

# SUBMISSION



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To: Ministry of Business, Innovation and Employment

Submission on: Plant Variety Rights Act 1987 review: Options Paper

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# **SUBMISSION ON PLANT VARIETY RIGHTS ACT 1987 REVIEW: OPTIONS PAPER**

## **1. INTRODUCTION**

- 1.1. Federated Farmers of New Zealand (Federated Farmers) welcomes the opportunity to submit to the Ministry of Business, Innovation and Employment (MBIE) on their consultation document “Options Paper: Review of the Plant Variety Rights Act 1987” (the Options Paper).
- 1.2. We acknowledge this Options Paper is the second phase of public consultation on the review of the Plant Variety Rights Act 1987 (PVRA) and that this review is expected to continue for another two years as legislation is amended to comply with New Zealand’s requirements to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
- 1.3. We understand for New Zealand to meet obligations to CPTPP, New Zealand can either ratify the International Convention on the Protection of New Varieties of Plants (UPOV) 1991 agreement or give effect to it. The UPOV agreements have strengthened the rights of plant breeders, at what could be considered a reduction in the rights of farmers and other end-users.
- 1.4. Federated Farmers represents the interests of those farmers who are growing the seed on farm bred by plant breeders for multiplication, those who purchase seed for sowing on their own farms or farming enterprises and those who save their own seed for future use on their own farms. Our interest in the PVRA review relates to any possible changes to provisions relating to the use of farm-saved seed, extension of rights over harvested material, changes to compulsory licensing provisions and a strengthening of enforcement provisions. Federated Farmers will comment on all these issues raised in the Options Paper.
- 1.5. Federated Farmers has been a participant in the pre-consultation workshops held by MBIE in 2017, has previously submitted on the “*Issues Paper: Review of the Plant Variety Rights Act 1987*”, in September 2018 and looks forward to continued engagement with the Ministry as the review unfolds.

## **2. SUMMARY OF KEY RECOMMENDATIONS**

- 2.1. Federated Farmers recommends the added objective “*to recognise the need to ensure farmers and growers remain competitive domestically and internationally*”.
- 2.2. Federated Farmers recommends implementing a PVR regime that gives effect to UPOV 91.
- 2.3. Federated Farmers supports provision in the Act for an explicit exemption that allows growers/farmers to use farm-saved seed from protected varieties without permission from PVR Owners or Licensees.
- 2.4. Federated Farmers supports provision in the Act that allows a PVR holder to collect a royalty on farmer saved seed with the value of that royalty set in conjunction with the farmer/grower representatives.

- 2.5. Federated Farmers does not support any extension of plant breeders rights over harvested material.
- 2.6. Federated Farmers recommends that provisions around Compulsory Licences are retained in any new PVRA regime.

### **3. GENERAL COMMENTS**

- 3.1. The Federated Farmers submission has been developed based on the feedback which we have received from our membership on the Options Paper. We acknowledge any submissions which MBIE has received from individual farmers on the Issues Paper. It is our expectation that few arable farmers will directly submit on the Options Paper, as they are concerned that Plant Breeders, PVR Owners, Licensees or Companies may read the submissions and withdraw seed contracts or other contracts from those farmers because of that submission.
- 3.2. Federated Farmers supports provision in the Act to enable Farmers and Growers to carry out their day-to-day business without undue impediment.

### **4. OBJECTIVES OF THE PVRA**

- 4.1. Federated Farmers supports in principle the objectives proposed:
  - a. To promote innovation and economic growth by incentivising the development and dissemination of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and society as a whole;
  - b. Compliance with New Zealand's international obligations; and
  - c. Consistency with the Treaty of Waitangi.
- 4.2. However, feedback from our membership indicated that they felt it was important for an additional objective of the PVRA which was focused on the needs of growers, farmers and society. Our members believe that it is essential for any new Plant Variety Rights regime to be workable and fit for purpose for all users.
- 4.3. Federated Farmers supports an additional objective:
  - To ensure farmers and growers are enabled to remain competitive domestically and internationally.

