

Review of the Plant Variety Rights Act 1987

A Discussion Paper

March 2002

ISBN 0-478-24284-6

© Crown Copyright
First published March 2002 by the
Regulatory and Competition Policy Branch
Ministry of Economic Development
P O Box 1473 Wellington
New Zealand

<http://www.med.govt.nz>

Permission to reproduce: The copyright owner authorises reproduction of this work, in whole or in part, so long as no charge is made for the supply of copies, and the integrity and attribution of the work as a publication of the Ministry of Economic Development is not interfered with in any way.

Disclaimer

The opinions contained in this publication are those of the Ministry of Economic Development and do not reflect official government policy. Readers are advised to seek specific legal advice from a qualified professional before undertaking any action in reliance on the contents of this publication. While every effort has been made to ensure that the information set out in this publication is accurate, the Crown does not accept any responsibility whether in contract, tort, equity or otherwise, for any action taken, or reliance placed on, any part, or all, of the information in this publication or for any error in or omission from this publication.

Contents

FOREWORD	1
INFORMATION FOR PERSONS MAKING SUBMISSIONS	3
1. INTRODUCTION	5
2. BACKGROUND	7
What Are Plant Variety Rights?	7
Why Grant Plant Variety Rights?	8
International Obligations.....	8
How Are Plant Variety Rights Granted?	9
3. WHY REVIEW THE PLANT VARIETY RIGHTS ACT 1987?	11
Farm Saved Seed.....	12
Compulsory Licenses	12
Plant Varieties and Patents	13
History of Reform.....	13
Questions	14
4. UPOV 91	15
How Does UPOV 91 Differ from the Plant Variety Rights Act 1987	15
Scope of the PVR.....	15
Exceptions to the PVR.....	16
Date and Term of Grants.....	17
Questions	17
5. IMPLICATIONS FOR NEW ZEALAND OF EXTENDING THE RIGHTS GRANTED TO PLANT BREEDERS	19
Ratification of UPOV 91.....	19
The Scope of the PVR.....	19
Exclusive Right to Produce or Reproduce the Protected Variety.....	20
Exclusive Right to Export the Propagating Material of the Protected Variety	20
Conditioning for the Purposes of Propagation	21
Stocking of the Protected Variety	21
Essentially Derived Varieties	22
Exceptions to the PVR: Farm Saved Seed.....	22
How Should New Zealand Deal with the Issue of Farm Saved Seed?	23
Option i: Farmers Pay Full Royalty on Farm Saved Seed.....	23
Option ii: Allow Farmers to Use Their Saved Seed Subject to Reduced Royalty Payment.....	24
Option iii: Allow Farmers a Limited Right to Use Saved Seed	24
Option iv: Allow Farmers the Unrestricted Right to Use Farm Saved Seed	24
Exceptions to the PVR: Private and Non-Commercial Use	25
Term of the PVR.....	25
Compulsory Licenses	25
Questions	26
6. CONCERNS OF MĀORI	29
Consultations to Date	29

Issues to Be Considered	29
Māori Concerns and the Review of the PVRA 87	31
Questions	32
APPENDIX: COMPARISON OF PROVISIONS OF PVRA 87 AND UPOV 91	33

Foreword

In putting forward the government's innovation strategy, the Prime Minister has stressed the need to enhance the innovation system. As the Prime Minister noted, an important element of this is enhancing New Zealand's intellectual property framework.

The provision of plant variety rights can provide an incentive for plant breeders to invest in the development of new and improved varieties. The plant variety rights system also provides an incentive for overseas plant breeders to allow their new varieties to be exploited in New Zealand.

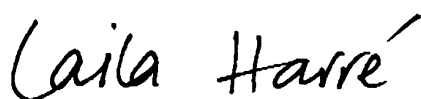
This review of the Plant Variety Rights Act 1987 will contribute towards the government's goal of growing an innovative New Zealand and help to ensure that New Zealand gains the greatest value from its innovations. As part of this review, this discussion document is being released. It considers issues surrounding the granting of plant variety rights, the intellectual property rights granted to plant breeders for their new plant varieties.

Since the Plant Variety Rights Act 1987 was passed, there have been significant advances in plant breeding techniques. There have also been international developments. New Zealand is a member of the International Union for the Protection of New Varieties of Plants (UPOV). In 1991 UPOV member states negotiated a revised version of the UPOV Convention, to which New Zealand is not a party. In light of these developments, there have been concerns that the Act no longer provides adequate protection for new plant varieties.

A number of issues surrounding the granting of plant variety rights have been the subject of considerable public debate, both in New Zealand and overseas. Māori have concerns about the granting of plant variety rights over indigenous plant varieties. Concerns have been expressed about the possible adverse effects of the grant of plant variety rights on such matters as the right of farmers to sow their saved seed without payment of a royalty, biodiversity and food security.

In view of these concerns, the government has decided to seek input from the public before deciding whether any changes should be made to the Plant variety Rights Act.

We welcome your submissions on the matters discussed in the document as a first step in the government's consideration of these issues.



Hon Laila Harré
Associate Minister of Commerce



Hon Paul Swain
Minister of Commerce

Information for Persons Making Submissions

Submissions in relation to this discussion paper are invited from plant breeders, farmers, other users of protected, and members of the public. Submissions will be considered in the development of policy recommendations to the government on possible legislative reform. Readers should note that a discussion of the patent system in New Zealand appears in *Review of the Patents Act 1953: Boundaries to Patentability: A Discussion Paper*.¹

To aid respondents in making submissions, questions for discussion can be found at the end of sections 3 - 6.

Submissions should be sent to:

Plant Variety Rights Act Review Submissions
Attention Warren Hassett
Regulatory and Competition Policy Branch
Ministry of Economic Development
PO Box 1473
WELLINGTON

Emailed submissions are also welcome. They should be addressed to:
warren.hassett@med.govt.nz

Submissions may be subject to disclosure under the Official Information Act 1982. Persons making submissions that include commercially or otherwise sensitive material that they wish the Ministry to withhold under the Act should clearly identify the relevant information and the applicable grounds under which the Ministry could withhold the information.

The closing date for submissions is **Friday 26 July 2002**.

¹ Ministry of Economic Development, March 2002. A copy of that paper is available from the Ministry's website: <http://www.med.govt.nz>

1. Introduction

1. The grant of Plant Variety Rights (PVR) under the Plant Variety Rights Act 1987 (PVRA 87) provides plant breeders with the exclusive right to sell seed or reproductive material of their new varieties. This gives plant breeders an opportunity to make a return on their investment in breeding new varieties, and provides an incentive for such investment.

2. The rights provided for in the PVRA 87 for PVR owners are relatively restricted, and limit the ability of PVR owners to earn revenue from their protected varieties. This may reduce the incentive for local plant breeders to develop new varieties, or for foreign breeders to allow their new varieties to be exploited in New Zealand.

3. New Zealand has a significant plant breeding industry. New plant varieties developed in New Zealand can provide significant income to New Zealand both from the sale of produce, and from the licensing of those new varieties in other countries where PVRs have been obtained.

4. It is possible that the restricted rights provided for under the PVRA 87 make it more difficult for New Zealand growers to gain access to new plant varieties. As agriculture is a substantial contributor to New Zealand's economy, New Zealand growers may be disadvantaged if growers' access to new plant varieties is restricted.

5. New Zealand has a significant plant breeding industry. For some crops, such as apples, kiwifruit, ryegrass and clover, the majority of the PVRs registered in New Zealand are owned by New Zealand breeders. New plant varieties developed in New Zealand can provide significant income to New Zealand both from the sale of produce, and from the licensing of those new varieties in other countries where PVRs for those new varieties have been obtained.

