MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

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Information redacted **YES**

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Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Further policy decisions for the review of the Plant Variety Rights Act 1987

Proposal

1 This paper seeks approval for further changes to the Plant Variety Rights (**PVR**) regime.

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 obligations in relation to the PVR regime under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**).

3 Advancement of this review will help lay foundations for a better future for plant breeders and growers, as well as help strengthen the Māori-Crown relationship by ensuring the Crown meets its Treaty obligations in the PVR regime.

Executive Summary

4 The PVR Act provides for the grant of fixed term intellectual property rights to plant breeders over new plant varieties they have developed. The PVR Act is currently being reviewed to meet the Crown's obligations under (i) the Treaty, and (ii) the CPTPP.

5 In November 2019, Cabinet agreed to policy decisions to amend the PVR Act [DEV-19-MIN-0301 refers] to meet these obligations. A number of further policy decisions are required relating to:

5.1 outstanding issues relating to the Treaty of Waitangi provisions

5.2 operational policy issues relating to the PVR Office (the part of the Intellectual Property Office of New Zealand that assesses applications for PVR grants).

6 In July 2020, Cabinet agreed to release a discussion document outlining options to address these issues [DEV-20-MIN-0153 refers]. MBIE carried out public consultation between August and October 2020.

7 The outstanding Treaty issues relate primarily to the establishment and functioning of the Māori advisory committee (the **Committee**) which will

consider the impacts of the grant of a plant variety right (a **PVR**) on kaitiaki relationships. Cabinet previously agreed to give the Committee a decision-making power in relation to this issue. It is important that the legislation sets out sufficient detail about how the Committee will consider an application, reach a decision, and how a decision will be reviewed. This paper sets out my recommendations on these matters.

8 The operational issues relating to the PVR Office mainly relate to the application and testing processes for a proposed new plant variety. My recommendations reflect the changes that have occurred in the plant breeding industry over the last 30 years, and the implications of these changes for the testing of new plant varieties.

9 Finally, this paper notes that the Intellectual Property Office of New Zealand (**IPONZ**) has commenced a fee review. The review is needed to ensure that fees for the PVR regime are set at a level that recovers the operational costs of the regime and to consider how the additional costs required for the establishment and operation of the Māori advisory committee will be met.

Background

10 The review of the PVR Act began in February 2017 with the aims of meeting our obligations under the Treaty of Waitangi; meeting our obligations under CPTPP in relation to the 1991 revision of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**); and modernising a regime that is over 30 years old [CAB-16-MIN-0423 refers].

11 The review has been carried out by the Ministry of Business, Innovation and Employment (**MBIE**). MBIE has engaged extensively with industry stakeholders and Māori organisations and individuals throughout the review, including with the release of an Issues paper in September 2018 [CAB-18-MIN-0434 refers] and an Options paper in July 2019 [CAB-19-MIN-0317 refers].

Engagement with Māori

12 Engagement with Māori during the review has been informed by both the guidelines produced by Te Arawhiti and early conversations with Māori about how best to proceed. A Māori Engagement Plan accompanied the release of the Issues paper and this has been updated at each stage of the review. Hui have been held both regionally and centrally in Wellington at all stages of the review, and funding has been provided for travel and accommodation to support attendance.

13 The Crown's engagement with Māori, along with the policy decisions made in November 2019, were the subject of a three day hearing at the Waitangi Tribunal in December 2019. This hearing was Stage 2 of the Wai 2522 "TPP" inquiry. The Tribunal concluded the Crown's engagement with Māori and its policy decisions were consistent with the Crown's obligations under the Treaty.

Review of PVR Office processes

14 In conjunction with this review, MBIE also carried out a review of the Plant Variety Rights Office (**PVR Office**) processes 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 of PVR users (including nine face-to-face meetings in July/August 2019). Feedback was received from 34 stakeholders on different parts of the application process under the PVR Act.

Meeting our CPTPP obligations

15 In order to meet our obligations under CPTPP, a new regime giving effect to UPOV 91 needs to be in force by 30 December 2021. Due to COVID-19, drafting and introduction of the regime have been significantly delayed. Despite these delays, it will be important that New Zealand demonstrates a genuine effort to meet our obligations.

16 New Zealand is required to report regularly to the CPTPP Commission on progress towards meeting our transition period obligation in this area. This report back process provides a mechanism to advise our CPTPP partners should any short delay occur. However, when we do this, we would need to be clear about the expected new date of implementation and the reasons for the delay.

