



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

Policy decisions for the review of the Plant Variety Rights Act 1987

Proposal

1. This paper seeks approval for changes to the Plant Variety Rights Act 1987 to meet our obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) and the Treaty of Waitangi (the **Treaty**).

Executive Summary

2. The Plant Variety Rights Act 1987 (**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, in part due to obligations New Zealand has under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**).
3. The PVR Act is currently aligned with the 1978 revision of the International Convention for the Protection of New Varieties of Plants (**UPOV 78**). Under the CPTPP New Zealand has to either accede to, or adopt a *sui generis* regime to “give effect” to, the 1991 revision of the Convention (**UPOV 91**). The second option was negotiated to ensure that New Zealand could implement any measures “deemed necessary” to meet the Crown’s obligations under the Treaty of Waitangi.
4. The four recommendations of the Waitangi Tribunal report *Ko Aotearoa Tēnei* (the **Wai 262 report**) in relation to PVRs and taonga species were taken as the starting point for consideration of our Treaty obligations.
5. This paper proposes meeting our CPTPP obligation by “giving effect” to UPOV 91 as one of the measures deemed necessary to meet our Treaty obligations effectively adds a sixth condition for the grant of a PVR, and this is not permitted under UPOV.
6. In practice, this means that our PVR regime will be consistent with UPOV 91 for all varieties that are not derived from taonga species but would implement additional protections in relation to varieties that are derived taonga plant species (estimated to be around seven per cent of current PVRs) consistent with Treaty. UPOV 91 significantly strengthens plant breeders rights compared to UPOV 78 and most of our main trading partners are UPOV 91 members.
7. Giving effect to UPOV 91 requires New Zealand to align with UPOV 91 as closely as possible while also meeting our Treaty obligations. Some changes to the PVR regime are dictated by certain provisions of UPOV 91 (such as the extended exclusive rights – and the compulsory exceptions to those rights – that it provides for).

8. Other provisions of UPOV 91 leave some domestic policy flexibility as to how they are implemented and this paper makes recommendations in relation to these. Issues include (i) the term of the right, (ii) how we extend the regime to new varieties that are “essentially derived” from a protected variety, (iii) how far we extend the rights to cover the harvested material of protected varieties, and (iv) how we treat “farm saved seed” (the seed that farmers save from one season to plant the following season) in the regime.
9. The paper then makes a number of recommendations for changes to the PVR regime that are not (or are only minimally) prescribed by UPOV 91. These include the compulsory licencing regime and enforcement.
10. Finally, the paper updates the Committee on the Waitangi Tribunal Wai 2522 inquiry (the **TPP Claim**). The Tribunal will be considering the Crown’s policy and engagement with Māori on how we meet our CPTPP obligations in relation to UPOV 91 at a hearing scheduled for 4-6 December 2019.

Background to the review of the Plant Variety Rights Act

11. The Plant Variety Rights Act 1987 (**PVR Act**) is currently being reviewed. The PVR Act provides for the grant of fixed term intellectual property rights to plant breeders over new plant varieties they have developed.
12. Aside from the need to modernise a regime that is over 30 years old, the review is also driven by the need to meet our obligations under the CPTPP and the Treaty of Waitangi.
13. Under the CPTPP New Zealand agreed to either accede to the 1991 revision of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**), or to adopt our own system to “give effect” to it, within three years of the CPTPP coming into force for New Zealand (that is, by 30 December 2021). The CPTPP also includes provision for New Zealand to adopt measures it “deems necessary” to fulfil its obligations under the Treaty. If these are incompatible with acceding to UPOV 91, then New Zealand can adopt its own system to “give effect” to UPOV 91 through close alignment.
14. How the Crown meets its Treaty obligations in the PVR regime – and the implications of this for the way in which New Zealand meets its CPTPP obligations – is a significant element of the review. The starting point for this is the four recommendations relating to the PVR Act in the Waitangi Tribunal report *Ko Aotearoa Tēnei* (the **Wai 262 report**).
15. The review of the PVR Act began in February 2017 [CAB-16-MIN-0423 refers] and 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].

The Options paper

16. The Options paper put forward proposals for meeting our CPTPP obligation to align our PVR Act with UPOV 91, and our Treaty obligations. The paper indicated preferred options where these were supported by the analysis.
17. The preferred option for Treaty compliance put forward in the Options paper proposes what is, in effect, an additional condition for the grant of a PVR when the grant relates to a taonga species. This is not permitted under UPOV, with the consequence – as noted by Cabinet when it considered the release of the Options paper – that New Zealand would instead adopt its own system to “give effect” to UPOV 91.
18. In practice this means that the regime would be consistent with UPOV 91 for all varieties that are not derived from taonga species but would implement an additional condition in relation to varieties that are derived taonga plant species (while otherwise remaining consistent with UPOV 91). To put this in perspective, data from the PVR Office indicates that there are currently around 1300 PVRs granted and around 100 of these relate to indigenous species. Varieties derived from indigenous species are mostly ornamental varieties.
19. There are risks associated with not acceding to UPOV 91, but I consider that the policy outcomes achieved by meeting our Treaty of Waitangi obligations outweigh these. I address these risks at paragraphs 40-57 below.
20. Giving effect to UPOV 91 means making some changes to the PVR regime that are dictated by the provisions of UPOV 91 – such as the extended exclusive rights it provides for. Other changes that are required to give effect to UPOV 91 leave some domestic policy flexibility and the Options paper put forward preferred options for these.
21. Overall, submitters were mostly comfortable with the preferred options in the paper and the proposals I am putting forward in this paper are largely consistent with those. I am recommending adjustments to one or two in response to submissions.
22. Some plant breeders and researchers considered that acceding to UPOV 91 was important for New Zealand’s international reputation as it would clearly demonstrate a commitment to a certain level of PVR protection. They remain concerned that some foreign breeders may decide not to bring their new varieties here if we are not a UPOV 91 member. Some in this group also challenged New Zealand to go beyond the minimum level of protection required by UPOV 91.
23. Most Māori organisations and individuals were generally comfortable with the preferred option for Treaty compliance. This option was also supported by an independent analysis of the Treaty chapter in the Options paper by an expert in intellectual property and traditional knowledge issues. This analysis was commissioned by MBIE following a request from PVR hui attendees. The main concern of Māori is that reviewing the PVR regime in isolation from other legislation impacting taonga species is inadequate to provide genuine protection. Important issues, such as bioprospecting, remain unaddressed. These issues now fall under the whole-of-government approach to Wai 262.

