

# **Summary of Submissions Received on the Plant Variety Rights Act Review Discussion Paper**

Regulatory and Competition Policy Branch

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# 1. Introduction

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1. This report summarises the submissions received on the discussion document *Review of the Plant Variety Rights Act 1987*. It is not intended to provide detailed analysis of every submission received.

2. The submissions are summarised on an issue by issue basis as follows:

- profile of submissions received
- adequacy of the protection provided by the Plant Variety Rights Act 1987 (“PVRA 87”)
- ratification by New Zealand of UPOV 91
- implications for New Zealand of Extending the Rights Granted to Breeders
- Māori Concerns;

3. A list of respondents (together with the corresponding abbreviations used in the body of the report) is attached as Appendix 1. Attached as Appendix 2 is a list of the questions asked in the discussion paper.

## 2. Profile of Submissions

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4. A total of 36 submissions were received (see Appendix 1). There were 21 submissions made by plant variety right holders or their licensees, and by sellers of protected varieties such as seed merchants or nursery owners (“PVR owners and supporters”). Only one submission came from a group that could be described as representing users of protected varieties.

5. Twelve submissions came from groups or individuals concerned about the environmental and social effects of the granting of plant variety rights (“environmental groups”). These submissions also expressed sympathy with Māori concerns regarding the granting of plant variety rights over indigenous flora. Two submissions were received from Māori groups.

### **3. Adequacy of Protection Provided by the PVRA 87**

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6. Most submitters considered that changes were required to the Act. PVR owners and supporters considered that the protection provided under the Act should be increased. These submitters considered that to ensure continued investment in the development of new varieties the scope of the exclusive rights granted to plant variety owners be increased.

7. Jeff Miller's submission suggested that the lack of a definition of "breeding" in the Plant Variety Rights Act could cause uncertainty as to the eligibility of new plant varieties for plant variety rights. He suggested that such a definition be incorporated into the Act. Mr Miller also suggested that the description of a "variety of common knowledge" in UPOV 91 should be incorporated into the Plant Variety Rights Act whether or not New Zealand ratifies UPOV 91.

8. Greenpeace argued that the PVRA 87 needed to be amended to address Māori concerns regarding the granting of intellectual property rights over traditional knowledge and indigenous plants. Lewis Barristers and Solicitors and Bio Gro New Zealand submitted that essentially derived varieties<sup>1</sup> should not be protected and emphasised that there needed to be a balance between intellectual property rights, biodiversity, and farmers' rights. ARENA was opposed to any review of the PVRA that pre-empts or constricts the outcome of the Wai 262 claim.

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<sup>1</sup> An essentially derived variety is one that is derived from an initial variety, while retaining the expression of the essential characteristics of the initial variety, but is clearly distinguishable from the initial variety.

## 4. Ratification by New Zealand of UPOV 91

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9. The submissions from PVR owners and supporters were strongly in favour of ratification of UPOV 91. Supporters of ratification considered that ratification was essential to encourage breeding in New Zealand and to encourage foreign plant breeders to release their new varieties in New Zealand. Most of the submissions that supported ratification of UPOV 91 also indicated that, if it were decided that New Zealand should not ratify, the provisions of UPOV 91 should still be incorporated into the Plant Variety Rights Act.

10. The NZIPA submitted that ratification of UPOV 91 by New Zealand would avoid the possibility that other countries that have ratified UPOV 91 would limit the protection that they would be willing to give to New Zealand developed varieties.

11. The environmental groups were opposed to ratification of UPOV 91. Greenpeace considered that the rights granted to plant breeders under UPOV 91 were excessive in the context of plants. ARENA submitted that New Zealand should quit UPOV 78 and repeal the Plant Variety Rights Act 1987. It was also submitted by ARENA that although TRIPS requires New Zealand to have a *sui generis* system for protecting new plant varieties, this does not have to be the UPOV system.

12. Greenpeace submitted that if New Zealand were to ratify UPOV 91, this would limit the ability of New Zealand to put in place a *sui generis* regime to protect Māori rights and interests and to protect New Zealand biodiversity.

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

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### **Scope of Plant Variety Rights**

13. Many of the submitters who supported ratification of UPOV 91 considered that there would be benefits to New Zealand from extending the scope of the rights granted to breeders that would outweigh any costs. The benefits claimed included greater incentives for the development of new varieties and for foreign breeders to release their varieties here, and greater opportunities for collaboration with foreign breeders. Enzafruit submitted that the extension of rights to cover exporting is important to protect New Zealand's legitimate horticultural exports.

