



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI

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# Issues Paper

## Review of the Plant Variety Rights Act 1987

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September 2018

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MBIE 3976

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# How to have your say

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## Submissions process

The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the issues raised in this document by **5pm on Friday, 21 December 2018**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at: <http://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/review/issues-paper>. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or email accompanying your submission.

You can make your submission:

- By sending your submission as a Microsoft Word or PDF document to [PVRActReview@mbie.govt.nz](mailto:PVRActReview@mbie.govt.nz).
- By mailing your submission to:

Business Law  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to [PVRActReview@mbie.govt.nz](mailto:PVRActReview@mbie.govt.nz)

## Engagement

In addition to receiving written submissions, we will be holding regional hui and public meetings across the country in October-December 2018 to hear views about the issues covered in this paper and any other issues in the plant variety rights regime. You can find further information and register your interest in attending one of these hui or public meetings at: <http://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/review/issues-paper>

This paper includes discussion of how the Crown should meet its Treaty of Waitangi obligations in the plant variety right regime. We have developed a Māori Engagement Plan for the issues stage of the *Plant Variety Rights Act 1987* review, which can be found here: <http://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/review/maori-engagement-plan>. We are interested in your feedback as to how we engage with Māori as this review progresses.

## Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on whether any changes need to be made to the *Plant Variety Rights Act 1987*. We may contact submitters directly if we require clarification of any matters in submissions.

## Release of information

MBIE intends to upload PDF copies of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

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## Private information

The *Privacy Act 1993* establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.

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# Glossary and Acronyms

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*Descriptions of key terms here are not intended to be definitions.*

2005 draft Bill	The draft <a href="#"><i>Plant Variety Rights Amendment Bill</i></a> (00-1), released for consultation in 2005
biological resources	Includes genetic resources, organisms, parts of organisms, populations and any other biotic component of an ecosystem with actual or potential use or value for humanity (CBD definition) (e.g. honey)
bioprospecting	The collection of biological material and the analysis of its material properties, or its molecular, biochemical or genetic content, for the purpose of developing a commercial product
botanical variety	A naturally occurring plant grouping within a species. They are generally used to distinguish groups of plants of a species that have a common single characteristic or one or more defining common sets of characteristics. Some botanical varieties are known as subspecies
CBD	Convention on Biological Diversity
Commissioner	The Commissioner of Plant Variety Rights. The Commissioner is part of the Plant Variety Rights Office, within the Intellectual Property Office of New Zealand
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
cultivated variety	A plant grouping within a single botanical taxon of the lowest rank, whose horticultural or agricultural origin is primarily due to intentional human activity, and is defined by traits which are consistently expressed, and can be propagated unchanged (e.g. the kiwifruit variety 'Zesy002' which is commonly sold under the brand SunGold®). Includes any clone, hybrid, stock, or line, of a plant, and excludes botanical varieties
DUS	Distinct, uniform and stable (requirement)
EDV	Essentially derived variety
EU	European Union
genetic resources	Genetic material of actual or potential value. 'Genetic material' is any material of plant, animal, microbial or other origin containing functional units of heredity (CBD definition) (e.g. mānuka plant)
genotype	The genetic makeup of an organism

hybridise	To cross-breed two different varieties or species of plant, often to attain desired characteristics in the parent plants
IPONZ	Intellectual Property Office of New Zealand
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
kaitiaki	Guardian, protector, caretaker
kaitiaki relationship recommendations	The Waitangi Tribunal’s two main recommendations in the Wai 262 report: <ul style="list-style-type: none"> <li>• that the Commissioner be empowered to refuse a PVR that would affect the kaitiaki relationship; and</li> <li>• that the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest</li> </ul>
kaitiakitanga	The obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection (Wai 262 report)
mātauranga Māori	The Waitangi Tribunal referred to mātauranga Māori as “the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional knowledge” (Wai 262 report)
mana	Authority, prestige, reputation, spiritual power (Wai 262 report)
mauri	The life principle or living essence contained in all things, animate and inanimate (Wai 262 report)
MBIE	Ministry of Business, Innovation and Employment
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
phenotype	The set of observable characteristics of an organism resulting from the interaction of its genotype with the environment (e.g. leaf shape)
PVR Journal	A journal published quarterly by the Plant Variety Rights Office. It includes notice of every decision to make or decline a grant, and all prescribed particulars relating to applications and grants
PMAC	In this paper, PMAC refers to the Patents Māori Advisory Committee (not the Plant Market Access Council, which will be familiar to farmers)
propagating material	Any part of a plant that is normally or traditionally used to propagate plants, including reproductive (e.g. spores, seeds) and vegetative (e.g. cuttings) propagating material  While the term ‘reproductive material’ is used in the PVR Act to describe all propagating material, we consider that ‘propagating material’ is more accurate and have used this term in this paper

PVR	Plant variety right
PVR Act	<i>Plant Variety Rights Act 1987</i>
PVR regime	New Zealand’s plant variety rights regime
PVRO	Plant Variety Rights Office
reproductive material	Any part of a plant that is normally or traditionally used to reproduce a plant (e.g. seeds). Reproductive material is a subset of propagating material. See ‘propagating material’
RMA	<i>Resource Management Act 1991</i>
rangatiratanga	Chieftainship, self-determination, the right to exercise authority; imbued with expectations of right behaviour, appropriate priorities, and ethical decision-making (Wai 262 report)
rongoā	Traditional Māori medicine, including herbal medicine made from plants, physical techniques like massage, and spiritual healing
taonga	A treasured possession, including property, resources and abstract concepts such as language, cultural knowledge, and relationships (Wai 262 report)
taonga species	Taonga species are native birds, plants and animals of special cultural significance and importance to Māori
tino rangatiratanga	The greatest or highest chieftainship; self-determination, autonomy; control, full authority to make decisions (Wai 262 report)
TPP	Trans-Pacific Partnership Agreement
Tribunal	Waitangi Tribunal
TRIPS Agreement	World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UPOV	International Union for the Protection of New Varieties of Plants ( <b>U</b> nion <b>I</b> nternationale pour la <b>P</b> rotection des <b>O</b> btentions <b>V</b> égétales)
UPOV Convention	International Convention on the Protection of New Varieties of Plants
UPOV members	Countries that have ratified the International Convention on the Protection of New Varieties of Plants
UPOV 78	The 1978 revision of the International Convention on the Protection of New Varieties of Plants

UPOV 91	The 1991 revision of the International Convention on the Protection of New Varieties of Plants
variety	See ‘cultivated variety’
variety denomination	A generic name which allows the protected variety to be identified
vegetative propagation	A form of asexual reproduction of plants (e.g. reproduction by bulbs or tubers, the planting of cuttings, or grafting and budding of fruit trees)
Wai 262 report	Waitangi Tribunal report entitled <i>Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity</i>
whakapapa	Genealogy, ancestral connections, lineage (Wai 262 report)
whanaungatanga	Ethic of connectedness by blood; relationships, kinship; the web of relationships that embraces living and dead, present and past, human beings and the natural environment (Wai 262 report)

# Foreword

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As the Minister for Commerce and Consumer Affairs, I am proud to announce the release of this Issues Paper as part of the review of the *Plant Variety Rights Act 1987*.

New Zealand's intellectual property rights regime for plant varieties is designed to encourage the development and dissemination of new plant varieties. Plant breeding improves the range and performance of plant varieties and has a number of desirable outcomes, including providing growers with higher yields of better quality, and providing consumers with a wider choice of products. A robust plant variety rights regime rewards innovation in plant breeding and encourages international breeders to bring new varieties to New Zealand.

As a country with a strong track record in agriculture and horticulture, a high-functioning plant variety rights regime can have significant economic benefits for New Zealand. However, the regime is now over 30 years old, and much has changed in the industry during this time. I want New Zealand to achieve the maximum benefit from the regime while meeting our international and Treaty of Waitangi obligations. To do that, we need to ensure our plant variety rights regime strikes the right balance between the interests of rights holders, Māori, farmers and growers, and our wider economy.

Meeting our obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) is a key driver for this review. Under the CPTPP, New Zealand has an obligation to either ratify the most recent version of the International Union for the Protection of New Varieties of Plants (**UPOV 91**), or put in place a regime that gives effect to it, within three years of the CPTPP coming into force. This obligation will mean that plant breeders' rights are strengthened under any new regime. This Issues Paper covers key issues and areas of flexibility under UPOV 91.

It is also important that we meet our obligations to Māori under the Treaty of Waitangi in relation to the PVR regime. New Zealand negotiated a specific exception in the CPTPP to be able to adopt any policy it considers necessary to give effect to these obligations. The Government recognises the importance to Māori of kaitiaki relationships with taonga species and mātauranga Māori. The Government also acknowledges the Waitangi Tribunal's recommendations in its report on the Wai 262 inquiry, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, which reflect its conclusions that the kaitiaki relationship with taonga species is entitled to a reasonable degree of protection. These recommendations provide a valuable framework for considering some of the PVR issues, and are explored in this Issues Paper. Ensuring that there is adequate protection and recognition of Māori interests within the plant variety rights regime will be an important outcome of this review. I encourage you to have your say on the matters covered in this Issues Paper, whether by written submission or by participation in MBIE's consultation hui. The information and evidence you provide will help the development of a reformed and fit-for-purpose plant variety rights regime.



**Hon Kris Fafoi**

Minister of Commerce and Consumer Affairs

# Part 1 – Purpose and context of the review

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## Introduction

1. The Ministry of Business, Innovation and Employment (**MBIE**) is reviewing the plant variety rights regime (**PVR regime**). The *Plant Variety Rights Act 1987* (**PVR Act**) provides for the grant of intellectual property rights called ‘plant variety rights’ (**PVRs**). Plant breeders and developers may apply for PVRs over new plant varieties that they have developed. The purpose of the PVR regime is to incentivise the development and importation of new varieties of plants.
2. The release of this Issues Paper initiates the first stage of public consultation in the review of the PVR regime. We are seeking your views on whether there are problems with the PVR regime that should be addressed. The issues canvassed in this paper are potential issues with the PVR regime that have been raised by in our pre-consultation engagement.
3. Our coverage of the problems in this issues paper is intended to be exploratory. At this stage, we are seeking to better understand how the PVR regime operates in practice, the key issues and opportunities for change.

## Your submissions will help inform the development of policy options

4. We seek your views to improve our understanding of how the PVR regime operates in practice, how Māori interests are protected in the regime, and the key issues and opportunities for change. Your responses will inform our development of policy options for reform of the PVR regime. We intend to test those options with the public through an Options Paper, scheduled for release in the first half of 2019.
  - a. We would like to hear from you if you have an interest in any of the matters covered in this Issues Paper. We are also interested in hearing about other issues with the PVR regime not covered in this paper. Some of you may want to respond to all of the questions in this Issues Paper. Others may want to respond only to one or a small number of questions. Please provide evidence or examples to support your views where possible.
5. This Issues Paper has been released concurrently with a Māori Engagement Plan which can be found here: <http://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/review/maori-engagement-plan>.
6. Submissions are due by **5pm on Friday, 21 December 2018**.

# The review process

7. An outline of the intended review process is below. The stages in green represent opportunities for you and other members of the public to provide your input into the process.



8. Each stage in the above process (other than the Select Committee process) is subject to a decision by Cabinet. Cabinet may also decide whether consulting on an exposure draft of the amendment bill is necessary after we have consulted on the Options Paper.

# 1 What does this Issues Paper cover?

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9. In **Part 1**, we explain the purpose and context of the review, and provide an overview of the PVR regime.
10. In **Part 2**, we outline our proposed objectives for the PVR Act and seek your views on the overall regime in the context of those objectives.
11. In **Part 3**, we cover the key potential issues raised by industry stakeholders, including PVR owners and farmers/growers.
12. In **Part 4**, we seek your views on matters relating to the Waitangi Tribunal's recommendations on the PVR regime resulting from the Wai 262 inquiry and feedback received from Māori in our pre-consultation engagement.
13. In **Part 5**, we provide a high-level outline of additional issues with the PVR regime that we are aware of and may warrant further consideration.
14. **Part 6** is a recap of the questions we have asked in this Issues Paper.

## 2 Background to the review

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15. The PVR Act was passed in 1987 to bring New Zealand's PVR regime into line with the 1978 version of the International Convention on the Protection of New Varieties of Plants (**UPOV Convention**). The UPOV Convention is the principal international agreement relating to intellectual property protection over plant varieties.
16. The PVR Act is now over 30 years old and has only had minor amendments since it was first passed. The plant breeding industry has changed significantly during this time as research and development is increasingly carried out by private organisations or Crown Research Institutes (which are Crown-owned companies). Certain industry groups (mainly plant breeders) have been calling for a review for some time, in particular because the majority of our main trading partners (including Australia, the United States of America, Japan, the European Union (**EU**) and Canada) have ratified the most recent (1991) version of the UPOV Convention (**UPOV 91**). Bringing our legislation more in line with UPOV 91 members is expected to encourage investment in the New Zealand plant breeding industry, as well as the importation of new varieties into New Zealand.
17. A review of the PVR Act began in the late 1990s, largely focusing on the issue of whether New Zealand should accede to UPOV 91. UPOV 91 strengthens plant breeders' rights, for example by extending their rights to cover export, conditioning and stocking of propagating material and extending the minimum term of the right for woody plants from 23 to 25 years.<sup>1</sup>
18. The review culminated in a draft *Plant Variety Rights Amendment Bill* (the **2005 draft Bill**), which the then Ministry of Economic Development<sup>2</sup> released as an exposure draft for public consultation.<sup>3</sup> The 2005 draft Bill would have brought the PVR Act closer to, but not quite in compliance with, UPOV 91. However, work on that bill was put on hold in 2007 because the Government was expecting the Waitangi Tribunal (the **Tribunal**) to release its report on the Wai 262 inquiry (the **Wai 262 report**). The Wai 262 report was released in 2011 and, significantly for the PVR regime, emphasised the importance of the kaitiaki relationship between Māori and mātauranga Māori in general, and taonga species in particular.

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<sup>1</sup> Annex 1 provides a comparison of the rights under the current PVR regime in New Zealand with those under UPOV 91.

<sup>2</sup> The Ministry of Economic Development was one of the predecessors of MBIE.

<sup>3</sup> Initial public input to the review was sought through a discussion document, *Review of the Plant Variety Rights Act 1987: A Discussion Paper* (<https://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/documents-and-images/review-of-the-plant-variety-rights-act1987-discussion-paper.pdf>), released March 2002. Submissions closed in July 2002 (a **summary of submissions** was released in November 2002). In July 2003, *Cabinet agreed to policy proposals* (<https://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/documents-and-images/review-of-the-plant-variety-rights-act1987-discussion-paper.pdf>) arising from the review, and the *Draft Plant Variety Rights Amendment Bill* (<https://www.mbie.govt.nz/info-services/business/intellectual-property/plant-variety-rights/documents-and-images/draft-plant-variety-rights-amendment-bill.pdf>) to amend the PVR Act was drafted.

19. Reviewing the PVR Act was further delayed because of the Trans-Pacific Partnership Agreement (**TPP**) negotiations. This was because a requirement to ratify UPOV 91 was being negotiated. The TPP negotiations concluded in October 2015 and the TPP was signed in February 2016. It included a requirement for New Zealand either to ratify UPOV 91 or to update the current PVR regime so that it gives effect to UPOV 91 within three years of the TPP coming into force, subject to such conditions as may be necessary for New Zealand to comply with its Treaty of Waitangi obligations.
20. In August 2016, Cabinet decided to launch a review of the PVR Act. MBIE began the review in February 2017. The first stage of the review was the pre-consultation phase. This included information-gathering, planning, engagement with some interested groups, and development of this Issues Paper.
21. Following the US withdrawal from the TPP, on 8 March 2018 the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) was signed. This retains the obligations relating to UPOV 91 that were negotiated in the TPP. The CPTPP is likely to come into force for New Zealand in late 2018 or early 2019. This means an updated PVR regime would need to be in place by late 2021 or early 2022.
22. The CPTPP terms protect the right of the New Zealand government to adopt any policy it considers necessary to give effect to its obligations under the Treaty of Waitangi.
23. The UPOV Convention and the Wai 262 report have informed our approach to this review. We discuss them further in Chapter 6.
24. Reviewing the current PVR regime presents an opportunity to:
  - a. find the right balance between strengthening plant breeders' rights to encourage innovation (consistent with our international obligations) and preserving the interests of growers, consumers and New Zealand as a whole;
  - a. ensure the regime is consistent with New Zealand's Treaty obligations; and
  - b. modernise the regime consistent (where appropriate) with other intellectual property legislation.

## 3 What are Plant Variety Rights?

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25. A PVR is an intellectual property right designed to encourage people to develop and disseminate new varieties of plants. Under the PVR Act, plant breeders and developers may be granted an exclusive right to commercialise the **propagating material** (e.g. spores, seeds or cuttings) of new varieties they develop, for up to 23 years.
26. PVRs are granted by the Commissioner of Plant Variety Rights on the advice of the Plant Variety Rights Office (**PVRO**), which is part of the Intellectual Property Office of New Zealand (**IPONZ**).

### What is the purpose of the PVR regime?

27. Plant breeding improves the performance of plant varieties, enabling growers and farmers<sup>4</sup> to gain higher yields of better quality (e.g. disease resistance) that meet commercial and consumer needs. Harvested material from new plant varieties may lead to the production of new, improved products (e.g. craft beer from hops), more nutritious fruit and vegetables and more choice in general for consumers.
28. The development of new plant varieties can be time and resource-intensive. It can take several years of developing, breeding, selecting, and trialling for desirable characteristics before a new variety can be commercialised. For example, the development of a new ryegrass cultivar can take 8-10 years.
29. If no intellectual property protection were provided for new plant varieties, anyone would be able to take a new variety as soon as it became available and reproduce, grow and sell it in competition with the person who developed it. This would limit the benefits that plant breeders can gain from the new varieties they have developed.
30. The PVR regime is predicated on the notion that if local plant breeders cannot make a meaningful return on their investment to develop new varieties, they will be less likely to invest time, money and effort in the development of new varieties. In addition, foreign plant breeders might not be willing to bring new varieties to New Zealand if the level of protection provided for those varieties is not in line with other countries. The PVR regime is intended to provide incentives for plant breeders to develop new varieties and to make new varieties available in New Zealand for the benefit of the public.
31. In order for the PVR regime to provide benefits to New Zealand, the incentives to create new varieties must be appropriately balanced with the costs of providing a commercial monopoly over these new varieties to PVR owners. If the commercial rights PVRs grant are too strong, costs may include reduced competition, higher prices (e.g. for farmers) and restricted access to protected varieties. The PVR regime should strike the right balance between the interests

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<sup>4</sup> We use the terms 'farmers' and 'growers' interchangeably in this paper, unless the context requires more specificity (as, for example, when we discuss the issue of farm-saved seed for arable farmers in Chapter 7).

of plant breeders, Māori, growers, consumers and other interested groups – such that there is a net benefit to society as a whole.

32. We seek your feedback on the objectives of the PVR Act in Part 2.

### Case study

Breeders in New Zealand have developed a grass that deters birdlife. This has proved to be a success throughout the world – particularly with airports, to prevent bird strike (birds hitting airplanes). The grass is also used in parks and sports fields such as Christchurch’s Hagley Park cricket venue.

The bird-deterrent grass was bred with a symbiotic fungus to lower the amount of insects it harbours, which dissuades birds from eating it.

