

1 July 2021

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Chairperson
Economic Development, Science and Innovation Committee
Parliament Buildings
Wellington
NEW ZEALAND

Submission on the Draft Plant Variety Rights Bill of New Zealand

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About NZ Plant Producers

NZPPI is the peak industry body for plant producers in New Zealand. Our industry as a whole employs approximately 4000 people and is worth an estimated \$500 million per annum. Our members grow seedlings and plants for food, forests, urban and rural landscapes and home gardens.

Plant producers are a vital part of the success of our primary sector, providing innovation through the selection and production of new plant varieties that create value in both domestic and international markets. Plant producers have a successful track record of introducing new horticultural varieties into New Zealand, such as cherries and apples, that enable our export sectors to remain internationally competitive. New ornamental cultivars, including indigenous plant varieties, are highly sought after in overseas markets earning royalty revenues for New Zealand plant breeders.

Our members have interests across the PVR regime. Many of our members propagate or own the rights to plants that are protected by the current Plant Variety Rights Act (PVRA). Our submission highlights the importance of timeliness and certainty about property rights for plant breeders, to ensure that continued investment drives economic prosperity and sustainability in our horticultural sectors. NZPPI is looking for these protections in the PVR Act Bill.

Industry Context

The Plant Variety Rights Act is an important piece of legislation that supports the success of our sector. The ongoing strategic work between industry and government to help grow New Zealand's Primary Industries is heavily dependent on the commercialisation of new plants and plant products, which relies on access to new high value plant varieties and cultivars from New Zealand and offshore plant breeding and improvement programmes.

Fit For a Better World is the Government's vision to accelerate the productivity, sustainability and inclusiveness of the primary sector to deliver more value for all New Zealanders. Fit for a Better World aims to increase export earnings by \$44 billion by 2030, with an additional \$2.6 billion from forestry, \$2.6 billion from horticulture and \$500 million from arable and other fibres. To enable this growth, Government has brought forward \$84 million from the Sustainable Food and Fibre Futures Fund to support industry-led projects.

Over the past 5 years the plants sectors have experienced a period of unprecedented growth, with exports alone reaching \$6.5 billion. The forecast growth of the sector is expected to rise to \$7.1 billion by 2023. These figures show the sector is well placed to contribute to New Zealand's economic success.

The other plant sectors, viticulture, arable and seed, also experienced growth. In 2020 wine exports totalled \$1.92 billion and arable seed exports reached \$290 million. New Zealand remains one of the world's largest seed exporters for a range of crops including pasture grasses, carrots, and radishes. Many of the plant sectors have developed strategies for industry growth, creating jobs and bringing economic prosperity to our regions.

A key part of these strategies is to improve the value of plant products that can be traded at higher value in existing and new markets, advance sustainability improvements, use natural resources better and adopt innovation and technologies.

In addition to the growth of exports in the plants industries, New Zealander's also need access to new varieties of plants for food, houseplants, landscaping and urban spaces. The National Policy on Urban Development sets a framework for Councils to improve our urban areas to make them more liveable, incorporating more green life. To be successful, New Zealander's need access to new plant varieties and selections of amenity plants, garden plants and street trees that are better suited to changing climate, denser living spaces, new pests and diseases, and with lower water-use requirements.

Over the past 30 years New Zealand's capability in plant breeding has declined markedly, with residual programmes in the export horticulture and agriculture sectors. Today most of the new

varieties and selections of food and amenity plants are sourced from overseas selection programmes. These selections are protected in their country of origin and PVR license holders in New Zealand are governed by international and regional laws covering plant variety rights.

New Zealand's reliance on overseas breeding programmes as a source of high quality genetic material requires that New Zealand has a regime in place that gives confidence and a high level of respect and protection for variety rights owners from overseas.

SUBMISSION

NZPPI welcomes the opportunity to provide comment on the Draft Plant Variety Rights Bill.

“Giving effect” to UPOV 91

NZPPI supports the Government's intention to align the future PVR regime with the International Convention for the Protection of New Varieties of Plants (UPOV) 1991. Like other submitters however, we are concerned that by only “giving effect” to UPOV 91 risks weakening New Zealand's trade standing internationally and is out-of-step with our most important trading partners.

The PVR Bill acknowledges that while the regime aligns with UPOV 91 to the fullest extent possible, the additional provisions for indigenous plant species and non-indigenous plant species of significance (Part 5) adds another criterion for granting a PVR which makes it inconsistent with UPOV 91.

1. We would like to see the draft Bill structured in a way that enables accession to UPOV 91 while also recognising Kaitiaki relationships with respect to indigenous and non-indigenous plant species of significance. We understand that the UPOV office has worked with other jurisdictions to find solutions for their domestic regulations.
2. We respectfully ask the select committee to engage with the UPOV office on the draft Bill and ask them to provide advice on simple structural rearrangements which could achieve both objectives: accession to UPOV 91 and recognising additional provisions for indigenous plant species and non-indigenous plant species of significance.

Maori Plant Varieties Committee

Article 52 Treaty of Waitangi (Te Tiriti o Waitangi)

NZPPI supports the establishment of a Māori Plant Varieties Committee and the processes for engagement between the applicant, Maori Plant Varieties Committee and the Commissioner.

We support upfront discussions between persons, iwi, hapū and whānau and breeders to consider kaitiaki interests pre-grant and therefore providing more certainty for both the breeder and kaitiaki.

This approach also aligns with other intellectual property (IP) legislative settings. This option is Treaty compliant and balances kaitiaki interests while giving certainty for breeder investment.

During the consultation process to develop the PVR Bill, MBIE proposed to provide guidance for how breeders and kaitiaki could interact in a future regime will provide more certainty of what should be considered during the PVR application process.

