

# Plant Variety Rights Act 1987 review: Options Paper

## Your name and organisation

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## Responses to questions in the Options Paper

1	<b>Objectives of the PVR Act</b>
	Do you have any further comment to make on the objectives of the PVR Act? <i>[Insert response here]</i>
2	<b>Meeting our CPTPP obligations</b>
	Do you agree with our analysis and conclusion of the CPTPP options? If not, why not? <i>[Insert response here]</i>
3	<b>Treaty compliance – criteria for analysis</b>
	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? <i>[Insert response here]</i>

4	<p><b>Treaty compliance – key terms</b></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> <p><i>[Insert response here]</i></p>
5	<p><b>Treaty compliance – options analysis</b></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>[Insert response here]</i></p>
6	<p><b>UPOV 91 alignment – criteria for analysis</b></p> <p>Do you have any comment to make about our approach to, and criteria for, the preliminary options analysis in this paper?</p> <p><i>[Insert response here]</i></p>
7	<p><b>Definitions – breed</b></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>[Insert response here]</i></p>
8	<p><b>Definitions – general</b></p> <p>Do you have any comments on the definitional issues discussed in this Part?</p> <p><i>[Insert response here]</i></p>
9	<p><b>Scope of the breeder’s right</b></p> <p>Do you have any comments about these new rights required by UPOV 91?</p> <p><i>[Insert response here]</i></p>
10	<p><b>Exceptions to the breeder’s right</b></p> <p>Do you have any comments about the exceptions required by UPOV 91?</p> <p><i>[Insert response here]</i></p>
11	<p><b>Term of the right</b></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>[Insert response here]</i></p>

12	<p><b>Essentially derived varieties</b></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>We agree with the position taken in the Options Paper that options 1 and 4 are both lacking in clarity or will be hard to put into practice.</p> <p>In our view option 2 strikes a fair balance between right holder's interests as well as the interests of third parties in developing new varieties.</p>
13	<p><b>Rights over harvested material</b></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>[Insert response here]</i></p>
14	<p><b>Farm saved seed</b></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>[Insert response here]</i></p>
15	<p><b>Compulsory licences – general issues</b></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>

a. Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?

While we support the positions taken in the Options Paper regarding procedure, proof of obtaining a voluntary licence and limits on a compulsory licence regarding the ability to export reproductive material we disagree with the position of the options paper regarding the implementation of a public interest test.

In our opinion only the insertion of a public interest test will be able to properly reflect the objectives of compulsory licensing regime.

The core purpose of the compulsory licence provision in the PVR Act is to ensure access of the general public to the protected variety.

The current test included in section 21 of the PVR Act relies on the availability of reasonable amounts of the variety in a reasonable quality on reasonable terms to the general public. This test implies that a public interest in the availability of reproductive material of a certain variety always exists.

This does not reflect the reality. There are cases where there is practically no public interest in the availability of reproductive material of a certain variety, either due to the availability of comparable pre-existing varieties and/or the propagation of that variety is not practicable for the general public due to difficult growing conditions.

Comparable compulsory licensing regimes in New Zealand Intellectual Property Law such as section 169 of the Patents Act 2013 also takes into account whether or not there is demand for the availability of the patented invention.

A public interest test would therefore be more suitable to reflect the objective behind the compulsory licensing regime.

b. Other than the two substantive issues below, are there other issues we have missed?

The scope of the compulsory licence granted should be defined further. The limits on a compulsory licence not to export and to only allow for non-exclusive licenses are important elements that we support. However, following the purpose of compulsory licences for plant variety rights - ensuring availability of reproductive material to the general public - further limits need to be put on the grant of a compulsory licence.

If these restrictions are not set the grant of a compulsory licence could go further than just ensuring the availability of reproductive material to the general public. The grant of a not sufficiently limited compulsory licence could serve as a means for competitors of the right holder to gain access to the protected variety against the will of the right holder. This is, however, not in line with the objective underlying the compulsory licence regime.

For these reasons the grant of a compulsory licence should be limited as follows:

- the licence is not assignable, cannot be sub-licensed and non-exclusive;
- does not allow the export of reproductive material and
- only allows the licensee reproduction and sale of reproductive material, not the propagation for the purposes of commercial fruit production.

16	<p><b>Compulsory licences – grace period</b></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>The three year grace period is too short. Depending on the variety it might not even be practically possible to ensure sufficient availability to the general public as required by section 21. This might lead in some cases to situations where compulsory licence is granted and the right holder is not able to fulfil his/her obligations under that licence.</p> <p>Due to such a possible shortage the right holder might become liable for a breach of his/her obligations not only under the imposed compulsory licences but possibly also obligations to other of his/her licensees.</p> <p>We therefore submit that the grace period should be at least five years.</p>
17	<p><b>Compulsory licences – section 21(3)</b></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>[Insert response here]</i></p>
18	<p><b>Enforcement – infringements</b></p> <p>Do you agree with the discussion and the proposals in relation to the four issues discussed above? If not, why not?</p> <p>Should the PVR Act provide that infringement disputes be heard in the District Court?</p> <p>Are there others issues relating to infringements that we have missed?</p>
	<p><i>[Insert response here]</i></p>
19	<p><b>Enforcement – offences</b></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>[Insert response here]</i></p>
20	<p><b>Exhaustion of the breeder’s right</b></p> <p>Do you have any comments about the exhaustion provision required by UPOV 91?</p>
	<p><i>[Insert response here]</i></p>
21	<p><b>Cancellation and nullification of the breeder’s right</b></p> <p>Do you have any comments about the cancellation and nullification provisions required by UPOV 91, and MBIE’s additional proposals discussed in this section?</p>
	<p><i>[Insert response here]</i></p>

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?

*[Insert response here]*

23

**Provisional protection**

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

*[Insert response here]*

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?

*[Insert response here]*

**Other comments**

*[Insert response here]*