



## COVERSHEET

<b>Minister</b>	Hon Kris Faafoi	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	<b>Review of the Plant Variety Rights Act 1987: Release of Discussion Document on Outstanding Policy Issues for public consultation</b>	<b>Date to be published</b>	No later than 14 September 2020

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
29 July 2020	<i>Review of the Plant Variety Rights Act 1987: Release of Discussion Document on Outstanding Policy Issues for public consultation</i>	Office of the Minister of Commerce and Consumer Affairs
29 July 2020	<i>DEV-20-MIN-0153 – Review of the Plant Variety Rights Act 1987: Release of Discussion Document on Outstanding Policy Issues</i>	Cabinet Office

### Information redacted

**NO** [select one]

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

## **Review of the Plant Variety Rights Act 1987: Release of Discussion Document on Outstanding Policy Issues for public consultation**

### **Proposal**

1. To seek approval to release the *Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues* Discussion Document (Discussion Document) for public consultation (see Appendix 1).

### **Relation to government priorities**

2. The proposals in this paper are part of the wider review of the Plant Variety Rights Act 1987 (the PVR Act). The review implements the Crown's obligations under the Treaty of Waitangi (the Treaty) and implements obligations in relation to the Plant Variety Rights (PVR) regime under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP).
3. In relation to the Government's 12 priorities, the review is expected to:
  - 3.1. Build closer partnerships with Māori – through engagement on, and implementation of, the Crown's Treaty of Waitangi obligations in the PVR regime.
  - 3.2. Grow and share New Zealand's prosperity – through incentivising innovation in the plant breeding industry and supporting the sharing of that innovation.

### **Background**

4. The PVR Act is currently being reviewed. The Act provides for the grant of fixed term intellectual property rights to plant breeders over new plant varieties they have developed.
5. The review of the PVR Act has focussed on (i) meeting the Crown's obligations under the Treaty of Waitangi, and (ii) CPTPP in relation to the 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91).
6. Following extensive consultation and engagement with both industry stakeholders and Māori organisations and individuals, Cabinet agreed to policy decisions to amend the PVR Act in November 2019 [DEV-19-MIN-0301]. Drafting of a PVR Amendment Bill on the basis of these decisions is underway.
7. However, there remain a few policy issues for the primary legislation on which further consultation is required. These relate to:
  - 7.1. outstanding Treaty of Waitangi issues, some of which were anticipated in the November Cabinet paper; and

- 7.2. operational issues arising from a parallel review of the processes of the Plant Variety Rights Office (PVR Office).
8. The review of PVR Office processes took place in 2019, with the aim of ensuring that these processes reflected the changes in the plant breeding industry over the last 30 years. As part of that review, the Intellectual Property Office of New Zealand (IPONZ) conducted a survey (including nine face-to-face meetings in July/August 2019). Feedback was received from 34 stakeholders on different parts of the applications process under the PVR Act.

#### The Waitangi Tribunal report on the PVR review

9. The Crown's engagement with Māori in the review of the PVR Act and its policy decisions in relation to UPOV 91 have also been considered as part of the Wai 2522 Waitangi Tribunal inquiry (the TPP Claim). A hearing on the review was held in December 2019.
10. The Waitangi Tribunal (the Tribunal) concluded that there was no breach of the Treaty in relation to the Crown's engagement or policy decisions on the PVR review. More specifically, the Tribunal found that:
  - 10.1. the Crown's engagement on the PVR review was conducted in good faith and reasonable in the circumstances;
  - 10.2. the Crown's policy decisions were consistent with the Tribunal's characterisation of kaitiakitanga as an aspect of tino rangatiratanga in the Wai 262 report, *Ko Aotearoa Tēnei*; and
  - 10.3. the PVR review should not be delayed to be considered as part of the whole-of-government response to Wai 262: Te Pae Tawhiti workstream.
11. The Tribunal was supportive of the Crown's decision to go beyond the recommendations in the Wai 262 report, for example by giving the Māori Advisory Committee a determinative, rather than purely advisory, function, and seeking to incentivise early engagement between breeders and kaitiaki.
12. While the Tribunal did not make any recommendations to the Crown in relation to the PVR review, the Crown's evidence at the hearing acknowledged that there are some issues which require further engagement. The Tribunal noted the value in engaging further on the appointment process for the Māori Advisory Committee to ensure the process is effective given the pivotal role the Committee will play.
13. Following public consultation on these issues, it is intended that Cabinet will make further policy decisions once Parliament resumes after the election. It is intended that a PVR Amendment Bill will be introduced before the end of the year.