6. An additional consideration, the 1991 revision of the International Convention for the Protection of New Varieties of Plants (UPOV 91) provides for more extensive rights for plant breeders than the PVRA 87, which is based on the 1978 revision of the Convention (UPOV 78). New Zealand is not a party to UPOV 91.

7. When considering the question of whether the PVRA 87 should be amended, along with the question of becoming a party to UPOV 91, the following broad context will need to be taken into account:

- the government's goals of growing an innovative New Zealand for the benefit of all, and the need to support research and development, while minimising regulatory barriers to innovation;
- the government's obligations under the Treaty of Waitangi, and the need to take into account Māori concerns regarding the exploitation of indigenous flora;
- New Zealand's international obligations under the TRIPS agreement and UPOV 78.

8. Within the broad context outlined above, If New Zealand were to provide more extensive rights for plant breeders (whether or not New Zealand becomes a party to UPOV 91), there will be costs as well as benefits:

Possible benefits of extending plant variety rights	Possible costs of extending plant variety rights
<ul style="list-style-type: none"> • Greater investment by New Zealand plant breeders in the development of new varieties; • Greater foreign investment in research and development of new varieties in New Zealand; • Greater availability of new plant varieties to New Zealand growers; • Newly developed plant varieties may increase the international competitiveness of New Zealand growers, leading to increased exports. 	<ul style="list-style-type: none"> • Higher prices to growers and consumers of protected varieties and produce of those varieties, particularly if the farm saved seed exception is removed; • An increase in the number of PVR applications from overseas; much of the economic benefits of these foreign owned PVRs may flow offshore. • Reduced incentives for some plant breeders if PVRs are extended to cover varieties essentially derived from a protected variety. • Reliance on a narrow range of protected varieties could reduce biodiversity, and increase the vulnerability of crops to disease or insect pests

9. In putting forward the innovation strategy the Prime Minister has stressed the need to enhance the innovation system. As the Prime Minister noted, an important element of this is improving New Zealand’s intellectual property framework. The purpose of this discussion document is to inform interested parties about issues concerning the granting of plant variety rights in New Zealand. Public input is sought on whether, and if so, how the Plant Variety Rights Act 1987 should be amended to address any of these issues so that the Act contributes to the government’s goal of growing an innovative New Zealand and ensures that New Zealand gains full value from its innovations.

2. Background

What Are Plant Variety Rights?

10. In New Zealand, protection is provided for new plant varieties² through the provisions of the Plant Variety Rights Act 1987 (“PVRA 87”). New Zealand has ratified the 1978 revision of the UPOV Convention³ (“UPOV 78”) and has been a member of the International Union for the Protection of New Varieties of Plants (UPOV) since 1981.

11. The grant of a Plant Variety Right (“PVR”) under the PVRA 87 gives the owner of the PVR the exclusive right to produce for sale, and to sell,⁴ reproductive material of the variety concerned [section 17(1)(a) of the PVRA 87]. A variety that is the subject of a PVR is referred to as a “protected variety”.

12. In the case of vegetatively propagated fruit or vegetable producing varieties or ornamental varieties,⁵ the owner of the PVR also has the exclusive right to reproduce the variety for the purposes of the commercial production of fruit, flowers or other products of the variety.⁶ A PVR lasts for 23 years from the date of grant of the PVR in the case of woody plants or their rootstocks, and for twenty years for all other plant varieties [s14 of the PVRA 87]. Plant variety rights are considered personal property and may be sold, assigned or licensed.

13. The grant of a PVR under the PVRA 87 does not prevent the sale of reproductive material of a protected variety (such as grain) for human consumption or other non-reproductive purposes, or the use by farmers of seed saved from a previous year’s harvest. The reproduction, or use, of a protected variety for non-commercial purposes, does not infringe a PVR.

14. A PVR does not prevent others from breeding and selling a new variety derived from a protected variety, as long as production of the new variety does not require repeated use of the original protected variety. That is, if each lot of reproductive material of the new variety can only be produced using the protected variety, then the sale of the new variety would be an infringement of the PVR right for the protected variety. An example of this would be the production of a hybrid seed variety, which requires the use, each time, of the seed of a protected inbred variety.

15. The main requirements for the grant of a PVR are that the plant variety must be new, distinct, homogenous, and stable. These terms are defined in section 10(4) and (5) of the PVRA 87:

² Section 2 of the PVRA 87 defines a “variety” as a cultivar, or cultivated variety, of a plant, and includes any clone, hybrid, stock, or line of a plant, but does not include a botanical variety of a plant.

³ The text of the UPOV Conventions can be found at <http://www.upov.int/eng/convntns/index.htm>

⁴ “Sale” includes any disposition for valuable consideration and any offer for sale; and “sell” and “sold” have corresponding meanings [Section 2 of the PVRA 87].

⁵ “Vegetative propagation” is a form of asexual reproduction. Examples of vegetative propagation include propagation by bulbs or tubers, the planting of cuttings, or grafting and budding of fruit trees.

⁶ Section 17(1)(b) PVRA 87, and the Plant Variety Rights (Grantees’ Rights) Order 1997.

- a variety is considered to be “new” if there has been no sale of that variety in New Zealand earlier than 12 months before the date of application for a PVR, or if there has been no sale overseas earlier than 6 years before the date of application (for woody plants) or earlier than 4 years for all other plants;
- a variety is “distinct” if it is distinguishable from any other known variety by one or more characteristics, for example, colour of flowers, time of flowering, dimensions of leaves;
- a variety is “homogeneous” if, subject to the normal variation expected from its method of propagation, it is uniform in its relevant characteristics.
- a variety is “stable” if it remains true to its description after repeated reproduction or propagation.

Why Grant Plant Variety Rights?

16. The development of a new plant variety can be a long and costly process. The grant of a PVR allows a breeder to control the commercialisation of a new variety, and gives the breeder an opportunity to make a return on the breeder’s investment in research and development of the new variety. This encourages research and investment in the development of new plant varieties. The presence of PVR protection also encourages the commercialisation in New Zealand of foreign-bred varieties. Without the protection provided by PVRs, foreign plant breeders may be reluctant to allow their new varieties to be sold in New Zealand.

17. The availability of PVRs has increased the level of investment in plant breeding in New Zealand. After the enactment of New Zealand’s first plant variety protection law, the Plant Varieties Act 1973, investment in plant breeding increased rapidly, before peaking around 1984 and declining to a level approximately twice that in 1975.⁷

18. The provision of statutory protection to new plant varieties enables farmers, horticulturists, and home gardeners to gain access to a larger range of improved varieties than might be the case if no protection was provided. This benefits not only plant breeders, but also society as a whole. The agricultural sector is a major contributor to New Zealand’s economy. If New Zealand farmers do not have access to improved varieties, then they may be placed at a disadvantage compared with farmers in other countries who do have access to such varieties.

19. New Zealand’s ratification of UPOV 78 also means that New Zealand plant breeders may obtain protection for their new varieties in all other UPOV member states.

International Obligations

20. Article 27(3)(b) of the WTO TRIPs Agreement⁸ requires member states to provide protection for plant varieties either by patents or by an effective *sui generis* (stand alone)

⁷ H. J. Bezar, R.B.Wynn-Williams, and A.V.Stewart: “Plant Variety Rights in New Zealand: A Review”, *Proceedings of the Agronomy Society of New Zealand*, Vol. 20, 1990.