### **5. THE SAPERE REPORT – Economic Analysis Of The PVR System**

- 5.1. The Sapere Report was clear “The review finds that the balance between providing an opportunity for a plant breeder to obtain a reward for their effort in developing a new plant variety, and the benefits to growers and society from having access to new and improved plant varieties, has been reasonably well set.”
- 5.2. We are supportive of this view in that we are satisfied with the current Plant Variety Rights regime meeting objectives, but as we have mentioned, we believe that there are opportunities to improve the balance between the rights of growers, farmers, society and breeders.

### **6. CPTTP OBLIGATIONS AND UPOV 91**

- 6.1. Federated Farmers supports taking the approach of implementing a PVR regime that “gives effect” to UPOV 91.
- 6.2. The costs for farmers to accede to UPOV 91 are unknown, however preliminary calculations do not see a positive benefit for the industry and therefore do not support the approach of adopting UPOV91.
- 6.3. The Federation acknowledges that acceding to UPOV91 would result in a situation where any Treaty of Waitangi obligations could not be considered. We support a PVRA which is inclusive and considers a balance for all interest or affected parties.
- 6.4. We note there are provisions within UPOV 91 that leave room for domestic policy flexibility The main ones are:
  - a. the term of the right (beyond the minima provided for in UPOV 91);
  - b. how we implement the new provisions relating to “essentially derived varieties (EDVs)”;
  - c. whether we extend the rights to harvested material and the products of harvested material beyond the minimum required by UPOV 91;
  - d. how we address the issue of farm saved seed;
  - e. how we implement the compulsory licence provisions;
  - f. how infringements are enforced;
  - g. what, if any, offence provisions we need.

## **7. TREATY OF WAITANGI OBLIGATIONS**

- 7.1 Federated Farmers would like to acknowledge Waitangi Tribunal’s findings and recommendations in the 2011 Wai 262 report, Ko Aotearoa Tēnei and more specifically the two recommendations in relationship to the PVRA ; that:
  - the Commissioner of PVRs be empowered to refuse a PVR that would affect the kaitiaki relationship;
  - the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest.
- 7.2 The Federation supports, in principle, the development of a PVR Maori Advisory Committee to:
  - i. develop guidelines for breeders and kaitiaki on engagement;
  - ii. provide advice to breeders and kaitiaki at the pre-application stage;
  - iii. provide advice to the Commissioner of Plant Variety Rights as to whether kaitiaki interests would be adversely affected by the grant of a PVR and, if so, whether the impact can be mitigated to a reasonable extent such as to allow the grant.
- 7.3 Federated Farmers also supports empowering the Commissioner of Plant Variety Rights, to decide whether, on the basis of the Māori advisory committee’s advice, the PVR should be granted.

7.4 However, we do not support the Chair of the PVR Maori Advisory Committee to have joint decision-making powers with the Commissioner for the following reasons:

1) The Wai 262 recommendation did not specify this provision or promote it.

2) We do not think it appropriate for an advisory committee to act in three different capacities on individual applications; to offer advice at the pre-application stage; to provide advice to the commissioner (recommendation); and then, as Chair of the PVR Maori Advisory Committee, make a decision on it.

7.5 For transparency and clarity for all users of the PVRA we support the inclusion of definitions including but not limited to: kaitiakitanga, toanga plant species, whakapapa, mauri.

7.6 We note that MBIE considers (123) “that a mana-enhancing decision-making process should reflect the principle that interests of all parties are valid and important, and worthy of consideration in a genuine and meaningful way. Engagement in the PVR regime should enhance the mana of all involved: kaitiaki, breeders, growers, other parties and the Crown”.

7.7 However we are concerned that the use of the term mana-enhancing is subjective and may raise expectations that are unable to be met through this process. We support Kaitiaki interests being considered in a “meaningful way”.

## **8. HARVESTED MATERIAL**

8.1 Federated Farmers supports no restrictions on the end use of harvested material of protected varieties. For our membership this means that farmers have total control over the end use of their harvested material.