#### **Key features of the Discussion Document**

14. The Discussion Document covers both the outstanding Treaty issues and the operational issues.

Outstanding Treaty issues

15. In November 2019, Cabinet agreed to a package of measures to incentivise early engagement between breeders and kaitiaki when the breeding programme involved taonga plant species. This package included the establishment of a Māori Advisory Committee (MAC) that would make a determination on whether the grant of a PVR would affect the kaitiaki relationship and, if so, whether the impact could be reasonably mitigated so as to allow the grant.
16. There are some additional policy questions which need to be addressed to ensure the regime operates effectively to protect Māori interests. Specifically:
  - 16.1. definitional issues to provide clarity to breeders when Treaty considerations are likely to arise
  - 16.2. procedural issues relating to the MAC, including:
    - 16.2.1. the process to follow when making a determination
    - 16.2.2. the nature, if any, of a review step for MAC determinations prior to judicial review in the courts
    - 16.2.3. further details about how the MAC will be appointed
  - 16.3. how the standard PVR processes under which (i) an objection to a grant can be made, and (ii) grants can be cancelled and nullified, will work in relation to decisions on kaitiaki relationships.
17. The Discussion Document indicates preferred options where these are supported by the analysis.

Operational issues

18. The review of the operational provisions in the PVR Act and regulations indicated a number of issues that would require changes to the primary legislation, including:
  - 18.1. that the current procedures relating to growing trials do not reflect changes in the industry in the last 30 years, including in the role of the PVR Office;
  - 18.2. the lack of a prescribed period for paying growing trial or examination fees, and uncertainty for both breeders and the PVR Office around what happens if these fees are not paid;
  - 18.3. concerns raised by breeders about the requirement that all information, including breeding and origin information, is made public when an application is made; and
  - 18.4. a lack of clarity and compunction relating to PVR Office requests for propagating material from applicants and grantees.
19. Of these issues, the first is the most substantive. The statutory status quo is that the burden of demonstrating that a new variety meets the conditions for a PVR grant

rests with the applicant. This would usually include the applicant carrying out growing trials. If the PVR Commissioner is not satisfied that they have sufficient information to make a grant, they can carry out (or commission) growing trials themselves.

20. However, the reality on the ground now is that the PVR Office conducts centralised testing in the majority of PVR applications. This is primarily due to the large increase in the number of plant varieties (against which a new variety would have to be compared) and the associated complexity of the trial process which is challenging particularly for the large number of smaller breeders.
21. Proposals to address these issues are set out in the Discussion Document, and preferred options are indicated where these are supported by the analysis.

### **Financial Implications**

22. There are no financial implications from the proposals in this paper.

### **Legislative Implications**

23. There are no legislative implications from the proposals in this paper, though I do anticipate legislative change once policy decisions are made by Cabinet.

### **Impact Analysis**

#### **Regulatory Impact Statement**

24. The discussion document for the purpose of consultation substitutes a Regulatory Impact Assessment. The Ministry of Business, Innovation and Employment's (MBIE) Regulatory Impact Analysis Review Panel has reviewed the Discussion Document and confirms that it is likely to lead to effective consultation and support the delivery of Regulatory Impact Analysis to inform subsequent decisions.

#### **Climate Implications**

25. The Ministry for the Environment has been consulted and confirms that the climate implications of policy assessment (CIPA) requirements do not apply to this proposal as the threshold for significance is not met.

#### **Population Implications**

26. No significant population implications arise from the proposals in this paper.

#### **Human Rights**

27. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

#### **Consultation**

28. MBIE has consulted on this paper with the Ministry of Foreign Affairs and Trade, Te Puni Kōkiri, the Office for Māori Crown Relations – Te Arawhiti, the Ministry of Justice, the Ministry for Primary Industries, the Department of Conservation, the

**I N C O N F I D E N C E**

Ministry for the Environment, the Crown Law Office, Local Government  
New Zealand, the Treasury and the Department of Prime Minister and Cabinet.

**Communications**

29. MBIE will publish the discussion document on its website. MBIE will advise interested parties by email when the discussion document is released for consultation.

**Proactive Release**

30. I propose that this Cabinet paper be proactively released, with any redactions as appropriate under the Official Information Act 1982, on the MBIE website, at the same time as the release of the discussion document.

**Recommendations**

The Minister of Commerce and Consumer Affairs recommends that the Committee:

1. **agree** to release the attached *Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues* Discussion Document for public consultation;
2. **authorise** the Minister of Commerce and Consumer Affairs to make editorial or minor content changes to this discussion document prior to its public release;
3. **note** that the discussion document will be released for public consultation by 10 August 2020 and be open for a period of 6 weeks;
4. **note** that the Minister of Commerce and Consumer Affairs intends to return to Cabinet with a paper seeking (i) further policy decisions on amendments to the PVR regime and (ii) approval for introduction of a Plant Variety Rights Amendment Bill once Parliament resumes after the election.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs