

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?

Yes correctly stated.

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

No not meeting the objectives it needs to incorporate UPOV 1991

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.

Potential loss of royalty income. Export of PVR plants to other countries where the plants are not protected, and then the production of plants without paying royalty for sales of plants in that market or exported to other markets or even into markets protected by PVR. We believe our EU protected Phormiums are being produced in Costa Rica then exported to Europe in competition to our own exports and our licenced producers. We cannot prove or quantify this.

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?

Cannot see the point in not adopting UPOV 1991 in its entirety.

Farm-saved seed

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

NA

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.

NA

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.

NA

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.

NA

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?

NA

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?

NA

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)?

NA

Rights over harvested material

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

NA

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

NA

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.

NA

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.

NA

Rights over similar varieties

16

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

There is no need for other features for distinctness but some determinations need to be clearer such as the case with some of the Cordylines. We have several varieties released of plants that are basically copy cats of a protected variety. Cordylines as mentioned, Pittosporums is another.

17

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

There are advances in genetics with genetic markers and other cellular markers. These may assist with determination of EDVs but of limited use if the test and proof of distinctness has to rely only on these markers.

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.

As replied in 16

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.

Particularly in ornamentals, the commercial importance should be considered when differences are small such as the Cordylines mentioned. The copy cat syndrome where an initial protected variety is undermined by very similar variety. This is basically cashing in on someone's commercialisation.

20

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

As stated earlier if a variety has to prove distinctness only by testing reliant on technology then I do not think this is achieving the aim of PVR. My bias is with ornamentals, and as such, if there is no other way of distinguishing a variety except by technology then there is no distinct benefit to the ultimate consumer. Perhaps with the exception of a trait like disease resistance.

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.

Stated above

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.
The problems are the free riding.	
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.
There are no benefits in not having an EDV regime. The benefit of EDV is the encouragement to breeders and the commercialisation of the variety. The NZ PVR without EDV, it limits the effort put into NZ breeding and commercialisation. Many licence agreements have EDV clauses but these seem to be ignored by operators in NZ, with very few of the the breeders of new varieties seeking the permission of the holder of the initial variety PVR. Adopting UPOV 1991 would give legal backing to EDV.	
24	How might technological change affect the problems/benefits of not having an EDV regime that you have identified?
Click here to enter text.	

Compulsory licences

25	Are there important features of the current situation regarding compulsory licences that we have not mentioned?
No, the paper seems to sum up them all.	
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.
Not encountered this.	
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.
Click here to enter text.	

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?

We have been involved in dispute in EU with an EUPVR. We disputed the ownership rights of the original applicant. CPVO office agreed that we were the owners not the applicant, and we then applied for PVR for the varieties under CPVO regulations. The CPVO office decision was appealed to the CPVO Appeal Board and this resulted in submissions and hearing. The Appeal Board ruled in our favour. The applicant then disputed the Appeal Board ruling and the case went before the European Court of Justice. The Court eventually dismissed the case in favour of CPVO and our PVRs came into effect. The process was effective but was very slow taking several years. We were granted costs by CPVO Board of Appeal and the EU Court however we have not received any money to date, the case now being 4 years since resolution.

30 How prevalent are PVR infringements and offences?

Do not know

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.

To me the CPVO Appeal Board process was a good one. The Appeal Board was made up of 2 attorneys and a retired judge all were conversant with IP. Presentation to the appeal board did not require legal representatives. Both sides presented their own cases.

Once the EU Court was involved then it required legal representation for the preliminary submissions, signed affidavits, etc. In this case a European registered and domiciled legal representative was required. Costs then came prohibitive and it will take us many years to recoup the costs from royalties.

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 advocate the formation of an Appeal Board where disputes, offences, infringements can be heard and perhaps arbitrated. With final appeal to the High Court still an option.

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.

See 37

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

[Click here to enter text.](#)

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?

No knowledge of this.

'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?

There are already many varieties of taonga species that have been granted PVRs in NZ plus some with grants of PVRs overseas, including EU, Japan, Australia, and US Patents. Species include, Cordyline, Hebe, Phormium, Pittosporum.

Equally there are varieties of taonga species that have been derived and bred overseas and obtained overseas and NZ PVRs. Examples include UK bred Cordyline, Hebes and Phormium. These overseas 'bred' varieties have PVR in NZ and as well as overseas such as EU. Eg. Cordyline Sprilecflash, and Hebe Champseiont.

Overseas there are many suppliers of taonga species (not protected) usually seed derived from seed lots that are already established overseas. Example are Phormium tenax and Cordyline australis, seed can be sourced from US and EU of these taonga species.

I do not think that NZ breeders should be restricted from deriving varieties from taonga species when access to this genetic material is already overseas and available to overseas breeders. Other nations and their indigenous peoples have lost control of their "taonga" species to the benefit of greater man. Examples include potato, wheat, rice, maize and kumara.

It is part of man's nature to cultivate plants and transfer plant material. Examples include Kumara and Cordyline bought to NZ by Maori. Maori may consider the Kumara a taonga species but perhaps this is a 'taonga' species to the indigenous people of South America.

Offensive names

38

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

We believe the commissioner can, with the help of a Maori advisory committee, determine if a name is offensive.

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?

Most of the genetic material we use in plant breeding is already in the commercial plant environment. We only source genetic material from the 'wild' species populations that are either privately owned or available in the open sourced environment.

Maori have also collected over generations 'selections' of the taonga species, such as the weaving flaxes (*Phormium tenax*).

Our varieties of taonga species are derived by natural or induced mutation due mainly to selective pressure, somaclonal variation, backcrossing and selection of variant individuals, usually from selected varieties. There is investment in time and resources to establish new variant varieties and to eventually commercialise. PVR does enable some return on this investment but this is long term and in our experience many varieties fail to provide a return on the investment.

As stated earlier I do not think NZ breeders should be restricted to access to taonga species especially where this genetic material is available to overseas breeders.

We fully support that taonga species in reserves, national parks, marae, Maori lands should be protected from commercial exploitation and 'genetic' mining.

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?

[Click here to enter text.](#)

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?

As exporters of plant material we believe that it should be illegal to export propagating material of a protected variety as per UPOV 1991., without the permission of the PVR owner. We refer to our answer at 3.

Other comments

43

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

[Click here to enter text.](#)