14. Greenpeace, however, submitted there could be significant disadvantages in extending the scope of plant variety rights. These were stated to include increased costs to commercial users and farmers, restrictions on the freedom of farmers and other growers to innovate, and monopolistic practices and "price gouging" by multinational businesses. It was argued by Greenpeace that the type of commercially directed "innovation" encouraged by UPOV style legislation is at the expense of diversification, sustainability and choice.

### **Farm Saved Seed**

15. It has long been traditional for farmers to save seed from their harvests for sowing subsequent crops. This seed is known as "farm saved seed". Under the Plant Variety Rights Act 1987, farmers may use saved seed from protected varieties without obtaining the permission of the plant variety right owner or paying a royalty.

16. On this subject, the submissions from PVR owners and supporters advocated that farmers should be required to seek the plant variety rights owner's permission, and pay a royalty before sowing saved seed of a protected variety. The general tenor of these submissions was that allowing the free use of saved seed of protected varieties reduced the income of plant breeders, which had the effect of reducing the incentive for investment in new varieties. Trees and Technology suggested that farmers could pay a reduced royalty for farm saved seed

17. The PBRA and the Grains Council of Federated Farmers submissions contained a joint proposal for the management and control of farm saved seed. They proposed that a royalty should be paid for the use of saved seed for all protected varieties, with a reduced royalty being paid on certain specified species. A statutory body would be set up to co-ordinate and/or manage any regulations controlling farm saved seed. They also suggested that defined "small farms" could be exempted from any restrictions on farm saved seed, but noted that there could be problems defining a "small farm".

18. Apart from the submission received from the Grains Council of Federated Farmers, there were no submissions from growers or farmers. Two of the submissions (from Wrightson and Pyne Gould Guinness) described problems that these submitters had encountered in persuading growers and farmers to pay royalties on farm saved seed. The problems described suggest that there may be significant opposition from some

farmers and growers to any requirement for royalties to be paid on saved seed of protected varieties.

19. Environmental groups were opposed to any restrictions being placed on the use of farm saved seed of protected varieties. Preventing farmers from saving seed of protected varieties, or requiring them to pay a royalty for saved seed was seen as increasing farmer's costs and reducing biodiversity.

## **Compulsory Licenses**

20. Section 21 of the Act provides for the grant of a compulsory license if a PVR owner does not make reasonable quantities of reproductive material of the protected variety available for purchase by members of the public at a reasonable price.

21. PVR owners and supporters were strongly opposed to the compulsory license provisions in the Act and wanted them removed. These submitters considered that the existence of such provisions reduced their ability to make a return from their breeding activities and made it more difficult to exercise control over the exploitation of their protected varieties.

22. The submission from the Grains Council of Federated Farmers expressed concern that the removal of the compulsory license provisions of the Act would remove growers' ability to sell their produce to the highest bidder. Growers would regard this as a loss of control over their own businesses. The Council was prepared to accept removal of the compulsory license provisions only if the Act contained provisions providing that certain "common" grain varieties were freely available to growers without restriction.

23. Greenpeace was opposed to any weakening of the compulsory license provisions. They submitted that the compulsory license provisions should ensure that the monopoly inherent in the grant of a Plant Variety Right does not result in unacceptable barriers to access. Such barriers were seen as reducing competition and consumer choice and increasing the cost of food.

## 6. Māori Concerns

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24. All the submissions that dealt with this subject considered that Māori concerns should be taken into account to some extent in the review of the Act, although they varied considerably in the emphasis that should be given to those concerns. Only two submissions were received from groups that specifically represented Māori.

25. The Māori groups that made submissions were Te Rūnanga o Ngāti Awa and the Ngatiwai Trust Board. These groups submitted that indigenous species be excluded from coverage of the Act until the Wai 262 claim has been resolved. Te Rūnanga O Ngāti Awa submitted that any future legislation be consistent with the Mataatua Declaration and also urged that consultation with Māori be part of any legislative reform.

26. The environmental groups were sympathetic to Māori concerns and generally considered that any amendment to the Act must take account of the views of Māori. A number of these submissions advocated that there be a total moratorium on the granting of plant variety rights over indigenous flora until the Wai 262 claim is resolved. ARENA and Greenpeace suggested that the review of the Act be deferred until the Wai 262 claim is resolved. The WILPF, PIRM, and the Wellington Rainforest Action Group pointed out that the concerns expressed by Māori about the granting of plant variety rights were shared by many pākehā.