Initial policy decisions made in November 2019

17 In November 2019, Cabinet agreed to policy decisions to amend the PVR regime to give effect to UPOV 91 [DEV-19-MIN-0301 refers] (the **2019 Cabinet Paper**). Amongst other proposals, Cabinet agreed to:

17.1 adopt protections and exceptions in line with UPOV 91, consistent with our CPTPP obligations

17.2 provide that a PVR grant could be refused if it would adversely impact kaitiaki relationships with taonga species and this impact could not be reasonably mitigated

17.3 establish a Māori advisory committee (the **Committee**) with a decision-making power in relation to kaitiaki relationships.

Outstanding policy issues

18 This paper seeks decisions on a few outstanding policy issues in the review. These relate to:

18.1 outstanding Treaty of Waitangi issues, some of which were anticipated in the 2019 Cabinet Paper and others that were raised during our engagement and in the Wai 2522 inquiry

18.2 operational issues arising from the parallel review of the processes of the PVR Office.

19 While the Tribunal did not make any recommendations on the Crown's policy decisions in the Wai 2522 inquiry, it noted the value in further developing the appointment process for the Committee. This would be to ensure the process is effective given the pivotal role the Committee will play. This was an issue that was discussed at length by claimants who believed Māori should play a greater role in the appointment of the Committee.

20 In July 2020, Cabinet agreed to release a discussion document outlining options to address these outstanding policy issues (the **discussion document**) [DEV-20-MIN-0153 refers]. MBIE carried out public consultation between August and October 2020. As part of the consultation process, MBIE facilitated a workshop, hui, and several informal discussions with interested parties to discuss the proposals set out in this discussion document.

21 Where MBIE indicated a preferred option, submitters were generally supportive of that approach. There were however, differing views on some issues which are acknowledged in this paper. I recommend adjusting some proposals in response.

22 Both breeders and Māori have expressed some concerns around how the Treaty provisions will work in practice. Given the transformational change the regime is going through, this is not surprising. While the legislation will set the broad framework, more detailed operational matters will be set out in non-legal instruments. This includes for example, the terms of reference for the Committee, and the engagement guidelines for breeders and kaitiaki that the Committee will be required to develop. Breeders and Māori will have further opportunities to engage on these matters during the implementation stage of this review.

Proposals for outstanding policy issues relating to the Treaty of Waitangi

23 The Crown's compliance with the Treaty in the PVR regime was informed by the Waitangi Tribunal's recommendations in *Ko Aotearoa Tēnei* (**Wai 262 report**) and the desire to adopt a mana enhancing decision-making process that empowers Māori.

24 There remain a few outstanding issues, relating to the Crown's compliance with the Treaty, which fall into six categories:

24.1 The assessment of kaitiaki relationships and the definitions of key terms

24.2 Disclosure obligations and confidentiality

24.3 The appointment of the Committee

24.4 The decision-making process of the Committee

24.5 Mitigations and imposing conditions on grant

24.6 Post-determination issues.

The assessment of kaitiaki relationships and the definitions of key terms

25 In response to the 2019 Cabinet Paper, Cabinet agreed that all PVR applications relating to either indigenous plant species or non-indigenous species of significance will be referred to the Committee for it to determine the impact of a PVR grant on kaitiaki relationships. The Committee must be satisfied that the grant of the PVR will not adversely impact kaitiaki relationships before an application can proceed to testing against the standard UPOV 91 criteria for the grant of a PVR. This was the Waitangi Tribunal's principal recommendation in relation to PVRs in the Wai 262 report. The purpose of these provisions is to protect the kaitiaki relationships that Māori have with certain plant species which are considered to be taonga.

26 The definition of indigenous plant species or non-indigenous species of significance will be critical for determining which applications are referred to the Committee for consideration. Some submitters continued to raise concerns that the terms 'taonga' and 'kaitiaki' are not going to be defined. In response to the 2019 Cabinet Paper, Cabinet agreed these terms will not be defined in this regime as they are fundamental terms in te ao Māori. Given the narrow scope of the PVR regime, it would be inappropriate to define these terms in this legislation. I remain of the view that the terminology proposed is the clearest way to indicate when an application must be referred to the Committee whilst avoiding these risks.

27 Submissions on the definitions have also raised some concerns around the assessment of kaitiaki relationships in respect of a plant species – specifically around how the impact on kaitiaki relationships will be assessed where:

27.1 it has not been possible to identify kaitiaki in relation to the particular species, but a relationship may still exist

27.2 there are multiple kaitiaki relationships

27.3 the candidate variety is a hybrid variety with genetic material from an indigenous plant species or non-indigenous plant species of significance

27.4 the candidate variety is bred or derived from plant material obtained overseas, but which is also indigenous to New Zealand.