24. A small minority of submitters felt that there was no place for the Treaty in this kind of legislation, and likewise a small number of Māori submitters felt that taonga species should be excluded completely from PVRs.

Outline

25. This paper is structured along similar lines to the Options paper with the proposals discussed under the following headings:
- 25.1. **Our CPTPP obligations in relation to UPOV 91** – this sets out our obligations under CPTPP and how I propose to meet them having determined the measures I deem necessary to meet our obligations under the Treaty of Waitangi;
 - 25.2. **Proposals for Treaty of Waitangi compliance** – this sets out in greater detail my package of proposals to make the PVR regime Treaty compliant;
 - 25.3. **Objectives/purpose of the PVR regime;**
 - 25.4. **Requirements of UPOV 91** – these are the provisions we are required to implement and for which there is no domestic flexibility;
 - 25.5. **Scope of the right** – this sets out my proposals for what a plant variety right covers in areas where there is some domestic policy flexibility within UPOV 91;
 - 25.6. **Post-grant issues** – issues that are relevant after the grant of a PVR has been made (compulsory licences and enforcement);
 - 25.7. **Additional issues** – a few issues not covered elsewhere.
26. Finally, this paper updates the Committee on the Waitangi Tribunal Wai 2522 inquiry (the **TPP Claim**). This claim was originally lodged in 2015 opposing the Crown's intention to conclude and sign the Trans-Pacific Partnership Agreement. The Tribunal will be considering the Crown's policy and engagement with Māori on how we meet our CPTPP obligations in relation to UPOV 91 at a hearing scheduled for 4-6 December 2019.

Our CPTPP obligations in relation to UPOV 91

27. Under the CPTPP all parties agreed to accede to UPOV 91. New Zealand negotiated some latitude in this obligation under Annex 18-A (paragraph 1) to permit New Zealand to comply by either (a) acceding to the Convention or (b) adopting a "*sui generis* plant variety rights system that gives effect to UPOV 1991". Annex 18-A was negotiated to ensure that New Zealand had flexibility to meet its Treaty of Waitangi obligations. This is clarified in paragraph 2 which explicitly restates that New Zealand can adopt "measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party."

28. Together, these provisions mean that, if a particular measure is deemed necessary to meet Treaty obligations and this measure is incompatible with acceding to UPOV 91, then New Zealand can instead meet its CPTPP obligation by “giving effect” to UPOV 91. The result will be a PVR regime that is consistent with UPOV 91 except for the measure(s) deemed necessary to meet our Treaty obligations.
29. There are a small number of taonga species that are not indigenous but which nevertheless require the same protection as indigenous species under the Treaty of Waitangi (e.g. some strains of kumara). If challenged on this by another party to the CPTPP, New Zealand could rely on the general Treaty exception clause in CPTPP (Article 26.9) to extend the same protection to these non-indigenous taonga species. Article 26.9 applies across all provisions of the CPTPP and permits New Zealand to adopt “measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.”
30. Interpretation of the Treaty of Waitangi and what may be deemed “necessary” would not be subject to the CPTPP’s dispute resolution mechanism. However, the classification of a plant as “indigenous” and whether a necessary measure was being used as a “means of arbitrary or unjustified discrimination” could be.
31. Drawing on the discussion on protection of kaitiaki interests in taonga species in Wai 262, and all that I have heard from Māori throughout the PVR Act review process, my understanding is that the Treaty of Waitangi requires the Crown to consider kaitiaki interests in a meaningful and mana-enhancing way at all stages of the PVR process; from the start of the breeding process to the decision on granting a PVR.
32. The package of proposals to meet our Treaty obligations (which I discuss in the next section) is based on this principle, and I consider these proposals necessary to meet those obligations.
33. The package includes implementing the four Wai 262 recommendations on the PVR Act. One of these – that the grant of a PVR be refused if kaitiaki relationships are affected – effectively adds a sixth condition for the grant of a PVR and this is not permitted under UPOV 91. (UPOV only permits five conditions: a new variety must be new, distinct, uniform, stable and have an acceptable denomination.)

Alternative options considered

34. I considered an alternative option to the ability to refuse a grant that would be consistent with UPOV 91, but do not consider that this would meet our Treaty obligations. This option was based on the “public interest” provision in UPOV 91 which permits restrictions on the exercise of the breeder’s right after a PVR grant is made. However, only providing for post-grant consideration of kaitiaki interests prioritises the interests of breeders. This is because the grant of a PVR would have to be made if the usual five conditions were met. This does not reflect a genuine, balanced – and therefore mana-enhancing – consideration of kaitiaki interests and so is not considered consistent with the principles important under the Treaty.
35. I have also considered whether it is possible to both accede to UPOV 91 and meet our Treaty obligations. UPOV officials suggested that meeting Treaty obligations in

relation to taonga species could be placed in separate legislation, or in a section of the PVR Act separate from the grant consideration process. The idea is that if Treaty obligations are a distinct consideration from the PVR grant process, then, as the PVR Act cannot override other legislation, getting a PVR may be prevented that way.

36. An example suggested by UPOV was the Costa Rican PVR legislation. This refers to other legislation regulating access to “wild plants within the biodiversity of Costa Rica”, (i.e. some form of bioprospecting legislation) that then prevents these plants from receiving PVR protection.
37. It is possible that future work provides appropriate protections for taonga species such that protections in the PVR regime are no longer necessary – and accession to UPOV 91 is possible – but there is no such alternative regime at present.
38. However, at present, our Treaty obligations in respect of PVRs over taonga species require consideration of the impact of a PVR grant on kaitiaki relationship, i.e. they are an integral part of the decision-making process. This effectively introduces an additional condition for a grant, and so I do not consider that we are able to accede to UPOV 91.

My recommendation

39. I propose that we meet our CPTPP obligations by adopting a *sui generis* regime that “gives effect” to UPOV 91, instead of acceding to UPOV 91.

Implications and risks of not acceding to UPOV 91

40. There are risks of not acceding to UPOV 91, specifically that:
 - 40.1. New Zealand is no longer seen as a strong supporter of UPOV and high international standards for plant variety rights protection;
 - 40.2. Other UPOV members will question whether we can even remain a member of UPOV 78 under these proposals (UPOV 78 is the previous iteration of the Convention);
 - 40.3. There may be some small economic impact of “giving effect” to UPOV 91 as opposed to acceding to UPOV 91.

New Zealand remains a strong supporter of UPOV

41. It is important that we send a clear signal to our international partners – both through the drafting of the new legislation and in our engagement through international fora and our bilateral relationships – that we remain a strong and active member of UPOV and a strong supporter of a robust international regime for plant variety rights protection
42. As the economic analysis of the plant varieties innovation system (commissioned by MBIE and carried out by the Sapere Research Group, the **Sapere report**) concluded, New Zealand already has a “relatively healthy dynamic system for generating new cultivars” and there are a number of areas of plant breeding – such as kiwifruit, ryegrasses and endophyte technology – where New Zealand is

considered a world leader. Aligning with UPOV 91 will only serve to strengthen the domestic plant breeding industry.

43. New Zealand, in turn, benefits from a robust international regime so that our innovation is well-protected overseas. We also play an active role at a technical level within UPOV, working with other UPOV members to share expertise and support, for example, in the development of robust examination processes.

Compliance with UPOV 78

44. New Zealand is currently a member of UPOV 78. UPOV 91 significantly strengthens rights for plant breeders over UPOV 78 and this is anticipated to increase investment in plant breeding. The benefits of the resulting innovation are anticipated to flow through to New Zealanders (eg, through better performing arable and pastoral crops for farmers, and greater choice of horticultural produce for consumers).
45. Not acceding to UPOV 91 means, despite our legislation being aligned with UPOV 91, we will remain a member of UPOV 78. UPOV 78 does not permit additional conditions – such as I propose for Treaty of Waitangi compliance – for a grant either. However, unlike UPOV 91, it does not require members to cover all plant genera and species: only a minimum of 24.
46. MBIE officials recently met with UPOV officials, including the Vice-Secretary General, Peter Button, in Geneva to discuss New Zealand's position. UPOV officials now have a clearer understanding of our domestic situation and the reason we cannot accede to UPOV 91, at least in the short to medium term. However, they remain concerned that there will be questions from other UPOV members, including as to whether, under my proposed approach, New Zealand can even remain a member of UPOV 78.
47. The current PVR Act is compliant with UPOV 78, with all plant genera and species covered. Implementing our Treaty of Waitangi obligations requires narrowing the coverage of UPOV 78 to those plant varieties that are already protected by a PVR and those plant genera and species where it is clear that there is no kaitiaki relationship. An initial estimate from the PVR Office suggests that this will be around 90 per cent of plant genera.
48. This is the first time a UPOV member will have reduced coverage, as the UPOV system only envisages the progressive application of its provisions to an increasing number of plant varieties. However, there is nothing in the text that prohibits a reduction in coverage.
49. I stress that this does not mean that species for which there may be a kaitiaki relationship are not covered at all by the PVR legislation. They will still attract the same rights, and be subject to the same additional provisions, as provided for in UPOV 91. It is just that they will attract an additional condition for the grant of a PVR and, as such, are not formally covered by the UPOV convention (either 91 or 78).

50. I will ensure that the drafting of new legislation is clear how (i) we are compliant with UPOV 78, and (ii) how we are “giving effect” to UPOV 91. The recommendations in this Cabinet paper are designed to ensure both ongoing adherence with UPOV 78 and alignment with UPOV 91.
51. My officials will continue to work with the Ministry of Foreign Affairs and Trade (**MFAT**) to ensure that, if questions are raised, New Zealand has a consistent response. Any such response would be along the lines of:
- 51.1. We remain a fully supportive and active member of UPOV, and supportive of the highest international standards of plant variety rights protection;
- 51.2. Our new regime aligns with UPOV 91, and only deviates to the extent necessary to give effect to our Treaty of Waitangi obligations;
- 51.3. We are only reducing our coverage in relation to UPOV 78 so far as is necessary to give effect to our Treaty of Waitangi obligations;
- 51.4. The door is not closed to signing up to UPOV 91 at some future point if, for example, other legislative developments (such as the development of a bioprospecting regime) provide appropriate protections for taonga species outside of the PVR Act. This is the kind of work that the whole-of-government response to Wai 262 envisages.
52. My officials have also accepted an invitation from UPOV officials to provide assistance on technical matters as we work to make these issues clear in the legislation.

