



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Further policy decisions for the review of the Plant Variety Rights Act 1987	Date to be published	28 April 2021

List of documents that have been proactively released		
Date	Title	Author
15 March 2021	Further policy decisions for the review of the Plant Variety Rights Act 1987	Office of the Minister of Commerce and Consumer Affairs
15 March 2021	CAB-21-MIN-0063.02	Cabinet Office – Cabinet Economic Development Committee

Information redacted

YES

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



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Review of the Plant Variety Rights Act 1987: Further Policy Decisions

Portfolio **Commerce and Consumer Affairs**

On 15 March 2021, following reference from the Cabinet Economic Development Committee (DEV), Cabinet:

Background

- 1 **noted** that on 13 November 2019, DEV agreed to a number of amendments to the Plant Variety Rights (PVR) Act 1987 [DEV-19-MIN-0301];
- 2 **noted** 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 **noted** that on 29 July 2020, DEV agreed to the release of a discussion document outlining options to address these outstanding policy issues [DEV-20-MIN-0153], and that the Ministry of Business, Innovation and Employment consulted on these issues 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 **noted** 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 **noted** 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 **agreed** 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 **agreed** that a list of 'non-indigenous plant species of significance' be prescribed in regulations;

8 **agreed** 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;
- 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 **agreed** that in relation to pre-application engagement between breeders and kaitiaki, there be an obligation of confidentiality on both parties in relation to any information disclosed;
- 10 **agreed** 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 **agreed** that civil remedies can be sought at the High Court for a breach of confidentiality, and that the remedies include an injunction, and either damages or an account of the profits (at the option of the plaintiff);

Appointment of the Committee

- 12 **noted** that, as previously agreed by Cabinet, the Commissioner of PVRs (the Commissioner) will appoint the Committee, and must consider whether prospective members have knowledge of mātauranga Māori, te ao Māori, tikanga Māori and taonga species;
- 13 **noted** 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 **agreed** 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 taking into consideration the experience and skills of the Committee as a whole;

The Committee's decision-making process

- 15 **noted** 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 **agreed** that the legislation 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 **agreed** 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 **agreed** 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 **noted** that in determining whether a grant will adversely impact a kaitiaki relationship, the Committee will take into consideration any actions the breeder has undertaken that would mitigate any adverse impacts;
- 20 **agreed** 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 **agreed** that the applicant or any person with a kaitiaki relationship 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 **noted** that when reviewing the decision, the Committee have the same powers to request further information and convene a hearing;
- 23 **agreed** that an objection after grant can be made on the ground that there is an adverse impact on kaitiaki relationships;
- 24 **agreed** that, if the Committee determines there was an adverse impact on kaitiaki relationships at the time the grant was made, the grant may be nullified by the Commissioner;
- 25 **agreed** that, if the Committee finds that the breeder has breached a condition of grant relating to mitigating adverse impacts to kaitiaki relationships, the grant may be cancelled by the Commissioner;
- 26 **agreed** 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;

Review of regime

- 27 **agreed** that the Minister of Commerce and Consumer Affairs review the effectiveness of the regime in meeting the objective of protecting kaitiaki relationships with taonga species at a timeframe to be determined with the Committee;

Operational issues relating to the Plant Variety Rights Office

- 28 **noted** that on 29 July 2020, DEV agreed to the release of a discussion document on changes to the PVR regime, including on whether any changes to PVR Office processes were needed [DEV-19-MIN-0301];

Information available to the public

- 29 **noted** that there are differing views within the plant breeding community around the publication and disclosure of 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;
- 30 **agreed** 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

- 31 **noted** 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;
- 32 **agreed** that the Commissioner be empowered to request material of a protected variety from a breeder for the following purposes:
- 32.1 for comparison purposes as part of a growing trial;
 - 32.2 to be held in a reference collection;
 - 32.3 any other official purpose;
- 33 **agreed** 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 that 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;
- 34 **agreed** that, if an applicant conducting a trial uses the material other than as directed by the Commissioner, the Commissioner may lapse that application;
- 35 **agreed** that an application for a PVR must be accompanied by the propagating material prescribed in regulations;

Conduct of growing trials

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

Payment of trial and examination fees

- 38 **agreed** that trial and examination fees be paid within a prescribed timeframe following a request from the Commissioner;
- 39 **agreed** that the Commissioner may defer any action in relation to an application if the relevant fee has not been paid;

Hearings and appeals

- 40 **agreed** that it be clarified that there is a right to be heard:
- 40.1 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);
 - 40.2 whenever the Commissioner exercises any of their discretionary powers (unless stated otherwise);

41 **agreed** that:

- 41.1 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;
- 41.2 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;

42 **noted** that regulations will set out the process that IPONZ will follow when conducting a hearing;

43 **agreed** that appeals against a decision of the Commissioner be made to the High Court;

Financial implications

44 **noted** that there will be financial implications in relation to the above paragraphs when considered alongside the changes previously agreed by Cabinet [DEV-19-MIN-0301];

45 **noted** that IPONZ has commenced a fees review that will:

- 45.1 assess the current levels of fees against the operational costs of the PVR Office;
- 45.2 assess the level of funding necessary for both the establishment and ongoing operational costs of the regime, and an awareness programme highlighting legislative changes to the industry;
- 45.3 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

47 **noted** that the drafting of the Bill is currently underway, and that Cabinet's decisions relating to the above proposals will be incorporated into the Bill before it is introduced;

48 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals;

49 **authorised** the Minister of Commerce and Consumer Affairs to make decisions consistent with the overall policy decisions in the paper under DEV-21-SUB-0026 on any issues which arise during the drafting process.

Michael Webster
Secretary of the Cabinet

Secretary's Note: This minute replaces DEV-21-MIN-0026. Cabinet added a new paragraph 27.