28 In response to these concerns, I propose:

28.1 to clarify that the assessment of kaitiaki relationships applies to all candidate varieties derived, either wholly or in part, from plant material from an indigenous plant species or non-indigenous plant species of significance, and that this material was sourced in New Zealand

28.2 that ‘indigenous plant species’ be defined as “a native plant species which is either endemic to New Zealand or has arrived in New Zealand without human assistance” (or similar wording)

28.3 that ‘non-indigenous plant species of significance’ be defined by way of including a list in regulations of species brought to New Zealand on the migrating waka that have become a part of Māori culture

28.4 that ‘kaitiaki relationships’ be defined broadly to enable the Committee to determine the appropriate scope of the relationship in respect of a particular species or application. Where there is no identifiable kaitiaki in respect of a plant variety, the Committee may consider the impact on kaitiaki relationships as understood by Māori generally. Given the concerns raised by Māori and breeders around the identification of kaitiaki, enabling the Committee to consider kaitiaki relationships in the absence of an identifiable kaitiaki is critical to meeting our obligations under the Treaty. Where there are identifiable kaitiaki, the Committee will be guided by the information provided by the kaitiaki in determining the impact of the grant on the relationship.

Disclosure obligations and confidentiality

29 Where a PVR application involves an indigenous plant species or a non-indigenous species of significance, breeders may need to disclose information about their breeding programme during their early engagement with kaitiaki (if it has been possible to identify kaitiaki) and are required to disclose additional information about the outcome of any engagement with their application.

30 Breeders have raised concerns with sharing information about their breeding programmes prior to an application being filed. Once an application is filed, the applicant has provisional protection for that variety until a grant is made. This protection will not be in place pre-filing.

31 Acknowledging that the information exchanged during this early engagement process may be commercially or culturally sensitive, I propose that:

31.1 the legislation should impose an obligation of confidentiality on both parties in relation to any information disclosed prior to an application being filed

31.2 once the breeder files their application, the information included in the application may be publicly available, consistent with the treatment of any other information included in an application.

32 As a breach of confidentiality is essentially a civil matter between the two parties, I propose that civil remedies can be sought in the same manner as for an infringement of a PVR. Proceedings would be brought at the High Court and the remedies would include (i) an injunction, and (ii) either damages or an account of the profits (at the option of the plaintiff).

The appointment of the Committee

33 In response to the 2019 Cabinet Paper, Cabinet agreed that members of the Committee will be appointed by the Commissioner for Plant Variety Rights (the **Commissioner**). As with the other intellectual property regimes, I propose that the appointments process is described at a high level in the legislation to enable the Commissioner to develop the details of the appointment process in consultation with the Committee and relevant agencies. For the Māori advisory committees in other intellectual property regimes, these details are in the Terms of Reference that guide those Committees. I envision that the appointment process would be similar to the appointment process used in other intellectual property regimes which involves seeking expressions of interest and nominations from Māori organisations. Members would then be appointed by the relevant Commissioner following an interview process.

34 During the consultation process, Māori submitters expressed a strong desire for Māori to play a more active role in the appointments process and for Māori organisations to have the ability to appoint representatives to the Committee. It was also suggested that committee members should be drawn from iwi. I do not propose to adopt these proposals as they could compromise the autonomy of the Committee. Members of other Māori committees expressed concerns that being appointed by an iwi can put the committee members in a difficult position, creating a conflict of interest. It is particularly important that the Committee acts autonomously given its decision-making role. I note that some of the concerns raised by submitters will be addressed through the Commissioner's engagement with Māori organisations during the appointment process.

35 In 2019, Cabinet agreed that members of the Committee should have relevant expertise including in relation to mātauranga Māori, te ao Māori, tikanga Māori and taonga species. Acknowledging the pivotal role the Committee will play in the new regime, I propose to strengthen the appointment process by requiring the Commissioner to also consider:

35.1 whether the proposed member has the mana, standing in the community and skills, knowledge, or experience to participate effectively in the Committee and contribute to achieving the purposes of the Committee.

35.2 the Committee's overall knowledge and experience as a whole.

36 To ensure the appointments process remains pragmatic and effective in appointing the most suitable candidates to achieve the purposes of the Committee, I expect the Commissioner to involve the Committee in the review of any terms of reference that shapes the Committee.

The decision-making process of the Committee

37 The 2019 Cabinet Paper anticipated that there remained a number of issues relating to the decision-making process that needed to be addressed.

38 Given that the Committee has a statutory decision-making role, it is important that key aspects of their decision-making process (e.g. how the Committee operates and how a determination is made) are set out in the legislation. This will provide clarity to both the Committee and those affected by its decisions.

39 In addition, submitters supported the Committee having sufficient flexibility to take an investigative approach to its assessment of kaitiaki relationships. Acknowledging the weight of the decisions being made by the Committee and the desire for greater clarity, I propose:

39.1 to include a non-exhaustive list of issues the Committee may consider when assessing the effect of a PVR grant on kaitiaki relationships, including:

39.1.1 the nature of the kaitiaki relationship

39.1.2 the effect of PVRs already granted in relation to that species

39.1.3 the purpose of this regime

39.1.4 whether any adverse impacts can be mitigated or avoided.

39.2 that, where kaitiaki have asserted a kaitiaki relationship with the candidate variety, the Committee must also consider:

39.2.1 whether the kaitiaki have demonstrated their relationship to the taonga species and associated mātauranga Māori

39.2.2 the kaitiaki's assessment of the effect of the PVR grant on their kaitiaki relationship

39.2.3 any agreement to mitigate adverse impacts reached between the breeder and kaitiaki

39.2.4 whether there is any evidence that the parties have not acted in good faith during the engagement

39.3 empower the committee to seek further information and convene a meeting/hui between parties (if needed) to take an investigative approach when making a decision on the impact of a PVR grant on kaitiaki relationships

39.4 include a requirement that the Committee should endeavour to reach a unanimous decision and only in the event that this is not possible, may the Chair of the Committee allow a decision to be made by a simple majority vote.

40 Breeders also sought some clarity in the legislation around how long the committee should have to consider an application. I do not propose to prescribe a time limit in legislation as it would unreasonably constrain the Committee's decision-making process. However, the Committee will, of course, be expected to act in a timely manner.

41 I acknowledge that this process may cause some delays to the grant of a PVR which may have an economic impact on breeders. However, I consider these procedural requirements necessary given the small size of the Committee, the complexity of the issue being considered, and the absence of a full appeal process. The proposed approach appropriately balances the desire for timely decisions against ensuring a fair and informed decision can be reached.

Mitigations and imposing conditions on grants

42 When assessing the impact of a PVR grant on kaitiaki relationships, the Committee must consider whether any adverse impacts can be mitigated. It is anticipated that, during the engagement between breeders and kaitiaki, an agreement would be reached to mitigate any adverse impacts. My view (and the view of the majority of submitters that commented on this issue) is that the Committee should not impose mitigations for the grant of a PVR.

43 However, in order to adequately protect kaitiaki relationships for the full duration of a grant, it will be important that any undertakings to mitigate any adverse impacts become conditions of a grant. To ensure breeders comply with any agreement or undertakings after a grant, I recommend that:

43.1 any undertakings made by an applicant which mitigate adverse impacts on kaitiaki relationships, either following an agreement with kaitiaki or discussion with the Committee, may be made a condition of the grant of the PVR; and

43.2 if the breeder breaches these conditions, then the grant may be cancelled.

Post-determination issues

44 The discussion document considered two issues that arise after the Committee has made a determination on the adverse impacts of a grant on kaitiaki relationships: (i) whether there should be a ‘first stage’ review prior to judicial review, and (ii) how objections after grant should be considered when these relate to impacts on kaitiaki relationships.

First stage review

45 Given the costs of judicial review and the absence of a substantive appeal right on the decision, I propose to include an option for a first stage review of decisions by the Committee whereby:

45.1 any person can request the Committee to reconsider the application in the light of new information

45.2 a first stage review will need to be initiated within 10 working days of the release of the Committee’s final decision

45.3 in reviewing the decision, the Committee should still have the same powers to request further information and convene a hearing where necessary.

Objections after grant

46 The PVR regime allows for objections to be made to a PVR after a grant has been made on the basis that:

46.1 the criteria for grant were not met at the time the application was made (in which case the grant will be nullified, meaning it is deemed never to have been made)

46.2 the variety is no longer stable or uniform (in which case the grant is cancelled, resulting in the right being revoked from that point forward).

47 In response to the 2019 Cabinet Paper, Cabinet agreed that a grant could be nullified if there is an objection on the grounds that there is an adverse impact on kaitiaki relationships that has not been recognised by the Committee.

48 Following public consultation, I remain of the view that objections after grant on the ground that there is an adverse impact on kaitiaki relationships should be available. The regime already provides for mechanisms to prevent vexatious claims which I believe will be sufficient to prevent re-litigation of issues without sufficient evidence.

49 Where there is an objection on this ground, I propose that the application be referred to the Committee for consideration before the grant is cancelled or nullified. If the Committee finds that, in the light of information provided:

49.1 the grant should not have been made in the first place, then the grant may be nullified

49.2 a breeder has breached any conditions of the grant, the grant may be cancelled.

50 If a new undertaking on mitigations is agreed by the breeder following this process, nullification or cancellation may be avoided, and the undertaking may be made a condition of continuation of the PVR.