⁸ Agreement on Trade Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement establishing the World Trade Organisation.

system, or a combination of the two. Article 27(3)(b) also allows member states to exclude plants (among other things) from patent protection. As mentioned earlier, New Zealand is also a member of UPOV, and has ratified UPOV 78. UPOV 78 requires New Zealand to provide the level of protection for plant varieties specified in UPOV 78.

How Are Plant Variety Rights Granted?

21. PVRs are granted by the Plant Variety Rights Office under the authority of the Commissioner of Plant Variety Rights. The Plant Variety Rights Office is part of the Operations Branch of the Ministry of Economic Development. The office is situated at Lincoln, near Christchurch. Eligibility for the grant of a PVR is, in most cases, determined through growing trials in New Zealand. Different procedures apply to different categories of plants. Information about the Office and the administration of the PVRA 87 can be obtained from the Office's website <http://www.pvr.govt.nz>.

3. Why Review the Plant Variety Rights Act 1987?

22. The PVRA 87 is based on the 1978 revision of the UPOV Convention. In 1991, UPOV member states agreed on the text of a new and enhanced Convention (“UPOV 91”). The changes embodied in UPOV 91 considerably expanded the rights available to plant breeders and were intended to reflect a number of problems that had arisen with UPOV 78. These included:

- conflict between plant variety rights and patents;
- developments in plant breeding techniques;
- inadequacy of UPOV 78 in relation to essentially derived varieties.

New Zealand has signed, but has not yet ratified, UPOV 91 so that it is not yet binding on New Zealand. In light of these developments, it is timely to review the PVRA 87.

23. Although New Zealand has signed UPOV 91, the necessary amendments to the PVRA 87 to enable ratification have not been made. Many plant breeders consider that amendment of the PVRA 87 is required to ensure that their investment in the development of new varieties is protected, and to give them control of essentially derived varieties. Breeders also consider that any amendments to the PVRA 87 should enable New Zealand to ratify UPOV 91. If New Zealand does not ratify UPOV 91, they claim, there is a risk that local plant breeders may transfer their activities to other countries that have ratified UPOV 91. There is also a risk that foreign plant breeders may be reluctant to allow their new varieties to be released in New Zealand.

24. The grant of a PVR under the PVRA 87 does not prevent the commercial exploitation of new varieties that are “essentially derived”⁹ from the protected variety. That is, the developer of such a new variety does not have to gain the permission of the owner of the PVR for the protected variety to sell the new variety, and does not have to pay the owner a royalty. This allows the developer of the new variety to “free ride” on the development work carried out by the developer of the protected variety.

25. As the protection provided by a PVR does not extend to varieties essentially derived from a protected variety, there is the potential to damage the interests of both New Zealand plant breeders and those who make use of the plants, such as farmers and orchardists. The owner of the PVR on the protected variety has no control over how the derived variety is marketed and does not receive any royalties.

26. The Royal Commission on Genetic Modification was told of overseas research to develop a new apple variety derived from the Royal Gala variety by genetic modification.¹⁰

⁹ Under Article 14(5)(b) of UPOV 91, a variety is considered to be “essentially derived” from an initial variety if it is: predominantly derived from an initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety; it is clearly distinguishable from the initial variety; and except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotypes or combination of genotypes of the initial variety

¹⁰ Report of the Royal Commission on Genetic Modification, Chapter 10, para. 16.

Under the PVRA 87, the owner of a PVR for a variety such as Royal Gala variety could not prevent the production and marketing of the genetically modified Royal Gala apples. The marketing of such apples might damage the market for Royal Gala apples as consumers might stop buying Royal Gala apples because they cannot distinguish between genetically modified and non-genetically modified apples. This prompted the Royal Commission to recommend that the PVRA 87 be amended to introduce the concept of “essential derivation” (recommendation 10.1). The government has agreed in principle to the PVRA 87 being amended in this way, subject to the outcome of this review of the PVRA 87.

27. Another perceived deficiency of the PVRA 87 is that PVR owners are not able to prevent the export of reproductive material of a protected variety. This means that it is currently possible for someone to take reproductive material of a protected variety to another country and use it to propagate the variety or develop new varieties. If the variety were not also protected in that other country, the variety could be used to grow produce that would compete with New Zealand-grown produce from the same variety. As the overseas producers would not have to pay any royalty for use of the variety, they may have a competitive advantage over New Zealand producers who do have to pay a royalty.

28. It seems likely that the unauthorised export of reproductive material of protected varieties has already taken place. For example, a few years ago, apples of the Pacific Rose variety (a variety developed in New Zealand) were found to have been grown illegally in Chile. It was suspected that they were derived from budwood smuggled out of New Zealand. In that case, Pacific Rose was also a protected variety in Chile, so it was possible to take action through the Chilean courts to have the apple trees destroyed. There was also an incident recently, where a visiting scientist was caught attempting to take cuttings of new apple varieties out of the country.

29. The expanded rights provided for under UPOV 91 include:

- the right to authorise the export of reproductive material of a protected variety;
- the extension of a PVR owner’s rights to include rights over varieties essentially derived from that person’s protected variety.

Farm Saved Seed

30. Under the PVRA 87, farmers are free to save harvested seed from a protected variety and use it to sow a subsequent crop. There is no requirement for farmers to pay a royalty for the use of their saved seed. Plant breeders feel that this is unfair, and significantly reduces the returns from the sale of their protected variety. This may discourage them from investing in the development of new varieties. Plant breeders consider that farmers should be required to pay a royalty for the use of saved seed of protected varieties in recognition of the breeder’s investment in new varieties.

Compulsory Licenses

31. Plant breeders have also expressed concern about the compulsory license provisions of the PVRA 87. Under section 21 of the PVRA 87, if a PVR has been in force for more than three years, then any person can request the Commissioner of Plant Variety Rights to consider whether or not reasonable quantities of the reproductive material of a reasonable quality of the variety concerned are available to the public at a reasonable price.

32. The concern of plant breeders is that these provisions may discourage some organisations from investing in the development of new varieties. For example, food processors may wish to breed a new variety whose harvested produce provides some advantage to the food processor. In these circumstances the processor may wish to prevent growers from selling the produce to other food processors so as to gain a competitive advantage over them. The provisions of section 21(3) of the PVRA 87 effectively mean that the processor who owned the PVR would not be able to prevent the sale of produce of the protected variety to other processors.

Plant Varieties and Patents

33. In New Zealand, it is also possible for plant varieties to gain patent protection, although not all plant varieties would meet the criteria for the grant of a patent under the Patents Act 1953. It is also possible for a patent to be granted for plants *per se*. The protection provided by a patent is similar to the protection provided for in UPOV 91. The grant of a patent for a plant variety does enable the patent owner to control the commercialisation of varieties essentially derived from the patented variety. If a variety is patented, then the use of saved seed of that variety or a variety derived from it by farmers for the purposes of sowing a future crop would constitute patent infringement.

34. The question of whether plants or plant varieties should continue to be eligible for a patent will be considered in stage 3 of the review of the Patents Act 1953 that is currently in progress. A discussion document entitled “Boundaries to Patentability” dealing with the issues raised in stage 3 is being released at the same time as this document.

History of Reform

35. In 1991, after New Zealand had signed UPOV 91, the then government considered amending the PVRA 87 to enable New Zealand to ratify UPOV 91 as part of a general review of intellectual property rights statutes. Initial proposals for reform of the PVRA 87 were produced by the Commissioner of Plant Variety Rights working in association with an Ad Hoc Working party on Plant Variety Rights consisting of representatives of a number of interest groups. During the course of the review, it became clear that Māori had significant concerns about the nature of the reforms. As result, substantive reforms to the intellectual property statutes, including the PVRA 87 were postponed until further discussion with Māori could occur.