8.2 If there was an extension of breeders rights over harvested material, then this would remove the autonomy of farmers to make the best decisions for their business and reduce the likelihood that they will make a meaningful return on that product. Extending the rights of breeders over harvested material would introduce an element of unnecessary control.

8.3 Federated Farmers does not support any extension of Plant Variety Owners or Licensees rights over harvested material and notes that no other UPOV member state has provided PVR owners with the exclusive right to exploit the harvested material of their protected varieties.

## **9. FARM- SAVED SEED**

9.1 Federated Farmers supports an exemption for PVR on farm saved seed with the only condition imposed in primary legislation to be a) for use by the farmer/grower on the farmer’s own property (defined by lease or ownership).

9.2 The practice of farm-saved seed is the process where a farmer or farming enterprise saves seed from a harvested crop to sow for the following year’s crop. This practice is a vital part of some farmers businesses and is largely based on farmers’ personal

preferences. Wheat and barley are the main crop types that are saved by farmers for future use.

9.3 Farmers use farm-saved seed because it can be the most reliable way of getting good seed in the ground on time, for its assured quality, supplied with only the extraneous weed seeds that exist on the farm already, get to choose the seed treatments which are placed on the seed, enables them to use seed that is no longer for sale in New Zealand.

9.4 Federated Farmers does not see how it will be practical for farmers to seek permission from PVR owners to use farm-saved seed. What opportunity for recourse would there be if a PVR owner or licensee refuses to allow to use that variety? Federated Farmers is concerned about possible delays that the need to gain permission would add to the sowing process, how the information would then be used and whether then the PVR owner or licensee would then seek a royalty payment from the farmer to use that seed. Our members indicate that they are concerned that PVR owners or licensees would use illegitimate reasons for declining the application to use farm saved seed of a protected variety.

9.5 Federated Farmers acknowledges that while the provision for farmer saved seed must remain, it is justifiable for the PVR holder to require a royalty to be paid on that seed. However, the royalty cannot be applied simply at the discretion of the PVR holder and should be set for specific varieties in conjunction with grower representatives. This is appropriate given the saved seed will not be first generation and will not have proceeded through certification.

## **10. COMPULSORY LICENCES**

10.1 Federated Farmers recommends that provisions around Compulsory Licences are retained in any new PVRA regime. The Federation supports the use of an education package to update growers and end users about the opportunities that exist with compulsory licences.

10.2 Members would support more emphasis on 'freely available' being applied. That exclusive supplier/purchaser contracts should not be considered 'freely' or 'publically' available, by definition, as they are in effect conditional sale and purchase contracts.

## **11. ENFORCEMENT: INFRINGEMENTS AND OFFENCES**

11.1 Feedback from our membership indicates that they do not perceive any problems with the current situation.

## **12. ADDITIONAL ISSUES**

12.1 Farmers would be concerned if the grant was extended for longer than 20 years as we feel this timeframe is sufficient for PVR owners to recoup their investment in the product.

## **13. CONCLUSION**

13.1 Federated Farmers welcomes this opportunity to submit to MBIE on their consultation document "Options Paper" Review of the Plant Variety Rights Act 1987.

13.2 Federated Farmers represents the interests of farmers who grow seed for multiplication, those who purchase seed and those that save seed for their own use.

Federated Farmers has provided comment on use of farm-saved seed, extension of rights over harvested material, changes to compulsory licencing provisions and a strengthening of enforcement provisions.

- 13.3 Federated Farmers looks forward to participating in the PVRA review process as it moves forward into the future.

#### **14. ABOUT FEDERATED FARMERS**

- 14.1 Federated Farmers of New Zealand is a primary sector organisation that represents farmers and other farming businesses. Federated Farmers has a long and proud history of representing the needs and interests of New Zealand farmers.
- 14.2 The Federation aims to add value to its members' businesses. Our key strategic outcomes include the need for New Zealand to provide an economic and social environment within which:
- 14.3 Our members may operate their businesses in a fair and flexible commercial environment;
- 14.4 Our members families and their staff have access to services essential to the needs of the rural community; and
- 14.5 Our members adopt responsible management and environmental practices.

**ENDS**