



Submission

to MBIE on the

Options PAPER

Review of the Plant Variety Rights Act 1987

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Submission on the Options Paper: Review of the Plant Variety Rights Act 1987

About the Submitter

This is a submission by Bloomz New Zealand Ltd

BLOOMZ has a 30 year history in 'hands on' breeding and has extensive worldwide experience in the import and import of plant germplasm as well as an active role in the initiation, execution and maintenance of Intellectual Property (Plant Patents, PBRs and PVRs) both on its own account and behalf of others

BLOOMZ has had an active Leptospermum (Manuka) breeding programme in the past and continues to work worldwide with results of such proprietary progeny. BLOOMZ has also had detailed experience in a number of NZ native derivatives – phormium, cordyline and other miscellaneous natives which we have traded worldwide for many years, mainly in the form of tissue culture

BLOOMZ was a prime instigator in the New Zealand plant industry quest to have UPOV 91 included in our national legislation and has taken an active role in the recent MBIE programme of national meetings and hui. BLOOMZ attended the Wellington hui in June 2019 at the invitation of MBIE in order to present a background of breeding and its relationship to PVR right within New Zealand. The company has maintained an active interface with Maori Interests to help promote the orderly and sensitive resolution of the WAI 262 claim as part of New Zealand's obligations with the Treaty of Waitangi

We welcome the Options Paper as a step in the right direction to reform the Plant variety Rights Act 1997, which is a mandatory requirement under the CP Trans Pacific Partnership. We maintain that the requirements of UPOV 91 are enabled as soon as possible to better protect New Zealand PVR holder interests and the interests of offshore breeders, a number of whom we represent here in New Zealand.

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Executive summary of this submission by BLOOMZ

Having read and considered the options paper, BLOOMZ supports:

- The adoption of the provisions of **UPOV 91**
- Inclusion of a Treaty exception clause to fulfill the obligations under the Treaty of Waitangi (TOR)
- The banning of offensive names
- Strengthening of Breeders Rights as per **UPOV 91**
- Essential Derived Varieties: Option 2 – definition of an EDV as a *copycat* variety
- Harvested Material Rights: Option 1 as required by **UPOV 91**
- Farm saved seed: Option 2 9ii) – provision to impose limitations
- Infringements: Strengthening of PVR Act to provide realistic remedies (damages, injunction)
- Inclusion of Algae in the new Act
- The retention of Compulsory licensing

BLOOMZ has concerns regarding:

- No definition of terms **Taonga** and **Kaitiaki**
- No terms of reference for the Maori Advisory Council (**MAC**)
- No definition of payment provisions for the **MAC**
- We prefer full ratification of UPOV 91 with a TOR exception clause
- No support for enforcement
- We do not support the MBIE Option 3 Enforcement: offences – repeal of offence provisions
- We do not support MBIE approach of no provisional protection until after a grant is made

BLOOMZ suggests:

- NZ ratify the full provisions of **UPOV 91** in the new Act
- The **MAC** require a full Terms of Reference and remain as an Advisory Group only
- A full schedule of charges for the **MAC** must be published as leaves breeders with no certainty
- Maori language terms must be defined
- A register of **Taonga** / native species be developed with exceptions for existing hybrids
- That Breeders also have a Government appointed representative
- Provisional Protection be given full rights
- The grace period for Compulsory Licensing be increased to five years

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I do not want my submission placed on MBIE’s website because... [Insert text]

Responses to questions in the Options Paper

1	Objectives of the PVR Act
	<p>Do you have any further comment to make on the objectives of the PVR Act?</p> <p><i>Disagree with "giving effect" - NZ now out of step with rest of world. Should accede but add a TOW clause to protect Maori Interests and various other modifications discussed later</i></p> <p><i>Disagree with Clause 40 and 41. Operationally we have been told by offshore breeders that they are distinctly unhappy about the lack of UPOV 91 legislation. We made this clear to the interviewers in the Sapere report</i></p>
2	Meeting our CPTPP obligations
	<p>Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?</p> <p><i>Disagree with the MBIE conclusions and do not agree with Option 2. New Zealand would be the only country taking such an approach) giving “effect”) in UPOV and by doing so does not send a good message to our trading partners – especially to breeders of new germplasm that is required by our high value horticultural industries. We regularly deal with these people and can report that there is serious concern from them as to the transfer of their valuable plant material (which need to remain globally competitive) to New Zealand as currently it cant be effectively protected</i></p>
3	Treaty compliance – criteria for analysis
	<p>Do you agree with the criteria that we have identified? Do you agree with the weighting we have given the criteria? If not, why not?</p> <p><i>[Insert response here]</i></p>

Treaty compliance – key terms

4

Do you agree with our proposed approach to these key terms?

Do you have any comments on the principles listed above and how they might apply in practice? For example, would it be useful to specifically list non-indigenous species of significance?

As discussed at the various hui we need a clear definition of a “taonga” (clause 67) and “kaitiaki” (clause 67c). Without such definition or register of Taonga species there is no certainty and from a breeders perspective “who is/are the kaitiaki” – there is absolutely no definition or guidance on this

The problem with undefined kaitiaki is that it maybe local or regional and that has its own issues between various concerned kaitiaki (we have talked to Maori about this). As suggested by respondents at the hui an overall kaitiaki approach may be preferred

Agree that as per clause 68 that offensive names be refused

Furthermore , without a register of Taonga species there is difficulty with Clause 68 in that if its too difficult or the bar is raised by payment issues, then breeders will just go offshore where there is no control and never will be

Treaty compliance – options analysis

5

Do you agree with the proposed options? Are there alternatives we have missed?