Economic impact of “giving effect” to UPOV 91

53. Some submitters (mainly plant breeders and researchers, including NZ Plant Breeding and Research Association (**NZPBRA**) and Plant and Food Research (**PFRC**)) are concerned about the impact of not actually being a “UPOV 91” country. Other submitters including Zespri, Horticulture New Zealand, New Zealand Plant Producers Incorporated (**NZPPI**) and Federated Farmers supported “giving effect” to UPOV 91 if this is what is required to meet our Treaty obligations.
54. There may be some small economic impact of not actually being a member of UPOV 91. Full accession to an international instrument does potentially offer more certainty to investors than simply aligning domestic legislation. As a result some foreign breeders may choose not to bring their new varieties here, despite our domestic regime offering protection equivalent to UPOV 91. However, I consider the risk of this to be low.
55. The Sapere report investigated the current ‘state of health’ of our plant varieties innovation system, which is underpinned by legislation consistent with UPOV 78. While time and resources meant that the report was unable to canvass the views of foreign breeders, the analysis of the domestic situation found that:
- 55.1. The balance between rewarding breeders for their innovation and the benefits to growers and society from new varieties is reasonably well set;

- 55.2. There is no strong evidence that New Zealand is missing out on new plant varieties;
- 55.3. There is a relatively health, dynamic system for generating new cultivars within New Zealand.
56. However, the report did acknowledge the strongly expressed views that the future is less certain and that New Zealand risks being left behind if we do not upgrade our PVR regime.
57. Regardless of whether or not we actually accede to UPOV 91, the proposals in this paper significantly upgrade our PVR regime to align with current international standards – as supported from across the spectrum of industry participants – from a baseline that is itself in reasonable economic shape. As a result, I anticipate far more significant economic benefits from my proposals, than any costs that may be associated with not actually acceding to UPOV 91.

Proposals for Treaty of Waitangi compliance

58. The Wai 262 report found that the Treaty requires that kaitiaki relationships with taonga species are entitled to a reasonable degree of protection. What is reasonable should be decided on a case-by-case basis as the nature of the kaitiaki relationship – and so the degree of protection required – will vary. In addition, kaitiaki rights in respect of the mātauranga Māori associated with those taonga species also require proper recognition. Again, this needs to be determined on a case-by-case basis.
59. Some species may have particular significance (for example being emblematic of community or cultural identity, or having important rongoā or medicinal properties) whereas for others the relationship may be more general (for example, they are simply part of the local indigenous flora).
60. Concerns raised by Wai 262 claimants in relation to specific species included lack of input into the development of new varieties, lack of acknowledgement of mātauranga associated with the species and lack of any sharing of the benefits of commercialisation.
61. The Wai 262 report made four recommendations PVRs and these were taken to be the starting point for considering our Treaty of Waitangi obligations in the PVR regime. These are that:
- 61.1. The Commissioner of PVRs be empowered to refuse a grant that would affect the kaitiaki relationship;
- 61.2. The Commissioner of PVRs be supported by a Māori advisory committee;
- 61.3. A definition of 'breed' be included to clarify that a plant simply discovered in the wild would not be eligible for a PVR;
- 61.4. The Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community including Māori.

62. In addition to the importance of these recommendations, the main feedback I have received from Māori during this review is that:
- 62.1. Early, meaningful and ongoing engagement with kaitiaki is central to meeting our Treaty obligations;
 - 62.2. Kaitiaki interests must be considered at all stages of the breeding and PVR process in a meaningful and mana-enhancing way.
63. The package of proposals I put forward in the Options paper implements the Wai 262 recommendations, but is also designed to incentivise that early engagement. The intent of these proposals is that if effective engagement takes place at an early stage, any issues that may otherwise hold up the process for application for a PVR should be able to be resolved. But if effective engagement has not taken place, there would be backstops in place in the decision-making process.
64. This package of proposals for Treaty of Waitangi compliance covered:
- 64.1. Definitions of key terms;
 - 64.2. New disclosure requirements for breeders when working with plant species that could be taonga;
 - 64.3. New decision-making powers that:
 - 64.3.1. The grant of a PVR can be refused if kaitiaki relationships are affected (and cannot be mitigated to a reasonable extent);
 - 64.3.2. The Commissioner of PVRs can refuse a name for a new variety if registration or use of that name would offend a significant section of the community, including Māori.
 - 64.4. The establishment of a Māori advisory committee, with the Chair of the Committee sitting alongside the Commissioner of PVRs when kaitiaki interests are involved.

Definitions

65. Although I do not propose to define terms such as 'kaitiaki' and 'taonga' in the legislation, I acknowledge those submitters who said this was necessary. The PVR Act is of too limited scope to consider these wider issues – these terms have far wider relevance than just the PVR regime.
66. What is important is that all parties have clarity about when the additional protections required by the Treaty apply. The Options paper proposed instead using the terms 'indigenous species' and 'non-indigenous species of significance' as a trigger for breeders to consider whether kaitiaki interests might be affected.

My recommendations

67. I propose to advance the proposal in the Options paper to refer to 'indigenous species' and 'non-indigenous species of significance'. The latter is a limited number of species and can be listed in regulations following consultation.
68. Definitions will also be important from the point of view of clarifying which plant genera are covered by UPOV 78, and which attract the extra protections. This is also likely to involve further consultation as to how best to achieve this and so it will be important that the legislation contains a suitable regulation-making power.
69. I also propose to clarify that a plant simply discovered in the wild would not be eligible for a PVR. There was a definition of 'breed' proposed in an earlier draft Bill amending the PVR Act in 2005 to address this. This was endorsed in the Wai 262 report and was supported by submitters.

Disclosure requirements

70. Submitters were supportive of the proposal for new disclosure requirements that would accompany certain applications for a PVR. Around seven percent of applications involve indigenous plant species, so these requirements would affect around ten applications each year.
71. A common question raised by submitters was 'how will kaitiaki be identified?' Wai 262 suggests that, in the first instance, the iwi or hapū from whose territory the plant material is sourced ought to be treated as kaitiaki. The report also suggested establishing a register of kaitiaki interests in taonga species and this may be something that the Māori advisory committee could consider. There may also be situations in which more than one iwi have interests in a particular taonga species, and, again, this is where the Māori advisory committee will assist.

My recommendations

72. I therefore propose that breeders be required to indicate if they are working with indigenous species or non-indigenous species of significance and, if they are, disclose:
 - 72.1. If there are kaitiaki identified, who the kaitiaki are;
 - 72.2. A summary of their engagement with kaitiaki and the outcome of that engagement including, where relevant:
 - 72.2.1. An assessment from kaitiaki of the potential impact if a PVR is granted;
 - 72.2.2. Any consideration given to mitigating those impacts;
 - 72.2.3. Whether or not agreement was reached on the grant of a PVR.

Decision-making

73. In line with the Wai 262 recommendations, the Options paper proposed to introduce:

- 73.1. A new power to allow the refusal of a PVR if kaitiaki relationships would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant; and
- 73.2. A Māori advisory committee to assist the Commissioner in determining the impact of a PVR grant on kaitiaki relationships.
74. The assessment of the impact of a PVR grant on the kaitiaki relationship is at the heart of these proposals. My approach to this is to acknowledge the challenges of importing concepts from te ao Māori into legislation in order to create a legal test for this assessment, and instead focus on procedural safeguards.
75. Effective early engagement – facilitated if necessary by the Māori advisory committee – would, it is hoped, result in a mutual understanding of the interests of both breeders and kaitiaki and agreement on the way forward. If this occurs, the decision-making process will be straightforward.
76. If the early engagement has not reached agreement, the legislation will set out a process for the Māori advisory committee's consideration of kaitiaki interests. This might include factors for the Committee to consider when making this assessment, such as:
- 76.1. Have the parties acted in good faith?
- 76.2. Have kaitiaki demonstrated their relationship to the taonga species and associated mātauranga Māori?
- 76.3. What is the kaitiaki's assessment of the affect that the grant of a PVR might have?
- 76.4. How significant is that affect?
- 76.5. Is this affect consistent with (i) the nature of the kaitiaki relationship, (ii) the affect from PVRs already granted in relation to that species?
- 76.6. Have mitigations been considered?

My recommendation

77. Submitters were generally supportive of this option and, as already discussed, I consider this necessary to meet our Treaty obligations. I therefore recommend that a new power be introduced to allow a PVR grant to be refused if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant. I also note that this is consistent with similar provisions in both the trade marks and patents regimes.
78. I recommend that the legislation set out a process for considering kaitiaki relationships, noting that this might include consideration of the kinds of factors identified above.

79. I also recommend that the Commissioner of PVRs be enabled to refuse a name for a new variety if registration or use of that name would offend a significant section of the community, including Māori.

Decision makers

80. The Wai 262 report recommended that the Commissioner for PVRs be supported by the same Māori advisory committee as it recommended for patents. It was comfortable with the idea that the Committee would have an advisory, as opposed to a “directive” role, but did recommend that the Chair of the Committee “sit alongside” the Commissioner “to ensure a Māori voice is at the table when competing interests come to be balanced”. This was reflected in the proposal in the Options paper. Many submitters wanted the Committee to go further than this and have at least a deliberative role, if not a veto on PVR grants that involve taonga species.
81. While there will be some balancing of the interests of kaitiaki and breeders if the early engagement is effective, I do not intend to set up a new process whereby kaitiaki interests are considered and balanced more widely against other interests (e.g. the interests of researchers, or economic interests). This would involve the need for further expertise to be brought into the decision-making process.
82. Decisions relating to grants of intellectual property rights are, generally, just about assessing whether or not the conditions for a grant are met. Just as the PVR examiners determine whether the conditions of a grant are met (i.e. that the variety is distinct, uniform and stable), so it would be for the Committee – as the relevant experts – to determine the impact on kaitiaki relationships where the breeder and kaitiaki had not already resolved this.
83. So, while I do not consider the structure of the Chair of the Committee (or some other person) sitting alongside the Commissioner appropriate for this situation, I acknowledge the submissions on this issue and propose instead that the Committee make a determination in relation to the kaitiaki relationship. If the determination is that the grant of a PVR would impact that relationship and this could not be mitigated to a reasonable extent, then the grant would be refused.
84. Submitters also commented on the appointments process for the Committee, with many commenting that the members should be appointed by – or have a mandate from – Māori. I consider that the most important factor is that the members of the Committee have relevant expertise, rather than how they are appointed.
85. The members of the current Committees (for trade marks and patents) are appointed by the Commissioner, following a call for nominations. They must have appropriate knowledge in relation to mātauranga Māori, te ao Māori and tikanga Māori. There is no evidence that this is not working well and I propose the same for the PVR Māori advisory committee.
86. While in these respects, the proposed committee is similar to those already established under the Patents and Trade Mark Acts, in other respects – and in line with the proposals discussed in the Options paper – I consider that the Committee should have a more expansive role in relation to the PVR Act.

My recommendations

87. I therefore propose that:
- 87.1. A Māori advisory committee be established with a broad set of functions, including:
- 87.1.1. Developing and maintaining guidelines for breeders and kaitiaki on engagement;
- 87.1.2. Providing advice to breeders and kaitiaki before an application for a PVR is made;
- 87.1.3. Providing advice to the Commissioner on:
- 87.1.3.1. Whether the use of registration of a variety name is likely to be offensive to Māori;
- 87.1.3.2. Any information that may be relevant to the Commissioner's consideration of the five standard conditions for a PVR grant;
- 87.1.4. Making a determination on whether kaitiaki relationships would be affected by the grant of a PVR and, if so, whether these impacts could be mitigated to a reasonable extent so as to allow the grant;
- 87.2. All applications or varieties belonging to either indigenous plant species or non-indigenous plant species of significance, and denominations (names) that are derived from Māori language, are considered by the Committee;
- 87.3. The members of the Committee be appointed by the Commissioner and be required to have relevant expertise including in relation to mātauranga Māori, te ao Māori, tikanga Māori and taonga species.
88. Consistent with the approach to decision-making set out in the preceding section – namely that legislation, and therefore the courts, are not well-placed to be making substantive determinations on kaitiaki relationships – I propose that determinations of the Committee only be subject to judicial review (as oppose to appeal on merits). This means that a court would be able to review the process the decision-maker followed to arrive at the determination (i.e. the way the decision was made), but it is not for the court to substitute its own decision for that of the decision-maker.
89. I will also consider whether the IPONZ internal hearings process would be suitable (with appropriate modifications) as a first step review of the determinations of the Committee.