Proposals relating to the operation of the Plant Variety Rights Office

51 The discussion document also considered a number of issues relating to PVR Office processes. They can be grouped into the following five categories:

51.1 Information available to the public

51.2 Provision of plant material for growing trials

51.3 Conduct of growing trials

51.4 Payment of trial and examination fees

51.5 Hearings and appeals.

Information available to the public

52 PVR applicants are required to provide some basic information regarding the origin and breeding of their varieties in the technical questionnaires that accompany their application. Currently the Act requires all information submitted with an application to be publicly available. However, the PVR Office considers that some breeders are concerned that this could give competitors an advantage and so do not provide this information. This can adversely impact the work of the PVR Office, for example in correctly identifying the taxonomic information for the new variety.

53 Intellectual property rights come with certain responsibilities, including transparency of information to encourage follow-on innovation. I considered whether origin and breeding information should be kept confidential until a PVR is granted. However, my view (and the view of the majority of submitters that commented on this issue) is that this principle of transparency is more important to the overall purpose of the PVR regime, and so I do not recommend any change.

Provision of plant material for growing trials

54 Growing trials will often require comparator varieties to be grown alongside the candidate variety to test whether the candidate variety is distinct. This is one of the criteria for the grant of a PVR. In addition, the PVR Office also maintains reference collections for some varieties (in collaboration with third parties). These also assist with assessment of a candidate variety.

55 However, there is no clear authority for the Commissioner of PVRs (through the PVR Office) to request material of protected varieties from third parties for comparative or reference purposes. In most cases breeders are happy to provide this material, but if they refuse, then this can result in a less robust testing process.

56 While breeders generally accept this is necessary, their main concern is the security of their plant material when the growing trial is not being directly carried out on a trial site owned or managed by the PVR Office, but by a third party (who may be a competitor). Breeders also noted that their ability to provide material for comparative purposes can be affected by circumstances beyond their control (e.g. delays importing material due to quarantine requirements). Breeders requested that any new provisions need to be flexible enough to accommodate these circumstances.

57 I propose that the Commissioner be empowered to request material of a protected variety from a breeder for the following purposes:

57.1 For comparison purposes as part of a growing trial

57.2 To be held in a reference collection

57.3 Any other official purpose.

58 I propose that sanctions be available both in relation to the non-provision of material when requested, in the absence of a good reason, and in relation to any use of material that is provided that is inconsistent with the purposes above.

59 Article 22 of UPOV 91 only provides limited grounds for cancelling a grant, so instead I propose to rely on Article 17(1) which permits the imposition of conditions on a grant in the public interest. I consider that having a robust testing regime is in the public interest as it ensures that decisions on PVR grants are made with the best possible information.

60 I therefore propose that it be a general condition of a grant that a breeder be required to respond to a request for protected material from the Commissioner. If the material is not provided within the prescribed timeframe without good reason, the Commissioner may cancel the grant in respect of that material.

61 Furthermore, if the material requested is supplied for a growing trial run by an applicant and the applicant uses a material other than as directed by the Commissioner, the Commissioner may lapse that application. This is in addition to any claim the breeder providing the material may make in relation to an infringement of their rights.

62 Finally, I also considered the current provisions relating to provision of propagating material with an application. No concerns were raised by submitters with these provisions. However, I propose a small amendment to how the legislation deals with this issue by specifying that an application must be accompanied by the propagating material prescribed in regulations. Currently the provision only refers specifically to seed, and generalising this to propagating material will ensure flexibility.

Conduct of growing trials

63 All candidate varieties for a PVR need to be tested to ensure that they are distinct, new, uniform, and stable. These are is the standard criteria for the grant of a PVR under UPOV 91. A growing trial is necessary to see if the variety meets the criteria for grant.

64 There are a range of options for how this testing may be carried out. These may vary depending on the type of variety. For example, some testing is carried out by the PVR Office, some by third parties (potentially including the applicant) and sometimes test reports from overseas testing can be relied upon.

65 The current legislation is unclear about (i) whether growing trials are compulsory, and (ii) and what authority the Commissioner of PVRs has in relation to directing the type of growing trial necessary in each case. While the current system generally works well, it does create uncertainty in some instances, which can lead to disputes between applicants and the PVR Office.

66 Submitters supported clarifying that growing trials are compulsory in each application and that the Commissioner should have the power to direct the type of growing trial appropriate. This reflects current practice. The main issue raised by submitters was that they would like to see the PVR Office make more use of foreign test reports. This is an operational matter for the PVR Office to manage.

67 I therefore propose that:

67.1 the legislation should be clear that all applications for a PVR require a growing trial, whether undertaken by the Commissioner, a third party on direction of the Commissioner, or by an appropriate overseas testing body.

67.2 the Commissioner should be empowered to direct certain details of a growing trial and that these are prescribed in regulations. These will include details such as the location and timing of the trial, trial design and varieties to be included, conditions under which the trial must take place, and how the trial will be overseen and by whom.

