



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Further Policy Decisions on the Review of the Plant Variety Rights Act 1987	Date to be published	22 November 2021

List of documents that have been proactively released

Date	Title	Author
September 2021	Further Policy Decisions on the Review of the Plant Variety Rights Act 1987	Office of the Minister of Commerce and Consumer Affairs
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Information redacted

YES / NO

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In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

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

Proposal

- 1 This paper seeks approval to amend three previous policy decisions as part of the review of the Plant Variety Rights Act 1987 following consideration of submissions to the Economic, Development, Science and Innovation Committee (**EDSI Committee**) on the Plant Variety Rights Bill 2021 (**PVR Bill**).

Relation to government priorities

- 2 The proposals in this paper are part of the wider review of the PVR regime. The review implements the Crown's obligations under the Treaty of Waitangi (the **Treaty**) and international obligations in relation to the PVR regime under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (the **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 assisting the Crown to meet its Treaty obligations in the PVR regime.

Background

- 4 The Plant Variety Rights Act 1987 (the **PVR Act**) provides for the grant of fixed-term intellectual property rights to plant breeders over new plant varieties they have developed.
- 5 A review of the PVR Act was initiated in February 2017 [CAB-16-MIN-0423 refers]. In addition to modernising a regime that is now over 30 years old, the purpose of the review is to meet the Crown's obligations under the Treaty and the CPTPP.
- 6 Under the CPTPP, New Zealand has agreed to "give effect" to the International Convention for the Protection of New Varieties of Plants 1991 (known as **UPOV 91**). This enables New Zealand to align its PVR regime with UPOV 91 to the fullest extent possible while also meeting the Crown's Treaty obligations in relation to taonga species.
- 7 Cabinet has made two sets of policy decisions in relation to the PVR Act review in November 2019 [DEV-19-MIN-0301 and CAB-19-MIN-0593 refer]

(the **2019 Cabinet Paper**) and in March 2021 [DEV-21-MIN-0026 and CAB-21-MIN-0063.02 refer] (the **2021 Cabinet Paper**).

- 8 The PVR Bill was introduced on 11 May 2021 and passed its first reading on 19 May 2021. The Bill was referred to the EDSI Committee. A total of 38 written submissions were received on the Bill from a broad range of stakeholders including plant breeders, intellectual property experts, Federated Farmers, the New Zealand Law Society, Te Hunga Roia Māori o Aotearoa (the Māori Law Society), iwi, Māori groups and individuals.

Amending policy decisions following submissions to EDSI Committee

- 9 I am seeking approval to amend three 2019 Cabinet decisions regarding the PVR Bill as a result of careful consideration of submissions made on the Bill to the EDSI Committee.
- 10 Subject to Cabinet approval, these amendments will be reflected in the Departmental Report that officials are presenting to the EDSI Committee on 30 September 2021.
- 11 The three policy decisions I am seeking approval for are to:
- a. provide a right of appeal for decisions of the Māori Plant Varieties Committee (**MPVC**)
 - b. extend the term of protection for new varieties of potatoes from 20 years to 25 years; and
 - c. amend the definition of an essentially derived variety (**EDV**) in the Bill to align with the wording in UPOV 91.

Issue 1: Proposal to include a right of appeal regarding determinations by the Māori Plant Varieties Committee

- 12 This establishment of the Māori Plant Varieties Committee (**MPVC**) is guided by the principle that Māori should make decisions relating to Māori cultural interests. Consistent with this principle, Cabinet agreed to the MPVC having a decision-making, rather than advisory, function regarding the effects of PVR applications on the kaitiaki relationship with taonga species. The MPVC members are required to have relevant expertise and knowledge of mātauranga Māori, tikanga Māori, te ao Māori and taonga species.
- 13 Cabinet also agreed that decisions of the MPVC would be subject to judicial review but not an appeal process. The Bill currently reflects this decision. Judicial review provides PVR applicants the opportunity to seek review by the High Court of the process the MPVC had followed in reaching a decision. However, without an appeal process, the Court could not adjudicate on the merits of the MPVC decision. Six submissions commented on this issue.
- 14 Four submitters considered that it is important that a right of appeal to the courts is provided for by the Bill. These submitters included plant breeders and the New Zealand Law Society (**NZLS**). The other two submitters, the

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Māori Law Society and Wakatū Inc, supported the current position in the Bill. Wakatū proposed that, if a final arbiter is required, decisions of the MPVC should be referred to the Māori Appellate Court.