36. In 1994, as part of the consultation on a proposed Intellectual Property Law Reform Bill, the then Ministry of Commerce prepared a Māori Consultation Paper.¹¹ The paper discussed proposed amendments to the Trade Marks, Patents and Plant Variety Rights Acts. At that time, submissions on the paper were largely confined to issues relating to trade marks and patents with little substantive comment being made on the proposals to amend the PVRA 87.

37. In August 2000, cabinet decided to re-start the process for reform of the Patents Act 1953. As mentioned earlier, stage 3 of the Patents Act review will include consideration of whether or not patent protection should continue to be available for plants or plant varieties. As many of the issues raised in relation to the patentability of plants or plant

¹¹ Available from the Intellectual Property Group, Regulatory and Competition Policy Branch, Ministry of Economic Development.

varieties are also relevant to any review of the PVRA 87, Cabinet has decided that any review of the PVRA 87 take place at the same time as stage 3 of the review of the Patents Act 1953.

Questions

1. Apart from the possible problems identified above, are there any other problems with the PVRA 87? If so, what are they?
2. If there are no other problems with the PVRA 87, should it be amended at this time? If so, why?

4. UPOV 91

How Does UPOV 91 Differ from the Plant Variety Rights Act 1987

38. UPOV 91 made a number of changes to the earlier UPOV 78 Convention upon which the PVRA 87 is based. Many of these changes were intended to clarify the wording of UPOV 78 and will not be dealt with in this document. In the discussion that follows, only the substantive changes incorporated into UPOV 91 will be considered. A table comparing the provisions of the PVRA 87 and UPOV 91 appears at the end of this document.

Scope of the PVR

39. Under s 17(1)(a) and (b) of the PVRA 87, PVR owners are given the exclusive right to produce for sale, and to sell, reproductive material of the protected variety. Under the Plant Variety Rights (Grantees' Rights) Order 1997, PVR owners also have the exclusive right to propagate the protected variety, for the commercial production of fruit, flowers or other products, where the protected variety is a vegetatively propagated ornamental, or fruit or vegetable producing variety. Sections 17(5) and (6) of the PVRA 87 effectively prohibit the importation into New Zealand of propagating material of a protected variety without the PVR owner's consent.

40. Article 14(1) of UPOV 91 provides that the PVR owner has the right to authorise the following acts in respect of the propagating material of a protected variety:

- production or reproduction (multiplication);
- conditioning for the purpose of propagation;
- offering for sale;
- selling or other marketing;
- exporting;
- importing;
- stocking for any of the purposes mentioned above.

These rights of authorisation also apply to harvested material and products made directly from harvested material where these were obtained through the unauthorised use of propagating material of the protected variety (Article 14(2) and (3)).

41. Article 14(5)(i) of UPOV 91 extends the rights provided in Article 14(1) to varieties which are "essentially derived" from the protected variety, where the protected variety is not itself an essentially derived variety. A variety is deemed by Article 14(5)(b) to be "essentially derived" from an initial variety if:

- it is predominantly derived from the initial variety and retains the essential characteristics of the initial variety;
- it is clearly distinguishable from the initial variety; and

- except for differences that result from the act of derivation, it conforms to the initial variety in the essential characteristics that result from the genotype of the initial variety.

Exceptions to the PVR

42. Section 18 of the PVRA 87 allows for some exceptions to the exclusive rights provided for in s17. Section 18(a) of the PVRA 87 allows any person to propagate, grow or use any protected variety for non-commercial purposes. Under s18(b) any person may produce and sell a hybrid or new variety from a protected variety as long as it does not require repeated use of the protected variety. Section 18(c) also allows any person to use reproductive material (such as fruit or grain) from a protected variety for human consumption or other non-reproductive purposes.

43. Farmers also have the right to save some of their harvested product for growing future crops, as this product has not been produced for sale. This saved product is usually seed, and so is often referred to as “farm saved seed.”

44. Article 15 of UPOV 91 provides for some exceptions to the exclusive rights provided for plant breeders in Article 14. Article 15(1) provides that the breeder’s right shall not extend to:

- acts done privately and for non-commercial purposes;
- acts done for experimental purposes; and
- acts done for the purposes of breeding other varieties (but not the commercial exploitation of those varieties).

45. For the purposes of Article 15, a “private” act is one that is not carried out in public. For example, the propagation of protected varieties in a public space such as a botanic garden, while not done for commercial purposes, would not be regarded as “private”. On the other hand, the use of a protected variety by a subsistence farmer or home gardener, which is also non-commercial, is “private” and not subject to the breeder’s exclusive right. This also means that such people may use farm saved seed without infringing a PVR.

46. The expanded rights granted under Article 14(1) would not allow farmers to save seed of a protected variety without the breeder’s consent. Article 15(2), however, allows members of UPOV 91 to restrict the plant breeder’s right so that farmers can use their saved seed of a protected variety to grow future crops on their own land. Any use of farm saved seed under this provision must be within reasonable limits, and the legitimate interests of the plant breeder must be safeguarded. This provision is optional, so that if New Zealand were to ratify UPOV 91, New Zealand would not be required to make any change to our existing provisions relating to farm saved seed.

47. Under Article 16(1), the sale or use of any material (including propagating material) of a protected variety which has been sold or marketed by or with the consent of the breeder is a form of exception to the breeder’s exclusive right to sell or market propagating material. Once material of the protected variety has been placed on the market by or with the breeder’s consent, the breeder’s rights are said to be “exhausted.” This only applies if the material is not used for further propagation of the variety.

48. It would not normally be necessary to obtain the breeder's consent for the sale or use of material such as fruit, vegetables or grain for human or animal consumption or for any other use that does not involve growing the protected variety. That is, breeders have no general rights over the produce of their protected varieties. This is consistent with the present provisions of the PVRA 87.

Date and Term of Grants

49. Under s 14 of the PVRA 87, the term of a PVR is 23 years in the case of a woody plant or its rootstock and 20 years for all other plants. The term runs from the date of grant of the PVR. An annual grant fee must be paid to keep the PVR in force. If the fee is not paid, the grant will be cancelled (s16(2)(g) of the PVRA 87).

50. Article 19 of UPOV 91 specifies that the breeder's right shall be granted for a minimum period of 20 years from the date of grant. For trees and vines the period is a minimum of 25 years from the date of grant.

Questions

3. Should the PVRA 87 be amended to enable New Zealand to ratify UPOV 91? If so, why?
4. If it were decided that New Zealand should not ratify UPOV 91, should the PVRA 87 be amended to incorporate any of the provisions of UPOV 91? If so, which provisions should be incorporated in the PVRA 87?
5. Are there any other matters, not provided for in UPOV 91, which could be incorporated into the PVRA 87?

5. Implications for New Zealand of Extending the Rights Granted to Plant Breeders

51. The grant of a PVR, like other intellectual property rights, gives the right owner, for a limited time, a form of monopoly right. Monopolies can impose costs on society, in the form of higher prices and reduced choice, and are usually considered undesirable. The grant of intellectual property rights, however, can be justified on the grounds that the grant of such rights encourages innovation and creativity that might not otherwise occur. Provided the conditions for grant are met, the benefits to society of this increased innovation and creativity are considered to exceed the costs.

52. If New Zealand were to extend the rights granted to plant breeders, for example by amending the PVRA 87 to bring it into line with UPOV 91, there would be significant changes to the rights granted to PVR owners. This raises the question of whether the benefits (if any) to society by such changes would exceed the costs (if any). This question will be dealt with in the discussion that follows.

Ratification of UPOV 91

53. As discussed in Section 2, it may be desirable that any amendments to the PVRA 87 be consistent with the provisions of UPOV 91 so that New Zealand is in a position to ratify that Convention. If the government decides to ratify UPOV 91, then any amendments to the PVRA 87 would need to incorporate all the provisions of UPOV 91. If a decision is made not to ratify UPOV 91, any amendments to the PVRA 87 must be still be consistent with UPOV 78 as New Zealand has already ratified that Convention.

54. It would be possible to amend the PVRA 87 to incorporate only some of the provisions of UPOV 91. Another possibility would be to incorporate provisions that were not consistent with it, for example to address Māori concerns. In these cases, New Zealand would not be able to ratify UPOV 91. There are some disadvantages with this approach:

- there may be insufficient incentive for local plant breeders to increase their investment in the development of new varieties;
- foreign breeders may not have sufficient incentives to release their new varieties in New Zealand;
- any enhanced plant variety rights provided by an amended PVRA 87 would only apply within New Zealand.

55. Other members of UPOV 91 would not be obliged to provide the enhanced protection provided in that Convention to nationals of non-members. As a result New Zealand plant breeders may find that the level of protection available to them overseas is less than that available in New Zealand. Most of New Zealand's major trading partners, including Australia, Japan, the United States, and the United Kingdom have ratified UPOV 1991.

The Scope of the PVR

56. As discussed in section 3, the UPOV 91 provides the PVR owner a greater range of exclusive rights than is provided for in s17 of the PVRA 87. The rights provided for in Article 14 of UPOV 91 that are additional to those in the PVRA 87 are the right to authorise

the production or reproduction, conditioning for the purpose of propagation, exporting, and stocking of the protected variety. What are the advantages and disadvantages of providing these greater rights?

Exclusive Right to Produce or Reproduce the Protected Variety

57. Under this provision, only the PVR owner or someone with the owner's permission could produce or reproduce the protected variety. Under the PVRA 87, the equivalent right is limited to production or reproduction for sale in the case of seed propagated varieties. In the case of vegetatively propagated fruit, vegetable or ornamental varieties, the rights of PVR owners are extended to cover propagation for the commercial production of fruit, flowers or other products of those varieties.

58. A disadvantage of granting PVR owners the exclusive right to authorise the production or reproduction of a protected variety is that it could increase costs to commercial users of protected varieties where there is no exemption for farm saved seed. The issue of farm saved seed is discussed later in this document. This could mean that some commercial users of protected varieties would not be able to freely use their saved seed, but would either have to pay a royalty for doing so, or buy fresh seeds each growing season. This could have the effect of increasing the prices paid by consumers for some agricultural products where these are produced from protected varieties.

59. The right to authorise the production or reproduction of their protected varieties could provide PVR owners with the opportunity to earn considerably more revenue than they are able to earn at present. By increasing the return from breeders' investment in the development of new varieties, this may give them a greater incentive to develop new varieties, or allow them to be marketed in New Zealand. Since many PVR owners are not New Zealand residents, however, some of the extra revenue that PVR owners may earn will flow overseas. This will offset some of the benefits to New Zealand of any increased investment in new varieties.

Exclusive Right to Export the Propagating Material of the Protected Variety

60. At present, the permission of the PVR owner is not required before propagating material of a protected variety is exported. Under the provisions of UPOV 91, the PVR owner's permission would be required for export of the propagating material of a protected variety. Consent would only be required if the propagating material is to be used for further propagation of the variety. For example, the export of seeds of a protected variety for human consumption would not require the PVR owner's consent.

61. The major advantage of providing PVR owners with this right is that PVR owners would be able to take action in New Zealand where propagating material of their protected varieties had been exported without their consent. They might also be able to prevent the propagating material being taken out of the country in the first place. It would be up to PVR owners to take action to enforce their rights to prevent unauthorised export of propagating material. Without this right, PVR owners would have to take action in the country to which the propagating material of the variety had been exported. This latter course of action would only be possible if the variety was also protected in that country.

62. The provision of an exclusive right to authorise export of propagating material may make it more difficult for foreign growers to "pirate" new plant varieties developed in New

Zealand. Recent incidents such as the discovery of Pacific Rose apples being illegally grown in Chile, or an attempt by a visiting scientist to take cuttings from apple trees, suggest that PVR owners need to be able to control the export of their protected varieties.

Conditioning for the Purposes of Propagation

63. It is common for the propagating material of some plants to be “conditioned” before being used for propagating purposes. This conditioning can include drying, cleaning and treating the material with fungicide.

64. The right to authorise the conditioning, for the purposes of propagation, of the propagating material of their protected varieties would enable PVR owners to more effectively control the use of their varieties. This right is currently not provided for in the PVRA 87. Persons or firms offering conditioning services, such as seed dressers or conditioners, could be held to be infringing a PVR if they condition the propagating material of a protected variety without the PVR owner’s consent. This might make it easier for PVR owners to detect the unauthorised use of their protected varieties.

65. If this right was provided to PVR owners, there may be an increase in costs for those engaged in the conditioning of propagating material. They may face increased costs due to the need to obtain licenses from PVR owners to condition the propagating material of protected varieties. Provision may also have to be made for the costs of PVR infringement litigation. It is possible that such increased costs could be passed on to users of the propagating material, such as farmers.

66. If PVR owners were given the right to authorise conditioning for the purposes of propagation, they could decide to give this authorisation to only a few of those providing conditioning services. This may reduce competition in the industry, which could increase costs to users of conditioned propagating material, such as farmers.

Stocking of the Protected Variety

67. Article 14 of UPOV 91 provides that plant breeders be given the right to authorise the stocking of propagating material for any of the purposes specified in Article 14(1) over which the plant breeder has an exclusive right. The PVRA 87 does not, at present, provide plant breeders with a right to authorise the stocking of their varieties.

68. If PVR owners were given the right to authorise the stocking of propagating material, then they would be able to ensure that only competent persons were able to store and keep propagating material. PVR owners would be able to ensure that persons stocking propagating material had adequate quality assurance systems, to ensure that material was properly stored, and not mixed with material from other varieties. The provision of this right would also make it easier for PVR owners to obtain evidence of infringement.

69. The provision of this right would enable PVR owners to take action against people who are storing propagating material without the PVR owner’s consent for later commercial use after the PVR has expired or lapsed. At present such people could start selling, or propagating the variety as soon as the PVR expires or lapses. If people cannot stock propagating material of the protected variety until the PVR expires, they will have to build up stocks after it expires. This will take time, and will effectively give the PVR owner a *de facto* extension of the PVR term. This effective increase in term may increase the costs to society of granting the PVR.

70. Where a variety of a basic food plant, such as wheat is covered by a PVR, then any measure that may increase the period during which the PVR owner has a monopoly may not be in the public interest. One possible solution would be for the right to authorise stocking of the propagating material to be restricted, in the public interest, for certain plant varieties that were considered to be basic food plants. Such a restriction is permitted by Article 17(1) of UPOV 91 if such a restriction is in the public interest.

Essentially Derived Varieties

71. As discussed in section 2, under the PVRA 87, the grant of a PVR does not give the PVR owner any rights over varieties which are “essentially derived” from the protected variety. There is no requirement for breeders of “essentially derived” varieties to pay a royalty to the PVR owner if the new varieties are commercially exploited. As also discussed in section 2, the marketing of such essentially derived varieties may damage the market for the original variety.