68 I note that, if my proposal below in relation to the right to be heard is agreed, applicants will be able to challenge a decision of the Commissioner in relation to growing trials through the IPONZ hearing process.

Payment of trial and examination fees

69 Currently, trial and examination fees are required to be paid within a prescribed period after a PVR application is made, but no period is prescribed in regulations. However, the time at which growing trials actually can begin is very variable. They may start a considerable amount of time after the fee has been paid (meaning that the PVR Office is holding on to that fee for all that time). Or they may get underway before the fee is paid (which can give rise to a situation where the applicant withdraws the application if a grant is looking unlikely and leaves the PVR Office with no easy way to collect the fee).

70 To clarify the situation – and provide flexibility that can accommodate the variance in when growing trials can get underway – I propose that trial and examination fees be paid within a prescribed timeframe, following a request from the Commissioner. I also proposed to make it clear that the Commissioner can defer any action in relation to an application (eg commencing or continuing a growing trial) until the appropriate fee is paid.

Hearings and appeals

71 Giving affected parties a right to be heard in situations which potentially affect their rights (whether that be in relation to an objection filed by a third party, or when the Commissioner exercises their discretion) is an important principle of natural justice. However, at present, only two provisions in the legislation explicitly refer to a right to be heard, and there is no process set out in regulations according to which a hearing would be conducted.

72 There was agreement from all submitters that this situation needed addressing. I therefore propose that it be clarified that there is a right to be heard:

72.1 in all specific situations in which a person's rights may be affected (e.g. when an objection to a grant is made, when an application for a compulsory licence is made, or when a grant may be cancelled or nullified

72.2 whenever the Commissioner exercises any of their discretionary powers.

73 Corresponding to the Commissioner's role in conducting hearings, I propose that the Commissioner be given the power to issue a summons to a person requiring that person to attend a hearing before the Commissioner to give evidence or produce documents or other information relevant to the hearing. The Patents Act 2013 contains similar provisions. If the Commissioner is to be given the power to issue a summons, the Commissioner will also need the power to sanction persons who do not comply with the summons. I propose that sanctions consistent with those in section 236 of the Patents Act 2013 be provided for (a fine not exceeding $2000).

74 These changes will bring the PVR regime in line with other intellectual property legislation, eg Patents. Regulations will set out the process to be followed for a hearing.

75 As for appeals against a decision of the Commissioner, these are currently made to the District Court. I propose that the PVR regime be brought in line with other intellectual property regimes, and that appeals be heard at the High Court. This court has the appropriate technical expertise to consider these cases. I note that the only two PVR cases which have gone to Court in recent years were considered at the High Court. They were both infringement cases.

Financial Implications

76 The PVR Office is currently funded by third parties (primarily from application and trial/examination fees) and a small amount of Crown funding (for New Zealand's membership of UPOV).

77 There has not been a fees review for the PVR regime since 2002 and the fees charged to applicants no longer cover the full cost of the regime. Annual revenue is currently of the order $0.4 - $0.5 million against the allocated appropriation of $1.193 million.

78 The new regime will have funding implications which will further strain the funding of the PVR Office. The establishment and operation of the Committee, in particular, will require additional funding.

79 IPONZ has commenced a fees review that will:

79.1 assess the current levels of fees against the operational costs of the PVR Office

79.2 assess the level of funding necessary for both the establishment and ongoing operational costs of the Committee and any awareness programmes highlighting changes for the industry

79.3 consider a full range of options, including Crown funding and changes to the current fee structure, for meeting the costs of both the PVR Office and the Committee.

80 I am conscious in the current climate that there are constraints on, and a high bar to additional Crown funding, particularly for Offices like the PVR Office that are funded with third party revenue.

81 I anticipate that consultation on a proposed new fee structure will take place alongside consultation on the new PVR regulations while the Bill is before select committee.

Legislative Implications

82 Legislation will be required to implement the proposals in this Cabinet paper. Confidential advice to Government Our CPTPP obligations require the new regime to be in force by 30 December 2021.

83 Drafting on the basis of the November 2019 policy decisions is underway. If agreed, the proposals in this paper will be incorporated in the draft Bill. I will return to Cabinet shortly to seek approval for introduction of the new legislation.

84 New PVR regulations, including a new fees regime, will also be required to support the new legislation and I will shortly be seeking Cabinet's approval to consult on these.

Impact Analysis

Regulatory Impact Statement

85 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Climate Implications of Policy Assessment

86 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

87 The proposals in this paper will not disproportionately impact population groups (including children, seniors, disabled people, women, people who are gender diverse, Pacific peoples, veterans, rural communities, and ethnic communities).

88 The impact on Māori, as an extension to Te Tiriti o Waitangi implications, has been considered in the policy analysis section above.