- 15 The NZLS submitted that the courts have been interpreting the principles of the Treaty in a substantive way for over three decades and are therefore well placed to make substantive determinations on kaitiaki relationships. It was further submitted that a right of review is best practice, encourages quality-decision-making and is consistent with the Legislation Design and Advisory Committee's guidelines.
- 16 I have given this issue careful consideration, and have consulted closely with my colleague, the Associate Minister for Māori Development. Legislation should provide adequate pathways to challenge a decision when a person's interests are affected by a statutory decision. I consider that the most appropriate pathway in this situation is to include the right of appeal. Enabling the MPVC decisions to be appealed to a higher authority strikes an appropriate balance between the rights of kaitiaki and the rights of plant breeders.
- 17 The question is, which is the appropriate Court to hear such an appeal? There are two options here given the nature of the issue at hand: the High Court or the Māori Land Court. I am seeking Cabinet's agreement to one of these two options.
- 18 There remain a number of issues still to be considered in relation to each of these options, and consultation with the judiciary on these will be needed. Therefore I am also seeking Cabinet's agreement to give me authorisation, in consultation with the Associate Minister for Māori Development, to make subsequent decisions on the details of the appeal pathway. These decisions will inform officials' subsequent advice to the EDSI Committee.
- 19 Appeals regarding statutory decisions are usually considered in the High Court in the first instance. This includes other appeals in the PVR Bill and in other intellectual property regimes such as patents and trademarks. For these reasons, and consistent with the submission from NZLS, this is my preferred option.
- 20 However, I acknowledge that the MPVC is being asked to consider the very specific matter of kaitiaki relationships with taonga species. Consideration does need to be what needs to be put in place to ensure the High Court is well-placed to consider matters of this nature.
- 21 Questions that require further consideration include:
 - a. Does the High Court have the expertise to consider matters relating to kaitiaki relationships with taonga species?
 - b. If it does not, what powers does it need to appoint expertise?

- c. What should the nature of the appeal right be, and what subsequent appeal rights should be available?
- 22 The other possible appeal pathway is the Māori Land Court. This court has broad knowledge of te ao Māori and expertise in the kinds of issues that would need to be considered but currently does not have jurisdiction to hear these matters.
- 23 Questions that require further consideration here include:
- a. What are the implications of seeking to extend the jurisdiction of the court (including what legislative change may be needed to the Te Ture Whenua Māori Act)?
 - b. Does the expertise of the court extend to the specific nature of the issue at hand?
 - c. What are the operational implications for the Court?
- 24 I also note that appeals to the higher courts are invariably expensive to all participants, though the filing fees for the Māori Land Court are lower than the High Court. This can make it very challenging for kaitiaki in particular to protect their rights and interests in any appeals process. While court action in the PVR regime is extremely rare (there have only been two cases in the last 30 years), consideration needs to be given as to how kaitiaki might be supported should the situation arise.