72. Because the PVR owners have no rights over varieties essentially derived from their protected varieties, developers of essentially derived varieties can “free ride” on the investment made by plant breeders in developing new varieties. If New Zealand was to extend PVR owners’ rights to include essentially derived varieties, PVR owners would be able to control the marketing of essentially derived varieties, and derive some revenue from them. This may increase the incentive to develop new plant varieties.

73. If PVR owners were to be given rights over essentially derived varieties, as required by Article 14(5) of UPOV 91, then this would not prevent others from developing new varieties, or from using a protected variety for experimental purposes. Article 15(1) of UPOV 91 gives others the unrestricted right to develop new varieties derived from protected varieties, and to use the protected variety for experimental purposes.

74. The provisions of Article 14 of UPOV 91 would mean that the PVR owner’s consent would be required before essentially derived varieties could be commercially exploited. This may discourage some plant breeders from developing new derived varieties because they would have to pay some of their revenue to PVR holders as royalties.

Exceptions to the PVR: Farm Saved Seed

75. It has long been traditional for farmers to save seed from their harvests for sowing future crops. This saved seed is often known as “farm saved seed”, and farmers’ entitlement to save this seed is often known as the “farmer’s privilege”. Farmers, in the past, have also exchanged their saved seed with, or sold it to, other farmers. Under the PVRA 87, farmers in New Zealand may save seed of protected varieties for their own use, but they cannot sell it for the purposes of sowing another crop.

76. The increased rights provided under Article 14 of UPOV 91 would not allow farmers to save seed of a protected variety without the plant breeder’s consent. For example, Article 14(1)(i) of UPOV 91 gives the plant breeder the exclusive right to propagate the protected variety. Article 15(2), however, does allow countries that have ratified UPOV 91 to make an exception to the plant breeders’ rights for farm saved seed. The effect of the exception would be to allow farmers to use saved seed of protected varieties without being required to seek the permission of the PVR owner.

77. The issue of the “farmer’s privilege” is a highly contentious one. Those who support the unrestricted right of farmers to use their saved seed point out that the plant varieties grown today have their origins in selective breeding by farmers over thousands of years, long before the concept of breeders’ rights arose. By selecting which of their harvested seeds to re-sow, farmers have been able to continuously improve the varieties that they grow. If farmers sell or exchange their seed, then society as a whole gains the benefits from the improved varieties. This may also encourage biodiversity, whereas the granting and enforcement of plant breeders’ rights may result in farmers growing only a few protected varieties.

78. Another justification for retaining the farmer’s privilege is that plant breeders do not develop new varieties from scratch, but use existing varieties as their starting point. Allowing farmers to use farm saved seed is one way of recognising farmers’ contribution to the development of existing plant varieties.

79. If the PVRA 87 is amended to remove the farmers’ privilege, then farmers may face higher costs, either because they would have to buy new seed for each year’s crop, or would have to pay royalties for using their own saved seed.

80. Plant breeders argue that farmers should not be free to save and re-sow their saved seed of protected varieties, as plant breeders do not collect royalties on this seed. This reduces the return that the breeders can earn from their investment in developing new varieties. This may mean that breeders have less incentive to develop new varieties, and that fewer new varieties are developed. On the other hand, it may increase the incentive for breeders to develop more new varieties, as they will be able to collect royalties from sales of the seed of the new varieties.

How Should New Zealand Deal with the Issue of Farm Saved Seed?

81. The issue of farm saved seed involves a consideration of the competing rights and interests of farmers, consumers, and of plant breeders. This consideration of competing interests can be approached in several ways. Four possible options are discussed below, although there may well be other ways of dealing with the issue:

- Make no exception at all for farm saved seed;
- Allow farmers to use their saved seed, but require them to pay a lower royalty to the PVR owner than would normally be required;
- Allow farmers a limited right to use saved seed of some protected varieties, and require them to pay royalties for the use of saved seed from other varieties;
- Allow farmers the unrestricted right to use their saved seed.

Option i: Farmers Pay Full Royalty on Farm Saved Seed

82. If this option were to be adopted, farmers would have to pay normal royalties to PVR owners if they wished to save seed of protected varieties for future use. This would provide extra revenue for PVR owners, but could increase costs for farmers and consumers. If, as a result of their increased revenue, plant breeders increased their

investment in the development of new varieties, the benefits of these new varieties may outweigh the costs.

Option ii: Allow Farmers to Use Their Saved Seed Subject to Reduced Royalty Payment

83. Under such a provision, farmers would be allowed to use their saved seed from protected varieties, but would be required to pay a royalty to the PVR owner. This royalty would be lower than the royalty that would normally be charged by the PVR owner. PVR owners would get some revenue, however, the revenue to PVR owners, and costs to farmers and consumers, would be lower than those for option i. One problem with this approach might be in the determination of a suitable royalty.

Option iii: Allow Farmers a Limited Right to Use Saved Seed

84. If this option was adopted, then farmers would be able to freely use saved seed from some protected varieties, while paying a royalty for the use of saved seed from other protected varieties. The varieties for which a royalty is paid may be varieties where the free use of saved seed would severely discourage investment by plant breeders in improving those varieties. This option could result in lower revenues for some PVR holders, and lower costs to some farmers and consumers, than for option ii.

85. Again, there may be some problems in determining the appropriate royalty payments if it is decided that the royalties should be lower than normal. There may also be difficulties in determining which protected varieties should be subject to a royalty payment for their use, and which should not.

86. In the European Community, all farmers except defined “small farmers” must pay a royalty that is “sensibly lower” than the royalty normally paid¹² if they wish to use saved seed of protected varieties of certain specified crops. For all other crops farmers have no rights to use farm saved seed. The European Community’s Plant Variety Rights Regulations are consistent with UPOV 91.

87. In Australia, s17(1)(d) and (e) of the Plant Breeder’s Rights Act 1994 state that the conditioning and use of farm saved seed of a protected variety does not infringe Plant Breeder’s Rights. S17(2) provides that regulations may declare that s17(1) does not apply to particular varieties. Australia has ratified UPOV 91.

Option iv: Allow Farmers the Unrestricted Right to Use Farm Saved Seed

88. Under this provision, farmers would have the right to freely use saved seed of protected varieties, without any requirement to pay a royalty. This is essentially the approach followed in the United States¹³, which has ratified UPOV 91. Option iv would essentially preserve the current situation in New Zealand. At present New Zealand farmers may freely use their saved seed. As discussed earlier, plant breeders argue that

¹² Article 14, Council Regulation (EC) No 2100/94 on Community Plant Variety Rights, 27 July 1994.

¹³ See §2543, Chapter 57, Title 7, United States Code.

this reduces their revenue, and reduces their incentive to invest in the development of new varieties.

Exceptions to the PVR: Private and Non-Commercial Use

89. Under s 18 of the PVRA 87 any person may propagate, grow, or use a protected variety for non-commercial purposes without infringing a PVR. Under Article 15(1) of UPOV 91, this right is limited to private non-commercial use. This would mean, for example, that the propagation of protected rose varieties in a municipal nursery to produce bushes for planting in municipal parks and gardens without the permission of the PVR owner would infringe the PVR. Such use of a protected variety would be considered public non-commercial use. As a consequence, local bodies may be required to pay royalties for the use of protected varieties in their parks and gardens. This would increase their costs if they continued to use protected varieties.