Do you agree with our analysis and conclusions? If not, why not?

There is absolutely no clarity in the MBIE options (Clause 102-103)

As much as Option 2 is probably the only sensible option the lack of definition of kaitiaki and who they are will be very messy. As per clause 127 (and clause 133) breeders may simply not bother with kaitiaki engagement – who is going to monitor this??

There are major problems with the derivation of the Maori Advisory Committee MAC (clause 118)and its responsibility

- Who appoints the individuals on the MAC*
- What are their credentials*
- Are they paid and what is the mechanism and responsibility for payment*
- Are breeders expected to pay for this arrangement – this is not clear*

The new PVR Act should encapsulate the TOW (clause 86)

If indeed an MAC is enacted then Breeders should have the same rights in terms of a government appointed Breeders representative so that there is balance in any challenge

UPOV 91 alignment – criteria for analysis

6

Do you have any comment to make about our approach to, and criteria for, the preliminary options analysis in this paper?

[Insert response here]

Definitions – breed

7

Our preferred option is to incorporate the definition of “breed” that was considered in the previous review to address concerns around discovery of varieties in the wild.

Do you agree? If not, why not?

BLOOMZ agrees with new definition of ‘breed’

Definitions – general

8

Do you have any comments on the definitional issues discussed in this Part?

BLOOMZ agrees with definition of “variety”

Scope of the breeder’s right

9

Do you have any comments about these new rights required by UPOV 91?

BLOOMZ supports inclusion of Articles 15 of UPOV 91

10	<p>Exceptions to the breeder’s right</p> <p>Do you have any comments about the exceptions required by UPOV 91?</p>
	<p><i>BLOOMZ supports inclusion of Articles 15 of UPOV 91</i></p>
11	<p>Term of the right</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p><i>BLOOMZ supports Option 1</i></p>
12	<p>Essentially derived varieties</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p><i>BLOOMZ agrees with Option 2</i></p>
13	<p>Rights over harvested material</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p><i>BLOOMZ agrees with Option 1</i></p>
14	<p>Farm saved seed</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p><i>Farmers should be able to save seed of a protected variety for their own property but BLOOMZ supports that the breeder should still be paid a royalty. BLOOMZ supports Option 2 (ii)</i></p>
15	<p>Compulsory licences – general issues</p> <p>Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?</p> <p>Other than the two substantive issues below, are there other issues we have missed?</p>
	<p><i>We agree that the PVR Act <u>must continue</u> to make provision for compulsory Licences</i></p> <p><i>We agree that the parties be given reasonable opportunity to be heard before the Commissioner makes a decision</i></p> <p><i>We agree with Clause 360 ie reasonable efforts to obtain a license</i></p>

Compulsory licences – grace period

16 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

*We agree with **Option 2** that the grace period should be longer than 3 years post the grant – 3 years may be too short in which to truly commercialise a successful PVR – therefore **five years** appears fair to us and provided reasonable attempts to negotiate with the PVR owner have been made*

Compulsory licences – section 21(3)

17 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

*Retain **Option 1**: retain section 21(3). It remains important the public retains the ability to challenge breeders*

Enforcement – infringements

18 Do you agree with the discussion and the proposals in relation to the four issues discussed above? If not, why not?
Should the PVR Act provide that infringement disputes be heard in the District Court?
Are there others issues relating to infringements that we have missed?

Agree that infringements be heard in the District Court and that the penalty for offences in clause 432 be raised to a meaningful level to be determined by the court – at least \$50,000 as otherwise it is simply being slapped by a wet bus ticket

Use of the Fair trading act is not effective

It's a bit like Easter trading - cheaper to pay the fine and carry on trading

Enforcement – offences

19 Do you agree with the proposed options? Are there alternatives we have missed?
Do you agree with our analysis and conclusions? If not, why not?

Disagree –that is why current legislation has no teeth and is of little real use to PVR holders. Why have an act if you cant effectively enforce it

BLOOMZ submits that enforcement actions are aligned with the other New Zealand Acts dealing with intellectual Property (Patent and Trade Marks Act)

Exhaustion of the breeder's right

20 Do you have any comments about the exhaustion provision required by UPOV 91?

[Insert response here]

Cancellation and nullification of the breeder’s right

21

Do you have any comments about the cancellation and nullification provisions required by UPOV 91, and MBIE’s additional proposals discussed in this section?

[Insert response here]

Extending coverage to algae

22

Do you have any comments to make about whether or not algae should be included within the definition of “plant” for the purposes of the PVR regime?

BLOOMZ agrees that Algae should be included in the new PVR Act

Provisional protection

23

Do you agree with our preferred option for dealing with provisional protection? If not, why not?

BLOOMZ disagrees with MBIE approach on this – action for an infringement must be able to be made once an application has been applied for

Transitional provisions

24

What is your view on the options presented here in relation to this issue? Are there alternatives we have missed?

How should transitional provisions apply to EDVs?

[Insert response here]