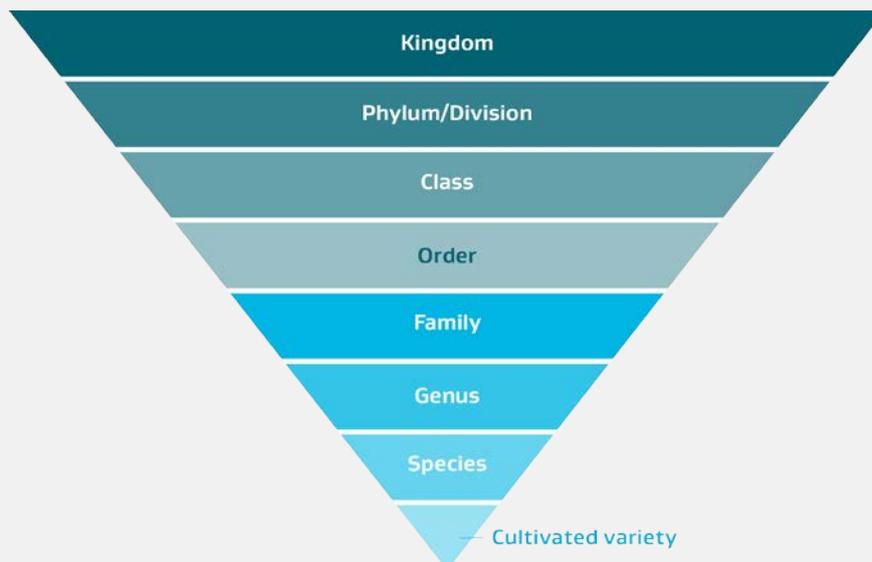
The grass was developed a few years ago after decades of trials funded by a local seed company and a Crown Research Institute. There is both a PVR and a patent associated with this grass.

## What can be protected by a PVR?

33. A PVR may be granted over any **cultivated variety** of plant, except alga. We discuss the issue of whether alga should be protectable subject-matter under the PVR Act in Part 5.

34. In the plant kingdom, cultivated varieties (or cultivars) are a subset of species. Within a species, there can be a wide range of different types of plants (e.g. different coloured roses). A cultivated variety is a defined group of plants within a species, with a common set of characteristics (e.g. flower colour or drought survival). These characteristics are selected through plant breeding.

35. The diagram below shows the main taxonomic ranks of plants:



36. In the PVR Act (and this Issues Paper), the term ‘**variety**’ means ‘**cultivated variety**’.<sup>5</sup>

<sup>5</sup> Section 2 (all ‘Section’ references refer to clauses in the PVR Act unless otherwise stated).

37. Protection provided by a PVR covers the **phenotype**; the morphological characteristics (e.g. flower colour or leaf shape) or physiological characteristics (e.g. disease resistance or drought survival) of the cultivated variety. PVR protection does not protect the **genotype**, the underlying genetic material.

## What is the scope of protection under the PVR Act?

### Content of the rights

38. A PVR gives the person who bred a new plant variety the exclusive right to:
- sell, or offer for sale, propagating material of the protected variety; and
  - produce propagating material of the protected variety for the purposes of sale.
39. In addition, the PVR owners of some vegetatively reproduced varieties (fruit-producing, vegetable-producing, or ornamental varieties) have exclusive right to propagate the variety for the commercial production of fruit, flowers or other products.<sup>6</sup> This right is limited to the production of the fruit, flowers or other products, but does not provide the PVR owner with control over the sale of the fruit, flowers or other products.
40. PVR owners do not have any rights under the PVR Act over any harvested material itself (where it is not intended to be used for propagation) or any products made from the harvested material (though it is not uncommon for these rights to be established contractually).

### Term of grant

41. The term of protection is 20 years, unless the variety is a 'woody plant'. These are protected for 23 years.<sup>7</sup> 'Woody plants' include grape vines, large shrubs, roses, trees, and rootstock.<sup>8</sup> They have a longer term because they typically take longer to grow and are generally more difficult to propagate.<sup>9</sup>
42. During the term, PVR owners must pay an annual renewal fee. Failure to pay the renewal fee will result in the PVR lapsing, at which point it will be cancelled by the PVRO. Once a PVR is cancelled, or expires at the end of the term, the variety enters the public domain and becomes free for anyone to use.

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<sup>6</sup> Section 17 "Products of the harvested material" is not defined in the PVR Act. A definition from UPOV 91 states that this is product made directly from the harvested material. This could include juice from fruit.

<sup>7</sup> Section 14.

<sup>8</sup> Rootstock is a root, and its associated growth buds, which is used as a stock in plant propagation for grafting.

<sup>9</sup> The terms 'woody' and 'non-woody' in the Act reference morphological features, determined by the presence or amount of lignin in a stem on a plant in a genus or species. (Lignin is an organic substance binding the cells, fibres and vessels that constitute wood and the 'lignified' elements of plants, like straw.) According to IPONZ, this is the standard botanical view on 'woody' and 'non-woody' plants.

## Provisional protection

43. Examination of a PVR application can take several years. If a person other than the PVR applicant were able to exploit a variety for which a PVR has been applied for, but not yet granted, it could significantly reduce the profits the applicant could make from the variety after the PVR is granted. To deal with this issue, the PVR Act provides for 'provisional protection'. This allows a PVR applicant to take action against any person exploiting a variety for which a PVR has been applied for, before the PVR is granted.

## Exceptions

44. The PVR Act provides for some exceptions from the exclusive rights granted to PVR owners.<sup>10</sup> Any person may do what is set out in the exceptions in relation to protected varieties without seeking the PVR owner's permission. In particular, any person may:
- propagate, grow, or use a protected variety for non-commercial purposes** – for example, in private gardens.
  - use any variety for breeding, to hybridise and produce a new variety from one or more protected varieties** – this is known as the breeder's exemption and is intended to ensure that plant breeders can use protected varieties to breed new varieties even if they are not the PVR owner. If the production of the hybrid or new variety does not require repeated use of the protected variety, sale of the new variety is permitted without the permission of the PVR owner.<sup>11</sup>
  - use propagating material from a protected variety for human consumption or other non-reproductive purposes** – for example, a person can sell harvested sunflower seeds for human or animal consumption without the PVR owner's authorisation, as the seeds are not being sold as propagating material.

## What are the requirements to gain a PVR?

45. There are a number of requirements that plant breeders must meet to gain PVRs for new varieties.
46. A plant variety must be **new** to be eligible for protection. A variety is 'new' if it has not been sold in New Zealand for more than a year before the PVR application was made, or more than 4-6 years for sale overseas.<sup>12</sup>
47. A person applying for a PVR must also show that their plant variety is distinct, uniform (or homogeneous) and stable (**DUS** requirements):<sup>13</sup>
- A variety is **distinct** if it is distinguishable from any other known variety by one or more (morphological or physiological) characteristics – for example, colour of flowers, time of flowering, dimensions of leaves.<sup>14</sup>

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<sup>10</sup> Section 18.

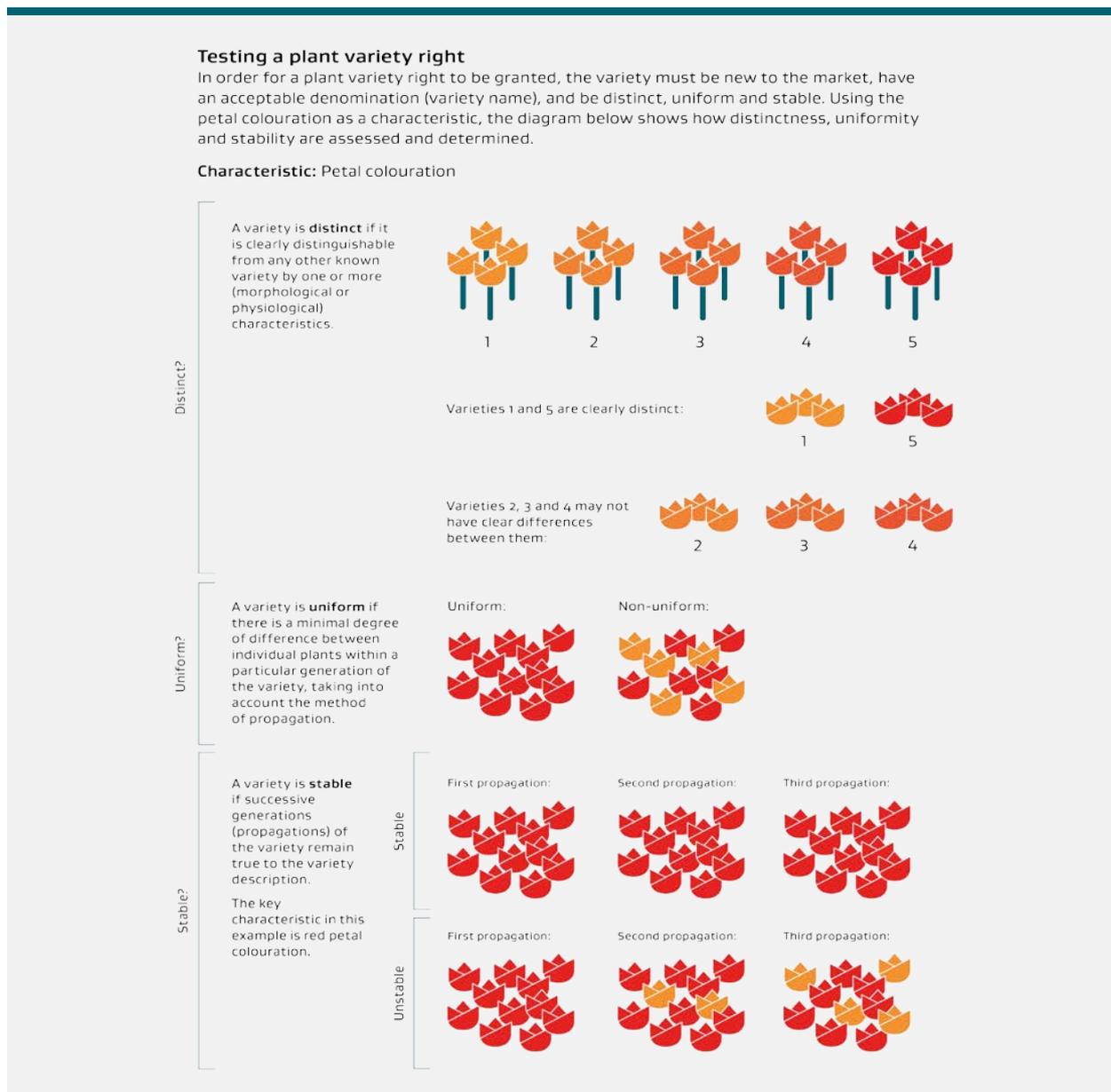
<sup>11</sup> However, if production of a hybrid seed variety requires the repeated use of a protected variety as a parent, then selling the hybrid seed variety would infringe the PVR right for the protected variety used as a parent.

<sup>12</sup> Section 10(4)(a).

<sup>13</sup> These terms are defined in sections 10(4) and (5).

<sup>14</sup> Section 10(4)(b).

- b. A variety is **uniform** if the degree of difference between plants within a particular generation of the variety is within reasonable limits, taking into account the way it is reproduced.<sup>15</sup>
- c. A variety is **stable** if successive generations of the variety remain true to the variety description.<sup>16</sup>
48. In addition to the requirements for the variety itself, the person applying for a PVR must also supply an acceptable variety denomination. The denomination acts as the name of the protected variety and the variety must always be labelled accordingly.<sup>17</sup>
49. An illustration of the DUS requirements is in the diagram below.



<sup>15</sup> Section 10(5).

<sup>16</sup> Section 10(4)(c).

<sup>17</sup> Alongside general criteria about use, it is a requirement that the denomination is not misleading or does not convey false impressions as to the origin of the variety, characteristics which the variety exhibits, or the person who bred the variety.

## Applying for a PVR

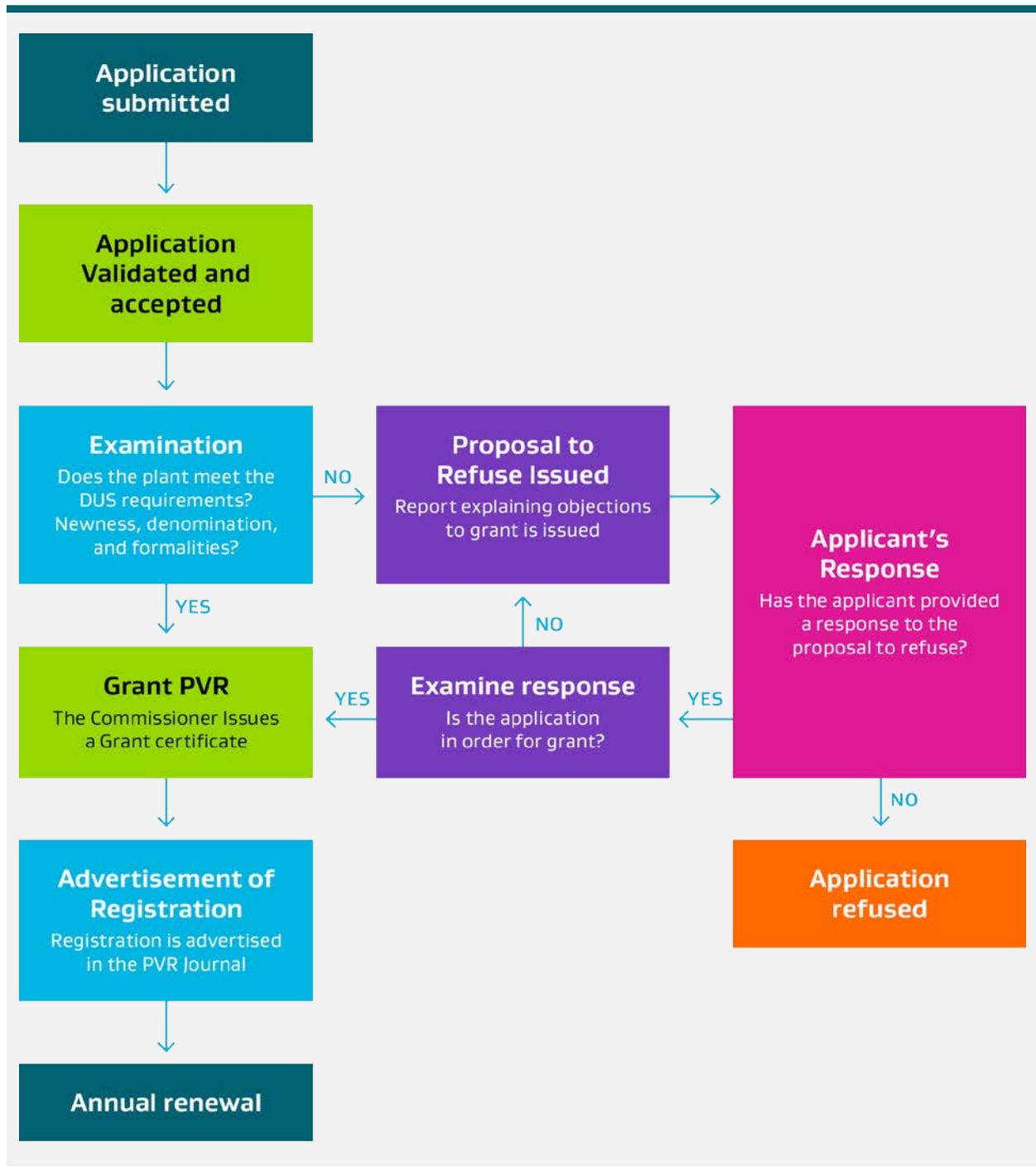
50. PVRs, like other intellectual property rights, are geographically limited rights. To gain protection over a variety in New Zealand, the owner or their authorised agent must apply to the PVRO in New Zealand.<sup>18</sup>
51. The application must meet acceptance criteria at the time of application. This includes the provision of the information required for the PVRO to conduct an examination of the variety. Following acceptance, the PVRO carries out a preliminary examination. At this stage, the PVRO may request more information or clarification regarding newness, ownership of the variety and technical matters.
52. The plant variety must be tested and evaluated to determine if it meets the DUS requirements. The DUS evaluation is carried out through growing trials of the variety, either in New Zealand or in another UPOV country. The growing trial may take a number of years to complete depending on the nature of the variety. For example, growing trials for potatoes may be completed in a little over a year, while apple varieties may take five years.
53. Once the DUS evaluation is complete and the application has been fully examined, the PVRO will recommend to the Commissioner whether or not the variety is eligible to be granted a PVR. If the Commissioner is satisfied that the variety meets the criteria, the variety will be granted a PVR.
54. If the Commissioner is **not** satisfied that the variety meets the criteria for a PVR, the Commissioner will send the applicant a proposal to refuse a grant of rights. The applicant has an opportunity to respond to the proposal before the Commissioner either confirms the refusal or returns the variety to examination.
55. If a person believes that a grant should not be or should not have been provided for a variety, they may write to the Commissioner with their objection. The PVR Act sets out the grounds for these objections – for example, if a variety is not new, distinct, uniform or stable.<sup>19</sup> The Commissioner will provide both parties with the opportunity to be heard and to state their cases before making a decision. The Commissioner’s decisions are also appealable through the courts.

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<sup>18</sup> See <https://www.iponz.govt.nz/about-ip/pvr/pvr-process/> for more information on the PVR assessment process.

<sup>19</sup> Sections 6 and 15.

56. The application process is set out in the diagram below.



## How do PVRs compare to other forms of intellectual property protection?

57. PVRs are a form of intellectual property right. The table below sets out the main types of intellectual property rights, their maximum term of protection and how they are registered.

Type of intellectual property right	What's protected?	Term	Registrable with
Plant variety rights	Protects new cultivated varieties of plants	Up to 23 years	IPONZ
Patents	Protects new inventions – protects products and how they are manufactured	Up to 20 years	IPONZ
Trade marks	Protects branding (e.g. logos/words) – protects use in trade	Renewable indefinitely	IPONZ
Registered industrial designs	Protects new features of shape, configuration, pattern or ornament as applied to an object	Up to 15 years	IPONZ
Geographical indications	Protects origin labelling for wine and spirits products	Renewable indefinitely	IPONZ
Copyright	Protects new works, including written content (including software code), artworks, music, films etc. Protects expression of ideas	Up to life plus 50 years	Not registrable

## 4 The PVR regime has a narrow application

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### Plant varieties that are eligible for protection do not exist in the wild

58. Some people have expressed concern about the possible protection of plant varieties that have been ‘discovered’ in the wild. The definition of ‘variety’ and the requirements for protection require significant human input in the development of a variety. It is not possible to discover a variety that is eligible for a PVR in the wild. We discuss this further in Part 4, Chapter 14.

### Few plant varieties are protected

59. Most plant varieties are ‘varieties of common knowledge’ that exist in the public domain. This includes varieties that have never been protected (e.g. the ‘Granny Smith’ apple) and plant varieties that are no longer protected (e.g. the potato variety, ‘Nadine’). There are no restrictions on the use of these varieties.

### If a plant variety cannot be legally grown, a grant of PVRs is unlikely

60. Some people have expressed concerns about certain kinds of plant varieties — for example, noxious or genetically modified plants — being eligible for protection. Though theoretically possible, it would be very difficult to gain protection over a variety that, legally, cannot be grown in New Zealand. And even if protection was granted, the variety could not be cultivated.
61. For example, a breeder may seek to gain protection of an overseas variety of heather — a species designated as an ‘unwanted organism’ under the *Biosecurity Act 1993*. As it is not possible to import heather, the breeder would not be able to provide plant material for growing trials. The examination would not be able to occur, and the application would lapse. In some circumstances PVR examiners in New Zealand may rely on overseas test reports when considering a grant of a PVR.
62. Even if a PVR were granted in these circumstances, a grant of PVR does not confer a positive right to grow the variety. PVRs only provide PVR owners with the right to prevent others from commercialising the propagating material of the protected variety. PVR owners cannot do anything — including grow, develop or commercialise the protected variety — that would be unlawful under other legislation.

63. Legislation relevant to the development and use of plant varieties include:
- a. *Hazardous Substances and New Organisms Act 1996*, which regulates the use and development of genetically modified organisms and importation of new organisms;
  - b. *Forests Act 1949*, which provides guidelines for sustainable logging and control over indigenous timber;
  - c. *Native Plants Protection Act 1934*, which enables regulations to be made to declare indigenous plant species to be protected, making it an offence to remove those plants from Crown land; and
  - d. *Biosecurity Act 1993*, which allows the Ministry for Primary Industries to create requirements for importing plants and restrict the growing and dissemination of certain varieties to respond to biosecurity risks.

## PVR ownership does not entail ownership of the individual plants, or the harvested material, of a protected variety

64. The PVR Act does not provide that PVR owners are the owners of all plants or individual specimens of protected varieties or of the propagating material from their protected varieties. The PVR Act provides PVR owners with a right to prevent other people selling, or producing or offering for sale, the propagating material of protected varieties only. This allows the PVR owner to have some control over commercialisation of the variety, but not ownership of the plants themselves – or the harvested material. For example, if a consumer were to buy a tomato plant of a protected variety, the PVR owner would have no rights over the tomatoes produced.
65. In a commercial context, PVR owners may seek commercial control over harvested material through contract. If a commercial grower were to buy tomato cuttings (propagating material) of a protected variety directly from a PVR owner, the PVR owner may seek control of the tomatoes produced as a condition of providing the cuttings. This control would have to be achieved through contract, as there is no such right to harvested material under the PVR Act.