90. The extension of PVRs to public non-commercial uses could provide a significant extra source of revenue to PVR owners. For example, as suggested in the previous paragraph, local bodies are not required to pay a royalty to propagate protected varieties in public parks and gardens. This may deprive PVR owners of substantial revenue, and discourage them from developing new varieties.

Term of the PVR

91. If New Zealand were to ratify UPOV 91, then the only change to the term of a PVR that is required by UPOV 91 is to increase the term for trees and vines from a minimum of 23 years to a minimum of 25 years. The minimum term for all other plant varieties would remain at 20 years. The small increase in term would add slightly to the costs to society of granting the PVR. Most PVRs, however, do not run their full term, as most protected varieties are superseded by more recently developed varieties long before the full term of the PVR has expired.

92. The terms set out in UPOV 91 (and in the PVRA 87) are minimum terms. It would be open to New Zealand to increase the length of these terms. This, however, would increase the costs to society of granting PVRs. To justify any increase in the PVR term over the minima prescribed in UPOV 91 or the PVRA 87 it would be necessary to show that the benefits to New Zealand of any increase in the term exceeded the costs.

Compulsory Licenses

93. As discussed in section 2 plant breeders have expressed concern about the compulsory license provisions in the PVRA 87. Under s21 of the PVRA 87, any person, may, once three years or more have passed from the date a PVR was granted apply to the Commissioner of Plant Variety Rights for a compulsory license. Such a license may be granted if the Commissioner considers that the PVR owner has not made reasonable quantities of reproductive material of a reasonable quality of the protected variety available for purchase by the public at a reasonable price.¹⁴

94. Particular concern has been expressed regarding s21(3) of the PVRA 87. Under this provision, the Commissioner, in considering availability of material under s21(1), must not

¹⁴ S21(1) of the PVRA 87

take into account any reproductive material that is made available only under certain restrictive conditions. An example of such a restrictive condition would be the situation where seed was supplied to a farmer under a contract that required that the entire resultant crop be sold to the seed seller or some other specified person.

95. Plant breeders have argued that the compulsory license provisions, in particular s21(3) provide no incentive for those involved in the processing of harvested produce to invest in the development of new varieties. For example, a flour miller might want to invest in the development of a new wheat variety with superior milling qualities and obtain a PVR for it. In such a case, the miller may wish to prevent farmers who are growing the new wheat variety from selling the wheat to competing millers. The provisions of s21(3) of the PVRA 87 would effectively make it impossible for the miller to prevent competing millers from gaining access to the new variety.

96. On this basis, plant breeders have suggested that s21 be amended to remove s21(3). While this might encourage the development of new plant varieties, the repeal of s21(3) would effectively enable PVR owners to exercise rights over the produce of their protected varieties if they so wished. Section 21(3), however, was inserted into the PVRA 87 because it was felt at the time that the grant of a PVR should **not** allow the PVR owner to control the marketing of the produce of the protected variety.

97. At present, the PVRA 87 does not allow PVR owners to control the marketing of the produce of their protected varieties. Article 16 (1) of UPOV 91 makes it clear that the breeder's rights do not extend to the produce of a protected variety if the produce was obtained from propagating material placed on the market with the breeder's consent. That is, if New Zealand were to amend the PVRA 87 to bring it into line with UPOV 91, then PVR owners would not have any general rights over the produce of their protected varieties.

98. If the Plant Variety Rights Act does not give PVR owners an explicit right to control the use of the produce of their protected varieties, then any attempt by PVR owners to exercise such control may be inconsistent with the Commerce Act 1986. Such attempts may be seen as reducing competition, or taking advantage of market power. The lack of an explicit right over produce would mean that the exceptions contained in the Commerce Act 1986 regarding the enforcement of intellectual property rights would probably not apply.

Questions

6. If New Zealand were to increase the rights available to plant breeders, would there be any disadvantages to New Zealand. If so, what would they be?
7. Would there be any benefits to New Zealand in increasing the rights available to plant breeders? If so, what would they be?
8. Should New Zealand continue to allow the unrestricted use of farm saved seed? If not, why not?
9. If New Zealand continues to allow the use of farm saved seed, which of the options ii – iv should be adopted? Why?

10. If either of options ii or iii were adopted, which crops should be subject to the requirement to pay a royalty? Why?
11. Should the compulsory license provisions be amended to enable PVR owners to exercise rights over the produce of their protected varieties? If so, why? If not, why not?

6. Concerns of Māori

99. Many Māori are concerned about the granting of intellectual property rights to life forms, including indigenous flora. There is concern that the grant of an exclusive right over a variety derived from an indigenous variety may infringe what Māori consider to be their rights under the Treaty of Waitangi to maintain control over their resources, and may also limit the rights of Māori themselves to develop new uses of those resources. There is also concern about the cultural and spiritual implications of the alteration of life forms, and the encouragement given through the intellectual property rights system to continue innovation in this field.

100. Māori are also concerned that if exclusive rights are granted over indigenous varieties, Māori may be denied access to these varieties without either informed consent or arrangements for benefit sharing. The requirement for varieties to be “new” and “distinct” before they can be granted a PVR means that Māori would not be able to obtain protection under the PVRA 87 for existing indigenous varieties.

101. Another concern is that the current intellectual property rights system, which treats intellectual property rights as private property does not as a whole, sit well with the Māori concept of collective ownership of knowledge. It is also argued that the intellectual property rights system allows and promotes the commercial exploitation of knowledge, whereas the objective for Māori is more often the protection of traditional knowledge against inappropriate use and possible loss. In many instances the commercial exploitation of traditional knowledge is culturally offensive.

Consultations to Date

102. Four consultation hui were held in 1994 to discuss Māori concerns raised about proposed changes to intellectual property legislation. As discussed in section 2, most attention at the time was focussed on proposed changes to the Patents Act 1953, and the Trademarks Act 1953. In light of this, and the time that has elapsed since then, it is essential that Māori be consulted further before any changes to the PVRA 87 are considered.

Issues to Be Considered

103. The purpose of this discussion is to assist in exploring the extent to which Māori concerns about the PVR system might be accommodated within the existing or reformed regime while still permitting the system to function effectively in promoting innovation, competition and New Zealand’s overall economic interests. There is a broader set of concerns relating to the protection of traditional knowledge and cultural heritage which conventional intellectual property mechanisms, such as the Patents Act or PVRA 87, do not address because of the underlying objectives and values on which they are based. These concerns could be addressed by the development of a stand-alone system to protect traditional knowledge (this issue is discussed further in the discussion document to be released as part of Stage 3 of the Review of the Patents Act).

104. An alternative to adapting existing intellectual property legislation to protect traditional knowledge is to develop a *sui generis* (stand-alone) system. The development of a *sui generis* system will address the broader concerns raised about the protection of traditional knowledge which cannot be adequately achieved by adapting existing intellectual property mechanisms.

105. The importance of developing mechanisms to protect traditional knowledge has been recognised internationally. Work is being undertaken in a number of international fora including the World Intellectual Property Organisation, which has recently established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. New Zealand has signaled its support for work by the Committee on *sui generis* systems to protect elements of traditional knowledge not covered by existing intellectual property systems. This is consistent with recommendation 10.4 of the Royal Commission on Genetic Modification, that:

“New Zealand be proactive in pursuing cultural and intellectual rights for indigenous peoples internationally”.

The government has agreed with this recommendation, and has directed officials to implement it. New Zealand has also stated that this approach should not preclude the development of country or region-specific alternative approaches to protecting the knowledge and practices of indigenous communities.