Objectives/purpose of the PVR Act

90. Consistent with discussions and feedback received throughout the review, I propose that a purpose statement be included in new legislation. This is consistent with other intellectual property legislation, and proposed elements have been discussed with

submitters during the review. This statement should capture the intent of the following elements:

- 90.1. Promoting innovation and economic growth by incentivising the development and use of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and others so that there is a net benefit to society as a whole;
- 90.2. Compliance with New Zealand's international obligations;
- 90.3. Compliance with the Treaty of Waitangi through the recognition and protection of kaitiaki relationships with taonga species and associated mātauranga Māori.

Requirements of UPOV 91

91. Under the CPTPP we have agreed to align with UPOV 91 as closely as our Treaty of Waitangi obligations allow. There are a number of provisions in UPOV 91 that leave no domestic policy flexibility regarding how they are implemented. New Zealand is therefore required to implement these, subject to any Treaty of Waitangi considerations. However, other than those Treaty considerations already discussed, I have not heard of any other Treaty obligations that are inconsistent with UPOV 91.
92. These provisions are listed in the table in **Annex 1** of this paper. Some of these may already be covered in our domestic legislation, others will require amending existing provisions in the legislation, and some will be entirely new. Some additional technical provisions (some of which relate to these UPOV 91 requirements) are proposed in **Annex 2**.
93. I propose that the provisions listed in **Annex 1** and the additional technical provisions listed in **Annex 2** be implemented in the new legislation.

Scope of the right

94. There a number of provisions in UPOV 91 where there is some flexibility as to how, or whether, they are implemented in domestic legislation. These relate to:
 - 94.1. The term of the right;
 - 94.2. Essentially derived varieties;
 - 94.3. Rights over harvested material;
 - 94.4. Farm saved seed.

Term of the right

95. In the PVR Act, the term of the right is 23 years for woody plants or rootstock and 20 years for all other plants. UPOV 91 requires minimum terms of 25 and 20 years respectively.

96. Approximately half of submitters who commented on this supported the UPOV 91 minimum terms (including the NZPBRA and Federated Farmers). Some submitters commented that specific varieties (e.g. potatoes, kiwifruit) should have longer terms, or that there should be provision to extend terms for specific varieties if the case was made. **CIOPORA** (the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties) submitted that all terms should be 30 years to reflect the trend towards higher breeding and research costs.
97. Most UPOV 91 members (including Australia) have adopted the minimum terms, though the EU has terms of 30 and 25 years (and 30 years for potatoes). I also note that the PVR Act already has provision to extend the term for woody plants by Order in Council, but this has never been used.

My recommendations

98. I have not seen any persuasive evidence to go beyond the minimum terms in UPOV 91, and so I propose that the term of the right aligns with these.

Essentially derived varieties

99. The concept of essentially derived varieties (**EDVs**) is new in UPOV 91. The idea essentially is to prevent a breeder making a small change to an existing variety (the **initial variety**) and then marketing it in competition to the initial variety without any recompense to the breeder of the initial variety. Under UPOV 91, the breeder of an EDV would require the authorisation of the breeder of the initial variety to carry out any of the acts covered by the scope of the exclusive rights.
100. The UPOV 91 definition of an EDV talks about a variety that is “predominantly derived” from another variety (the initial variety) and retains the “essential characteristics” of that variety. The definition leaves important terms undefined and does not offer a great deal of clarity to breeders. While UPOV 91 requires us to introduce EDVs into our PVR regime, we have some choice about how we define them. The main options canvassed in the Options paper were (i) following the UPOV definition, (ii) defining EDVs as “copycat” varieties which only changes the initial variety in a commercially insignificant way (this was the **preferred option**), and (iii) defining EDVs as any variety that possesses at least one of the essential features of the initial variety.
101. The preferred option was an attempt to provide some clarity to the definition, and follows the Australian legislation. Most UPOV 91 members have simply copied the UPOV 91 definition. A narrower definition means lower returns for breeders of the initial variety than would otherwise be the case (as fewer varieties will be considered EDVs), so established breeders tend to support a broader definition.
102. Submitters were evenly split between those that supported the preferred option (e.g. NZPBRA, Grasslanz, NZ Hops, NZPPI) and those that did not (e.g. PFR, Zespri, CIOPORA, NZ Institute of Patent Attorneys (**NZIPA**)). Some commented that the preferred option would be just as ambiguous in its definition. Both sides argued that innovation could be stifled. Some breeders were concerned that their returns on investment in breeding (and thus future innovation) would be impacted by the preferred option. For example, a simple mutation that gave rise to a significant new

characteristic would not be an EDV and would compete in the market place with the initial variety. They did not consider that this would recognise the often considerable investment that had gone into the original innovation. However, other breeders commented that innovation would be impacted by too broad a definition of EDVs as some of their returns would have to go to the breeder of the initial variety.

103. This is a complex and relatively untested area. UPOV itself acknowledges that the concept is not well defined and understood, despite a number of seminars and guidelines on the issue over the years. These discussions are ongoing within UPOV.

My recommendation

104. I am sympathetic to both sides of the argument. However, given that the preferred option provides greater clarity than the UPOV definition, I propose that the preferred option be adopted. I will, however, instruct my officials to keep both the implementation of this approach, and future developments among UPOV members, under review.

Rights over harvested material

105. Harvested material refers to any part of the plant that either (i) cannot be used for propagating the variety (e.g. fruit, cut flowers), or (ii) can be used for propagating the variety but can also be used for some other purpose (e.g. seeds for consumption).
106. UPOV 91 requires extension of rights to harvested material when (i) the material was obtained through the unauthorised use of propagating material, and (ii) the breeder did not have reasonable opportunity to exercise their rights in relation to that propagating material. However, it also gives members the option to extend rights over harvested material more broadly, and extend rights to the products of harvested material.
107. The preferred option in the Options paper was to implement the minimum extension required by UPOV 91. More submitters disagreed with the preferred option (e.g. PFR, CIOPORA, Zespri, Turners and Growers (T&G), NZIPA) than agreed with it (e.g. NZPBRA, Federated Farmers, NZPPI).
108. Submitters who disagreed with the preferred option wanted rights to be extended further. They argue that modern commercial strategies increasingly rely on the commercialisation of harvested material rather than the sale of propagating material.
109. An increasingly common business model, particularly in horticulture, is the 'closed loop' model. This is a system where the PVR owner controls the marketing, quality standards and supply of the harvested material. This is usually done through contractual arrangements requiring growers to sell their harvested produce back to the PVR owner.
110. Supporters of this model argue that it is a commercially successful way of supplying the market with produce. It is claimed that this model prevents the "boom and bust" cycles that have affected growers in the past. However, it can mean that prices for harvested produce may be higher than might otherwise be the case if growers were free to sell produce on the open market.

111. The intent of the minimum extension required by UPOV is to give PVR owners an additional opportunity to enforce their rights if they have not been able to enforce those rights in relation to the original propagating material.
112. I consider that extending rights any further than the minimum required by UPOV is not consistent with the intent of the PVR regime (whose focus is on rights associated with propagating material), and could potentially give considerable market power to rights holders.

My recommendation

113. I propose to advance the preferred option in the Options paper which implements the minimum requirement in relation to harvested material required under UPOV 91.

Farm saved seed

114. Farm saved seed refers to farmers using the seed from one season's crop to plant the next season's crop. Currently, if farmers saved seed from a protected variety they are free to do this without the authorisation of the breeder. The new exclusive rights in UPOV 91 would cover farm saved seed. This means that farmers would not be able to save seed without the authorisation of the breeder.
115. However, UPOV 91 provides an optional exception in relation to farm saved seed that members can choose to implement. Under this exception, farm saved can be removed from coverage of the new exclusive rights, subject to whatever limitations members decide to implement.
116. The intention of this exception is that it applies to crops where there is already a tradition of saving seed. In New Zealand, it is cereal crops such as wheat and barley where this practice is common.
117. I understand that all UPOV 91 members have invoked this exception, although different countries have imposed different limitations. For example, the EU lists the crop types that are exempt and regulations prescribe the circumstances in which royalty payments are required for those crop types. In Australia, all varieties are exempt, but regulations can be made removing certain varieties from this exemption.
118. The preferred option I put forward in the Options paper was broadly in line with the Australian model. Most submitters were supportive of this proposal, but many expressed some reservations. In particular, concern was expressed that the exemption could apply to crops where saving seed is not common practice (e.g. vegetatively reproduced crops), and many still felt that some form of royalty should be paid.
119. I do not share the concern that the exemption could apply more widely than intended. By definition, vegetatively reproduced crops are not grown from seed. I do acknowledge the point about royalties. Federated Farmers have indicated that they too consider a royalty could be paid and have had some discussion with NZPBRA on this. But there is still a long way to go before agreement is reached on what conditions should apply. I support these discussions continuing, with the assistance of officials if necessary.

My recommendations

120. I propose that the optional exception provided by UPOV 91 is implemented for farm saved seed. I also propose that a regulation making power be included that would permit limitations to be placed on this exception (e.g. varieties covered by the exception, requirement to pay remuneration, differentiation according to farm size, specification of an amount of produce to which the exception applies).

Post-grant issues

121. There are a number of issues that only arise after a grant has been made. These need to be addressed in this review of the Act and are not (or are only minimally) prescribed by UPOV 91. These relate to :

121.1. Compulsory licences;

121.2. Infringements;

121.3. Offences.

Compulsory licences

122. The Commissioner of PVRs can grant a compulsory licence (meaning that the licensee can carry out the acts covered by the grant without the permission of the PVR owner) if:

122.1. Three years have passed since the PVR was granted; and

122.2. The PVR owner has not made reasonable quantities of propagating material available at a reasonable price.

123. Under section 21(3) of the PVR Act, when deciding if this second condition is met, the Commissioner is required to ignore propagating material that has been made available subject to the condition that any or all of the produce must be sold or offered to a specified person. The intent of this provision at the time was to counter anti-competitive behaviour that could arise if PVR owners also had control over the produce of their propagating material.

124. It is these provisions, and section 21(3) in particular, that have caused the most consternation among submitters. The Options paper proposed retaining them, and most submitters disagreed with this, arguing that these provisions should either be repealed or significantly amended to reflect current commercial practices.

125. The concerns come predominantly from the horticulture sector (e.g. Zespri, T&G, PFR), particularly those involved in the kind of 'closed loop' business model discussed above.

126. The main concern expressed by submitters is that, under section 21(3), the Commissioner cannot take into account propagating material provided as part of a closed loop system when assessing whether reasonable quantities are available, and so the PVR owner may be forced to make propagating material available outside of the closed loop. Submitters argue that this raises the risk of a return to "boom and

bust” and could lead to a reduction in quality standards. Some argued for section 21(3) to be repealed, but if not, they commented that the more important issue is the supply of harvested material to the market.

127. I agree that we need a more nuanced approach than current section 21(3), but would not want to see it repealed without anything in its place.
128. If repeal was not an option, many of these same submitters supported the introduction of a “public interest” test for compulsory licences on the grounds that this would more effectively capture the desired outcome of having compulsory licences. Some UPOV members (e.g. the EU, Singapore and Japan) have a public interest test, while others don’t (e.g. Australia, Canada and the UK).
129. The same stakeholders also comment that the three year period – the “grace period” – is too short for a new variety to be successfully commercialised and should be either extended to, say five years, or be variable across crop types. Some UPOV members have no grace period, others two years.

