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Responses to questions in the Options Paper

1	<p>Objectives of the PVR Act</p> <p>Do you have any further comment to make on the objectives of the PVR Act?</p> <hr/> <p><i>The Act objectives are not yet redrafted, making conclusive comment imprudent. However, we are satisfied with the MBIE commentary on likely changes and we note the specific wording will be the responsibility of PCO.</i></p> <p><i>We support the MBIE proposal to include Treaty compliance.</i></p> <p><i>We don’t support including efficient and effective system – this reflects challenges of importation, not the Act, and should be implicit as a responsibility of effective legislation.</i></p> <p><i>We note importantly that commercial ‘use’ of new varieties is how NZ’s primary sector creates economic activity, not just dissemination of plant varieties, therefore ‘use’ is a more appropriate term.</i></p>
2	<p>Meeting our CPTPP obligations</p> <p>Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?</p> <hr/> <p><i>Giving effect to UPOV 91, rather than accession, for the reasons stated, appear appropriate. Can NZ’s domestic implementation of UPOV 91, if we were to accede, allow for a carve out for Treaty of Waitangi obligations, such as occurred in CPTPP?</i></p>

3	<p>Treaty compliance – criteria for analysis</p> <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>The approach of recognising that the Crown must consider kaitiaki interests seems very sensible approach to Crown obligations as a partner to the Treaty.</i></p>
4	<p>Treaty compliance – key terms</p> <p>Do you agree with our proposed approach to these key terms?</p> <p>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?</p>
5	<p>Treaty compliance – options analysis</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>The scope of the various matters at heart of the options is too ambiguous as to enable comment. E.g. what level of limit might be placed on a PVR based on what level of evidence of negative effect and level of 'kaitiaki interest'? Some examples or guiding criteria are necessary to understand the balance sought most broadly under the Act (the balance between IP owners and society), and to meet Treaty obligations.</i></p>
6	<p>UPOV 91 alignment – criteria for analysis</p> <p>Do you have any comment to make about our approach to, and criteria for, the preliminary options analysis in this paper?</p>
7	<p>Definitions – breed</p> <p>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.</p> <p>Do you agree? If not, why not?</p> <p><i>We support the definition as proposed</i></p>
8	<p>Definitions – general</p> <p>Do you have any comments on the definitional issues discussed in this Part?</p>
9	<p>Scope of the breeder’s right</p> <p>Do you have any comments about these new rights required by UPOV 91?</p>

	<p><i>Para 183 sets out a response to one of the key concerns of PVR Owners in NZ; theft and exploitation by foreign actors, who depart NZ before action can be taken. We support this inclusion.</i></p>
10	<p>Exceptions to the breeder's right</p> <p>Do you have any comments about the exceptions required by UPOV 91?</p>
11	<p>Term of the right</p> <p>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?</p> <p><i>We support the adoption of UPOV 91 minimum terms</i></p>
12	<p>Essentially derived varieties</p> <p>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?</p>

We note the Options Paper comments that all previous submitters supported extension to cover EDVs, and therefore we clarify our previous comments. We note, for the record, that our submission expressed concern about adoption of UPOV EDV rules as below: “We are of the view that until EDVs are properly defined and understood in the NZ context, the current UPOV EDV rules would have a chilling effect on ‘non-breeder’ plant variety innovation.”

For clarity we do not support extension to include all EDVs.

EDV Options

We note firstly that for EDVs, as identified in para 214 of the Options Paper, UPOV 91 prevents commercial exploitation without the PVR Owner’s permission. Therefore, to give effect to UPOV 91, will require a like NZ clause. Consequently, the definition of an EDV is crucial to prevent limitations on the subsequent innovation from EDVs, and disadvantaging society.

There seems adequate scope for New Zealand to be progressive in giving effect to UPOV 91, noting that the EU has not adopted the full UPOV 91 wording. Precedent exists therefore for NZ to adopt UPOV 91, without overly constraining future commercialisation of EDVs. From a layman’s perspective, the various interpretations set out in the options paper (by Japan, EU) amplify the challenge of determining what “essential characteristics of an EDV are; we consider the Australian definition only adds to the ambiguity.

We do also note that some propagation contracts include further contractual obligations, usually for management of harvestable material, but also to retain ownership of EDVs. This option currently exists for IP owners to allay concerns about loss of future IP.

We do not support options 1,3, or 4. We propose that the definitions of “copycat”, as considered in paras 225 – 232 and 245-6, do not specifically articulate which EDVs would, or would not, be considered EDVs and therefore IP of the original breeder. Paras 252-3 discuss the wording of such provisions without conclusion or clarity. Therefore, whilst this is the most balanced, and our preferred option, this option still requires much greater definition before having our unqualified support. We reiterate our real concern about the loss of incentives for innovation and commercialisation if EDVs are too constrained.

We contest the assertion in paragraph 227 that “because it (a derived variety) has the same commercially valuable characteristics as the initial variety, it competes with the initial variety in the marketplace”. Deriving value in the marketplace for products such as apples (harvestable material) results from a combination of highly contestable variabilities, not just like fruit characteristics. Again, we challenge the defining of variety based on commercial value. We consider that such a statement reflects a limited understanding of the commercialisation process beyond breeding, and is also an attempt by some of the breeding community to exercise further control. In our view such control may result in lesser commercialisation, and therefore benefit, for New Zealand.

Freshco Varieties Ltd would be happy to discuss a real-world example of such commercialisation to MBIE, as a case in point. Our example is an EDV with distinct characteristics that, by our understanding, could well be an EDV under UPOV 91.

Rights over harvested material

- 13 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 support the adoption of UPOV Article 14(2) as a minimum.