## PVRs are not permanent rights

66. PVRs only provide a temporary right in protected varieties (20 or 23 years).<sup>20</sup> Once the term of grant expires, varieties that were protected by a PVR enter the public domain and may be freely used in the same way as any other variety that has never been protected.

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<sup>20</sup> Depending on whether the variety is a 'woody plant'. See paragraph 41 above.

## 5 PVRs in New Zealand

67. Most of the varieties protected by PVRs in New Zealand are varieties of species originally found outside New Zealand like kiwifruit, apples and potatoes. Some species indigenous to New Zealand, such as horopito (*Pseudowintera colorata*), have cultivated varieties which are protected.
68. PVR applications in New Zealand will be made by mix of domestic and overseas breeders. Over all plant types, the approximate split is generally around 40% (domestic), 60% (overseas).
69. As of 7 June 2018, there are 1301 current PVR grants in New Zealand. In total, 3807 grants have been made since the regime began. The remainder have either expired (i.e. the term of the grant has finished) or been cancelled or surrendered.
70. The following table sets out the number of applications made in New Zealand in the last four full financial years, broken down by broad plant groups:

Year to 30 June	Crop + Vegetable	Pasture	Fungi	Fruit	Ornamentals	Total
2013/14	31	12	5	49	73	170
2014/15	25	5	1	37	68	136
2015/16	22	7	4	32	54	119
2016/17	27	10	2	37	55	131

71. The following table sets out the number of grants made in New Zealand in the last four full financial years, broken down by broad plant groups:

Year to 30 June	Crop + Vegetable	Pasture	Fungi	Fruit	Ornamentals	Total
2013/14	40	12	-	3	102	157
2014/15	17	10	9	26	71	133
2015/16	28	3	-	22	62	115
2016/17	20	6	2	26	46	100

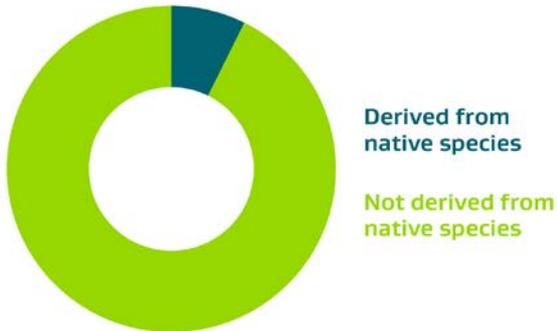
## Indigenous species

72. It is hard to put a figure on the number of indigenous plant species in New Zealand. Estimates vary between 2,500<sup>21</sup> and 7,000<sup>22</sup>. We estimate that around 20 of these have had PVRs derived from them. The number of current PVR grants relating to these species is 98.

73. These approximate figures are represented in the diagrams below.

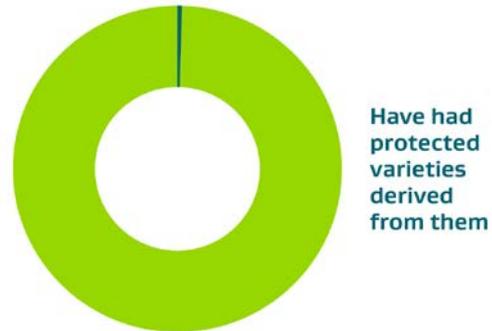
### PVRs granted over cultivated varieties

As at 7 June 2018



### Indigenous species in New Zealand

As at 7 June 2018



74. The most common indigenous species to which PVRs relate are harakeke (flax), ti kōuka (cabbage tree), karamū (coprosma), kōkōmuka (hebe), mānuka (tea tree) and kōhūhū (pittosporum).

<sup>21</sup> <https://teara.govt.nz/en/native-plants-and-animals-overview/page-1>

<sup>22</sup> [http://www.nzpcn.org.nz/page.aspx?help\\_faqs\\_NZ\\_plants](http://www.nzpcn.org.nz/page.aspx?help_faqs_NZ_plants)

## 6 Constitutional and international obligations that inform our approach

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75. In this chapter, we set out the key obligations and consideration that inform our approach.

### The Treaty of Waitangi

76. The Treaty of Waitangi is a constitutionally significant document and the foundation of the Crown-Māori relationship.

77. Article 2 of the Treaty refers to the Crown guaranteeing Māori (including iwi, hapū and whānau) “the full, exclusive and undisturbed possession of their...forests...and other properties” (English version) and “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa” (Māori version).

78. We have heard from Māori interested in the PVR Act about the significance of indigenous plant species as taonga in te ao Māori. PVRs have a temporary effect on what people, including Māori, can do with the propagating material of newly-bred varieties of indigenous plant species. It is important that the Crown’s Treaty obligations are carefully considered before the Crown seeks to modify the PVR regime.

### The Wai 262 report

79. The findings and recommendations in the Wai 262 report on PVRs provide a useful structure for a conversation between the Crown and Māori about how the PVR regime could be reformed in a way that is consistent with the Treaty of Waitangi.

80. In the Wai 262 inquiry, the Waitangi Tribunal (the **Tribunal**) examined the claims of six iwi (Ngāti Wai, Ngāti Kuri, Te Rarawa, Ngāti Porou, Ngāti Kahungunu and Ngāti Koata), who sought to establish “who owns or controls three things”<sup>23</sup>:

- a. **mātauranga Māori** (Māori traditional knowledge);
- b. the “tangible products of mātauranga Māori” – traditional artistic and cultural expressions that the Tribunal referred to as “**taonga works**”;<sup>24</sup> and
- c. the things that are “important contributors to mātauranga Māori” – including the unique characteristics of indigenous flora and fauna, which the Tribunal referred to as “**taonga species**” and New Zealand’s natural environment more generally.<sup>25</sup>

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<sup>23</sup> Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) at 17.

<sup>24</sup> *Ibid.*

81. The Wai 262 inquiry was the Tribunal’s first whole-of-government inquiry, spanning almost 20 years – reflecting the significant breadth and complexity of the claims. It has been said<sup>26</sup> that the inquiry was about the place of Māori culture, identity and traditional knowledge in New Zealand’s laws, government policies and practices. Part of the inquiry examined the interface between te ao Māori (the Māori world) and New Zealand’s intellectual property regimes, including the PVR regime.
82. In 2011, the Tribunal released its report, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*.
83. In relation to the PVR regime, the Tribunal recommended changes to recognise and protect Māori interests in plant taonga species. These were:
- a. that the Commissioner of Plant Variety Rights (the **Commissioner**) be empowered to refuse a PVR that would affect the **kaitiaki relationship**;
  - b. that the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest;
  - c. to clarify the level of human input into the development of a plant variety for the purposes of PVR protection; and
  - d. to enable the Commissioner to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori.

## Convention for the Protection of New Varieties of Plants

84. ‘**UPOV**’<sup>27</sup> is the French acronym for the International Union for the Protection of New Varieties of Plants. UPOV is an international organisation that was established by the UPOV Convention. Since 1981, New Zealand has been a party to the 1978 version of the UPOV Convention (**UPOV 78**). The PVR Act is consistent with UPOV 78.
85. In 1991, the UPOV Convention was further revised. Changes were intended to deal with issues arising from UPOV 78, including the interface between PVRs and patents, developments in plant breeding techniques, and essentially derived varieties<sup>28</sup>.
86. New Zealand has signed but not ratified UPOV 91 and is therefore not legally bound by it. The PVR Act is not consistent with UPOV 91 and would need to be amended if New Zealand decided to accede to UPOV 91. This may be required under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

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<sup>25</sup> *Ibid.*

<sup>26</sup> <https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>

<sup>27</sup> Union Internationale pour la Protection des Obtentions Végétales, [www.upov.int](http://www.upov.int).

<sup>28</sup> Essentially derived varieties are discussed in Chapter 9.

87. As compared to the PVR Act, UPOV 91 strengthens PVRs, and narrows the exceptions to PVRs. The differences between UPOV 91 and the PVR Act/UPOV 78 are outlined in a table in **Annex 1** and briefly summarised below:

### Key differences between UPOV 91 and the PVR Act/UPOV 78

#### Stronger rights

UPOV 91 provides PVR owners with more rights over propagating material, giving them greater control of their protected varieties. It broadens the exclusive rights PVR owners have over the sale, offer for sale, or importation of propagating material (regardless of intended use) to cover an extended number of acts.<sup>29</sup>

PVR owners' rights may also extend:

- to harvested material or products made directly from harvested material (discussed in Chapter 8); and
- to new varieties that are 'essentially derived' from their protected varieties (discussed in Chapter 9).

Under UPOV 91, the minimum term of grant for woody varieties rises to 25 years (from 23 years), and remains 20 years for all other varieties (term of grant is discussed in Part 5).

#### Narrower exceptions

The exceptions to PVR owners' rights are slightly narrower under UPOV 91 than under the PVR Act. Under the PVR Act, reproduction and use of a protected variety is permitted for non-commercial purposes. Under UPOV 91, the use must be non-commercial and *private* (discussed in Part 5).

Otherwise, the exceptions are the same in practice:

- Protected varieties can be used to *breed new varieties without the PVR owner's permission* (unless the new variety is considered an essentially derived variety).
- PVR owners *do not have rights over the use of the variety for reasons other than propagation*.

UPOV 91 also provides an optional exception which would allow farm-saved seed (discussed at Chapter 7).

## Comprehensive and Progressive Agreement for Trans-Pacific Partnership

88. The CPTPP is a free trade agreement between 11 Pacific-rim countries: New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Viet Nam. It was signed on 8 March 2018.
89. The Government has signalled its intention to ratify CPTPP, which would require New Zealand to either:
- a. accede to UPOV 91; or
  - b. implement a PVR regime that gives effect to UPOV 91.

<sup>29</sup> For more information, see Article 14(1)(a) of UPOV 91.

90. When implementing either option, the Crown can adopt measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty. This option was negotiated specifically by New Zealand.
91. It enables the Crown, in consultation with Māori, to decide what type of PVR regime for indigenous plant species would be necessary to fulfil its obligations under the Treaty.

## The TRIPS Agreement

92. New Zealand is a party to the World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights (**TRIPs Agreement**). The TRIPs Agreement requires parties to provide for the protection of plant varieties either through the patent regime, through a regulatory regime designed specifically for plant varieties, or a combination of the two.
93. New Zealand has chosen to comply with the TRIPs Agreement through the plant varieties-specific regime under the PVR Act. Plant varieties cannot be patented in New Zealand under the *Patents Act 2013*.<sup>30</sup>

## United Nations Declaration on the Rights of Indigenous Peoples

94. New Zealand supports the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). Unlike the other agreements referred to in this chapter, UNDRIP is not a treaty and therefore not legally binding. Nevertheless, UNDRIP can help guide our approach to reviewing the PVR Act.
95. The rights in Article 31 are those most directly relevant to the PVR Act review:

*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
96. This review is an opportunity to consider how to give effect to Article 31 in the PVR regime.

## Biodiversity agreements

97. New Zealand is a party to the 1992 Convention on Biological Diversity (**CBD**). The objectives of the CBD are the conservation of biological diversity, the sustainable use of the components of biodiversity and the fair and equitable sharing of the benefits arising from the utilisation of **genetic resources**.
98. The CBD recognises the sovereign rights of states over their natural resources. Parties to the CBD have the authority to determine access to their genetic resources and the obligation to

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<sup>30</sup> However, underlying genetic material in plants may be granted a patent – if it meets the patentability requirements (e.g. a gene that makes the plant resistant to certain herbicides).

take appropriate measures with the aim of sharing in a fair and equitable way the benefits arising from their commercialisation or other use.

99. Article 8(j) of the CBD relates to the use of traditional knowledge that is relevant to the conservation and sustainable use of biological diversity. It encourages the equitable sharing of benefits arising from the utilisation of this knowledge. Parties to the Convention:
- ...shall, as far as possible and as appropriate:  
Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.*
100. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (**Nagoya Protocol**) is a supplementary treaty to the CBD that came into force in 2014. It is intended to:
- a. create greater legal certainty and transparency for providers and users of genetic resources and associated traditional knowledge;
  - b. establish more predictable conditions for access to genetic resources; and
  - c. help to ensure benefit-sharing when genetic resources leave the country where the genetic resources originated.
101. New Zealand is not yet party to the Nagoya Protocol. Key issues that would require consideration before New Zealand could become a party include how New Zealand regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in this context. These issues are outside of the scope of this review.
102. A third relevant treaty is the International Treaty on Plant Genetic Resources for Food and Agriculture (**ITPGRFA**). The ITPGRFA was negotiated by the UN Food and Agriculture Organization, and operates in harmony with the CBD. Its objectives are:
- a. the conservation and sustainable use of all plant genetic resources for food and agriculture; and
  - b. the fair and equitable sharing of the benefits arising out of their use for sustainable agriculture and food security.
103. New Zealand has not yet determined whether it will become a party to the ITPGRFA. Should it do so, the government would need to make certain plant genetic resources held in its public sector gene banks (e.g. held by Crown Research Institutes) available on terms agreed under the ITPGRFA. The ITPGRFA applies to a list of species that are regarded as significant food crops.

# Part 2 - Objectives of the PVR regime

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104. We consider that the main objectives of a modern, fit-for-purpose PVR regime are:
- a. to promote innovation and economic growth by incentivising the development and dissemination of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and society as a whole;
  - b. compliance with New Zealand’s international obligations; and
  - c. consistency with the Treaty of Waitangi.
105. We discuss these objectives below. We intend to use these objectives to help us assess both whether there are problems with the regime and the merits of any options for addressing any problems. It is therefore important that we get these objectives right. We welcome your feedback on the objectives.
106. At the options stage of this review, it will be important that we understand what the potential costs and benefits of any potential changes to the PVR regime are. We will be seeking to ensure the new PVR regime provides a net benefit to New Zealand as a whole.

## Promoting innovation and economic growth

107. PVRs are intended to provide an **incentive for plant breeders to develop or disseminate new varieties** in New Zealand for the benefit of society as a whole. Without the protection that the regime provides, local plant breeders may be unable to make a meaningful return on their investment in the development of new varieties. Foreign plant breeders may also be unwilling to bring their new varieties to New Zealand. However, in order for the PVR regime to provide benefits to New Zealand as a whole, this incentive must be balanced with the costs of providing a commercial monopoly. This balance is discussed further in paragraphs 114-118 below.

## Compliance with New Zealand’s international obligations

108. We have canvassed relevant obligations in this area for New Zealand in Chapter 6 of Part 1, above.
109. An important potential international obligation for this review is the CPTPP. If the Government decides to ratify the CPTPP, and it enters into force for New Zealand, we will have an **international obligation** to either accede to UPOV 91 or give effect to UPOV 91 (without accession) through a *sui generis* (standalone) PVR regime.
110. International obligations limit the scope of policy options available to the Government. While UPOV 91 generally strengthens PVRs, it does give UPOV members some flexibility in some of the key areas of the PVR regime – such as farm-saved seed and scope of rights issues relating to harvested materials. We explore some of these areas of flexibility throughout Part 3.

## Consistency with the Treaty of Waitangi

111. The **Crown’s obligations to Māori under the Treaty of Waitangi** in the PVR context are a key component of this review. At this stage, the Waitangi Tribunal’s four recommendations for changes to the PVR regime in the Wai 262 report inform how we consider of the Crown’s Treaty of Waitangi obligations in the PVR Act review. We explore the recommendations and other relevant considerations in Part 4.
112. In relation to its PVR obligations, New Zealand negotiated a specific exception in the CPTPP relating to the Crown’s Treaty of Waitangi obligations. Under the CPTPP, New Zealand has the policy space to adopt “measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination” against another party to CPTPP. This would apply whether the Government chooses to accede to UPOV 91 or give effect to UPOV 91 without becoming a party to it.
113. Whether becoming a party to UPOV 91 would be consistent with the Crown’s Treaty of Waitangi obligations in relation to indigenous plant species is an important issue in this review. If acceding to UPOV 91 would not be consistent with the Crown’s Treaty of Waitangi obligations in relation to indigenous plant species, New Zealand could choose not to accede to UPOV 91 under the CPTPP. New Zealand could instead implement changes consistent with the Crown’s Treaty of Waitangi obligations, and make the requisite changes to give effect to UPOV 91 in the remainder of the PVR regime.

## Questions

- |   |                                                                                                        |
|---|--------------------------------------------------------------------------------------------------------|
| 1 | Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not? |
| 2 | Do you think the PVR regime is meeting these objectives? Why/why not?                                  |

## Is there a lack of incentive under the current PVR regime?

114. We have heard from some PVR owners that the current PVR regime does not provide enough incentive for the breeding and development of new plant varieties. They claim that the limited exclusive rights provided for in the PVR Act restrict the revenue that they can earn from their new varieties. They argue that this makes it difficult for them to make a return on their investment in developing new varieties and that the PVR Act should provide PVR owners with enhanced rights, such as those provided for in UPOV 91.
115. The differences between UPOV 91 and the PVR Act are outlined in **Annex 1**.
116. Plant breeders argue that if the PVR Act was amended to provide for the enhanced rights in UPOV 91, this would result in:
  - a. opportunities for improved variety management;

- b. improved product quality and availability;
  - c. the development of more new varieties by local plant breeders; and
  - d. the release of more new varieties of in New Zealand by foreign plant breeders.
117. Plant breeders argue that access to a greater range of new varieties could assist in retaining or improving New Zealand’s competitive position in world agricultural markets and improve the contribution of plant breeding to New Zealand’s economic development. Consumers may benefit from a greater availability of improved varieties of fruit and vegetables. Home gardeners may also benefit from the availability of a wider range of ornamental plants.
118. However, we have heard from users of plant varieties that strengthening rights for PVR owners along the lines of UPOV 91 could result in increased costs for them. Higher costs may negatively affect the efficiency of the regime and its benefit to society as a whole. For example, a requirement to pay licence fees or royalties for a wider range of uses of varieties could lead to higher costs for growers. And consumers could face higher costs if growers pass those costs on (though some growers, e.g. arable farmers, note that they are generally ‘price-takers’ and are unable to pass costs on). Stronger protection may also discourage plant breeding activities, as these activities often depend on making use of existing protected varieties to develop new varieties.

## Questions

3	What are the costs and benefits of New Zealand’s PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.
4	Do you think there would be a material difference between implementing a <i>sui generis</i> regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

# Part 3 – The PVR regime

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119. In Part 3, we describe our understanding of the main potential issues raised by industry about the PVR regime. We do this by describing the current situation for each issue and, where relevant, outlining how they relate to UPOV 78 (which New Zealand has ratified) and UPOV 91 (which New Zealand will be required to become compliant with should the Government ratify CPTPP). We seek your views, and any evidence you have to support your views, to help us get a better understanding of these potential issues.
120. This part seeks your feedback on the following key issues identified by industry with the current PVR regime:
- farm-saved seed;
  - rights over harvested material;
  - rights over similar varieties (distinctness and essentially derived varieties);
  - compulsory licences; and
  - enforcement: Infringements and offences.
121. Other key issues raised by industry were the ‘discovery’ of plant varieties and the Waitangi Tribunal’s Wai 262 recommendations on PVRs. These issues are discussed in Part 4.

## 7 Farm-saved seed

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122. Farm-saved seed is seed from a farmer's<sup>31</sup> own harvested crop which is used, by the same farmer, to sow next season's crop. By using farm-saved seed, farmers do not have to rely exclusively on buying new seed to meet their sowing requirements each year. In this chapter, we look at the rules relating to farm-saved seed.

### The current situation

123. The PVR Act provides that people must obtain the PVR owner's permission before they can:

- a. sell, or offer for sale, propagating material of the protected variety;
- a. produce propagating material of the protected variety for sale as propagating material.<sup>32</sup>

124. Anybody who does these things without the PVR owner's permission, during the period for which the variety is protected, infringes the PVR owner's rights.