Human Rights

89 Consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 will be discussed with the Ministry of Justice during the drafting process.

Consultation

90 MBIE has worked closely with the Ministry of Foreign Affairs and Trade in relation to our CPTPP obligations throughout this review.

91 MBIE has also worked closely with both Te Puni Kōkiri and Te Arawhiti throughout the review process for guidance on the Crown's engagement with Māori.

92 MBIE has consulted on this paper with these agencies as well as Crown Law, Department of Conservation, Department of the Prime Minister and Cabinet, Land Information New Zealand, Ministry for the Environment, Ministry of Justice, and Ministry of Primary Industries.

Communications

93 Given the nature of the proposals in this paper, there will not be a press release. Cabinet's decisions will be communicated through MBIE's website and newsletters/pānui to interested parties.

Proactive Release

94 I propose that this Cabinet paper be proactively released, with any redactions as appropriate under the *Official Information Act 1982*, on the MBIE website, within 30 business days of decisions being confirmed by Cabinet.

Recommendations

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

1 **note** that in November 2019, Cabinet agreed to policy decisions to amend the Plant Variety Rights (**PVR**) Act [DEV-19-MIN-0301 refers]

2 **note** that some further policy decisions are required relating to:

2.1 outstanding issues relating to the Treaty of Waitangi provisions

2.2 operational issues relating to the PVR Office

3 **note** that in July 2020 Cabinet agreed to release a discussion document outlining options to address these outstanding policy issues [DEV-20-MIN-0153 refers], and that MBIE consulted on these from August to October 2020

Outstanding issues relating to the Treaty of Waitangi provisions

The assessment of kaitiaki relationships and the definitions of key terms

4 **note** that, as previously agreed by Cabinet, the new PVR regime will establish a Māori advisory committee (**the Committee**) that will determine whether the grant of a PVR will have an adverse impact on kaitiaki relationships and, if so, whether this impact can reasonably be mitigated so as to allow the grant

5 **note** that the Committee will need to assess PVR applications in respect of all varieties derived, either wholly or in part, from indigenous plant species or non-indigenous plant species of significance sourced in New Zealand

6 **agree** that 'indigenous plant species' be defined as "a native plant species which is either endemic to New Zealand or has arrived in New Zealand without human assistance" (or similar wording)

7 **agree** that a list of 'non-indigenous plant species of significance' will be prescribed in regulations

8 **agree** that:

8.1 where there is no identifiable kaitiaki in respect of a plant species, the Committee may consider the impact on kaitiaki relationships, as understood by Māori, generally, and

8.2 where there is an identifiable kaitiaki, the Committee will be guided by the kaitiaki and any evidence they provide

Disclosure obligations and confidentiality

9 **agree** that, in relation to pre-application engagement between breeders and kaitiaki, there should be an obligation of confidentiality on both parties in relation to any information disclosed

10 **agree** that information exchanged between all parties, including the Committee for the purposes of assessing the kaitiaki relationships, may be made public post-application, consistent with all other information provided by a breeder with their application

11 **agree** that civil remedies can be sought at the High Court for a breach of confidentiality and that the remedies would include (i) an injunction, and (ii) either damages or an account of the profits (at the option of the plaintiff)

Appointment of the Committee

12 **note** that, as previously agreed by Cabinet, the Commissioner of PVRs will appoint the Committee, and must consider whether prospective members have knowledge of mātauranga Māori, te ao Māori, tikanga Māori and taonga species

13 **note** that the Commissioner is expected to involve the Committee in the establishment and review of any terms of reference to ensure the terms are pragmatic and reflect how the Committee operates

14 **agree** to extend the criteria for appointment to the Committee previously agreed by Cabinet to include mana and standing in the community, skills, knowledge, or experience to participate effectively in the Committee and take into consideration the experience and skills of the Committee as a whole

The Committee's decision-making process

15 **note** that, as previously agreed by Cabinet, the Committee will be responsible for making a determination in relation to the impact of a PVR grant on kaitiaki relationships

16 **agree** that the legislation should include a non-exhaustive list of factors that the Committee may consider in assessing the impact of a grant on a kaitiaki relationship, as well as a list of additional considerations they must consider where kaitiaki have asserted a kaitiaki relationship with the candidate variety

17 **agree** to empower the Committee to seek further information and convene a hui between parties to enable the Committee to obtain a better understanding of whether the grant of a PVR right will have an impact on a kaitiaki relationship

18 **agree** that the Committee must endeavour to reach a unanimous decision, but in the event that this is not possible, the Chair of the Committee may allow a decision to be made by a simple majority vote

Mitigations and imposing conditions on grant

19 **note** that, in determining whether a grant will adversely impact a kaitiaki relationship, the Committee will take into consideration any actions the breeder has undertaken which would mitigate any adverse impacts

