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Submission on the Ministry of Business, Innovation and Employment's proposed options for the Plant Variety Rights Act 1987 Review

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Executive summary

NZPPI is the peak industry body for plant producers in New Zealand. Our industry employs approximately 4000 people and is worth an estimated \$500 million.

Our members grow seedlings and plants for food, forests, for urban and rural landscapes and for home gardens.

Our industry underpins the success of New Zealand's thriving primary industries, including forestry, horticulture, viticulture and farming.

Plant producers are a vital part of the success of our primary sector, providing innovation through the selection and production of plant varieties that are suited to New Zealand and create value both domestically and in international markets. This innovation enables New Zealand growers and farmers to remain competitive domestically and internationally.

Many of our members propagate or own the rights to plants that are protected by the Plant Variety Rights Act (PVRA). The PVRA is therefore an important piece of legislation that supports the success of our sector.

NZPPI welcomes the opportunity to provide comment on the Plant Variety Rights (PVR) Act 1987 review in its earliest stages. Our members have interests across the PVR regime, including as plant breeders, germplasm importers and as plant producers who propagate and grow plants that are covered by the PVR regime.

NZPPI supports MBIE's intention to align the future PVR regime with New Zealand's international obligations as required under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), through ratification of International Convention for the Protection of New Varieties of Plants (UPOV) 1991, or a similar regime that gives effect to it.

Our submission highlights the importance of the PVR regime to our members and to New Zealand and the areas of the current PVR regime that need to be addressed to ensure that the system is operating effectively.

MEETING CPTPP OBLIGATIONS

Question 2: Do you agree with our analysis and conclusion of the CPTPP options?

1. NZPPI supports MBIE's preferred option in relation to our CPTPP obligations, which is to 'give effect', rather than accede to UPOV 91. By 'giving effect' to UPOV 1991, the new PVR regime would align with its provisions and be consistent with trading partners implementation of the international agreement and as well as enabling kaitiaki interests to be considered in a meaningful way.

TREATY COMPLIANCE – CRITERIA FOR ANALYSIS

Question 3: Do you agree with the criteria that we have identified? Do you agree with the weighting we have given the criteria?

2. NZPPI agrees with the proposed criteria for inclusion in the new PVR regime for Treaty compliance to be appropriate:

- a) Facilitate meaningful and mana-enhancing consideration of kaitiaki interests in PVR decision-making processes;
- b) Provide clarity for plant breeders for whom kaitiaki interests will be relevant consideration in the PVR grant process;
- c) Minimise additional compliance costs.

3. The double weighting for criterion (a), compared to (b) and (c), is not necessary to enable the future PVR regime to be responsive and compliant with the Treaty. All three criteria are important for the feasibility of the regime.

TREATY COMPLIANCE – KEY TERMS

Question 4: 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?

4. The principles MBIE have proposed to provide guidance for how breeders and kaitiaki could interact in a future regime will provide more certainty of what should be considered during the PVR application process. Specifically, the relationship kaitiaki have with certain plant species needs to be clear, which could be achieved through development of a list of species of significance.

5. NZPPI considers developing a list of species of significance, in addition to the use of the below principles, will provide more certainty for breeders so they understand what kaitiaki engagement is necessary during the application process.

- a) Where plant material originating in New Zealand from indigenous plant species (**indigenous plant material**) has been used to develop a new plant variety, there is a presumption that there are kaitiaki who may have interests in the indigenous plant material.
- b) Generally, iwi, hapū or whānau who hold mana whenua over the rohe in which the plant material has been sourced in the wild may have kaitiaki interests in indigenous plant material.
- c) Iwi, hapū and whānau may also have kaitiaki interests in plant material from species that are not strictly indigenous to New Zealand – for example, species that were introduced to New Zealand on the migrating waka, like kumara. We refer to these in the remainder of this Part as **non-indigenous species of significance**.
- d) Where the indigenous plant material or plant material from non-indigenous species of significance has been used to develop a new plant variety, but its regional origin is not able to be identified, those who hold mana whenua over the rohe where the variety has been developed (e.g. the location of the nursery) may have a kaitiaki interest in the new variety.

TREATY COMPLIANCE – OPTIONS ANALYSIS

Question 5: Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions?

6. NZPPI would like to see the revised PVR regime recognising kaitiaki interests in a meaningful way that is Treaty compliant. The future regime should provide opportunity for early engagement between plant breeders and kaitiaki, when breeders are considering working with plants that are of kaitiaki interest.

7. NZPPI agrees with MBIE that Option 2 is most appropriate of the proposed options. It adds a sixth criterion for a grant of PVR, which makes it inconsistent with UPOV91. However the criterion is the first of the kaitiaki recommendations of the Waitangi Tribunal in the Wai 262 report. MBIE's analysis of the options, including consideration of participants (breeders, kaitiaki and the PVR office) interests, associated costs and level of certainty all support this preferred option.