125. Seed of a protected variety that is saved by a farmer to grow future seasons' crops is not produced for sale, offered for sale or sold. This means that farmers do not have to get the permission of the PVR owner to save seed of a protected variety and use it for future seasons under the PVR Act. Farmers have been saving seed in various ways for centuries. This practice is known as 'farm-saved seed'.<sup>33</sup>

126. While there is no legislative requirement for farmers to pay a royalty to the PVR owner in relation to the purchase of seed of a protected variety (including in relation to farm-saved seed), there is nothing preventing royalties being agreed contractually. These royalties are generally either 'seed point' royalties (a one-off payment made at the time the original seed is sold) or 'end point' royalties (paid according to the amount of produce resulting from the seed). If a farmer uses farm-saved seed and pays an end point royalty to the PVR owner, the PVR owner will effectively be receiving a royalty in relation to that farm-saved seed.

127. Farmers cannot, however, sell or trade saved seed of a protected variety to other people to grow without permission from the PVR owner. If a variety is not a protected variety, farmers can freely use saved seed or sell it to other growers.

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<sup>31</sup> Farmer in this chapter includes anyone who grows a protected plant variety.

<sup>32</sup> Propagating material is not always sold as propagating material: e.g. grain sold for consumption. See Chapter 8 on rights over harvested material for more details.

<sup>33</sup> It is worth noting that the rule for using saved seed for commercial harvest is different for the rules concerning vegetative propagating material (e.g. cuttings) (see paragraph 39). The difference exists because it is quicker and easier to propagate varieties vegetatively than reproduce them by seed.

## International considerations

### UPOV 78

128. UPOV 78 is silent on the subject of farm-saved seed. It requires Parties to provide plant breeders with the exclusive right to produce for sale, offer for sale and to sell, propagating material of their protected varieties. As explained in paragraph 125 above, because saved seed is not produced for sale, offered for sale or sold, using it to sow the next season's crop is not in conflict with the rights afforded to PVR owners under UPOV 78.

### UPOV 91

129. UPOV 91 requires Parties to give PVR owners more extensive exclusive rights over their protected varieties than UPOV 78.

130. PVR owners must give their permission for the following activities (among others) in respect of propagating material of protected varieties:

- a. reproduction of the protected variety;
- b. conditioning for the purposes of reproduction; and
- c. stocking of propagating material for any of the above purposes.

131. These new rights may affect growers' ability to both save seed and use saved seed. However, UPOV 91 has a specific exception that allows UPOV 91 Parties to permit farmers to use harvested material as propagating material on their own holdings "within reasonable limits and subject to safeguarding of the legitimate interests of the breeder"<sup>34</sup>. Parties can therefore decide whether or not farmers can use saved seed and, if they are permitted to save seed, the conditions under which they can use it, subject to the condition stated above.

### How do other countries address farm-saved seed in their PVR regime?

132. Nearly all UPOV 91 Parties have used the flexibility UPOV 91 provides to limit PVR owners' rights over farm-saved seed. Some allow growers to use saved seed of protected varieties without paying a fee to the PVR owner. Others allow growers to use saved seed if they pay a royalty, which may be less than the fee paid for purchased seed. Detail on various countries' approaches to farm-saved seed can be found in **Annex 2**.

### Questions

5

Are there important features of the current situation regarding farm-saved seed that we have not mentioned?

6

Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.

<sup>34</sup> Article 15(2), UPOV 91

## Is there a problem with the current situation?

133. There is a range of views on the impact of the farm-saved seed. We outline below some of the main concerns we have heard about the current regime and the potential for change.

### Breeders

134. The concerns we have heard from plant breeders have tended to focus on payments relating to farm-saved seed rather than the use of farm-saved seed *per se*. Many plant breeders who own PVRs over varieties grown from seed, such as cereal crops or grass, consider that farmers should pay to use saved seed of protected varieties. They estimate that they are missing out on approximately \$2 million in annual royalties because farmers do not have to pay to use saved seed from their protected varieties.
135. Some plant breeders argue that without royalties for farm-saved seed, their revenue from protected varieties is not enough for them to make a return on their investment in breeding new varieties. This causes local breeders to develop fewer new varieties and foreign plant breeders to allow fewer of their new varieties to be imported and grown in New Zealand. As a result, plant breeders conclude that the PVR Act should be changed so that farmers must pay a royalty for the use of saved seed to improve the funding of plant breeding in New Zealand.
136. Breeders consider that a royalty collection system for farm-saved seed should be flexible enough to accommodate the different circumstances that can apply to different crop types. They support a system which would accommodate both seed point and end point royalties.

### Arable farmers

137. Most arable farmers we have spoken to are happy with the current approach and oppose any restrictions being placed on their ability to use farm-saved seed. Benefits of saving seed for farmers include lower costs, knowledge of seed quality, maintaining access to varieties that may no longer be on the market, and timely seed availability. Farmers generally oppose any change to the PVR Act that would prevent them from saving seed without the permission of PVR owners, due to the perceived higher costs and complexities this would entail.
138. Some farmers have said they are open to the possibility of a regime where farmers are free to save seed of a protected variety without permission but must pay a royalty for seed that is planted. These farmers have stressed to us the need to ensure that any royalty payment system was simple and fair for all parties. From their perspective, this would entail the development of a mechanism for royalties to be set at a reasonable level with grower consultation. They also consider that the royalties should be applied to the amount of seed saved (seed point royalties), not the produce, as this penalises farmer crop management.

## Questions

7	Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
8	Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
9	Do PVR owners use mechanisms outside the PVR regime to control farmers' use or saving of the seeds of their protected varieties? What are these?
10	Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?
11	What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

## 8 Rights over harvested material

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139. This chapter considers the rights that PVR owners have over the harvested material of their protected varieties.

### The current situation

140. The concept of ‘harvested material’ is not used in the PVR Act or UPOV 78. It appears in the UPOV 91, though it is not defined. For the purposes of this discussion, the term ‘harvested material’ includes entire plants and parts of plants, which have been grown and harvested, and:
- a. are not normally used for propagating the variety; or
  - b. could be used for propagating the variety, but is used for some other purpose (such as human or animal consumption).
141. Examples are fruit, cut flowers, cereal grains, and vegetables.
142. The PVR Act gives PVR owners only very limited rights over the harvested material of their protected varieties, which is referred to as ‘produce’ in the Act. These rights arise only when:
- a. produce of a variety protected in New Zealand is imported into New Zealand; and
  - b. the country from which the produce is imported is not a UPOV member, or, if it is a UPOV member, does not grant PVRs over the variety concerned.
143. ‘Produce’ is not defined but may be understood in the context of ‘fresh produce’, describing fruit and vegetables intended for consumption. This means that if an importer wants to import apples of a variety protected in New Zealand from a country that is either not a UPOV member, or cannot grant a PVR over the apple variety, the New Zealand PVR owner’s permission is required.
144. Sometimes harvested material can also be propagating material. For example, the harvested material of a wheat crop (wheat grain) is also seed that can be used to sow another crop.<sup>35</sup> In this situation, the PVR Act gives rights over the material only when it is used as propagating material (seed) to sow another crop and explicitly excludes rights over the material if it is used for other purposes.<sup>36</sup> Under the PVR Act, growers are free to sell harvested material to food processors, supermarkets and others without the permission of the PVR owner. A wheat grower can, for example, sell their wheat grain to a miller to make into flour. However, many PVR owners use contracts to give them control over the harvested material of their protected varieties – for example, as a condition of providing the propagating material to the grower.

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<sup>35</sup> Not all harvested material is routinely or commonly propagating material. For example, the harvested material from a carrot crop is the taproot of the carrot plant (this is the part we eat). But the taproot is not normally used to reproduce a carrot plant – carrots are routinely grown from seed.

<sup>36</sup> Section 18.

## International considerations

### UPOV 78

145. The PVR Act is consistent with UPOV 78, which requires Parties to give PVR owners rights over the propagating material of their protected varieties. If harvested material of a protected variety is also propagating material, UPOV 78 only requires PVR owners to be given rights over the harvested material if it is used to propagate the protected variety.
146. UPOV 78 allows each Party to decide whether to provide PVR owners with more extensive rights over the harvested material.<sup>37</sup>

### UPOV 91

147. Like UPOV 78, UPOV 91:
- a. requires Parties to give PVR owners rights over the propagating material of their protected varieties; and
  - b. only requires PVR owners to be given rights over harvested material that is also propagating material if the material is used to reproduce the protected variety.
148. If the harvested material of a protected variety is not also propagating material, UPOV 91 requires PVR owners to be given rights over the harvested material if:
- a. it was obtained through unauthorised use of the propagating material of a protected variety; and
  - b. the PVR owner did not have a “reasonable opportunity” to assert their rights in relation to the propagating material.
149. In these cases, UPOV 91 also gives Parties the flexibility to provide additional rights over the products made directly from harvested material.
150. Like UPOV 78, UPOV 91 also allows individual Parties to determine whether to provide PVR owners with more extensive rights. We are not aware of any UPOV Member State that gives plant breeders rights over the harvested material of their protected varieties that are additional to the basic rights required under UPOV 91.

## Questions

12 Are there important features of the current situation regarding rights over harvested material that we have not mentioned?

13 Do you agree with our definition of ‘harvested material’? Why/why not?

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<sup>37</sup> Article 5(4) of UPOV 78.

## Is there a problem with the current situation?

### What do PVR owners say?

151. Some PVR owners argue that because they do not have rights over harvested material under the PVR Act, they cannot adequately control the supply or the standards of the harvested material of their protected variety. They consider that controlling the supply and the standards to which the plants are grown and processed enables them to better protect the reputation of their protected variety.
152. Others suggest that being able to collect a royalty at different points will encourage investment in new varieties by enabling PVR owners to get a better return on their investment.

### Potential issues with providing rights over harvested material

153. It is unclear whether lack of control over harvested material in the PVR Act is inhibiting PVR owners' ability to commercially exploit their plant varieties. Many PVR owners use contracts to give them control over the harvested material of their protected varieties. Some PVR owners and some farmers we have spoken to prefer the flexibility of being able to use contracts, rather than having the PVR Act itself determine the issue.
154. Providing PVR owners with rights over harvested material of their protected varieties under certain conditions may effectively give them a monopoly over that material, and might also enable them to prevent growers from selling to the highest bidder. This may be seen as giving PVR owners more market power than is desirable, leading to reduced competition, and higher prices for consumers.
155. There may, however, be benefit in providing PVR owners with the ability to enforce their rights over harvested material under certain conditions, in line with UPOV 91. This would be where the material was grown without authorisation and the PVR owner has not had an opportunity to take enforcement action before the material was harvested. An example of this would be if the PVR owner did not know that the protected variety was being grown. Another example would be where produce of a protected variety was imported into New Zealand from a country where the variety could not be protected.
156. UPOV 91 also gives Parties the flexibility to provide additional rights over the *products* made directly from harvested material. An example is the use of roses of a protected variety that have been grown from unauthorised use of propagating material being used for potpourri.
157. Expanding these rights may be seen as an enforcement mechanism, to help deter people from using propagating material of protected varieties without PVR owners' permission. However, whether this is occurring in New Zealand – and whether the resulting harvested material is being used in products – is unclear. Extending rights over harvested material and products could also lead to an increase in costs for manufacturers of plant-based products. Manufacturers may not be aware that the plants they are sourcing have been propagated without the PVR owners' permission.

## Questions

- |    |                                                                                                                                                                                                                                               |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 14 | Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible. |
| 15 | Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.   |

# 9 Rights over similar varieties

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158. In this chapter, we look at how PVRs are granted over new varieties that are similar to existing varieties. This chapter looks more in depth at the rules that relate to:
- a. whether varieties which have close similarity to an existing variety should be eligible for protection (the distinctness requirement); and
  - b. who should benefit from protection when a new variety is bred using existing protected varieties, where the new variety is very similar to the parent variety (this is referred to as ‘essentially derived variety’, which is a concept introduced in UPOV 91).

## The distinctness requirement

159. The distinctness requirement is set out in section 10(4)(b) of the PVR Act:
- A variety is distinct if it is distinguishable by 1 or more characteristics from any other variety whose existence was a matter of common knowledge when the application [for a plant variety right] was made.*
160. In New Zealand, assessment of distinctness is based upon international practices agreed to by UPOV Members.

## Distinctness based on phenotypical differences

161. Distinctness is assessed on phenotypical (expressed) differences rather than genetic differences. Phenotypical differences are:
- a. morphological (physical) characteristics, such as flower colour, stem length or leaf shape; and
  - b. physiological characteristics, such as disease resistance or drought resistance.
162. To be eligible for a PVR, a variety needs to vary sufficiently from commonly known varieties in at least one of these phenotypical characteristics. Distinctness is intended to be assessed objectively rather than on a subjective assessment of the benefit (commercial or otherwise) the phenotypical difference may provide.
163. If a variety is considered by the PVRO to be distinct, and the other requirements for protection are met, the applicant will be granted a PVR.

## International obligations

164. Both UPOV 78 and UPOV 91 require varieties to be distinct in order to be granted a PVR. There is no practical difference between the two standards.

## Question

16

Are there other important features of the current situation regarding distinctness that we have not mentioned?

## Essentially derived varieties

165. The issues with the distinctness requirement (discussed below) are similar to the issues that led to the development of the concept of ‘essentially derived variety’ (EDV) in UPOV 91. One of the justifications for introducing the EDV concept was that it allowed the exclusive rights granted to PVR owners to be extended to varieties which differed from a protected variety in relatively few ways.
166. At present, New Zealand’s PVR regime does not include EDVs. Under New Zealand’s CPTPP obligations, we would have to extend protection for initial protected varieties to cover EDVs.
167. Articles 14(5)(b) and (c) of UPOV 91 contain a definition of EDV:

### Definition of essentially derived variety – UPOV 91 Article 14(5)(b) and (c)

A variety shall be deemed to be essentially derived from another variety (‘the initial variety’) when:

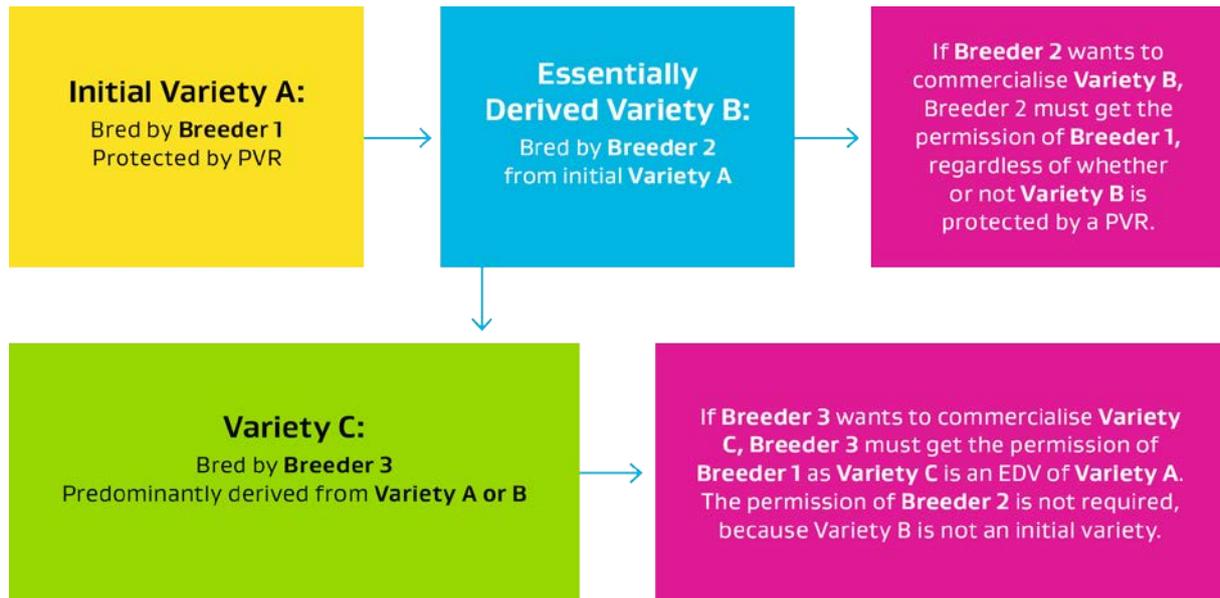
- i. it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
- ii. it is clearly distinguishable from the initial variety; and
- iii. 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 genotype or combination of genotypes of the initial variety.

Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

168. In order to be eligible to be granted a PVR, an EDV must be distinct from the initial variety it is derived from. There is no requirement for the initial variety to be protected by a PVR in order for a subsequent variety to be an EDV (though, of course, in this case the developer of the EDV has no restrictions on the exercise of their right over the EDV).

## Rights given by UPOV 91 over EDVs

169. UPOV 91 sets out the rights that Parties must provide to PVR owners over their protected varieties.<sup>38</sup> Those same rights are extended in UPOV 91 to varieties essentially derived from a protected variety.<sup>39</sup>
170. If a new variety is an EDV of a protected variety, anyone wanting to commercialise the EDV must obtain the permission of the PVR owner. This is the case whether or not the EDV is itself a protected variety. The diagram below shows how this works (based on the definition of EDV in UPOV 91):



171. Where Variety A is not a protected variety (either because no PVR was applied for or any PVR has lapsed or expired), breeders of any varieties derived from Variety A can commercialise these derived varieties without the need to obtain the permission of the PVR owner of Variety A.

## The current situation

172. The PVR Act currently provides that the exclusive right of PVR owners extend beyond the initial protected variety only in the following circumstances:
- varieties requiring repeated use of a protected variety (for example, a hybrid variety produced using two parental varieties for which one or both is protected); and
  - varieties not clearly distinguishable from the protected variety.
173. If a PVR is granted over a new plant variety under the PVR Act, the owner of the PVR has the exclusive right to grow and sell propagating material of the variety. This means that anyone who wishes to grow or sell propagating material of the variety must get a licence to do so from the PVR owner. This will usually involve paying a fee to the PVR owner.

<sup>38</sup> Articles 14(1) – (4), UPOV 91.

<sup>39</sup> Article 14(5)(a), UPOV 91.

174. The rights of PVR owners in their protected variety do not extend to any varieties derived from that protected variety.

## Question

- 17 Are there other important features of the concept of EDVs that we have not mentioned?

## Is there a problem with the current situation?

### Determining whether a variety is distinct

175. Some PVR owners suggest that there are problems with the current approach to determining distinctness. These include that the standard:
- only requires small differences to meet the distinctness standard;
  - does not assess the commercial importance of the change; and
  - allows for changes that do not provide any additional benefits over existing varieties.
176. This has led to suggestions that some plant breeders ‘piggy-back’ on the efforts of genuinely innovative breeders. The argument is that that they do this by taking protected varieties and making minor changes to them, usually in characteristics that do not affect the commercial value of the variety. Because the altered variety is distinct from the protected variety it was derived from, it does not infringe the protected variety’s PVR and the altered variety is able to be granted its own PVR. The example below illustrates how the current situation might be considered problematic.

### Example 1

Breeder A develops a new variety of pea, P1, which has greater disease resistance than the pea varieties it was derived from. P1 is protected by a PVR.

Breeder B takes variety P1 and derives a new variety P2 from it. P2 has the same disease resistance as P1 but has a different coloured flower. The colour of the flower does not contribute anything to the commercial value of P1.

Because it has different coloured flowers, it is clearly distinguishable from P1, so the sale or reproduction of P2 does not infringe the PVR on P1, and Breeder B does not have to get the permission of breeder B to commercially use P2.

177. Some plant breeders would argue that the derived variety P2 is no more than a copy of P1 because the differences between P1 and P2 in Example 1 are minor and have no commercial value. They consider that, in these circumstances, Breeder B is ‘free riding’ on Breeder A’s investment in developing greater disease resistance in P1.
178. Since P2 may compete with P1 in the market, the revenue earned by Breeder A may be significantly less than would otherwise be the case. This could reduce the incentive for plant breeders to develop new varieties that are a genuine advance over existing varieties, as

opposed to new varieties where the difference between the new variety and the initial variety is minor.

179. The extension of the exclusive rights of PVR owners to EDVs in UPOV 91 was intended to deal with the ‘free riding’ issue identified above. Extending rights in this way would mean that the breeder of the essentially derived variety would have to get the permission of the owner of the PVR in the initial variety. This would usually involve the payment of a fee to that PVR owner.

