

Plant Variety Rights Act 1987 review: Options Paper

Your name and organisation

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Responses to questions in the Options Paper

1	Objectives of the PVR Act
	Do you have any further comment to make on the objectives of the PVR Act? [The objectives are correct. With new breeding techniques there are going to be issues that arise which are not yet commonplace and may require further legislation or regulation in order to ensure the objectives of the PVR Act are met.]
2	Meeting our CPTPP obligations
	Do you agree with our analysis and conclusion of the CPTPP options? If not, why not? [We have no opinion on this]
3	Treaty compliance – criteria for analysis
	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? [We have no opinion on this]

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?

[We have no opinion on this]

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?

[We have no opinion on this]

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?

[Point 140 b. in the options paper review is important. The definition of reasonable opportunity for the public to access new varieties must be made clear. In an era of so-called grower clubs it is important the parties establishing the clubs have certainty before they invest in the marketing programmes that establish those clubs. Typically once a club is successful those who want to ride on the backs of the pioneers demand access. It is our submission the owner of the club must be able to refuse to accede to demands for access provided of course that he can demonstrate how he is meeting market demand.

Point 140 d. The opportunity for those who wish to build on innovation may only do so if the end product is not a "copycat". Consideration for increased so-called minimum distance between varieties should be greater where those who wish to build on the innovation demand access. There is no point in the existing reality where the minimum distance is ever decreasing as it is destroying the monopoly granted. Fortunately as pointed out in the paper the negative effects of this have not yet been seen.]

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?

[Discovery of varieties in the wild is not breeding. Likewise discovery of mutants or sports is also not breeding. With the shortly to be advent of new breeding techniques the possibility of single parent varieties could end up destroying classical breeding programmes of two parent varieties. Breeding should be that of two parent varieties. In the event of single parent varieties including sports or mutations the protection against "copycat's" needs to be significant. Compulsory licensing should include the possibility that discoverers of mutants have to make their discoveries known and if "copycat's" be licensed for use within an existing licensing or so-called grower club structure.]

Definitions – general

8

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

[UPOV91 definition for breed is good but it must be accompanied by regulation that prevents the establishment of "copycat" varieties. In the case of single parent varieties. This is one place where an improved definition not considered when UPOV91 was drafted could be considered.]

9

Scope of the breeder's right

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

[The rights required by UPOV91 are the minimum. Consideration should be given to ensuring the fruit or flowers of protected varieties are also protected.]

10

Exceptions to the breeder's right

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

[Where the breeding of new varieties is undertaken with a protected variety consider regulation which requires a greater so called minimum distance than would apply when comparing two varieties from conventional hybridisation. This is especially the case where the difference between the varieties is an esoteric morphological one on the plant and the product of the plant, the flower or fruit, is for all intents and purposes exactly the same between the varieties.]

11

Term of the right

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 most important issue with the term is the ability to properly test new rootstocks on tree fruit varieties and apply for protection within the six year period. Also to recover the cost of breeding a rootstock within even a 30 year term is not easy]

12

Essentially derived varieties

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?

[Option 2 is a good one provided that the criteria whether a copycat is based upon the commercially important part of the plant - in the case of flower or fruit species the flower and the fruit. It should not be based upon whether there is a production advantage or not]

13

Rights over harvested material

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 success of so called club varieties is going to depend upon the control over the harvested material. All legally acquired plants are going to be subject to a contract which gives the owner the right to control the harvested material. The issue of competition concerns is in the view of this submission a red herring as it is highly unlikely a single variety will achieve a market dominant position within the term of a PVR]

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>[Farm saved seed should be applicable to cereal crops only. The definition should be clear that it does not include the seed within fruit.]</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>[Establishing a new club is very expensive and typically the people who threaten to apply for compulsory licences are those who wish to ride on the backs of the pioneers. If the owner of a PVR can demonstrate he is making efforts to supply market demand he should not have to include a compulsory licensee who are typically the parties who do not supply the required quality of produce nor do they comply with the marketing programmes. If the PVR owner can demonstrate evidence of non-compliance with so-called club systems by a party who applies for a compulsory licence this should be sufficient grounds to refuse to licence a grower to produce a variety protected by PVR]</p>
16	<p>Compulsory licences – grace period</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 grace period should be longer for tree fruit crops. We propose 7 years]</p>
17	<p>Compulsory licences – section 21(3)</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 pressure on growers to apply for compulsory licences has not yet occurred in the current market cycle. We believe the absence of compulsory licence applications up until now does not mean the criteria should not be made clear now. It is vital that in the event of a compulsory licence application the grower applying for the compulsory licence must comply with all the terms the growers who have voluntarily agreed to contract with the PVR holder.]</p>
18	<p>Enforcement – infringements</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>[Insert response here]</p>

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?
-

[If the cost of enforcement is going to exceed the award that can be obtained effectively there is no protection. The damages should include a specific item for the costs of the enforcement on an attorney and client scale. Theft of someone's property remains theft and should be a criminal offence. The offence provisions should not be repealed.]

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?
-

[It should not be that the only time an alleged infringer can bring his or her counterclaim for revocation is when he is facing a claim of infringement. It is important to protect the PVR holder who typically is making significant investment against infringers who ride on the back of those who start the club. As soon as an infringer becomes aware of his or her grounds for a counterclaim it should be made. He should not have the opportunity to benefit from the investment of the PVR holder only to escape paying his share by proving the PVR should not have been granted]

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?
-

[Insert response here]

Provisional protection

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

[While the alleged infringer is not subjected to unnecessary hardship it is hardly fair on the PVR holder in the event the alleged infringer is a person of straw and cannot compensate the PVR holder]

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?
-

[If the first commercial sale has not yet occurred any EDV must be treated as an EDV.]

Other comments

[Insert response here]