- Option 2: introduce a new power to allow the refusal of a PVR by the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant.

8. Option 2 considers kaitiaki interests pre-grant and therefore provides more certainty for both the breeder and kaitiaki. This approach also aligns with other intellectual property (IP) legislative settings. This option is Treaty compliant and balances kaitiaki interests with certainty for breeder investment.

DEFINITIONS - BREED

Question 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?

9. NZPPI supports the use of better clarifying definitions in the Act, such as replacing “owner” with “breeder” and “grantee” with “holder”. While these are relatively minor changes, we suggest that they would significantly improve the ease with which the Act is understood.

10. NZPPI considers the proposed definition of ‘breed’ from the draft 2005 Bill, as outlined below, to be appropriate for inclusion in the new PVR regime. This definition provides an equivalent meaning to the definition used in UPOV 1991 and was endorsed by the Waitangi Tribunal as a recommendation in the Wai 262 report.

Breed: in relation to a variety, includes the process of selection within the natural variation of a plant or plant population, together with the process of propagation and evaluation so as to enable the development of the variety.

SCOPE OF THE BREEDER’S RIGHT

Question 9: Do you have any comments about these new rights required by UPOV 91?

11. The new rights proposed to align with UPOV 1991 will introduce additional control over the variety, compared with the rights in the current PVR regime. To give effect to UPOV 1991 requires an expansion of rights to the breeder but we recognise this may not necessarily be in the interests of growers and the public.

12. Article 15(1) of UPOV 91 provides for compulsory exceptions to PVR rights that are slightly different to those in the PVR Act, including an optional exception for farm saved seed (see 23).

TERM OF THE RIGHT

Question 11: Do you agree with the proposed options? Are there alternatives we have missed?

13. NZPPI supports MBIE’s preferred option of aligning with the minimum requirements from UPOV 1991. This would extend the term for woody plants/rootstock from 23 to 25 years. The duration of the grant for other species is already in line with UPOV 91.

14. Option 1 meets our CPTPP commitments and provides certainty to breeders about how long their rights will be in place.

ESSENTIALLY DERIVED VARIETIES

Question 12: Do you agree with the proposed options? Are there alternatives we have missed?

15. Under the current PVR regime it is too easy for a breeder who does not have the rights to a plant variety to make minor, non-functional changes, and gain their own PVR for a variety that is functionally no different. This free riding disincentivises innovation and has the potential to significantly impact breeders that invest heavily in developing new varieties.

16. We acknowledge that there is a trade-off between strengthening the rights of variety holders and ensuring that other breeders can still develop new, similar varieties. We believe that alignment of the updated PVRA with UPOV91 would provide an appropriate balance.

17. The definition of Essentially derived varieties (EDV) in UPOV 91 is ambiguous. MBIE have proposed four options for further defining EDVs.

18. NZPPI agrees with preferred option 2, which would define EDVs as a 'copycat' variety – that is, the difference between the initial variety and the derived variety makes no difference to the commercial value of the variety. The value of the distinctiveness should be commercially meaningful and recognise the original breeder if the variance between the original and derived variety isn't significant.

19. Participants at the PVR hui in August also commented on the need to include provision for how single parent EDVs could be protected, in order to recognise how breeding may occur in the future.

RIGHTS OVER HARVESTED MATERIAL

Question 13: Do you agree with the proposed options? Are there alternatives we have missed?

20. Rights over harvested material concerns the extent to which rights are extended to the harvested material (e.g. fruit) grown from the protected propagating material. NZPPI agrees with MBIEs preferred option, which would provide only the minimum requirements over harvested material by UPOV 91.

21. NZPPI considers option 1 at a minimum to be in the interests of commercial fruit and vegetable growers in New Zealand but understands some PVR owners may want to see further extension of rights.

FARM SAVED SEED

Question 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?

22. NZPPI believes that the current PVR Act does not meet the needs of breeders by protecting their investment on an ongoing basis and specific mechanisms should be put in place to ensure that breeders are able to collect royalties on seeds collected from their PVs.

23. Under the new exclusive rights afforded by UPOV 91, farmers would not be allowed to save seed without the authorisation of the PVR owner.

24. UPOV 91 provides an exception that member states can choose to implement (and, if so, under what conditions). MBIE's preferred option is to implement the exception for Farm Saved Seed, but with limitations which are imposed up front in the primary legislation or later on in regulations, if the case was made in relation to certain varieties later on. These could include limitations on which varieties the exception applies to, what types/size of farm the exception applies to and what amount of produce the exception applies to. It could also include regulations relating to royalty payments for varieties that the exception applies to.