Issue 2: Proposal for extending the term of protection for new varieties of potatoes

- 25 In November 2019, Cabinet also agreed that New Zealand would adopt the minimum terms for the duration of a plant variety right set out in UPOV 91. These are 25 years for woody plants and 20 years for all other plants.
- 26 Submissions on the PVR Bill have persuaded me that the unique characteristics of potatoes mean they should have a longer term of protection than the 20 years currently provided in the Bill.
- 27 New Zealand relies heavily on imported potato genetics (around 85 per cent of potatoes grown in New Zealand). Potatoes take longer than other crops to 'bulk up' to sufficient volume for commercialisation to begin. Combined with importation quarantine requirements, this can limit the effective term of protection and the opportunity to capitalise on the investment. This could make New Zealand a less desirable place for foreign potato breeders, impacting our domestic growers.
- 28 I propose that the term of protection for new varieties of potatoes be extended 25 years, consistent with the longer term of protection afforded to woody plants.

Issue 3: Proposal to amend the definition of an ‘essentially derived variety’

- 29 An EDV is a concept that was introduced by UPOV 91 that allowed the exclusive rights granted to PVR owners to be extended to varieties that differ from a protected variety in relatively few ways, while still retaining the essential characteristics of the initial variety.
- 30 There is significant debate within the international PVR community about how to define an EDV and where to draw the line between a new variety that is an EDV and one that is not. The wording used in Article 14(5) of UPOV 91 to define an EDV appears to admit a range of interpretations. UPOV has recently established a working group to revise the current guidance (contained in a 2017 Explanatory Note). The new draft guidance the working group has prepared provides a broader definition than the 2017 note.
- 31 In the 2019 Cabinet Paper it was agreed that New Zealand would adopt the narrower definition of an EDV from the Australian Plant Breeder’s Rights Act 1994. The rationale for following this approach was that it provided a clear boundary as to what would classify as an EDV and therefore provides more certainty for breeders. Most UPOV members, on the other hand, have simply adopted the wording from UPOV 91.
- 32 It was acknowledged at the time that this decision was a close call. I have since learned that Australia is consulting on changing its approach to EDVs. This is, in part, because of evidence that their current approach is too narrow, which means in practice there is little protection for EDVs. Combined with further arguments put forward by submitters on the Bill, I am now persuaded that we should adopt in substance the wording in Article 14(5) of UPOV 91 for an EDV. The precise wording will be determined by the Parliamentary Counsel Office.
- 33 I note that, while the new draft Explanatory Note being prepared by UPOV has not (and may not) be agreed by the membership, I do have concerns that it provides for too broad a definition. This could hamper downstream innovation. Though these notes are not legally binding, I consider that the 2017 Explanatory Note presents a reasonable middle ground for interpretation of Article 14(5).

Financial Implications

- 34 There are no financial implications from the proposals in this Cabinet paper.

Legislative Implications

- 35 The draft PVR Bill was introduced on 11 May 2021 following Cabinet approval on 10 May 2021 [LEG-21-MIN-0051 and CAB-21-MIN-0156 refer]. The proposed changes reflected in this Cabinet paper will require redrafting of provisions in the Bill and, if agreed, will be reflected in the Bill when it is reported back to the House in November 2021.

Impact Analysis

Regulatory Impact Statement

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

Climate Implications of Policy Assessment

- 37 The Climate Implications of Policy Assessment (**CIPA**) team at the Ministry for Environment has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 38 There are no material population group implications from the proposals reflected in this Cabinet paper.

Human Rights

- 39 The section 7 report [LPA-01-01-24] found the Bill to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The proposals in this paper do not amend any aspects that may have human rights implications.

Consultation

- 40 The Ministry for the Environment, the Ministry for Primary Industries, Te Puni Kōkiri, the Ministry of Justice and Treasury have been consulted on this Cabinet paper. The Department of Prime Minister and Cabinet was informed.

Ministry of Justice comment

- 41 The Ministry of Justice's view is that further consideration is required before Cabinet is asked to decide on whether a right of appeal should be to the High Court or the Māori Land Court.
- 42 In the very limited time available to comment on the proposals, the Ministry has not been able to assess the operational and funding implications of either proposal. The Ministry also consider consultation with the judiciary is advisable to gauge its views as to the most appropriate appeal court before this choice is made.
- 43 The Ministry of Justice also notes that expanding the jurisdiction of the Māori Land Court to include matters that are not to do with Māori land could set a precedent, and this needs to be considered carefully.