3. To provide certainty to the process, NZPPI considers that a list needs to be drawn up of indigenous species with kaitiaki interests and non-indigenous species of significance (Article 54 (a) and (b)) to provide more clarity for breeders so they understand what is required under this provision during the plant breeding process and prior to the PVR application process.

Powers to require nullification or cancellation of PVR

Part 5, Subpart 3 – Article 67 Powers to require nullification or cancellation of PVR

As currently worded, any person may apply at any time to the Commissioner for the nullification or cancellation of a PVR. Once this occurs, the Commissioner refers the application to the Māori Plant Varieties Committee, who may nullify or cancel the PVR if they determine there was any adverse effects on a kaitiaki relationship when the PVR was granted.

We appreciate that the Bill makes special provision to exclude grants which were given under the Plant Variety Rights Act 1987, or made under Part 4 before subpart 3 of Part 5 comes into force (as per Schedule 1, (10)). This will help to safeguard members who have already significantly invested in their plant varieties and we are pleased to see this has been well thought through.

We note that this Article does not come into force immediately (Article 2, Commencement), but that the Governor-General may through an Order in Council bring this subpart into force from any time following the first anniversary of the date on which the Act receives Royal assent.

Notwithstanding this, we consider this provision creates a perception of risk and uncertainty for applicants. Even if the pre-application engagement processes have led to a broad level of agreement, unless there is a complete consensus amongst all participants during that engagement, there is no guarantee that a further objection will not be raised in the future, effectively re-litigating the decision. This creates not only reputational risks to the grant holder, who may have taken steps towards commercialisation and licensing to partners but could also lead to significant financial liabilities if permissions are withdrawn with immediate effect.

This type of withdrawal can be particularly damaging to internationally established relationships, affecting business dealings far beyond the span of the single PVR grant.

4. NZPPI would like to see a further clarification of the scope applicable for Article 67, to specifically limit it to those PVRs concerning indigenous plant species or non-indigenous

species of significance, as defined in Article 54, where any person, iwi, hapū or group asserts they have a kaitiaki relationship as per Article 61.

5. We propose that powers to nullify or cancel PVRs where kaitiaki relationship is asserted (Article 61) should be arbitrated to include a process for all parties to come together to redress any conflict, or as a last resort, to re-litigate whether any adverse effects can be mitigated by an agreement or undertaking (Article 60,(3)(c)).
6. NZPPI also seeks clarity about the fate of plant material and any future rights to exploit that material in situations where an application for indigenous plant material has not been granted, or a PVR has been cancelled or withdrawn.

Other Matters

Part 6, Subpart 1 – Requests for information or propagating material

Article 69 (2) the Commissioner may request a PVR holder for propagating material or information about maintenance of a variety, if they consider it necessary.

7. NZPPI requests that Article 69 clause 2 is clarified to refer to candidate material only. We request that candidate material can be maintained by the PVR grant holder or by a nominated producer.

Part 6, Subpart 2 – Cancellation or nullification

Many PVR's are commercially valuable and there may be interest from other parties in disrupting the rights of a PVR owner, or exploiting the opportunity to benefit from a lapsed PVR. We are aware that individuals keep an eye on the status of PVR's and would welcome an opportunity to take advantage of such a situation. For example, if a PVR is cancelled by the Commissioner, individuals may take the opportunity to submit an application over that plant material, or begin propagating or selling the material, avoiding obligations for payments / royalties.

Unless it is known that the PVR holder does not intend to pay the required fees, or intends to allow the PVR to naturally lapse, there should be no opportunity for a person to make an application to the Commissioner to register a PVR that been cancelled there should be no opportunity for an application to be considered by the Commissioner

There are many personal or business reasons that a PVR renewal or fee payment may be overlooked or delayed, or it may simply be overlooked due to an unintended administrative oversight, assuming someone else has renewed the PVR, or a lack of awareness that renewals or fees are due.

8. NZPPI would like to see the Bill provide an appropriate level of protection for a PVR owner in a situation where a PVR been cancelled or nullified due to an administrative issue, like a late

renewal application, or a delay in payment of fees, etc. (Article 85). In this situation the PVR owner should be protected until they have an opportunity to deal with and rectify the issue. We suggest this timeframe should be between 3 to 6 months.

Essentially Derived Varieties

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

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

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

Compulsory licenses – general issues

Article 101. The intention of compulsory licences is to ensure the public has access to new varieties protected under the PVR regime. License applications can be made to the Commissioner.

10. NZPPI agrees there needs to be greater clarity about the process for applying for a compulsory licence and supports the opportunity for parties to be heard before a licencing decision is made.
11. NZPPI supports the proposal for compulsory licences to be non-exclusive (clause 3(a)).
12. NZPPI supports the proposal to amend the compulsory licence provisions to limit propagation of the variety to New Zealand (clause 3 (b)). This is consistent with the approach taken in section 170 of the Patents Act 2013. This proposal as it will facilitate the PVR owner's control of the licence in New Zealand.

Criteria for granting compulsory license

The criteria for granting a compulsory license for a protected variety includes the condition that a 3 year period has elapsed from the date the PVR grant was obtained (Article 103 (1) clause a). This 'grace period' provides the PVR owner with a short period to get a return on their investment and build up sufficient supply of propagative material. A 3 year timeframe may not be adequate in all circumstances for preparing a new variety for commercial production. For example, grafted trees can take several years to bulk up sufficient rootstock and scion wood, and grow following grafting.

13. NZPPI would like to see a clause which enables the applicant to request a longer period.
14. NZPPI supports the criteria that compulsory licenses must be in the public interest (Article 103 (1)(c)).

Enforcement provisions

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

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

Concluding remarks

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

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

Thank you for your consideration of the points in our submission.