27. Greenpeace submitted that any review of the Act should examine Māori spiritual values, traditional knowledge, access to genetic resources and benefit sharing and enhancement of biological diversity.

28. Submissions from plant variety right holders and supporters expressed mixed feelings about the need to consider Māori concerns. The NZIPA suggested that the Māori Consultative Committee proposed by the Royal Commission on Genetic Modification could have a role in identifying indigenous varieties that are of common knowledge to Māori. Wrightson recognised the need to consult with all concerned stakeholders, including Māori where appropriate.

29. NZPBRA supported the principle of consultation with Māori, but saw a disadvantage if such consultations, and their form, were prescribed in law, or were compulsory. Pyne Gould Guinness submitted that it might be appropriate for any party having a PVR to consult with knowledgeable Māori, but that this should not result in cancellation of the right. Fonterra and Liner Plants (NZ) Ltd considered that concerns of Māori and the Wai 262 claim should not hold up reform of the Act.

## Appendix 1: List of Respondents

No.	Respondent	Abbrev	Classification (Where Known)
1	Jeff Miller, IP Manager, AgResearch Grasslands		Plant breeder
2	Alex MacDonald (Merchants) Ltd		Seed Merchant
3	Peter Cates Ltd		Seed Merchant
4	Plant Research (NZ) Ltd		Plant breeder
5	Lewis' Barrister and Solicitors		Certification Agency for Organic Producers
5a	Bio Gro New Zealand		Certification Agency for Organic Producers
6	Women's International League for Peace and Freedom	WILPF	
7	Wellington Rainforest Action Group		Environmental Group
8	Enzafruit		Apple exporting company
9	New Zealand Institute of Patent Attorneys	NZIPA	Professional Association
10	Wrightson		Seed Merchant and Plant Breeder
11	Pyne Gould Guinness		Plant breeder and seed merchant
12	Crop and Food Research		Plant breeder
13	Greenpeace New Zealand Inc		Environmental Group
14	D Gosling		
15	Trees and Technology		Plant breeder
16	Action, Research & Education Network of	ARENA	Anti-globalisation

	Aotearoa		network
17	Liner Plants NZ (1993) Ltd		Nursery Company
18	New Zealand Plant Breeding and Research Association		Plant breeder industry association
19	HortResearch		Plant breeder
20	Pacific Institute of Resource Management	PIRM	Environmental Group
21	Allen Annett Ltd		Grain and seed merchant
22	Nursery and Garden Industry Association		Industry Association
23	Zespri International Ltd		Kiwifruit marketing company
24	Fonterra		Dairy Company
25	Grains Council, Federated Farmers		Farmer group
26	Lyndale Nurseries		
27	Multiflora Laboratories		Contract plant tissue specialists
28	R G Robinson Produce Ltd		Seed Potato merchants
29	Te Rūnanga o Ngāti Awa		Iwi trust board
30	Jay Ray, Focus Transpersonal Therapies		
31	Jane Penton		Green Party member
32	Jon Carapiet		
33	GE Free Northland		Environmental Group
34	GE Free New Zealand in Food and Environment, Inc		Environmental Group
35	Ngatiwai Trust Board, Resource Management Unit		Wai 262 Claimant

36	Chrystal Pitcher		
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## **Appendix 2: List of Questions Asked in the Discussion Paper**

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### **Why Review the Plant Variety Rights Act 1987?**

1. Apart from the possible problems identified [in section 3 of the discussion paper], are there any other problems with the Act? If so, what are they?
2. If there are no other problems with the Act, should be amended at this time? If so, why?

### **UPOV 91**

3. Should the Act 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 Act be amended to incorporate any of the provisions of UPOV 91? If so, which provisions should be incorporated in the Act?
5. Are there any other matters, not provided for in UPOV 91, which could be incorporated into the Act?

### **Implications for New Zealand of Extending the Rights Granted to Plant Breeders**

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 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?

### **Māori Concerns**

12. How should the Act be amended to take account of Māori concerns regarding the granting of proprietary rights over indigenous 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 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 Act be amended to give Māori specific standing to object to the grant of a PVR or to apply to have a grant cancelled?