Based on our layman's understanding of Art 14(3), this would appear to give recourse for breeders where unauthorised propagation has occurred and has resulted in 'products' being available for sale. If this is correct, we suggest inclusion of Art. 14(3) [i.e. Option 2]. Given the very limited options for recourse under PVR legislation we consider this gives very useful, and appropriate, enforcement and owner recourse. Ultimately the value of IP comes from sales; of both propagating material and harvestable material. Allowing ongoing sale of harvestable material destroys not just breeder value, but all subsequent value derived from a breeder's/owner's IP protection.

As per our previous submission we do not support inclusion of harvestable material in PVR Act, which is already available in contract, and may then conflict with contract law. We do not consider this fits with the social contract supposed by this legislation.

Farm saved seed

- 14 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?

Compulsory licences – general issues

- 15 Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?
Other than the two substantive issues below, are there other issues we have missed?

We are concerned about the current compulsory licencing provisions, the lack of clarity for IP owners, and the essentially untested procedures and considerations.

Reasonable effort to obtain voluntary licence. We consider the proposed MBIE considerations are a good basis from which to start.

Export Restriction. We do support the MBIE position that any compulsory licence is for NZ propagation only. By extension we would propose therefore that any such grant also be made to cover any such contracts as exist between the IP owner and growers that covers sale of harvestable material, where such sale is in an export market.

Public interest test. We consider the discussion in the Options Paper demonstrates the ambiguity of intended outcomes. As such this needs significant further consideration.

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 support Option 3. Grace periods should vary to reflect the time to bulk up propagating material

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?

The current challenge for compulsory licencing is the lack of definition as to what the objective of such licencing is. The Act states: “the Commissioner to consider whether or not reasonable quantities of reproductive material of a reasonable quality of the variety concerned are available for purchase by members of the public at a reasonable price”. The discussion in this case appears to shift the argument away from a public interest test on reproductive or propagating material to ‘produce’ or ‘harvestable material’. We note from the Sapere Report further ambiguity; The current PVR Act implies that the State believes that the public is interested in ensuring that the variety is available to the public (i.e. the consumer) in “reasonable quantities” and at “reasonable prices”. For example the public interest test in the Commerce Act emphasises “the long-term benefit of New Zealand consumers”.

Previous options for change in other areas of the Options paper deal specifically with propagating material, not harvestable material. However, the considerations put forward by MBIE on this section note the potential to grant a compulsory licence to ensure ‘produce’ of a protected variety is available to the general public (para 393). We note specifically that the options analysis of rights over harvested material, option 3 says “The PVR regime focuses on acts in relation to propagating material. This would be a significant departure from that...”

For clarity we therefore conclude that there is no intent to deviate from ‘propagating material’.

Paras 393-394 comment that the case of recent hop applications was ‘locking out’ some growers from the market for ‘produce of that species’, and that this is not in the public interest. We are concerned that the Ministry’s perspective on this matter is inconsistent with other aspects of the Act, and highlights the challenge of what is the ‘public’ interest in relation to PVR. The hop case was commercial, which we don’t agree is ‘the public’.

We are troubled about the comments in para 394 on the hop example used. Whilst there is an increase in economic activity (not the driver of S.21), there is no basis on which to suggest that overall export revenues will be gained over the longer term than otherwise might have been the case – to suggest, so early in the growing and in the midst of an unprecedented global growth of hop production, that this is the case leads us to conclude that the Ministry doesn’t fully understand the long run nature of such horticultural production, nor capital risk. The growth of the hop industry in New Zealand was not constrained by lack of access to varieties developed by Plant and Food (and co-funded for 60 years by growers); it was constrained by global hop pricing, and a reluctance of people to take the necessary risk, until such time as others had proven those risks were diminishing (i.e. by existing hop growers).

It is concerning that the necessary underlying changes to reflect the appropriate IP protection over a time-frame to ensure value recovery may not be forthcoming, and that a specific area needing change (compulsory licencing) is being considered in light of one isolated example, yet to be fully proven as an example of benefit from such licencing.

We support Option 2, the repealing of S 21(3). Firstly S.21(3) covers propagating material and the argument put forward in this paper extends mostly to ‘produce’, with no conclusive example of a lack of ‘reproductive material available to the public’ (and public meaning non-commercial; to broaden to commercial essentially condones IP theft). We note from Sapere “Rather, the compulsory license provision in the PVR Act is intended to safeguard the continuation of innovation in New Zealand, while allowing access to the PVR (with appropriate compensation) if that access is necessary and in the public interest.”

Secondly even if the interpretation were to fall to ‘produce’ and not just propagating material, there is no readily available basis to suggest there is a shortage of produce available to the public, even when controlled by contracts over harvestable material, e.g. licenced varieties of fruit such as, Jazz™ or Breeze™ apples and Zespri® Sungold kiwifruit.

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?

We support the remedies for infringements as proposed. Importantly an injunction may be able to prevent the illegal export as has, anecdotally, been suggested to have occurred from NZ.

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?

20

Exhaustion of the breeder’s right

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

21

Cancellation and nullification of the breeder’s right

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

22

Extending coverage to algae

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?

23

Provisional protection

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

24

Transitional provisions

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?

We suggest Option 1 is the most suitable, noting the constraints and challenges posed.

Other comments

We are heartened by the overall finding that the current system is generally working well, notwithstanding a few areas that require some attention, especially compulsory licencing, legal protection and enforcement. Any changes to the Act must ensure that the Act is capable of being enforced to achieve intended objectives; this is a key weakness in the current Act. This Act needs to provide certainty to those who interact with it. That certainty must extend to enforcement of rights, through an appropriate process.