20 **agree** that any undertakings made by an applicant, either following an agreement with kaitiaki or discussion with the Committee, may be made a condition of the grant of the PVR

Post-determination issues

21 **agree** that the applicant or any person with a kaitiaki relationship should be able to request that the Committee reconsider its determination in the light of new information and within 10 working days of the Committee's decision

22 **note** that when reviewing the decision, the Committee should have the same powers to request further information and convene a hearing

23 **agree** that an objection after grant can be made on the ground that there is an adverse impact on kaitiaki relationships

24 **agree** that, if the Committee determines there was an adverse impact on kaitiaki relationships at the time the grant was made, then the grant may be nullified by the Commissioner

25 **agree** that, if the Committee finds that the breeder has breached a condition of grant relating to mitigating adverse impacts to kaitiaki relationships, then the grant may be cancelled by the Commissioner

26 **agree** that if a new undertaking on mitigations is agreed by the breeder following this process, nullification or cancellation may be avoided, and the undertaking may be made a condition of the PVR

Operational issues relating to the Plant Variety Rights Office

27 **note** that, during 2019, MBIE surveyed PVR stakeholders to assess whether any changes to PVR Office processes were needed, and the discussion document sought feedback on proposed options in relation to certain issues that were raised

Information available to the public

28 **note** that there are differing views within the plant breeding community around the publication and disclosure information about the origin and breeding of the new variety provided with a PVR application, some arguing in favour of transparency, and others arguing in favour of keeping this information confidential until the grant is decided

29 **agree** that, on balance, no change be made to the current requirement that all information provided with an application be publicly available

Provision of plant material for growing trials

30 **note** that material of a protected variety is often required for comparison or reference purposes to ensure that a growing trial for a candidate variety is robust

31 **agree** that the Commissioner of PVRs be empowered to request material of a protected variety from a breeder for the following purposes:

31.1 For comparison purposes as part of a growing trial

31.2 To be held in a reference collection

31.3 Any other official purpose.

32 **agree** that it be a general condition of a grant that a breeder be required to respond to a request for material of a protected variety from the Commissioner, and if the material is not provided within the prescribed time frame without good reason, the Commissioner may cancel the grant in respect of that material

33 **agree** that, if an applicant conducting a trial uses the material other than as directed by the Commissioner, the Commissioner may lapse that application

34 **agree** that an application for a PVR must be accompanied by the propagating material prescribed in regulations

Conduct of growing trials

35 **agree** that all applications for a PVR require a growing trial, whether undertaken by the Commissioner, a third party on direction of the Commissioner, or by an appropriate overseas testing body

36 **agree** that the Commissioner be empowered to direct the type of growing trial in respect of an application and this direction may include certain details prescribed in regulations

Payment of trial and examination fees

37 **agree** that trial and examination fees be paid within a prescribed timeframe following a request from the Commissioner

38 **agree** that the Commissioner may defer any action in relation to an application if the relevant fee has not been paid

Hearings and appeals

39 **agree** that it is clarified that there is a right to be heard:

39.1 in all specific situations in which a person's rights may be affected (eg when an objection to a grant is made, when an application for a compulsory licence is made, or when a grant may be cancelled or nullified)

39.2 whenever the Commissioner exercises any of their discretionary powers (unless stated otherwise)

40 **Agree** that:

40.1 the Commissioner be given the power to issue a summons to a person requiring that person to attend a hearing before the Commissioner to give evidence or produce documents or other information relevant to the hearing, consistent with the corresponding provision in the Patents Act 2013

40.2 any person that fails to comply with the summons of the Commissioner will be liable to a fine not exceeding $2,000 consistent with the penalties provided for under the corresponding provisions of the Patents Act 2013

41 **note** that regulations will set out the process that IPONZ will follow when conducting a hearing

42 **agree** that appeals against a decision of the Commissioner be made to the High Court

Financial implications

43 **note** that there will be financial implications in relation to the proposals in this paper when considered alongside the changes already agreed by Cabinet in November 2019

44 **note** that IPONZ has commenced a fees review that will:

44.1 assess the current levels of fees against the operational costs of the PVR Office

44.2 assess the level of funding necessary for both the establishment and ongoing operational costs of the and any awareness programme highlighting changes from the legislation to the industry

44.3 consider a full range of options, including Crown funding and changes to the current fee structure, for meeting the costs of both the PVR Office and the Committee

Legislative Implications

Confidential advice to Government

46 **note** that the drafting of the Bill is currently underway and Cabinet's decisions on these recommendations will be incorporated into the Bill before it is introduced

47 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to these recommendations

48 **authorise** the Minister of Commerce and Consumer Affairs to make decisions consistent with the overall policy decisions in this paper on any issues which arise during the drafting process

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs