark Berry "in urgent need of amendment "Mark N. Berry Dr. *New Zealand Antitrust: Some Reflections on the First Twenty-Five Years*, 10 Loy. U. Chi. Int'l L. Rev. 125 (2013).
Available at: https://lawecommons.luc.edu/lucilr/vol10/iss2/2

2	Do you think the PVR regime is meeting these objectives? Why/why not?

No. Oddly given my comments above NZ is missing out by not having a regime consistent with UPOV 91.

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.

Quite simply we will get left behind the rest of the World.

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?

At the risk of stepping beyond my expertise becoming a party to UPOV 91 would bring one major advantage and that is equivalent national treatment under Article 4 which is a stronger provision than Article 3 of UPOV 78.. This would give NZ breeders who are, in some areas, internationally recognised and competitive, equivalent rights in other countries. As a nation that seeks free trade and depends on trade we should not shy away from giving equivalent national treatment because of the mutual benefits that it will bring to our best breeders and to farmers, growers and consumers who may otherwise not have access to the best that the World has to offer.

Farm-saved seed	
5	Are there important features of the current situation regarding farm-saved seed that we have not mentioned?
Not to my knowledge.	
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.
No	
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.
Yes. It creates a situation where the PVR owner may only get a one time return as a seed point royalty. Difficulties of enforcement of contractual limitations to create end point royalties potentially limit this avenue for breeders to get better returns to justify investment..	
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.
Yes. Food security issues cannot be ignored . With farm saved seed farmers have no dependence on seed availability from suppliers. There is an obvious cost saving to farmers. Farmers also know that what they are replanting works well on their land in their climate.	
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?
Terms in contractual licences to grow that require royalties or similar payments for the use of reproductive material.	
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?
No that would be onerous and impractical. If the PVR owner cannot secure adequate seed point royalties then consideration needs to be given to an alternative royalties regime if enforcement of contractual provisions for declarations of use and end point royalties are problematic which it seems they are. .	
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)?

The music industry has faced an issue with royalties in the digital age. Licencing schemes such as those employed for music could be worth exploring and adapting . If the end point royalties are reasonable and an agency (which as in the music industry is self funding from some of the royalties) exists for PVR owners to use to collect and enforce a reasonable balance could be struck between preserving public benefit from a practice that has existed for thousands of years and private PVR rights to earn a fair return on their investment and fund further R&D .

Rights over harvested material	
12	Are there important features of the current situation regarding rights over harvested material that we have not mentioned?
No	
13	Do you agree with our definition of 'harvested material'? Why/why not?
Yes	
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.
Without effective competition from alternative variety owners and adequate protections under the Commerce Act it is wide open to PVR owners to abuse growers and farmers by imposing onerous contractual terms in relation to the terms of licences to grow as they apply to harvested material. In a larger more competitive economy with open access for competing varieties constraints on the abuse of monopoly positions is less likely. See comments at paragraph 1 above and 15 below.t	
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.
Expanding these rights under UPOV 91 in order to improve growers and farmers access to the worlds best varieties would introduce an element of competitive discipline on current incumbents in the market. This alone would not be enough in the absence of a clear competition policy and an empowered Commerce Commission with a mandate to oversee monopoly abuse and consequential cost to growers and farmers as well as NZ consumers. A review of clause 7 of the standard Zespri grower licence shows the problem of a lack of effective competition or competition policy. Growers of Zespri varieties are handcuffed to Zespri outside of the Kiwifruit Export Regulations extending to not being allowed to plant non- Zespri varieties and arguably extending to a gagging ban on speaking against Zespris stranglehold on kiwifruit variety rights.	

Rights over similar varieties	
16	Are there other important features of the current situation regarding distinctness that we have not mentioned?
No	
17	Are there other important features of the concept of EDVs that we have not mentioned?

	Yes. If an EDV is bred from a variety out of PVR there should be no requirement to get the owners permission. The best information I have on the commercial life of a PVR from an agronomist is around 10 years before competing varieties arise or markets change. Having a liberal regime in relation to EDV's may enhance the longevity of the initial breeders variety . Perhaps the longer a PVR variety has been in existence the more lenient the conditions around breeders of EDV's. This would incentivise the initial breeder to commercialise and subsequent breeders of EDV's to pursue variety development symbiotically.
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.
	NO
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.
	Yes. Simple and tried and tested with centralised testing system and uniformity..
20	How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?
	N/A
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.
	No. My intuition tells me that this concept of " free riding" is an over stated construct floated by incumbent breeders and PFR looking after their own commercial interests. . The concept of " free riding" cuts both ways. Are incumbent breeders " free riding" on the State providing the legislative framework , funding for breeding programs and an absence of effective competition or competition policy in this area.?
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.
	Yes. Growers and farmers will likely either destroy the "sport" or export it for propagation in a location without these restrictions in order to get a return.
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.
	No. Clarity is desirable and if UPOV 91 gives rights to initial breeders then the matter becomes one of how extensive those rights are in our domestic legislation. See comments at paragraph 17 above.
24	How might technological change affect the problems/benefits of not having an EDV regime that you have identified?
	Gene technology and things like CRISPR need to be considered. The definition of what is an EDV may need to be expanded to contemplate this.

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

Yes. See our comments regarding the NZ Context in paragraph 1 and regarding monopoly abuse and competition in paragraph 15.

Changes to compulsory licencing cannot be considered in isolation from monopoly structures and those who profit from them . The State should not be allowing monopolists and those who depend on them to "free ride" on the backs of taxpayers , growers and farmers .

At page 78 of the Select Committee report on the Kiwifruit Industry Restructuring Bill the committee reported that several submitters (it was actually all submitters except Hort Research-now PFR) submitted that kiwifruit variety licences should be transferred to an industry body or grower Trust.(eg the TR Ellett Agricultural Research Trust). The committee did not want to upset the commercial arrangements of Hortresearch and what was considered to be an integrated approach . The committee stated that ……

" To the extent that the licence agreements form a future barrier to new entrants to the industry, then that can be addressed by generic competition law and section 21 of the Plant Variety Rights Act 1987, which provides for compulsory licencing."

Clearly section 21 was considered important by Parliament to prevent monopoly abuse in conjunction with competition law.

The danger here is that Hort NZ , PFR and Zespri in particular will overstate the problem because there are powerful commercial incentives to do that. Hort NZ's membership is dominated by kiwifruit growers who are captive to Zespri both contractually as licencees and also in terms of the information that they receive. PFR earns a significant amount of its income from royalties paid to it by Zespri and the kiwifruit breeding program is their largest program. (See PFR Annual Report). Zespri is projected to earn 84% of its EBIT (profits) from new varieties in FYE 19.(See Cameron Partners Valuation dated 30 June 2018- page 6 as prepared for recent Zespri share issue). Zespri is a private company in which only just over half of growers hold shares(and of those growers who are shareholders most do not have their production aligned to their shareholding) . Zespri pays out 80-90% of its profit as dividends to shareholders . There is, therefore, a powerful commercial incentive and a duty on Directors (the majority of who are among the largest shareholders of Zespri) to maximise profits for shareholders which necessitates overstating the compulsory licencing "problem" and excluding the context in which they operate as a State Trading Enterprise.

PFR , in the pre- consultation phase refer to an "independent comparative study" which was a private briefing paper made available to MBIE in 2016 by then Minister Joyce. I question the visibility of this paper, and whether it can be independent when being advanced by PFR. I also wonder why it was made available by the then Minister rather than being produced internally by MBIE or commissioned by MBIE.

One might observe that PFR Management have no reason to comment on monopoly abuse because their salaries depend on it . They suggest, like chicken little, that the sky will fall in on Pipfruit, Kiwifruit and Wine if we don't remove compulsory licencing. Reference to the size of those sectors and their growth suggests that compulsory licencing has not inhibited their growth this far. They are, in my view, scaremongering and presenting a one sided and self interested perspective on this issue. No doubt others in these sectors who enjoy monopoly rents from the current situation will , likewise, engage in scaremongering and delegations to Wellington to bend the ears of policy makers.

Can I suggest that MBIE treats their comments with a healthy degree of scepticism given the commercial interests that drive these comments. Compulsory licencing should remain until there are other protections in place for growers,farmers and consumers that mitigate abuses of market power in the NZ context.

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.

Yes. It is unclear and uncertain for both breeders and those who seek to rely upon it to mitigate monopoly abuse..

If it was effective as intended (see quote from Select Committee report in previous paragraph) then Zespri would not be able to charge NZ growers licence fees averaging around $257,000 per ha to grow its flagship Sungold variety while licening its own growers offshore for no licence fee.

[While Zespri will contend that offshore growers pay a higher commission which offsets this I would contend that this does not stand scrutiny when compared to the combined charge to NZ growers of a sales commission and a promotions charge which (as noted by Grant Samuel Capital Markets Advisorsin their draft 2007 report on the Zespri Margin which made its way into the public domain) is " unusual and should be subject to considerable review" . Add the two together and the kiwi grower is not paying much less in sales commission and promotion than Zespri's growers offshore}

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

Yes. It is clear to me from my enquiries under the OIA (available on request) and information in the public domain that without Hop Revolution Limited having pursued compulsory licencing the development of the Hop and Craft brewing sectors would have been constrained by the HRC Agreement between PFR and NZ Hops Ltd which had created a de-facto monopoly over hops . The Tapawera Hop development promoted by syndicator MYFARM and others would not have occurred without the Hop Revolution applications. Likewise the MPI funded Hapi – Brewing Success Primary Growth Partnership program would not have been possible.

In terms of the size of the benefits that is a matter for an economist to quantify but Michael Porters five forces framework would be a good place to start . MPI could be asked also in terms of their work around the PGP for Hapi. That would be interesting because while MPI has clearly been able to identify a Return on Investment to the taxpayer by entering into this PGP with the Garage Project from Wellington they have left it to the Garage Project to determine what the ROI internally will be in this " partnership" . I say this because under the PGP the Garage Project have exclusivity on any new varieties bred under the PGP for as long as it takes the Garage Project to " obtain a reasonable commercial return from its investment" . When asked how a reasonable commercial return for Garage Project would be determined I was told that " Determining what is a reasonable commercial return is for the industry co-investment partner to decide" .

So, apart from the taxpayer subsidising Zespri shareholders to earn monopoly profits on new varieties through government funding directly and via PFR we now see MPI through PGP handing money to private commercial interests for new varieties of hops where they , not the taxpayer, will determine what is a reasonable commercial return before those varieties bred with the help of taxpayer dollars are made more widely available. (These comments are from responses to questions of MPI and are available on request) .

In the absence of effective competition policy and an apparent laissez fare attitude by the Public Service to who benefits from taxpayer funding of breeding programs compulsory licencing is the only available handbrake on monopoly free riding by private interests aided and abetted by compliant public servants. .

Enforcement: infringements and offences

28	Are there important features of the current situation regarding infringements and offences that we have not mentioned?
No	
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?
No	
30	How prevalent are PVR infringements and offences?
There is one in the public domain involving Zespri. Other than that I have no specific knowledge.	
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.
I have insufficient experience or knowledge. . Reports suggest that Zespri as PVR owner through its licencing and other enforcement measures has been effectively able to combat this in NZ at least with a sledgehammer approach with regard to the matter that is in the public domain. .	
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.
I have no specific knowledge.	

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?
I am not qualified to comment	
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.
I would comment that the same concerns as highlighted above regarding policy capture and monopoly abuse need to be considered.	
35	What role could a Māori advisory committee play in supporting the Commissioner of PVRs?
I would be concerned if this gave rise to a de-facto or actual veto power. Safeguards need to be built in that allow legitimate concerns to be addressed while allowing a regime where economic development based on EDV's from native nz plant species can be accommodated for the benefit of Maori and the economy in general.	
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?

I observe what seems to be " window dressing" of self interested commercial plays as Maori economic development in horticulture. Healthy scepticism is required and a close examination of the detail of such arrangements. s

'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?

I am sure that others will raise the matter of Manuka.

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

I have no knowledge and defer to those that do.

Transparency and participation in the PVR regime	
39	What information do you think should/should not be accessible on the PVR register? Why?

I see no reason for there not to be transparency.

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

I would if actively involved rather than passively as at present

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?

I will defer to others with expertise.

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?

While we need UPOV 91 it cannot be adopted out of context . The danger of a narrow focus is a further concentration of unhealthy market power and cementing monopoly rents for a few at the expense of growers, farmers and consumers . It is arguable that in the NZ context we have reached a point where we have oligopolies and monopolies granted with PVR's a further monopoly (a monopoly on a monopoly). Such concentrations of power are not necessarily productive or efficient (management becomes lazy and they become "fat" and "arrogant") which constrains potential growth that might be available with PVR's being released in a more competitive environment. Some rigorous economic analysis and truly independent policy advice (preferably not contracted out to the usual consultants but developed by an independent public service approach) is needed .

Other comments

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

I think I have said it all above.