106. *Sui generis* protection for traditional knowledge could be developed in conjunction with mechanisms governing access to genetic resources and benefit-sharing, as well as other measures such as registries of traditional knowledge, which would be used by patent examiners when considering patent applications. Such protection might include registers recording traditional knowledge and prior informed consent.

107. Some countries, including the members of the Andean¹⁵ community and the Philippines, have already introduced *sui generis* systems at the national level. International agreement on a *sui generis* system is, however, likely to take some time, as is the development of any *sui generis* system within New Zealand. Meanwhile it is appropriate to explore ways in which the existing regimes for intellectual property rights, including Plant Variety Rights, can be adapted to address some Māori concerns while still meeting its overall objective to promote innovation and competition.

108. The New Zealand Biodiversity Strategy, released in February 2000, acknowledged the need to encourage Māori participation in managing biodiversity and in developing a framework for the retention and promotion of Mātauranga Māori¹⁶. It also recognised the need to take Māori interests into account in developing access to and use of New Zealand’s indigenous genetic resources and the sharing of benefits of their use. Implementation of the Strategy (which is the responsibility of several government departments, including the Department of Conservation and the Ministry of the Environment) will complement any amendments to the Plant Variety Rights Act to take account of Māori interests in these areas.

109. Currently there is a claim before the Waitangi Tribunal (“WAI 262”) which alleges that the Crown has breached its obligation to protect the cultural and intellectual property of Māori. This claim arises from Article II of the Treaty of Waitangi.

110. Article II of the Treaty of Waitangi preserves the rights of Māori to exercise te tino rangatiratanga (“their full chiefly authority”) over their taonga (literally “treasures”- rendered

¹⁵ Bolivia, Columbia, Ecuador, Peru, Venezuela.

¹⁶ Mātauranga Māori: Māori traditional knowledge, which includes knowledge about traditional medicines, fishing, weaving, and other aspects of everyday life.

in the English version of the Treaty as natural resources including lands, forests, fisheries and other properties).

111. The Wai 262 claim may be seen, at least in part, as a response to the tension between what are understood by Māori to be Article II rights and obligations, and the proprietary rights granted under intellectual property rights legislation, including the PVRA 87. The claim asserts that the Treaty guarantees rights of ownership, control, and authority over the genetic resources of indigenous flora and fauna, and cultural and intellectual heritage and traditional knowledge. It also asserts that the Crown is in breach of Article II of the Treaty through the enactment of legislation, including the PVRA 87, which is inconsistent with those rights.

112. The Wai 262 inquiry is some way from completion. Meanwhile the government is proceeding with other legislative reform that may go some way towards addressing the issues raised by the claim. For example, the new Trade Marks Bill introduced in June 2001, will, if enacted, require the Commissioner of Trade Marks to refuse to register a trade mark where the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Māori. The Bill goes some way towards addressing some of the concerns raised in the Wai 262 claim by ensuring that the Crown is not inappropriately registering trade marks containing Māori text and imagery.

Māori Concerns and the Review of the PVRA 87

113. Māori may be concerned that a PVR, through its grant of an exclusive right to use and commercially exploit a new plant variety, may prevent Māori from continuing to use the variety from which the new variety was derived. It is important to note however, that a PVR gives rights only in respect of a specific variety and nothing more. A PVR on a variety derived from an existing indigenous variety does not prevent the continued use of that existing variety.

114. If there were to be changes to the PVRA 87 it will be necessary to take account of the implications for Māori in granting intellectual property rights which may be perceived to conflict with Māori rights and interests in traditional knowledge and native plants. The Crown also has an obligation to consult with Māori on matters affecting their interests under the Treaty.

115. Māori interests in indigenous flora could be given some protection through amendments to the PVRA 87 while continuing to comply with New Zealand's international obligations. These might include, for example, providing for consultation with Māori when deciding to grant a PVR on a variety derived from a native variety. This could include advising whether the variety was "new" or "distinct". Māori could also be given explicit standing to object to the grant of a PVR under sections 6 and 15 of the PVRA 87.

116. Section 6 of the PVRA 87 allows "any person" to make an objection to an application for a PVR before the PVR is granted. Any person who objects to the name or "denomination" proposed for the variety can make an objection under s6(1) to the Commissioner of Plant Variety Rights ("the Commissioner"). This allows Māori to object to the inappropriate use of Māori words or names for plant varieties.

117. Section 6(3) allows any person to make an objection to the Commissioner that a variety that is the subject of a PVR application is not "new, distinct, stable or

homogeneous". A similar objection can be made after grant under s15(1) of the PVRA 87. This enables Māori to object to the grant of a PVR on an existing native plant variety.

118. It would be possible to take into account some Māori concerns, as discussed above. It would not be possible, however, under the provisions of either UPOV 78 or UPOV 91 to refuse to grant a PVR on cultural grounds, for example, that the grant of a particular PVR was offensive to Māori. Where an application to register a new variety related to a variety derived from an existing indigenous variety, it would also not be possible to refuse the grant of a PVR if the applicant had not obtained "prior informed consent" for the use of that indigenous variety.

119. Under s6(2) of the PVRA 87, any person who considers that an application for a PVR has been made by or on behalf of an applicant who is not the owner of the variety concerned may object the granting of the PVR to that applicant. A similar objection can be made after grant under s15(2). These provisions could provide Māori with an avenue to object to the grant of a PVR where, for example, the new variety was based on a discovery on Māori owned land. This would not, however, deal with the situation where a breeder developed a new variety from an existing, known, indigenous variety.

Questions

12. How could the PVRA be amended to take account of Māori concerns regarding the granting of proprietary rights over indigenous plant varieties?
13. Should there be specific consultation with Māori before a PVR is granted on a new plant variety derived from a native variety? If not, why not?
14. If there were to be specific consultation with Māori, what form should this take? Should there be a Māori advisory committee be established? How would such a committee be constituted?
15. Who should initiate the consultation? Should the onus be on PVR applicants to consult Māori, or should it be on the Crown, or a combination of both?
16. Should the PVRA 87 be amended to give Māori specific standing to object to the grant of a PVR or to apply to have a grant cancelled?

Appendix: Comparison of Provisions of PVRA 87 and UPOV 91

	PVRA 87	UPOV 91
Right to authorise propagation of protected variety	Yes, but only for the purposes of commercial marketing	Yes, for all protected varieties, and subject to farm saved seed exceptions.
Right to authorise conditioning for purpose of propagation	No	Yes
Right to sell, or offer for sale	Yes	Yes
Right to authorise export	No	Yes
Right to authorise import of propagating material	Yes (limited right)	Yes
Right to authorise stocking for any of the above purposes	No	Yes
Exclusive rights apply to varieties essentially derived from protected variety?	No	Yes
Exception for Non-commercial use	Yes	Yes, but only if it is private (non-public) use
Exception for experimental use	Yes - No specific exception, but such use would not infringe if it was not for commercial purposes	Yes
Exception for use of a protected variety to breed other varieties?	Yes, but only if the repeated use of the protected variety is not required	Yes but only if the repeated use of the protected variety is not required.

Exception for use of propagating material for human consumption or other non-reproductive purposes?	Yes	Yes
Use of Farm Saved Seed allowed?	Yes, for seed propagated varieties	Yes, if specific provision is made to allow this, and within reasonable limits
Term of Plant Variety Right	Minimum of 23 years for woody plants or their rootstocks Minimum of 20 years for all others	Minimum of 25 years for trees and vines Minimum of 20 years for all others