25. NZPPI supports the implementation of greater protections for our breeders from losses that could be accrued because of seed saving. If the exception in Article 15(1) is implemented, we believe that regulations need to be established to allow royalty payments to be mandated for specified varieties.

COMPULSORY LICENCES – GENERAL ISSUES

Question 15: Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?

26. The intention of compulsory licences is to ensure the public has access to new varieties protected under the PVR regime. Currently, licence applications can be made to the Commissioner after three years of the PVR being granted, to allow the public access to a reasonable amount of a protected variety at a reasonable price (the social bargain).

27. MBIE proposes that the PVR Act require that the application be dealt with in a manner prescribed in regulations, and that the parties be given a reasonable opportunity to be heard before making a decision on the application. NZPPI agrees there needs to be greater clarity about the process for applying for a compulsory licence and supports the opportunity for parties to be heard before a licencing decision is made.

28. MBIE proposes that the PVR Act provide that a compulsory licence must not be granted unless the applicant can show that: a) they have made reasonable efforts to obtain a licence over the variety concerned from the PVR owner on reasonable terms and conditions; and b) has not been able to obtain such a licence within a reasonable period of time. NZPPI supports this proposal - all reasonable steps should be taken to engage with the PVR owner before licence processes are commenced.

29. NZPPI supports the proposal to amend the compulsory licence provisions to limit propagation of the variety to New Zealand. This is consistent with the approach taken in section 170 of the Patents Act 2013. This proposal as it will facilitate the PVR owner's control of the licence in New Zealand.

30. NZPPI also supports the proposal for compulsory licences to be non-exclusive.

COMPULSORY LICENCES – GRACE PERIOD

Question 16: Do you agree with the proposed options? Are there alternatives we have missed?

31. Currently, the grace period after the PVR has been granted and during which time a compulsory licence application cannot be filed provides the PVR owner with a short period to get a return on their investment and build up sufficient supply of propagative material.

Of the three proposed options below that MBIE has put forward, their preferred option is to retain the three-year grace period (the status quo).

32. NZPPI considers the three-year grace period to be adequate in preparing a new variety for commercial production.

ENFORCEMENT – INFRINGEMENTS

Question 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 other issues relating to infringements that we have missed?

33. NZPPI considers the current PVR regime doesn't provide enough protection for those holding PVR. Penalties for those infringing PVRs are minimal and enforcement of a breeder's rights can be difficult, time-consuming, and costly.

34. NZPPI recommends that alternative methods than the court system are available for protecting a variety owner's rights. This should help to ease costs associated with the enforcement of variety rights. We also recommend greater penalties for infringing a variety owner's rights. The current penalty of \$1000 is insignificant compared to the hundreds of thousands of dollars that a rights owner could lose because of their rights being infringed.

35. MBIE's preferred option is to repeal the offence provisions under PVR and deal with breaches under the Fair Trading Act. Both the Commerce Commission and legal persons have the power to take prosecutions under the Fair Trading Act. The maximum fines for this behaviour are \$200,000 for an individual and \$600,000 for a body corporate. It is also possible for civil action to be taken by persons who are adversely affected by these activities. NZPPI supports this option.

OTHER COMMENTS

36. We note the PVR Act is silent on costs associated with gaining PVR, but have been informed that costs can be prohibitive, particularly given the high proportion of small- and medium-sized enterprises in the nursery sector. Any modifications to the Act should provide greater certainty about the costs associated with gaining and holding PVR.

37. We have been told of limited capacity in the PVRO and of difficulties communicating with the PVRO. There have also been concerns raised about the expertise in the management and protection of plant variety rights that is currently available in New Zealand. An updated PVRA should be more specific about the expertise required within the PVRO and provide greater clarity about the skills breeders can expect the PVRO to have.

CONCLUSION

38. NZPPI thanks MBIE for the opportunity to make a submission on key issues associated with the PVRA. We look forward to being part of an ongoing discussion about changes to the PVR regime and are available at any time for further discussions with MBIE.

39. NZPPI supports the intention of MBIE to align the future PVR regime with New Zealand's Treaty of Waitangi obligations and New Zealand's international obligations, as required under the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP), through giving effect to the International Convention for the Protection of New Varieties of Plants (UPOV) 1991.

40. NZPPI supports MBIE finding a balance in the future regime between encouraging innovation by plant breeders and ensuring this innovation is available to growers, other breeders and the general public. NZPPI hopes we can work towards a PVR regime that is aligned to UPOV 91 that is user-friendly, effective, and efficient.

REFERENCES

MBIE (2019) Plant Variety Rights Act 1987 review: Options paper. Accessed online:
<https://www.mbie.govt.nz/have-your-say/plant-variety-rights-act-1987-review-options-paper/>