## Alternate approaches to assessing distinctness

180. Some in the plant breeding industry have suggested that other approaches to determining distinctness would be better than the current approach, including:
- a. assessing distinctness based on ‘important’ characteristics for the species concerned; and
  - b. measuring ‘genetic distance’ between protected and altered varieties in order to determine whether a variety is distinct.
181. However, whatever advantages there might be in using alternative approaches to determining distinctness, there are also likely to be (at least at present) significant disadvantages:
- a. No other country uses alternative approaches in their PVR regime. If New Zealand were to adopt them, we would significantly increase the differences between how distinctness is treated in New Zealand and how it is treated overseas. Varieties that might be considered distinct and eligible for a PVR in other countries might not be considered distinct or eligible for a PVR in New Zealand (and vice-versa).
  - b. For some varieties developed overseas, the PVRO relies on examination reports from other UPOV Members when deciding whether or not to grant a PVR in New Zealand. If the approach to distinctness in New Zealand differs from that used elsewhere, the PVRO might not be able to rely on foreign examination reports. This would mean a greater use of growing trials in New Zealand, resulting in significant additional cost and complexity for some foreign applicants.
182. It is not clear that an alternate approach to distinctness would provide benefits – to plant breeders or to society as a whole – that would offset these disadvantages.
183. A change in how we assess distinctness could also impact how we determine whether a variety is an EDV (discussed below).

## Questions

18

Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

19

Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

## Determining whether a variety is an EDV

184. The definition of EDV in UPOV 91 is not definitive, with key terms such as “predominantly derived” and “essential features” undefined. The line between varieties that are non-EDVs and those that are EDVs could, in theory, be drawn anywhere on a continuum, and there is policy flexibility as to where New Zealand chooses to draw that line (though similar arguments as to those presented for ‘distinctness’ above in para 182 would apply here too).
185. However, the definition of EDV in UPOV 91 and the way in which UPOV 91 Members have implemented an EDV regime provide a starting point for thinking about how any EDV protection might work in New Zealand. A number of UPOV 91 Members, including Australia, the EU, the United States and Canada, have implemented EDVs in domestic legislation. The definitions of EDVs used by these countries are very close to the wording of UPOV 91, but there is very little case law relating to EDVs. International experience seems to suggest that the proportion of varieties which may be considered an EDV may be relatively low as compared to the total number of protected varieties.

## Would EDVs help increase innovation?

186. Plant breeders also argue that because PVRs do not extend to EDVs of protected varieties, foreign breeders may be reluctant to release their new varieties in New Zealand. This is because it would be easy for local breeders to ‘copy’ these foreign developed varieties by making perceived minor changes that would retain the original variety’s commercial value, but would not infringe any PVR on that original variety.
187. Others argue that extending PVR protection to cover EDVs of protected varieties could have the effect of discouraging some investment in plant breeding. Consider the situation set out in Example 2 below.

### Example 2

Breeder A develops a new variety of pea P1, which has essential characteristics X and Y. P1 is protected by a PVR and is an initial variety. Under the legislation that extends PVR protection to cover EDVs, Breeder A has exclusive rights over EDVs of P1.

Breeder B wants to invest in developing a new variety P2 from P1. Breeder B does not need the permission of Breeder A to do this.

If P2 is considered an EDV of P1, Breeder B will need to get permission from, and probably pay a fee to, Breeder A to commercially use P2. This will reduce the return that breeder B will earn from commercialising P2. As a result, Breeder B may decide that it is not worth investing in developing variety P2.

If P2 is not considered an EDV of P1, Breeder B can freely exploit variety P2. Breeder B may then decide that the return from exploiting P2 makes it worthwhile to invest in developing P2.

188. Considering Example 2, the extension of PVRs from the initial protected variety to EDVs of the protected variety may discourage some plant breeders from developing new varieties from protected varieties. This example suggests that it is possible that the greater the number of derived varieties that are considered EDVs, the more likely it is that some breeders will be discouraged from using protected varieties in their breeding programs. If so, EDVs may impede innovation. We would be interested in more information on how the plant breeding industry uses protected varieties in the development of new varieties.

## Questions

21	Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.
22	Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
23	Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
24	How might technological change affect the problems/benefits of not having an EDV regime that you have identified?

# 10 Compulsory licences

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189. Compulsory licences are a mechanism to ensure protected varieties are made available to the public at reasonable prices and on reasonable terms.

## The current situation

190. Section 21 of the PVR Act states that any person may apply to the Commissioner for a compulsory licence for a protected variety. If the application is accepted, the Commissioner grants a licence to reproduce and sell propagating material of the protected variety to the licensee.

191. A compulsory licence is granted without the permission of the PVR owner. As part of the licence conditions, the Commissioner can require the PVR owner to sell the propagating material of the protected variety to the licensee.<sup>40</sup> The licensee must pay a royalty to the PVR owner, which is set by the Commissioner.

192. A compulsory licence can be granted over a protected variety if:

- a. the application for the licence was made at least three years after the PVR was granted; and
- b. the PVR owner has not made reasonable quantities of the protected variety's propagating material available to the public at a reasonable price.

193. In deciding whether condition (b) above is met, the Commissioner must ignore propagating material that has been made available on a limited basis or with restrictive conditions (e.g. only allowed to be sold to specific people).

## International considerations

194. Compulsory licensing is permitted under Article 9 of UPOV 78 and Article 17 of UPOV 91, which provides for the restriction of PVRs for 'reasons of public interest'. Neither UPOV 78 nor UPOV 91 defines 'public interest'. Members must take all measures necessary to ensure that the breeder receives equitable remuneration.

## Compulsory licences are rare in New Zealand

195. Since the introduction of plant variety rights in New Zealand in 1973, only two compulsory licences have been granted. They were granted in 1985 for two varieties of feijoa, 'Gemini' and 'Apollo'.

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<sup>40</sup> Without this power, the right to use the protected variety would be of no practical use. The licensee needs physical possession of the propagating material as well as a legal right to use it. The PVR Act therefore allows a compulsory licence to include a requirement that the PVR owner give propagating material to the licensee.

196. Five applications have been made for compulsory licences in recent years. All of these applications related to PVRs over hop varieties and were made by the same company (one in 2015 and the other four in 2016). The applications were withdrawn in August 2017 following a confidential settlement between the applicant and the PVR owner. No compulsory licences were issued and the Commissioner was not required to make a decision.

## Why have compulsory licences?

197. Compulsory licence provisions are intended to provide a remedy for, and deterrent against, abuse of intellectual property rights. In addition to the PVR Act, compulsory licence provisions also appear in the *Patents Act* and the *Designs Act 1953*. If an intellectual property rights holder refuses to make their protected innovations available on reasonable terms and at reasonable prices, it is possible for anyone to apply for a compulsory licence.
198. The grant of intellectual property rights like PVRs is a social bargain. In return for being given the exclusive right to exploit the innovations protected by their intellectual property rights, rights owners are expected to share some of the benefits of their innovations with society as a whole. This is typically done by making these innovations reasonably available to the public.
199. Rights owners unreasonably refusing to make their innovations available can inhibit innovation. Most innovation builds on previous innovation. If previous innovations are difficult to access because the price is too high, or because rights owners restrict access, follow-on innovation could be discouraged to the detriment of society as a whole.
200. This can be a particular issue in the case of PVRs. If a plant breeder wants to use a protected variety in their breeding programs, they need propagating material of the variety concerned.<sup>41</sup> If they are unable to gain access to the propagating material because the PVR owner will not make it available to them, their ability to develop improved varieties from protected varieties can be severely curtailed. Additionally, where the owner of a PVR unreasonably limits the licences it provides to growers and nurseries, it may result in higher prices for consumers or consumers may miss out on products developed from the protected variety.
201. Compulsory licences may also help to balance the differing bargaining power of PVR owners and growers, particularly in situations where:
- a. a PVR owner is a much larger entity than a potential user or grower of a protected variety; or
  - b. a PVR owner is limiting access to propagating material of their protected variety in order to support a small number of growers or downstream enterprises.
202. Compulsory licences can limit the effect of monopolistic behaviour by PVR owners while still providing PVR owners with a reasonable return for their product. Additionally, the threat of a compulsory licence may aid a user or grower in negotiating with the PVR owner for access to a protected variety or influence a PVR owner's decision to provide reasonable access to their protected variety.

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<sup>41</sup> Other forms of intellectual property, like copyright works and designs, are usually easier to access and copy.

203. Compulsory licences may also support access to a protected variety where there is a public interest in the variety. A protected variety may have a particular medicinal property or health benefit. If the owner chooses to limit the access to the protected variety, the public may be denied the benefits. The compulsory licence regime enables the public to access the protected variety and receive the benefits.

## Question

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Are there important features of the current situation regarding compulsory licences that we have not mentioned?

## Is there a problem with the current situation?

204. PVR owners suggest that granting compulsory licences has the potential to reduce their return from their protected varieties. They have told us that compulsory licence provisions introduce uncertainty as to the value of a PVR.
205. Problems suggested by different stakeholders include:
- the PVR Act does not define what is meant by ‘reasonable quantities’, ‘reasonable quality’ or ‘reasonable price’;
  - there is no explicit requirement for the Commissioner to take account of the ‘public interest’;
  - the PVR Act does not state that the Commissioner can take into account mitigating factors. For example, the PVR owner may not have been able to produce reasonable quantities of propagating material;
  - there is nothing in the legislation to prevent compulsory licensees from exporting propagating material obtained under a compulsory licence;
  - the applicant for a licence does not need to show that they are capable of utilising the variety concerned;
  - there is a lack of legal precedent because there have been few compulsory licence applications and decisions issued by the Commissioner; and
  - there is a low threshold for compulsory licence applications – any person can apply if they pay the application fee of \$600 + GST.
206. Some of the problems identified above may reflect a lack of clarity in the PVR Act and Regulations about the procedure the Commissioner must follow when a compulsory licence application is received. This may have led to a perception that, if an application for a compulsory licence is filed, it will probably be granted, with the only cost to the applicant being the application fee.
207. In practice, however, before the Commissioner can make a decision on whether to issue a licence, the applicant and the PVR owner will need to prepare and submit evidence supporting their cases. This may involve significant costs to both the applicant and PVR owner. The Commissioner would only grant a compulsory licence if satisfied on the basis of the evidence submitted that the conditions for grant of a compulsory licence were met.

## Questions

- |    |                                                                                                                                                                                                                     |
|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 26 | Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible. |
| 27 | Do you think there are benefits with the current compulsory licence regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible. |

# 11 Enforcement: infringements and offences

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208. In this chapter, we look at the enforcement of PVRs – the action that PVR owners can take against people who infringe their PVRs and the remedies available to them. We also look at offences under the PVR Act.

## The current situation

209. Through the grant of PVRs, PVR owners obtain certain exclusive rights over their variety. The purpose of the exclusive rights is to provide the PVR owner an opportunity to make a return on their investment in developing the protected variety, and to provide an ability to control or manage that variety.
210. If another person uses the protected variety in a way that is covered by the exclusive rights without the PVR owner's permission, this action infringes the PVR. The infringing action could reduce the return that the PVR owner could gain from their new variety. As a result, plant breeders might not be willing to invest in developing new varieties. In addition, use of a variety without permission could reduce the ability of the PVR owner to enforce quality standards and maintain control over the variety. Providing a means of enforcing PVRs forms part of the incentive in the PVR regime for breeders to develop and introduce their varieties in New Zealand.
211. PVRs are private property rights. Because PVR owners receive the most benefits from PVRs, they are responsible for enforcing their rights (including any associated costs). This approach is consistent with the other intellectual property regimes such as the copyright, patents, trade marks, industrial designs and geographical indications regimes.

## What is infringement under the PVR Act?

212. The PVR Act provides that people must obtain the PVR owner's permission before they can:
- a. sell, or offer for sale, propagating material of the protected variety;
  - b. produce propagating material of the protected variety for sale as propagating material;
  - c. import propagating material of a protected variety into New Zealand for use in reproducing the variety;
  - d. import produce of a protected variety into New Zealand from a UPOV member whose laws do not permit protection of that variety; or
  - e. import the produce of a protected variety into New Zealand from a country that is not a party to UPOV.

213. If a person engages in any of the above activities without the permission of the PVR owner, they are infringing the PVR owner's rights.
214. In other intellectual property regimes, such as patents and trade marks, the scope and nature of what actions constitute infringement is often refined and clarified through case law. However, we are aware of only one PVR infringement case that has gone to court. This is *Cropmark Seeds Ltd v Winchester International Ltd*<sup>42</sup> and the subsequent appeal.<sup>43</sup>
215. In this case, Winchester arranged the sale of the seed of a protected variety without the PVR owner's permission but had not actually grown the seed for sale, nor did they sell the seed directly. The courts determined that this conduct had the effect of "diminishing the grantee's enjoyment of its exclusive right", and infringed the PVR. The decision clarified that "arranging for sale" is also part of the scope of PVR owners' rights.

## How do PVR owners enforce their rights?

### Private negotiations

216. Infringement is predominantly addressed through private negotiations. In cases where the PVR owner and the alleged infringer have an existing relationship, the PVR owner may make contact directly. The parties may discuss what action should be taken, if any, to address the infringement. Commonly, the two parties will have an existing contractual relationship. In these cases the discussion regarding PVR infringement will form part of the discussion alongside the contractual breach.
217. If the situation escalates, or the two parties do not have a relationship, the PVR owners may issue formal 'cease and desist' letters. However, these letters are not legally binding.

### Legal proceedings

218. PVR owners are able to take action for infringing behaviour through the courts. The PVR Act does not specify which court must hear infringement proceedings. The *Patents Act*, the *Trade Marks Act 2002*, and the *Designs Act* require infringement proceedings to be initiated in the High Court.

### Alternative dispute resolution services

219. Alternative dispute resolution potentially provides a simpler and cheaper way of enforcing PVRs than going through the courts. As the PVR Act is silent on alternative dispute resolution, this will only be an option if all parties to a dispute agree to it.
220. Alternative dispute resolution can include:
- a. negotiations between the parties;
  - b. mediation, where a mediator assists the parties to resolve their dispute by reaching an agreed settlement between them, but cannot impose a solution; and

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<sup>42</sup> HC Timaru CIV-2003-476-8.

<sup>43</sup> *Winchester v Cropmark Seeds Limited* CA 226/04, 5 December 2005.

- c. arbitration, where the dispute is heard by an arbitrator who assumes the role of a judge and whose decision is binding on the parties.
221. We do not know the extent to which alternative dispute resolution is used to resolve disputes involving PVR infringement, beyond direct negotiations. We are interested in information about your experiences with alternative dispute resolution and whether there are any features of the current PVR regime that might prevent PVR owners using it.

## Remedies for infringement

222. If a PVR owner proves in court that their PVR has been infringed, the court may award the PVR owner damages.<sup>44</sup> Damages are awarded to compensate the owner for the loss the infringement caused. The court may also award exemplary damages. Exemplary damages are awarded to penalise the infringer for their actions rather than to compensate the PVR owner. They are normally only awarded where the infringement has been flagrant.
223. In deciding on the level of damages, a court is required to take account of:
- a. any loss suffered or likely to be suffered by the PVR owner as a result of the infringement;
  - b. any profits or other benefits derived by any other person from the infringement; and
  - c. the flagrancy of the infringement.

## Provisional protection

224. If an applicant who has provisional protection for their variety<sup>45</sup> takes action against an alleged infringer before the PVR is granted but the application is then rejected,<sup>46</sup> the right to take action is deemed never to have been conferred. The PVR Act does not specify what remedies are available to an alleged infringer who has had proceedings taken against them and the application was not later granted.
225. This can be contrasted with the *Patents Act* and the *Trade Marks Act*. Under those Acts, owners can take action against infringement that occurs after application but before the application has been decided. However, they can only start proceedings once the application has been decided.

## Offences and Penalties

226. Infringement of a PVR is not a criminal offence. However, section 37 of the PVR Act does make it an offence to:
- a. supply, with intent to deceive, false or misleading information in connection with an application for a PVR;
  - b. falsely represent that a person is a PVR owner or that a person has applied for a PVR;

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<sup>44</sup> Section 17(4).

<sup>45</sup> Provisional protection is described in Chapter 3.

<sup>46</sup> This can happen if the application is refused, withdrawn or allowed to lapse.

- c. falsely represent that a variety is a protected variety or that a PVR application has been made in respect of that variety;
  - d. falsely represent that a variety is some other variety which is protected by a PVR or that is the subject of a PVR application;
  - e. sell a variety that is a protected variety, or that was a protected variety (because the PVR has been surrendered or expired), without using the denomination (variety name) approved with it when the PVR was granted; and
  - f. represent yourself as the PVRO or to suggest that you or your business is officially connected to the PVRO.
227. Enforcing these offences requires an enforcement authority, such as the PVRO or the Police, to take action. The PVR Act does not expressly provide a way for civil action to be taken against offenders by those who are adversely affected by these activities. However, activities (b) – (d) and (f) listed above may well breach sections 9 – 11 of the *Fair Trading Act 1986*. It is possible for civil actions to be taken for breaches of the *Fair Trading Act*.
228. It is also an offence for a person to apply for a PVR or acquire an interest in a PVR or a PVR application while employed by the PVRO or for 12 months afterward they have left the PVRO.
229. The maximum penalty for any of the offences in the PVR Act is a fine of \$1,000.

## International considerations

230. UPOV 78 and UPOV 91 only require parties to provide “appropriate legal remedies” for the enforcement of PVRs. They do not go into any further detail about what those remedies should be.

## Questions

28	Are there important features of the current situation regarding infringements and offences that we have not mentioned?
29	Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?
30	How prevalent are PVR infringements and offences?

## Are there any problems with the current situation?

231. We have heard from a range of PVR owners, who have expressed dissatisfaction with the current enforcement provisions in the PVR Act. Issues that one or more PVR owners identified include:
- a. the PVR Act lacks clarity on:
    - i. what constitutes infringement;

- ii. what action PVR owners can take against infringers; and
  - iii. the remedies or penalties that can be awarded against infringers;
- b. it is not cost effective to enforce PVRs;
  - c. there are difficulties in gathering evidence;
  - d. there is no provision that explicitly allows a counterclaim for invalidity as a defence to an accusation of infringement; and
  - e. it is unclear what happens if action is taken against an infringer when a variety is under provisional protection, but the right is not subsequently granted.
232. We deal with each of these in turn. We have also identified some issues with the offence provisions.

### It is not clear what constitutes infringement

233. In some areas, the PVR Act specifies the behaviour that infringes a PVR owner's rights. In others it gives little guidance to the courts, PVR owners or third parties.
234. In the *Winchester* case, the Court of Appeal determined that infringing behaviour includes behaviour which has the effect of 'diminishing the grantee's enjoyment of its exclusive right'. Due to the lack of PVR related case law in New Zealand, the scope of this determination has not been tested. It remains up to the courts to decide what conduct may have this diminishing effect.
235. We have heard concerns about the lack of a precise definition of infringement in the PVR Act. If it is unclear what activities might constitute infringement, third parties might develop an overly cautious approach to their conduct. An overly cautious approach may reduce innovation within the plant variety industries.

### The PVR Act is not clear on the process PVR owners can take against infringers

236. The PVR Act does not specify how a PVR owner can take action against an alleged infringer. Although the relevant part of the PVR Act refers to a 'court' (section 17(4)), it is unclear which court. However, in New Zealand intellectual property disputes are generally within the jurisdiction of the High Court.

### The PVR Act is not clear on the remedies or penalties that might be awarded against infringers

237. The PVR Act sets out the factors a court must take into account when awarding damages or any other relief that a court may order but does not go into any further detail. This may cause uncertainty over just what remedies a court can award. This uncertainty may affect whether PVR owners take an infringement allegation to court.

## Cost of enforcing PVRs

238. As with all intellectual property rights, enforcement of a PVR through the High Court can be costly. Gathering evidence and mounting a High Court case can cost tens of thousands of dollars, sometimes considerably more. There is a concern that the costs of mounting a High Court case, even if successful, may sometimes be higher than any damages the PVR owner might be awarded. Some owners have also raised concerns that the costs of mounting a High Court case may sometimes be higher than the overall profits a PVR owner can earn from the protected variety.

## Difficulties in gathering evidence

239. One issue that has been raised by some PVR owners is the difficulty in gathering evidence to support infringement proceedings.