Te Puni Kōkiri comment

- 44 Te Puni Kōkiri recommends that the decision on the inclusion of an appeal process is considered following Royal Assent of the Bill. Any inclusion of an appeal provision could be made to the amended Act before the Māori Plant Variety Committee comes into force. This will provide time for officials to consider the numerous factors and implications of designing an appeal process. Te Puni Kōkiri considers there is insufficient information for Cabinet to make an informed decision on this matter at this point.
- 45 Te Puni Kōkiri has concerns about the implications for whānau who hold mātauranga or a kaitiaki relationship relevant to any appeal. Our Comprehensive and Progressive Agreement for Trans-Pacific Partnership commitments also mean we should not defer Parliament's consideration of this Bill.

Communications

- 46 Given the limited 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

- 47 I propose that this Cabinet paper be proactively released, with any redactions as appropriate under the Official Information Act 1982, on the MBIE website, after the EDSI Committee has tabled its report on the Bill in the House.

Recommendations

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

- 1 **note** that Cabinet agreed to policy decisions as part of the review of the Plant Variety Rights Act 1987 in November 2019 [DEV-19-MIN-0301 and CAB-19-MIN-0593 refer] and March 2021 [DEV-21-MIN-0026 and CAB-21-MIN-0063.02 refer];
- 2 **note** that there are three policy decisions from November 2019 that the Minister of Commerce and Consumer Affairs recommends amending following consideration of submissions to the Economic Development, Science and Innovation (**EDSI**) Committee on the Plant Variety Rights Bill 2021;
- 3 **note** that, if agreed by Cabinet, these decisions will be reflected in the Departmental Report to be presented by officials to the EDSI Committee on 30 September 2021;
- 4 **note** that the Cabinet paper will be proactively released, with appropriate redactions, after the EDSI Committee has reported the Bill back to the House;

Include a right of appeal

5 **note** that in November 2019, Cabinet agreed that determinations of the Māori Plant Varieties Committee only be subject to judicial review [DEV-19-MIN-0301, recommendation 24];

6 **agree** to recommend that Cabinet rescind the decision referred to in recommendation 5, and instead agree that:

EITHER

6.1 there is a right of appeal regarding decisions of the Māori Plant Varieties Committee to the High Court;

OR

6.2 there is a right of appeal regarding decisions of the Māori Plant Varieties Committee to the Māori Land Court;

7 **authorise** the Minister of Commerce and Consumer Affairs, in consultation with the Associate Minister for Māori Development, to make further decisions on the nature of the appeal pathway, consistent with the decision in recommendation 6;

Extend the term for potatoes

8 **note** that in the 2019 Cabinet Paper, Cabinet agreed to adopt the minimum terms provided for in UPOV 91, namely 25 years for woody plants and 20 years for all other plants [DEV-19-MIN-0301, recommendation 31];

9 **agree** that there are good commercial reasons to make an exception for potatoes and to extend the term of protection for new varieties of potatoes to 25 years;

Amend the definition of an essentially derived variety

10 **note** that in the 2019 Cabinet Paper, Cabinet agreed to adopt a definition of an essentially derived variety that followed the approach in the Australian Plant Breeder's Rights Act 1994 [DEV-19-MIN-0301, recommendation 33];

11 **agree** to recommend that Cabinet rescind the decision referred to in recommendation 11, and instead agree to substantively adopt the wording in Article 14(5) of UPOV 91 in defining an essentially derived variety;

12 **note** that this recommendation is made on the basis that the current guidance provided by UPOV on essentially derived varieties (the 2017 Explanatory

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Note) remains in effect, and this decision may be revisited in the future if a broader interpretation creates issues for downstream innovation.

Authorised for lodgement

Hon Dr David Clark
Minister for Commerce and Consumer Affairs