240. Given the nature of plant material, evidence of infringement can easily be destroyed or not be available if it is the wrong season. Evidence is also likely to be held on the property of the alleged infringer, which the PVR owner is unlikely to have access to.

241. PVR owners can obtain a 'Search Order'<sup>47</sup> through the High Court to enable them to obtain the evidence. However, this can be costly and the threshold for obtaining the order is high. PVR owners must make a strong *prima facie* case of infringement and show that the potential or actual damage to the PVR owner is very serious. There must also be clear evidence that the alleged infringer possesses the relevant evidence, and that they may destroy it before infringement proceedings can be initiated.

## Counterclaim for invalidity

242. We have heard concerns that there is nothing in the PVR Act that allows alleged infringers to defend an allegation of infringement of a PVR by arguing that the PVR is invalid and should not have been granted.

243. In practice, it seems likely that a court dealing with an allegation of infringement may well accept a defence that the PVR was invalid. There may, however, be value in explicitly stating that invalidity of the PVR is a defence to an allegation of infringement. The Patents Act explicitly provides that invalidity of the patent concerned is a defence to an allegation of infringement.

244. Furthermore, while the PVR Act provides a mechanism to cancel a grant, it does not provide a mechanism to declare the grant null or invalid more generally. The cancellation of a grant stops the grant from being protected from the date of the cancellation. This is in contrast to nullity and invalidity, which treats the variety as though it were never protected at all.

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<sup>47</sup> Also known as an Anton Piller Order.

## Provisional Protection

245. As discussed in paragraph 43, the PVR Act allows PVR owners to take action, to prevent people exploiting a variety over which a PVR application has been made but not yet been granted.
246. Provisional protection may cause issues when the infringement case is successful, but subsequently the PVR is not provided with a grant of protection. This situation creates confusion as it is not clear what status the infringement case has if, subsequently, no rights have been granted over a variety.
247. In these situations, the ‘infringer’ may have suffered financial loss, for example if they were prevented from selling the variety described in the PVR application. However, there is no explicit protection to compensate them for their loss. The court considering the PVR application might require some sort of security or bond to use in the case that the PVR application is not granted. However, the PVR Act does not specifically require this and it has not been tested before the courts.

## Question

31

Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

## Offences and Penalties

### Providing false or misleading information to the Plant Variety Rights Office

248. It is an offence to provide false or misleading information to the PVRO in connection with an application for a PVR. This offence is subject to a \$1,000 penalty. Additionally, if the false or misleading information impacted the Commissioner’s decision to provide the variety with a grant, it may be cancelled.<sup>48</sup>
249. The offence provision covers scenarios where false/misleading information does not impact the decision to grant rights over the PVR. However, it is unclear whether the offence provision is a deterrent to false/misleading behaviour.
250. Instead, the threat of cancellation may well be a more powerful deterrent than a fine, as loss of a PVR may have a higher cost to the PVR owner than a possible fine. Under the Patents Act, the provision of false or misleading information in connection with a patent application is a ground for revoking the patent but is not an offence.

### Offences involving false representation

251. It is an offence under the PVR Act for someone to falsely represent:
- a. that they have applied for, or have been granted, a PVR over a plant variety;

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<sup>48</sup> Section 16(2)(a).

- b. that material of a variety that they are selling is material of a protected variety (including provisionally protected) or is material of some other protected variety;
  - c. that a person's place of business is, or is officially connected with, the PVRO.
252. Enforcing these offences requires the PVRO or other enforcement authorities to take action. However, it may be possible for people who are adversely affected by these activities to take civil action under the *Fair Trading Act*.
253. The *Trade Marks Act* contains similar offence provisions with a penalty of up to 2 years imprisonment. The *Patents Act 1953* contained similar provisions, but these were not carried over into the *Patents Act 2013*. Instead it was determined that offences relating to false representation were best covered by the *Fair Trading Act*.

#### Officers of the PVRO not to apply for, or acquire an interest in, a PVR

254. Officers of the PVRO are prohibited from applying for PVRs or acquiring an interest in a PVR. This rule seeks to ensure that no conflict between their commercial interests and their official duties arises. However, it is unusual for legislation to specifically deal with this issue.
255. Neither the *Trade Marks Act* nor the *Patents Act* makes it an offence for IPONZ officers to file, or acquire an interest in patent or trademark applications. It may be more appropriate to deal with the conduct of PVRO officers through the public service code of conduct and through the provisions of section 105A of the *Crimes Act 1961*. The *Crimes Act* provides that corrupt use of official information is an offence carrying a penalty of up to 7 years imprisonment.

#### Penalties for committing an offence

256. We have heard concerns with the offence provisions that the penalty (maximum of \$1,000 fine) is too low. It is argued that some offenders just see the fine as a 'cost of doing business' and therefore not a deterrent.
257. However, as offences under the PVR Act rarely result in court proceedings, it is not clear as to the extent to which people are committing offences under the PVR Act. Furthermore, it is not clear what, if any, impact the penalty has on peoples' behaviour.

#### Question

32

Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

# Part 4 - Plant variety rights and the Treaty of Waitangi

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258. The Crown’s obligations to Māori under the Treaty of Waitangi in the PVR regime are a key component of this review. The Waitangi Tribunal’s Wai 262 report provides a useful starting point for considering the PVR regime from a Treaty perspective. In Chapter 2 of the Wai 262 report, the Tribunal examined law and policy relating to the genetic and **biological resources** of taonga species and mātauranga Māori. This involved a close look at New Zealand’s **bioprospecting**, genetic modification and intellectual property regimes – including the PVR Act.
259. In this issues paper, we discuss the Wai 262 recommendations relating to PVRs. Before going into the detail of the recommendations, we provide context on the key findings and concepts underlying them. Part 4 is structured as follows:
- a. First, we outline the Wai 262 claim, and the Tribunal’s high-level findings on taonga species – including mātauranga Māori relating to taonga species (Chapter 12).
  - b. We then take a closer look at the concepts of kaitiakitanga and the kaitiaki relationship, the keystone of the Tribunal’s recommendations in the Wai 262 report (Chapter 13).
  - c. Finally, we consider the Tribunal’s recommendations on the PVR regime, and feedback we received in our pre-consultation engagement on protecting the kaitiaki relationship (Chapter 14).
260. We seek your views, and any evidence you have to support your views, to help us get a better understanding of how te ao Māori interacts with the plant variety rights regime, and the issues the Wai 262 recommendations are intended to address.
261. While we have used the Wai 262 report to structure our discussion of these issues, we are also interested in hearing about other Treaty of Waitangi considerations that we should be thinking about in this review. In this Part, we also discuss feedback received in our pre-consultation technical workshops with on participation and transparency in the PVR regime.
262. Definitions of terms used by the Tribunal, and that we have applied here, are in the glossary.

# 12 The Wai 262 claim and findings

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## The claim in brief

263. In the Wai 262 report, the Tribunal summed up the claim as being about “who owns or controls three things”:<sup>49</sup>
- a. **mātauranga Māori**;
  - b. the “tangible products of mātauranga Māori” – traditional artistic and cultural expressions that the Tribunal referred to as “**taonga works**”; and
  - c. the things that are “important contributors to mātauranga Māori”. This includes the unique characteristics of indigenous flora and fauna, which the Tribunal referred to as “**taonga species**”, and New Zealand’s natural environment more generally.
264. The Wai 262 claimants argued that the Crown had denied Māori the full exercise of their **tino rangatiratanga** over many aspects of their lives – particularly in relation to natural resources, including indigenous flora and fauna. The claimants also sought recognition of their tino rangatiratanga over “o rātou taonga katoa”, or all their treasured things, as guaranteed in the Treaty of Waitangi. The claimants saw this as:<sup>50</sup>
- including but not limited to matauranga, whakairo, waahi tapu, biodiversity, genetics, Maori symbols and designs and their use and development and associated indigenous, cultural and customary rights in relation to such taonga.*
265. In the claimants’ view, **tino rangatiratanga** in this context entitled them to:<sup>51</sup>
- a. *Decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna me o ratou taonga katoa;*
  - b. *The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o ratou taonga katoa;*
  - c. *The right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;*
  - d. *The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;*
  - e. *The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna;*
  - f. *A right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna;*

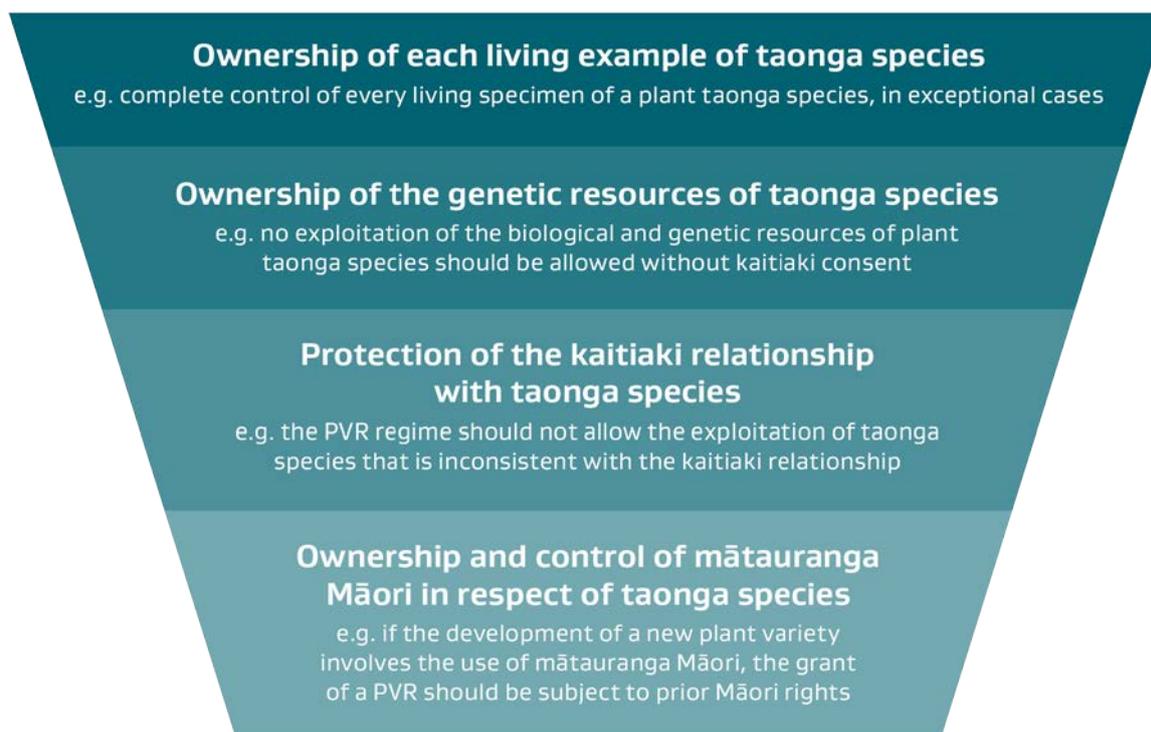
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<sup>49</sup> Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi (Wai 262, 2011) at 17.

<sup>50</sup> Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua (Wai 262, 2011) vol 1 at 4 (macrons omitted consistent with original).

<sup>51</sup> *Ibid*, at 4 – 5 (macrons omitted consistent with original).

- g. *The right to participate in, benefit from and make decisions about the application, development, uses and sale of me o ratou taonga katoa;*
  - h. *The right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in me o ratou taonga katoa.*
266. The PVR regime governs matters relating to cultivated varieties of plant species, including taonga plant species and, potentially, mātauranga Māori. On these two matters, the Tribunal considered that what claimants were seeking from the Crown could be considered at four levels.<sup>52</sup>



The top level represents the highest level of protection and recognition sought by claimants.

## The high-level findings on taonga species

### The principle of tino rangatiratanga

267. The Tribunal’s key finding on taonga species was that the Treaty of Waitangi does not guarantee ownership in taonga species (or mātauranga Māori relating to taonga species) but it does guarantee tino rangatiratanga.<sup>53</sup>
268. The Tribunal took the view that the flexible concept of tino rangatiratanga is to be preferred over the rigid concept of exclusive and undisturbed possession.<sup>54</sup> The Tribunal gave further background on the meaning of ‘rangatiratanga’ in its chapter on taonga works and intellectual property:<sup>55</sup>

<sup>52</sup> *Ibid*, at 157.

<sup>53</sup> *Ibid*, at 193.

<sup>54</sup> *Ibid*, at 79.

<sup>55</sup> *Ibid*, at 80.

*Its root word is rangatira, meaning tribal leader – literally, one who weaves together (ranga) a group of people (tira). So rangatiratanga carries expectations about right behaviour, appropriate priorities and ethical decision-making that are deeply embedded in Māori culture.*

*For example, rangatira would be expected to value kinship, respect the tapu and mauri of the natural elements surrounding the community, and above all be the embodiment of kaitiakitanga. Rangatira who behave in this way are said to have great mana.*

## Tino rangatiratanga and taonga species

269. The Tribunal considered that the principle of tino rangatiratanga requires recognition and protection of the kaitiaki relationship with taonga species and mātauranga Māori.

### Taonga species

270. The Tribunal took the view that the principle of tino rangatiratanga justifies a level of control by kaitiaki over the use of genetic and biological resources of taonga species. Such control must be sufficient for kaitiaki to protect their relationship with those species to a reasonable degree.<sup>56</sup> The level of control will depend on the nature of the kaitiaki relationship.

*What is reasonable control will depend very much on context. Kaitiaki relationships with their taonga species vary according to the priorities and perspectives of kaitiaki, the nature of the taonga species, and the history of the relationship.<sup>57</sup>*

*This plurality has important implications for the way we must think about protecting kaitiaki relationships with taonga species. It means the needs of the relationship can only be defined case by case. Each species will be different, and even within each species, contexts and kaitiaki may well drive different priorities.... Whatever the intended use of a taonga species, the level of protection must be sufficient to keep the relationship safe and healthy.<sup>58</sup>*

### Mātauranga Māori associated with taonga species

271. The Tribunal made the following findings about mātauranga Māori associated with taonga species:<sup>59</sup>

- a. There is a “just claim” against those who would seek to exploit mātauranga Māori for commercial gain without proper acknowledgement of the prior rights of kaitiaki. The relevant mātauranga Māori will always be a creation of the kaitiaki community and it would be unfair to deprive that community of a say in its commercial exploitation.
- b. Kaitiaki have three rights over their mātauranga Māori:
  - i. the right to acknowledgment;
  - ii. the right to have a reasonable degree of control over the use of mātauranga Māori; and

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<sup>56</sup> *Ibid*, at 193.

<sup>57</sup> *Ibid*, at 87.

<sup>58</sup> *Ibid*, at 194.

<sup>59</sup> *Ibid*, at 195.

- iii. proper recognition of the interests of kaitiaki for any commercial use of mātauranga Māori.

272. The Tribunal considered that what would constitute “proper recognition” would depend on the circumstances:<sup>60</sup>

*Kaitiaki relationships with their mātauranga will all be different, just as they often are with taonga species. There will be cases where a consent requirement is appropriate. In others, disclosure or consultation will be sufficient. The answer will depend on the balancing process in which the importance of the relationship will be weighed against the interests of researchers or the holders of IP rights on a case-by-case basis.*

273. In essence, the Tribunal’s findings aligned with second level of protection shown in the diagram on page 55: protection of the kaitiaki relationship with taonga species. The Tribunal made four recommendations in relation to the PVR regime, to ensure the kaitiaki relationship with taonga species and mātauranga Māori receives a reasonable degree of protection. These are discussed in detail in Chapter 14.

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<sup>60</sup> *Ibid*, at 195.

# 13 The kaitiaki relationship

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274. The unique kaitiaki relationship held by Māori with taonga species and associated mātauranga Māori is a foundational concept in te ao Māori, the Māori world, and the keystone for the Tribunal’s proposed changes to the PVR Act (and the broader intellectual property system).
275. In this chapter, we take a closer look at how the Tribunal described that relationship, before providing a few examples of how kaitiaki relationships have been incorporated into and recognised in New Zealand’s legal system thus far.

## Kaitiakitanga and the kaitiaki relationship as explained in the Wai 262 report

### The ethic of kaitiakitanga

276. Before looking at how the kaitiaki relationship works in practice, it is useful to consider the ethic of kaitiakitanga that underlies it. The concept of kaitiakitanga relates to several other key concepts in te ao Māori – in particular, whanaungatanga, mauri and whakapapa.
277. The Tribunal explained the interconnection in this way:<sup>61</sup>
- ...the defining principle is **whanaungatanga**, or kinship. In te ao Māori, all of the myriad elements of creation – the living and the dead, the animate and inanimate – are seen as alive and inter-related. All are infused with **mauri** (that is, a living essence or spirit) and all are related through **whakapapa**.*
- The people of a place are related to its mountains, rivers and species of plant and animal, and regard them in personal terms. Every species, every place, every type of rock and stone, every person (living or dead), every god, and every other element of creation is united through this web of common descent, which has its origins in the primordial parents, Ranginui (the sky) and Papa-tu-ā-nuku (the earth).*
- This system of thought provides intricate descriptions of the many parts of the environment and how they relate to each other. It asserts hierarchies of right and obligation among them...*
278. The rights and obligations of whanaungatanga are encompassed in the ethic of kaitiakitanga:<sup>62</sup>
- Kaitiakitanga is the obligation, arising from the kin relationship, to nurture or care for a person or thing. It has a spiritual aspect, encompassing not only an obligation to care for and nurture not only physical well-being but also mauri.*

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<sup>61</sup> *Ibid*, at 17.

<sup>62</sup> *Ibid*.

*It is a way of thinking and acting that seeks to express and enhance whanaungatanga with taonga in the natural environment.*

279. Kaitiakitanga is also related to the concepts of **mana** and, as outlined above, rangatiratanga.<sup>63</sup>

*... those who have mana (or, to use Treaty terminology, rangatiratanga) must exercise it in accordance with the values of kaitiakitanga – to act unselfishly, with right mind and heart, and with proper procedure. Mana and kaitiakitanga go together as right and responsibility, and that kaitiakitanga responsibility can be understood not only as a cultural principle but as a system of law.*

## The kaitiaki relationship in practice

280. The Waitangi Tribunal discussed how the kaitiaki relationship between Māori and taonga species and/or associated mātauranga Māori functions in practice.<sup>64</sup>

*... the relationship between kaitiaki and taonga species is often multi-layered. Species might be emblematic of community identity, used for their spiritual or medicinal power or for technology such as building, carving, weaving and so forth.*

*... different taonga species have different roles in different contexts (whether of time, place, or community), and in almost all cases more than one role. They will also be perceived differently by different iwi and hapū.*

281. The variation in kaitiaki relationships among different communities means that the needs of each relationship must be assessed on a case-by-case basis. This makes it impractical to create blanket rules to manage impacts on these relationships.<sup>65</sup>

*Each species will be different and, even within each species, contexts and kaitiaki may well drive different priorities. For example, many communities treat particular taonga species as their own kaitiaki, or spiritual guardians. But a species that is kaitiaki to one community will not be kaitiaki to all.*

*In addition, different proposed uses may have different effects. For instance, kaitiaki may say it is unacceptable to create a GMO based on a taonga species, but regard the commercial-scale production of **rongoā** plants as beneficial for the survival of both the species and the rongoā knowledge.*

## Recognition of kaitiakitanga in legislation

282. There are several examples of recognition of kaitiaki relationships with taonga plant species in general legislation, and legislation arising out of Treaty settlement processes. They demonstrate the different mechanisms that can be used to recognise and protect different kaitiaki relationships. We outline a few of these below.

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, at 194.

<sup>65</sup> *Ibid.*

## General legislation

283. The *Resource Management Act 1991 (RMA)* is New Zealand's main legislation that sets out how we should manage our natural environment. Under the RMA, decision-makers are required to have particular regard to kaitiakitanga.
284. The *Fisheries Act 1996* regulates fisheries management in New Zealand. The Act explicitly requires Ministers to have particular regard to kaitiakitanga when making certain decisions. The Act also allows for the establishment of mātaihai (traditional fishing grounds, to recognise the use and management practices of Māori in the exercise of non-commercial fishing rights) and empowers Māori to declare rāhui (traditional restrictions on depleted resources). While not explicitly recognised as such in the legislation, these are functions of kaitiaki.
285. While there is no general law on bioprospecting in New Zealand, a number of pieces of legislation administered by the Department of Conservation, most notably the *Conservation Act 1987*, provide varying degrees of Māori involvement in decision-making relating to the conservation estate, marine reserves within the territorial sea and (to a more limited extent) in the exclusive economic zone.
286. *The Hazardous Substances and New Organisms Act 1996* (which, among other issues, regulates genetic modification) requires consideration to be given to Māori perspectives and an advisory group – Ngā Kaihautū Tikanga Taiao – has been established under the Act to advise on these.

## Legislation arising from the Treaty settlement process

### Ngai Tahu Claims Settlement Act 1998

287. The *Ngai Tahu Claims Settlement Act 1998* establishes obligations including advising the rūnanga in advance of relevant conservation management documents relating to taonga species in its rohe (including harakeke, kānuka, koromiko and pīngao), and consulting with the rūnanga on policy decisions concerning the protection, management or conservation of a taonga species. Further obligations arise if a taonga species is the subject of recovery plan or species recovery group.

### Te Urewera Act 2014

288. The *Te Urewera Act 2014* establishes Te Urewera (a national park) as a separate legal entity with the same rights and responsibilities as all New Zealand citizens. The Te Urewera Board acts on behalf of Te Urewera and is responsible for approving a management plan for Te Urewera to reflect mātauranga Māori and tikanga in its management approach.
289. The Board may grant permits for taking, cutting or destroying indigenous plants within Te Urewera only if the preservation of the species concerned is not adversely affected, the effects on Te Urewera are minor and granting a permit is in line with the management plan.

## Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014

290. The *Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014* provides for the appointment of Te Pātaka a Ngāti Kōata as statutory advisers to the Minister of Conservation or the Director-General of Conservation on issues including the restoration of native plants in relation to certain rohe.

## The Tribunal's general conclusions on protection of the kaitiaki relationship

291. The Tribunal considered the extent to which current legislation protects the kaitiaki relationship with taonga species and mātauranga Māori along the continuum of activities from bioprospecting through to commercialisation. In general, the Tribunal concluded that, despite some isolated examples of meaningful Māori involvement in decision-making that could provide an opportunity for consideration of the kaitiaki relationship, the bioprospecting, genetic modification and intellectual property systems as a whole did not provide adequate protection.<sup>66</sup>
292. While there were some rules around bioprospecting on the conservation estate, they lacked cohesion and the lack of a more comprehensive bioprospecting regime meant that protection of the kaitiaki relationship was inadequate. The legislative provisions relating to genetic modification were a bit stronger, but again (in this case because Māori interests were not given appropriate weight within the regime) the Tribunal concluded that protection of the kaitiaki relationship was inadequate. Likewise for the intellectual property system – relevantly, patents and PVRs.
293. The Tribunal made a series of recommendations in Chapter 2, most of which are outside the scope of the current review. It is important to acknowledge that the PVR recommendations sit in the broader context of the Tribunal's recommendations for protection of the kaitiaki relationship with taonga species and mātauranga Māori along the continuum of activities from bioprospecting through genetic modification to commercialisation.
294. These recommendations are interrelated. For example, a comprehensive bioprospecting regime that adequately protected the kaitiaki relationship would also be likely to have flow on effects. For example, if the initial gathering of a taonga plant species was restricted, the possibility of PVR protection of a variety derived from that species may not even arise as the species would not be available for development in the first place. We would be interested to hear your views on how the Chapter 2 recommendations are interrelated.

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<sup>66</sup> *Ibid*, at 192.

# 14 The kaitiaki relationship and the PVR Act

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295. This chapter discusses the Tribunal’s assessment of the problems with the PVR regime, and its recommendations for change to provide recognition and protection of the kaitiaki relationship within that regime.

## Structure of this chapter

296. First, we consider the Tribunal’s analysis relating to its two main recommendations to ensure protection of the kaitiaki interest (the **kaitiaki relationship recommendations**):

- a. that the Commissioner of PVRs be empowered to refuse a PVR that would affect the kaitiaki relationship; and
- b. that the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest.

297. We then consider the Tribunal’s analysis relating to the proposals it supported in the 2005 *Plant Variety Rights Amendment Bill*.<sup>67</sup>

- a. to clarify the level of human input into the development of a plant variety for the purposes of PVR protection (**‘discovered’ varieties**); and
- b. to enable the Commissioner to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori (**offensive names**).

298. We also discuss feedback we received in our pre-consultation technical workshops on **transparency and participation** in the PVR regime, and **other Treaty of Waitangi considerations** outside of the Wai 262 recommendations.

## The kaitiaki relationship recommendations

### The Tribunal’s analysis and recommendations

299. The Tribunal considered that:<sup>68</sup>

*A general case for exclusive proprietary rights in the genetic and biological resources of taonga species cannot be justified by reason only of cultural association.*

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<sup>67</sup> Those changes were never enacted, however, as the work was put on hold in 2007 in anticipation of the Wai 262 report.

<sup>68</sup> *Ibid*, at 193.

300. However, the Tribunal did consider that the principle of tino rangatiratanga justified some level of kaitiaki control over the use of taonga species to protect the kaitiaki relationship with those species.

#### Empowering the Commissioner to refuse a PVR that would affect the kaitiaki relationship

301. The Tribunal found that the PVR regime did not provide sufficient protection for kaitiaki interests. It recommended that the Commissioner be empowered to:<sup>69</sup>

*... refuse a PVR on the ground that it would affect kaitiaki relationships with taonga species. The Commissioner of Plant Variety Rights would be required to understand the nature of that relationship and the likely effects upon it, and then to balance the interests of kaitiaki against those of the applicant and the wider public.*

302. The Tribunal recommended a process for balancing the kaitiaki interest with other interests, for a number of legislative regimes. The first step is to:

- a. identify a kaitiaki relationship with taonga species; and
- b. ensure the effects of a proposed use of a taonga species on the kaitiaki relationship were understood.

303. The interests of kaitiaki should then be weighed alongside the interests of others.

304. The Tribunal explained the process as follows:<sup>70</sup>

*To determine which interests should take priority in a particular case, two key issues need to be addressed. The first relates to the relationship between kaitiaki and [the] taonga species itself. What protection does the relationship need to keep it safe and healthy?*

*The second issue concerns external interests. Are there other valid interests in the genetic and biological resources of taonga species whose protection is so important that the kaitiaki relationship should be compromised? These other valid interests will include, for example, the research and development sector and IP right holders.*

*It is inherent in this two-stage balancing process that there is no single answer to fit all circumstances. If conflict between competing and valid interests cannot be avoided, then those interests must be weighed fairly and transparently... A genuine case-by-case analysis is the only sound approach to reconciling the needs of the kaitiaki relationship with those of other stakeholders.*

#### Enabling a Māori advisory committee to advise the Commissioner on the kaitiaki interest

305. To assist with the Commissioner's consideration of the kaitiaki interest, the Tribunal recommended that the Commissioner be supported by the same Māori advisory committee that it recommended be part of the patents regime. In the patents regime, this included the Committee having a proactive, investigative role in patent applications. At the time of the Tribunal hearings, there was a Patents Amendment Bill under consideration which had provision for such a committee, but its role was not as broad as that recommended by the Tribunal. The *Patents Act 2013*, which largely follows the Bill in this respect, allows the

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<sup>69</sup> Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua (Wai 262, 2011) vol 1 at 206.

<sup>70</sup> *Ibid*, at 195.

Commissioner of Patents to refuse to grant a patent if the commercial exploitation of the invention is contrary to public order or morality.

306. In making a decision, the Commissioner of Patents may seek advice from the Patents Māori Advisory Committee (**PMAC**) established under the *Patents Act*. The PMAC advises the Commissioner of Patents on:<sup>71</sup>
- a. whether the claimed invention is derived from mātauranga Māori or indigenous plants or animals; and
  - b. if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values.
307. The Tribunal also recommended that the Māori advisory committee advising on the kaitiaki interest would publish guidelines and codes of conduct for those working in research and development.

### How do the PVR regime and the kaitiaki relationship interact?

308. The PVR regime may not provide sufficient protection for the kaitiaki interest in taonga plant species.
309. The Tribunal considered that lack of explicit consideration of the kaitiaki interest in the PVR Act currently may result in the grant of PVRs that negatively affect the relationship between kaitiaki and taonga species. We would like to get a better understanding of the practical issues that are created by lack of consideration of the kaitiaki relationship in the PVR regime.
310. In other words: how does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?
311. We can envisage two potential problems that could result from lack of explicit consideration of the kaitiaki relationship in the PVR regime:
- a. *The grant of a PVR over a taonga species-derived variety that does not fulfil the 'distinctness' requirement, because the variety is known to Māori.* We discuss this further in the next section on 'discovered' varieties.
  - b. *The grant of a PVR over a taonga species-derived variety, where the plant material used to develop that variety should have been accessed with the involvement of kaitiaki.* Involving kaitiaki in third-party access and use of plant material may be required under legislation. For example, taking and use of plant material from Te Urewera must be authorised under the *Te Urewera Act*. (The PVR Act does not put in place general legal requirements for accessing indigenous plant material. This would be the role of a bioprospecting regime, which New Zealand does not currently have.)
312. We are not aware of any specific examples of the above scenarios, and would be interested in any examples of them. We would also be interested in hearing about other instances where the grant of PVRs has negatively impacted the kaitiaki relationship. It is important that we understand how the PVR regime interacts with the kaitiaki relationship currently. This will

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<sup>71</sup> Sections 225 and 226, *Patents Act 2013*.

enable us to better consider the Tribunal’s recommendations, and how to provide adequate protection for the kaitiaki relationship in the PVR regime, at the options stage of the review.

313. It is worth noting that it may be possible to prevent the above scenarios occurring through the PVRO’s existing examination process. This would be by establishing lack of distinctness, or illegal taking and use of plant material, respectively.
314. Examination is a comprehensive process. Breeders are often expected to provide more information than is initially requested through the application process. For example, if examiners have concerns about whether plant material has been accessed legally, they may ask the breeder for evidence of documented permissions to use the plant genetic material that is the basis of the variety. The PVRO makes these requests to ensure the requirements for protection are met (although a specific information-gathering power is not explicitly provided for in the PVR Act). Failure by the applicant to provide this information would result in the application lapsing, and no grant of PVR.
315. Another consideration for kaitiaki is the impact of new, cultivated varieties on plant species growing in the wild. We have heard about the responsibility of kaitiaki to ensure that native plants continue to survive in the environment in which they belong, and concerns about the introduction of cultivated varieties on native plant species growing in the wild. While we acknowledge these concerns, we consider at this stage that they are outside of the scope of the PVR regime. The PVR regime does not regulate whether and how varieties can be grown (see Chapter 4, on the application of the PVR regime, above). Nonetheless, we welcome your views on this issue.

## International considerations

### CPTPP

316. New Zealand is a party to UPOV 78. If New Zealand was to ratify the CPTPP, New Zealand would have the option of either becoming a party to UPOV 91, or giving effect to UPOV 91 through a *sui generis* (standalone) regime. In implementing either option, the Crown can adopt measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi. This allows New Zealand to consider what protection of the kaitiaki interest over indigenous plant species is required under the Treaty of Waitangi, before deciding whether to accede to UPOV 91. If it is not possible to protect the kaitiaki interest over indigenous plant species under UPOV 91, New Zealand could provide this protection and implement an otherwise UPOV 91-compliant regime – i.e. give effect to UPOV 91 through a *sui generis* regime.

### UPOV Convention

317. Whether becoming a party to UPOV 91 would be consistent with the kaitiaki relationship recommendations is an important issue for this review.
318. The international PVR system under the UPOV Convention does not provide an exception for the grant of a PVR due to morality or public order. This is in contrast with the treatment of

patents under the TRIPS Agreement. The TRIPS Agreement permits Member States to refuse to grant patents if they would be contrary to morality or public order.

319. A PVR must be granted if a plant variety meets the DUS, newness, and denomination requirements for a PVR, subject only to formalities (these requirements were discussed in detail in Chapter 3). Additional requirements – such as the Tribunal’s recommendation that the grant of the PVR would not affect the kaitiaki relationship – are not permitted.
320. Also significant is that UPOV 91 requires Parties to protect *all genera and species*. This means it would not be possible to exclude taonga species from coverage. This is not, however, a requirement under UPOV 78, though New Zealand currently covers all genera and species (except alga).
321. UPOV 78 and 91 do, however, allow parties to restrict the free exercise of the PVR if this is in the public interest.<sup>72</sup> This means that after a PVR is granted, appropriate restrictions can be placed on the exercise of the right.
322. ‘Public interest’ is not defined in the UPOV Convention. The European Union, a party to UPOV 91, has adopted the following public interest provision:<sup>73</sup>
- ... the exercise of the rights conferred by Community plant variety rights may not violate any provisions adopted on the grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of the environment, the protection of industrial or commercial property, or the safeguarding of competition, of trade or of agricultural production.*
323. Establishing a clear understanding of the kaitiaki relationship, in the context of the PVR regime, will allow us to better assess the possibility of accession to UPOV 91 for New Zealand.

## Questions

33	How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?
34	What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.
35	What role could a Māori advisory committee play in supporting the Commissioner of PVRs?
36	How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?

<sup>72</sup> See Article 9(1) of UPOV 78 and Article 17(1) of UPOV 91.

<sup>73</sup> Article 13.8 of UPOV 91.

## ‘Discovered’ varieties

324. In this part, we discuss the Tribunal’s endorsement of a proposal in the 2005 *Plant Variety Rights Act Amendment Bill* to clarify that mere discovery is insufficient to justify a claim to ownership of a new variety and that there must be human input into the development of a variety.
325. The proposed change in the 2005 draft Bill was to incorporate a definition of ‘breed’. It stated:
- breed, in relation to a variety, includes the process of selection within the natural variation of a plant or plant population, together with the process of propagation and evaluation so as to enable the development of the variety.*
326. The Tribunal commented that this proposed new definition would mean that, “if someone ‘discovers’ a plant [variety] that is already known to Māori, it could not qualify for a PVR”.<sup>74</sup> We would like to explore this concern further, as the ‘discovered’ varieties proposal in the 2005 draft Bill may not address it directly.
327. We discuss below:
- a. the policy effect of this proposed change; and
  - b. the Tribunal’s concerns about varieties known to Māori being granted PVR protection.

## Policy effect of the definition of ‘breed’

328. The above definition of ‘breed’ was proposed to clarify the level of human input needed to produce a plant variety eligible for PVR protection. While presented as a policy change, this clarification actually reflected the policy intent of the PVR Act, and operational practice at that time (and today).
329. The PVR Act currently allows a PVR to be granted to “a person who bred or discovered” the new variety.<sup>75</sup> There is no definition of ‘bred’ or ‘discovered’ in the PVR Act. Variety is defined 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**”.
330. Some have interpreted the words “bred or discovered” to mean that naturally occurring plant populations or types in the wild (i.e. mere discoveries) may be eligible for PVR protection. This is a common misunderstanding, and one that was reflected in the 2005 Bill. Such an interpretation is inconsistent with the definition of ‘variety’ in the PVR Act, which requires a variety to be cultivated and consist of more than one seedling, plant or specimen.

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<sup>74</sup> Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua* (Wai 262, 2011) vol 1 at 175.

<sup>75</sup> The PVR Act refers to this person as the ‘owner’ of the PVR. Most other countries use the term ‘breeder’ of the plant variety, rather than ‘owner’ of the PVR.

331. The “bred or discovered” formulation was intended to clarify that new varieties eligible for protection may be developed using **vegetative propagation** methods (like grafting) – that is, not just sexual propagation.
332. To illustrate: a mutated shoot in a population of cultivated plants that expresses different and desirable characteristics may be ‘discovered’ by a breeder. When it is ‘discovered’, it is not yet a variety. However, if the shoot is evaluated and then vegetatively propagated<sup>76</sup> several times to establish a group of plants which appear essentially similar, further selection of those plants is carried out and then those selected plants may be considered a cultivar. The cultivar may then be eligible for variety protection. This is the ‘discovery’ referred to in the “bred or discovered” formulation, and is a common, long-standing method of plant breeding.
333. ‘Bred’ in the PVR Act was intended to refer to what some consider is breeding in the strict sense, involving sexual propagation (where one or more plants are crossed with others in a controlled or partially controlled manner, allowing the offspring to contain the genetic material of the parent plants).
334. Rather than representing a policy change, the proposed change in the 2005 draft Bill may be better understood as a clarification of the current settings. It is important to note that the current PVR settings do not allow anyone to obtain a PVR for a single plant found in the wild. Plant material must be developed into a variety that is distinct, uniform and stable to be eligible for a PVR. Developing a PVR-eligible variety involves significant skill and know-how, and generally requires several generations of propagation and evaluation.

### Case study

Breeder A applied for a PVR after finding a single tussock bush with purple, orange-scented leaves in the wild which Breeder A propagated, further selected and developed into a variety.

Breeder A made an application to the Plant Variety Rights Office, highlighting the unique characteristics of the plant. An examiner undertook a preliminary investigation into the distinctness, uniformity and stability of the variety. In this preliminary examination, the examiner sought the advice of Professor B, a plant biologist at Nature University, and consulted other databases to inform their examination.

Professor B advised that the purple, orange-scented tussock was not unknown and that a few such plants had been identified in the Otago region. The examiner issued a preliminary examination report. The examiner found that the purple, orange-scented tussock could be found in the wild and as a result had the opinion that some plants were already in cultivation.

Breeder A was informed of the possible doubt regarding the distinctness of the variety and given information on what was required for a growing trial to determine distinctness, uniformity and stability. Breeder A was also advised that a voluntary withdrawal of the application could be made at any time. Breeder A chose to withdraw their application.

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<sup>76</sup> As described above, vegetative propagation is a process through which plants are essentially ‘cloned’ to ensure that the plants that are produced are true-to-type. Examples include grafting, cutting and tissue culture.

## International considerations

335. UPOV 78 does not define terms such as breed, breeder or variety, leaving it up to Member States to decide on the minimum level of human input necessary for a variety to be eligible for protection.
336. UPOV 91 is more prescriptive. It defines a breeder as a person who “bred, or discovered and developed” a variety. The explanatory note produced by UPOV on the definition of ‘breeder’ in UPOV 91 sets out the following guidance on what constitutes “discovery and development” (emphasis added):<sup>77</sup>
- With regard to “discovered and developed”, a discovery might be the initial step in the process of breeding a new variety. **However, the term “discovered and developed” means that a mere discovery, or find, would not entitle the person to obtain a breeder’s right. Development of plant material into a variety is necessary for a breeder to be entitled to obtain a breeder’s right. A person would not be entitled to protection of an existing variety that was discovered and propagated unchanged by that person.***
337. The proposed definition of ‘breed’ in the 2005 draft Bill is consistent with both UPOV 78 and UPOV 91.

## The Tribunal’s concerns

338. The Tribunal’s support for the new definition of ‘breed’ in the 2005 draft Bill may have been to ensure that taonga species-derived cultivated varieties known to Māori could not receive PVR protection, and to ensure that non-kaitiaki are not able to gain protection for varieties developed over time in a traditional context (traditional varieties). An example might be a harakeke variety developed for its leaf length and suitability for weaving.
339. We would like to explore this concern further, as it may not be adequately addressed by the 2005 draft Bill’s definition of ‘breed’. However, it may be addressed through the Tribunal’s kaitiaki relationship recommendations discussed above.
340. We are not familiar with any examples of anyone seeking to gain a PVR over a traditional variety derived from a taonga species in New Zealand, or a variety derived from such a traditional variety. We would be interested to hear of any instances of this. If this is an issue, the proposed Māori advisory committee discussed above could play an important role in the examination process by identifying varieties as traditional and advising that the grant be refused.
341. Traditional varieties will generally not be eligible for PVR protection.<sup>78</sup> There is a range of factors that may exclude traditional varieties from eligibility. Often there is no known breeder or clear ownership of the variety. If they had been traded at some stage, they would not meet the criteria of being ‘new’ for the purposes of the PVR Act.

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<sup>77</sup> See [http://www.upov.int/edocs/expndocs/en/upov\\_exn\\_brd.pdf](http://www.upov.int/edocs/expndocs/en/upov_exn_brd.pdf).

<sup>78</sup> In general, holders of traditional varieties are unlikely to be disadvantaged by this. If they have an interest in holding traditional varieties within their community, rather than making the varieties available to all, PVRs are unlikely to be an appropriate form of protection. The PVR regime is intended to encourage the development and dissemination of plant varieties. Aspects of the regime, such as the compulsory licensing and the limited term of grant, may be at odds with the community’s interests.

342. Traditional varieties may be treated as varieties of common knowledge. “Varieties of common knowledge” is not defined under the UPOV Convention, leaving this matter largely to Member State discretion, informed by UPOV guidance.<sup>79</sup> When new varieties are developed, they must be distinguishable from all varieties of common knowledge. Most varieties of common knowledge would be ineligible for PVR protection.

## Questions

37

Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?

## Offensive names

343. The Tribunal also endorsed a second proposal in the 2005 draft Bill: to enable the Commissioner to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori.
344. Under the PVR Act, applicants are required to provide the Commissioner with a proposed name for the variety when they apply for a PVR.<sup>80</sup> The Commissioner must notify the proposed name in the Plant Variety Rights Journal (**PVR Journal**) if it complies with the prescribed requirements.<sup>81</sup> To comply, a proposed name “must conform with international usage relating to the names of cultivated plants”, including relevant UPOV guidance.
345. Any person who considers that the Commissioner should not approve a proposed name notified in the PVR Journal may object to its approval.<sup>82</sup> However the grounds for opposition under the PVR Act are not clear, affecting certainty for objectors.
346. The proposed change in the 2005 draft Bill was intended to make it clear that the Commissioner must not approve a proposed name if he or she “considers that its use or approval would be likely to offend a significant section of the community, including Māori”. This could cover situations where Māori object to the inappropriate use of Māori words or symbols as names for plant varieties, or to inappropriate names for varieties of indigenous species.
347. Other intellectual property regimes have rules regarding offensive names, including the:
- a. *Trade Marks Act 2002*: the Commissioner of Trade Marks cannot register a trade mark if its use or registration would be likely to offend a significant section of the community, including Māori.<sup>83</sup>

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<sup>79</sup> See PVRO guidance: <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/varieties-of-common-knowledge-identification-and-usage/> and UPOV guidance: [http://www.upov.int/edocs/infdocs/en/0\\_c\\_extr\\_19\\_2\\_rev.pdf](http://www.upov.int/edocs/infdocs/en/0_c_extr_19_2_rev.pdf).

<sup>80</sup> Section 5(2)(b).

<sup>81</sup> Section 5(7).

<sup>82</sup> Section 6.

<sup>83</sup> Section 17, *Trade Marks Act 2002*.

- b. *Geographical Indications (Wine and Spirits) Registration Act 2006*: the Registrar of Geographical Indications can prevent a geographical indication being registered if it would be likely to offend a significant section of the community, including Māori.<sup>84</sup>

## International considerations

348. The UPOV Convention outlines some requirements for variety names – for example, that the name must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. But in general, UPOV 78 and UPOV 91 contemplate that Member States will determine for themselves what a suitable name, consistent with UPOV guidance is.<sup>85</sup>
349. Some UPOV members have provisions preventing offensive variety names. Australia's *Plant Breeder's Rights Act 1994* states that names must not contain scandalous or offensive matter. Australia is a party to UPOV 91.

## Question

38

What characteristics might make a variety name offensive to a significant section of the community, including Māori?

## Transparency and participation in the PVR regime

350. In this section, we explore whether there are issues relating to transparency and participation in the PVR system. This section reflects concerns raised in our pre-consultation workshops with Māori and industry experts.

## Lack of information on the PVR register

351. Participants in our technical workshops queried the accessibility of information about taonga species in the PVR register. The PVR register allows people to search for PVRs that are registered or have been registered in New Zealand. The register can be used to check who owns a PVR, or whether a variety is protected.
352. Advice on how to search the register (with a link to the search function) can be found on the IPONZ website [here](#).
353. Often the PVR register will be used by people who may have a commercial interest in accessing information on the register – for example, growers seeking to find out whether a variety is protected. However, others may have a non-commercial interest in accessing information on the register – for example, kaitiaki, who have an interest in the use of taonga species. As the register is not designed for these purposes, it does not contain information that some may seek.

<sup>84</sup> Section 13A, *Geographical Indications (Wine and Spirits) Registration Act 2006*.

<sup>85</sup> Article 13(5) of UPOV 78 and Article 20(5) of UPOV 91.

354. Examples of information that some of the workshop participants were interested in included:
- a. Māori names for plants;<sup>86</sup>
  - b. whether or not a variety derived from a taonga species was developed using indigenous plant material (noting that the majority of indigenous species are not endemic to New Zealand);<sup>87</sup> and
  - c. whether or not a breeder of a variety derived from a taonga species identifies as a kaitiaki.
355. This information was seen as providing a way for Māori and kaitiaki to find out how the PVR regime interacts with taonga species – for example, the number of PVR grants for varieties derived from taonga species, or who holds an interest in a protected variety derived from a taonga species.

## Disclosure of origin requirements

356. Some countries require PVR applicants to disclose the origin of genetic resources and/or traditional knowledge used in the development of plant varieties.<sup>88</sup> New Zealand does not have a disclosure of origin requirement in its PVR regime.<sup>89</sup>
357. A disclosure requirement could be a means of collecting information on the use of plant material – from taonga species, in particular – or mātauranga Māori used to develop new plant varieties.
358. Broadly, the UPOV Convention allows disclosure of origin requirements in parties' PVR regimes. However, parties cannot impose additional requirements (beyond DUS, newness and other formalities) in relation to the origin information disclosed. For example, parties could not refuse to grant a PVR simply because the applicant cannot provide origin information.
359. We are aware that there can be particular practical challenges to disclosing the origins of the genetic material used to develop new plant varieties. This will include cases where the exact geographic origin will be difficult to identify – for example, where germplasm originates from a combination of genes from different countries. In some countries, if origin is not known to the breeder or cannot be disclosed due to confidentiality, a declaration to that effect may be sufficient.
360. We are interested in understanding whether and how plant breeders gather information on the origin of genetic material they use in plant breeding. We are particularly interested in relation to the genetic material of taonga species.

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<sup>86</sup> Currently, the PVR register can be searched by grant or case number; application number; or name. Name may include the (proposed) denomination, the plant 'common' name (e.g. flax), or commercial synonyms. Applicants are not required to identify the Māori name. For example, as of June 2018, searching 'horopito' returned no results, while its Latin name, *Pseudowintera colorata*, returned four.

<sup>87</sup> This information is held, but not made public on the register.

<sup>88</sup> Internationally, disclosure of origin requirements are most commonly found in patents regimes but also appear in some countries' PVR regimes, e.g. Norway and Ecuador.

<sup>89</sup> The Waitangi Tribunal recommended in the Wai 262 report that a disclosure of origin requirement be implemented in the patents regime. This is discussed in the *Disclosure of Origin Discussion Document*.

361. Relatedly, we are exploring whether New Zealand should adopt a disclosure of origin requirements in the patents regime in a discussion document that has been released at the same time as this paper. It can be found here: <http://www.mbie.govt.nz/info-services/business/intellectual-property/patents/disclosure-of-origin-requirements-in-the-patents-regime/consultation>

## Questions

- |    |                                                                                                         |
|----|---------------------------------------------------------------------------------------------------------|
| 39 | What information do you think should/should not be accessible on the PVR register? Why?                 |
| 40 | As a plant breeder, do you gather information on the origin of genetic material used in plant breeding? |

## Other Treaty of Waitangi considerations

362. At our Māori technical workshops, we heard that while the Wai 262 recommendations are a good starting point for thinking about the Crown's Treaty of Waitangi obligations in the PVR regime, it was important to not limit the discussion to the Wai 262 report.
363. We are interested in hearing about other Treaty of Waitangi considerations that were not discussed in the Wai 262 report or recommendations.

## Question

- |    |                                                                                                                                  |
|----|----------------------------------------------------------------------------------------------------------------------------------|
| 41 | What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why? |
|----|----------------------------------------------------------------------------------------------------------------------------------|

## Part 5 – Additional issues

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364. This Issues Paper discusses a number of issues with the plant variety rights regime that were identified as important during the pre-consultation phase. However, these were not the only issues with the PVR Act that were raised. Some of the additional issues are described briefly below.
365. We would welcome any submissions on these areas. We also welcome submissions on any other issues not mentioned which you feel should be considered as part of the review of the PVR Act. These issues may be considered in more detail in the Options Paper which we intend to release in the first half of 2019.

### Export of propagating material

366. Exporting the propagating material of a protected variety from New Zealand without the permission of the PVR owner is not prohibited under the PVR Act. This is prohibited under UPOV 91. We have heard from some PVR owners that this is problematic, as they lose control of the propagating material or the protected variety. While in some cases the PVR owner may be able to take action for breach of contract, no action can be taken under the PVR Act. We are interested in hearing about instances where propagating material of a protected variety was exported without the PVR owner's permission, and what the commercial consequences were.

### Eligibility of alga for PVR Protection

367. Under the PVR Act, varieties of alga are not eligible for PVR protection. Many other countries, including Australia, provide PVR protection for algae. Some have suggested New Zealand may be missing out on new types of alga due to the lack of protection for algae varieties. We are interested in your views on whether there are issues with the lack of protection provided for alga under the PVR Act.

### Term of grant

368. The term of grant of a PVR under the PVR Act is 23 years from the date of grant for woody plants or their rootstocks, and 20 years for everything else. We have heard some concerns from some breeders that the term of grant is not sufficient for breeders and developers of plant varieties to recoup their costs. We are interested in your views on any issues arising from the current terms of grant.

## Use of a protected variety for non-commercial purposes

369. Some plant breeders expressed concerns about the operation of the exception in the PVR Act that any person may propagate, grow or use protected varieties for non-commercial purposes. Their particular concern was the propagation of protected varieties by local government organisations without payment to PVR owners.
370. UPOV 91's exception for "private and non-commercial" use of a protected variety may be narrower than the exception in the PVR Act, which applies to non-commercial use only. Examples of potentially infringing activity under UPOV 91 might include propagation of protected varieties by public or community organisations, meaning those organisations would need to pay royalties for use of protected varieties.
371. We are interested in hearing about problems or benefits arising from the current exception for non-commercial use.

## Access to propagating material for DUS Testing

372. As part of the process of examining a PVR application, the variety that is the subject of the application will be compared with existing varieties to determine whether or not the variety is distinct from those varieties. Where the existing varieties include varieties that are protected by a PVR, the PVRO will need access to the propagating material of those protected varieties so that they can be grown alongside the variety under examination.
373. There is currently no provision in the PVR Act that allows the PVRO to require PVR owners to supply propagating material of their protected varieties for the PVRO to use in growing trials. A lack of comparative material may cause delays to the testing process, increasing the costs for PVR applicants.

## Restoration of PVRs cancelled through non-payment of grant fee

374. Once granted, a PVR owner must pay an annual renewal fee to keep their grant in force. The fee is due within one month of the anniversary of the date the PVR is granted. If the fee is not paid by this date, the Commissioner must give the PVR owner 28 days to provide reasons why the PVR should not be cancelled.<sup>90</sup>
375. The PVR Act does not explicitly state what discretion the Commissioner has in this instance nor does it state the grounds upon which the Commissioner may exercise that discretion (if any). Furthermore, if the grant is cancelled, there is no provision for the grant to be restored, as there is in the *Patents Act* and the *Trade Marks Act*. These situations may cause uncertainty for users of the regime.

## Grounds for objection and cancellation

376. Section 15 of the PVR Act provides that any person can object to the continuation of a PVR grant, and lists two grounds for objection. Section 16 of the PVR Act provides for cancellation

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<sup>90</sup> Sections 16(2)(g) and (3), PVR Act and Regulation 19, *Plant Variety Rights Regulations 1988*.

of grants by the Commissioner. It is unclear whether third parties can apply to the Commissioner for a grant to be cancelled on a ground listed in section 16 that is not listed in section 15 – for example, if information supplied in an application was incorrect and the Commissioner would have declined the grant if the information had been correct. We are interested in your views on whether this or other aspects of the objection process are problematic.

## Procedures

377. There are a number of provisions in the Act which allow third parties to engage with the Commissioner over a PVR application or grant. These include:
- a. Section 6: Objections before grant.
  - b. Section 15: Objections after grant.
  - c. Section 21: Compulsory licences and sales.
378. However, the PVR Act is largely silent on the procedures to be followed by the Commissioner in making decisions under these provisions. This leads to uncertainty as to how the Commissioner should approach requests made under these provisions. It may also lead to the Commissioner and the parties involved spending considerable time and money deciding on the procedures to be followed.

## Interface between patents and PVRs

379. Under section 16(4) the *Patents Act*, plant varieties are not a patentable invention. However, patents can be granted for plants at a species level or over underlying plant genetic material, if it meets the patent requirements of being new and inventive. An example of this might be a patent for the genetic material which enables a wheat plant to be resistant to particular herbicides. This kind of patent would cover all varieties of wheat which incorporated the modification.
380. The effect of the exclusion of plant varieties from patent protection is that it is not possible to protect a plant variety by both a patent and a plant variety right. It is only possible to protect a plant variety by a PVR.
381. We are interested in your views on any issues that arise from the interface between the patents and PVR regime.

## Question

42

Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?

# Part 6 – Recap of questions

382. Below is a recap of the questions asked throughout this Issues Paper. Your submission may respond to any or all of these questions, or raise issues not covered by these questions. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

## Objectives of the PVR Act

- 1 Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?
- 2 Do you think the PVR regime is meeting these objectives? Why/why not?
- 3 What are the costs and benefits of New Zealand’s PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.
- 4 Do you think there would be a material difference between implementing a sui generis regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

## Farm-saved seed

- 5 Are there important features of the current situation regarding farm-saved seed that we have not mentioned?
- 6 Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.
- 7 Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
- 8 Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
- 9 Do PVR owners use mechanisms outside the PVR regime to control farmers’ use or saving of the seeds of their protected varieties? What are these?
- 10 Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?
- 11 What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

## Rights over harvested material

- 12 Are there important features of the current situation regarding rights over harvested material that we have not mentioned?
- 13 Do you agree with our definition of 'harvested material'? Why/why not?
- 14 Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
- 15 Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

## Rights over similar varieties

- 16 Are there other important features of the current situation regarding distinctness that we have not mentioned?
- 17 Are there other important features of the concept of EDVs that we have not mentioned?
- 18 Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
- 19 Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
- 20 How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?
- 21 Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.
- 22 Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
- 23 Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
- 24 How might technological change affect the problems/benefits of not having an EDV regime that you have identified?

## Compulsory licences

- 25 Are there important features of the current situation regarding compulsory licences that we have not mentioned?

26	Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
27	Do you think there are benefits with the current compulsory licence regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
<b>Enforcement: infringements and offences</b>	
28	Are there important features of the current situation regarding infringements and offences that we have not mentioned?
29	Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?
30	How prevalent are PVR infringements and offences?
31	Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
32	Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
<b>The kaitiaki relationship and the PVR Act</b>	
33	How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?
34	What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.
35	What role could a Māori advisory committee play in supporting the Commissioner of PVRs?
36	How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?
<b>'Discovered' varieties</b>	
37	Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?
<b>Offensive names</b>	
38	What characteristics might make a variety name offensive to a significant section of the community, including Māori?

## Transparency and participation in the PVR regime

39 What information do you think should/should not be accessible on the PVR register? Why?

40 As a plant breeder, do you gather information on the origin of genetic material used in plant breeding?

## Other Treaty of Waitangi considerations

41 What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?

## Additional issues

42 Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?

## Annex 1: Comparison of the PVR Act and UPOV 91

### Scope of protection (rights)

	PVR Act	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 Article 15 exceptions.
Right to sell, or offer for sale, propagating material	Yes.	Yes.
Right to authorise import of propagating material	Yes, in limited circumstances.	Yes.
Right to authorise conditioning for the purposes of reproduction	No.	Yes.
Right to authorise export of propagating material	No.	Yes.
Right to authorise stocking of propagating material for any of the above purposes	No.	Yes.
The above rights apply to varieties essentially derived from protected varieties	No.	Yes.
Term of PVR	Minimum of 23 years for woody plants or their rootstocks. 20 years for all others.	Minimum of 25 years for trees and vines. 20 years for all others

### Exceptions and limitations

	PVR Act	UPOV 91
Exception for non-commercial use	Yes.	Yes, but only if the use is private.
Exception for experimental use	No. But experimental 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 – no explicit provision, but provided for through an ‘exhaustion of rights’ provision.
Use of farm-saved seed allowed?	Yes, without restriction.	Yes, if optional exception invoked by Member State.

## Annex 2: Farm-saved seed in other jurisdictions

### Australia

1. Australia is a party to UPOV 91. Section 17 of the Australian *Plant Breeder's Rights Act 1994* provides an exception for farm-saved seed. The exception allows farmers to condition<sup>91</sup> and sow saved seeds of a protected variety without the PVR owner's permission. This effectively allows farmers to use saved seed of protected varieties to sow another crop without making a payment to the PVR owner. However, they are not allowed to sell the saved seed to others to grow.
2. Section 17(2) of Australia's *Plant Breeder's Rights Act* provides for regulations to be made declaring that the exception does not apply to particular species specified in the regulations. However, Australia's *Plant Breeder's Rights Act* does not specify the criteria for determining whether such regulations should be made. No regulations have yet been made.

### Canada

3. Canada is a party to UPOV 91. Section 5.3(2) of the Canadian *Plant Breeder's Rights Act (2015)* provides an exception for farm-saved seed. The exception provides that farmers may produce, reproduce, condition and stock seed of a protected variety for the sole purpose of growing the variety. This means that farmers do not have to pay to use saved seed of a protected variety. However, they are not allowed to sell the saved seed to others to grow.

### The European Union

4. The EU is a party to UPOV 91 (although not all EU members are party to UPOV 91). The grant of PVR in the EU is governed by the *Community Plant Variety Rights Regulation (No 2100/94 of 27 July 1994)*. Article 14 of this Regulation provides a limited exception for farm seed.
5. The exception only applies to specified species.<sup>92</sup> In relation to the specified species, farmers (except for 'small' farmers – see paragraph 7 below), can use saved seed without the PVR owner's permission. However, they must pay 'equitable remuneration' to the PVR owner. This remuneration must be 'sensibly lower' than the price charged for purchased seed.
6. For species other than the specified species, the PVR owner retains the right over farm-saved seed.
7. 'Small' farmers may use farm-saved seed freely and are not required to pay any fee.<sup>93</sup>

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<sup>91</sup> Conditioning is defined under the Australian *Plant Breeder's Right Act 1994* as 'cleaning, coating, sorting, packaging or grading of the material'.

<sup>92</sup> Chickpea, yellow lupin, lucerne, field pea, Egyptian clover, Persian clover, field bean, common vetch, Italian rye-grass (Portugal only), oats, barley, rice, canary grass, rye, triticale, wheat, durum wheat, spelt wheat, potatoes, swede rape, turnip rape, linseed (except flax).

<sup>93</sup> A small farmer is a farmer who does not grow plants on an area bigger than that needed to grow 92 tonnes of cereals, or a comparable criterion.

## The United States of America

8. The United States is a party to UPOV 91. The United States' *Plant Variety Protection Act of 1970* provides an exception to PVRs for farm-saved seed. Section 113 provides that a farmer who saves and grows seed of a protected variety does not infringe the PVR owner's rights. This means that farmers do not have to pay a fee to the PVR owner to save and grow seeds of a protected variety. However, they are not allowed to sell or trade saved seed to others to grow.

## Japan

9. Japan is a party to UPOV 91. Article 22 of the *Plant Variety Protection and Seed Act No. 83 of May 29, 1998*, provides an exception to PVRs for farm-saved seed. Farmers do not have to pay a fee to save and grow saved seed of protected varieties unless there is a contract between the PVR owner and farmer to the contrary. However, farmers are not allowed to sell saved seed to others to grow. The exception does not extend to vegetatively reproduced species that are designated by the Japanese Ministry of Agriculture, Forestry and Fisheries.

## China

10. China is a party to UPOV 78, though is working towards becoming a party to UPOV 91. As in New Zealand, farmers in China do not have to pay a fee to save and grow seed of protected varieties. However, as in New Zealand, they cannot sell the seeds to others to grow.