My recommendations

130. On the basis of submissions received, I consider changes to the preferred options in the Options paper necessary.
131. I recommend that the compulsory license provisions provide that a compulsory license can only be granted when it is in the public interest to do so. The legislation would provide a non-exhaustive list of matters that constitute the public interest that the Commissioner must consider when deciding whether or not to grant a compulsory license.
132. These matters would include:
 - 132.1. Whether the market was being supplied with reasonable quantities of propagating material of a reasonable quality of the variety concerned at a reasonable price;
 - 132.2. Whether the market was being supplied with reasonable quantities of harvested produce of the variety concerned of a reasonable quality and at a reasonable price;
 - 132.3. The need to ensure that innovation in plant breeding is encouraged;
 - 132.4. The need to protect the life or health of humans, animals or plants.
133. Depending on the situation, supplying the market could encompass the supply of propagating material to either growers (as in horticulture or agriculture) or the public (as in ornamentals), or the supply of produce to the public (as in horticulture).
134. Given the potential variability across crop types and the variation among UPOV members, I propose that the three year grace period be retained but, to meet the concerns raised, the Commissioner be required to consider whether the PVR owner has had sufficient time to make reasonable quantities of material available.

135. Stakeholders have also previously raised a number of other more technical issues with the compulsory licence provisions, and my recommendations in relation to these are in the table in **Annex 2**. These will make the system for applying for compulsory licences clearer and more robust.

Infringements

136. As with other intellectual property regimes, the onus is on the rights' holder to enforce their rights through civil actions when they think their rights have been infringed.

137. The Options paper proposed the following:

137.1. That the PVR Act take the same approach as in other intellectual property legislation and provide that a PVR is infringed if a person does any of the acts over which the PVR owner has exclusive rights;

137.2. That, while acknowledging the issues relating to the cost of enforcement, there are no cost-effective means of addressing it, and so the status quo remains;

137.3. That the PVR Act should provide that the remedies for infringement of a PVR include:

137.3.1. An award of damages; or

137.3.2. An account of profits; and/or

137.3.3. An injunction.

138. Submitters were generally supportive of the first and third of these proposals, but not the second. However, the issue of cost effective enforcement provisions is common across intellectual property regimes (and more broadly), and there are currently no clear options for lowering the cost of enforcement.

139. The Options paper also asked whether the PVR Act should state in which court infringement cases should be heard. I recommend that PVR Act remain silent on this and the usual District and High Court rules will determine the appropriate court.

My recommendation

140. I propose that the legislation be amended in line with the proposals in paragraphs 137.1 and 137.3 above.

Offences

141. The PVR Act provides for a number of offences, mainly relating to false representation or provision of false or misleading information. The maximum fine is \$1000.

142. The Options paper proposed repealing all of the offence provisions on the grounds that they are effectively covered in other legislation such as the Fair Trading Act (**FT Act**), or there are alternative means of sanctioning the behaviour. This approach

would be consistent with the Patents Act. Submitters generally supported this approach.

My recommendations

143. The following table summarises my recommendations:

Offence	Comment/Recommendation
Supplying false or misleading information with a PVR application.	Not an offence under other IP legislation. Recommend making this ground for nullification of a PVR grant.
Falsely representing that a person is a PVR owner.	Covered by FT Act. Recommend repealing offence.
Falsely representing that a variety is protected.	Covered by FT Act. Recommend repealing offence.
Falsely representing that a variety is another variety that is protected.	Covered by FT Act. Recommend repealing offence.
Selling a variety without using the approved denomination.	UPOV requires people selling protected material to use the approved denomination, but does not require a related sanction. There are some situations in which breaching this may cause harm (in which case they would likely be covered by the FT Act). However, in other cases it does not appear that this is significant enough to attract an offence sanction. I recommend repealing the offence.
Falsely representing yourself as connected to the PVR Office	Covered by FT Act. Recommend repealing offence.
Applying for a PVR as a PVR Office employee (or 12 months after).	More appropriately dealt with through public service Code of Conduct (or s105A of Crimes Act). Recommend repealing offence.

Additional issues

Extension to algae

144. Including algae (which includes seaweed) for PVR protection is not common among UPOV members, but all submitters who commented (e.g. NZBRA, PFR, Te Rūnanga o Ngāi Tahu) supported its inclusion. I agree and consider that it could help promote innovation and support the aquaculture industry.

Provisional protection

145. Currently an applicant for a PVR can start proceedings against an alleged infringer from the point at which the application is made. The PVR Act is silent on what happens if the PVR is not granted (or lapses) and the alleged infringer has incurred costs.

146. The majority of submitters that commented on this (e.g. NZPBRA, PFR, Zespri, T&G) preferred retention of the status quo. However, and despite the fact that infringement actions are very rare, I am concerned that the status quo leaves open the possibility of abuse of the provisional protection provisions.

147. Consistent with the preferred option in the Options paper and other intellectual property legislation, I propose that infringement actions can only be commenced after a grant is made, though they can apply to actions that occurred after the application was made and before the PVR was granted.

Transitional provisions

148. While the details of the transitional provisions will be worked out during drafting of the new legislation, they will need to take into account the following issues.

149. Aligning with UPOV 91 significantly expands the exclusive rights for plant breeders and introduces the new concept of an EDV. Submitters had mixed views on what the appropriate transitional provisions should be. PVR owners wanted the new rights to apply to existing PVR grants, whereas submitters from the legal profession commented that they should only apply to grants made after the new legislation comes into force.

150. I do not consider it fair that acts in relation to a specific protected variety that were not an infringement before the new legislation comes into effect should become an infringement after. And nor do I consider that a variety that is already available in the market that is not an EDV before the legislation comes into effect should become an EDV after.

151. The new legislation will also bring in new requirements relating to compliance with the Treaty of Waitangi. This is a significant change for breeders working with plant species that may be affected by these provisions. Breeding programmes may be running for many years prior to PVR applications being made. In addition, setting up the Māori advisory committee and giving it time to start developing guidelines is also likely to take some time.

Consistency with other intellectual property legislation

152. Many of my recommendations, particularly the more technical ones, have been guided by consistency with other intellectual property legislation – in particular the Patents Act – where appropriate. I consider this consistency an important feature of any regulatory regime and would contribute to reducing business compliance costs for PVR applicants and owners, as well as third parties. I would like this preference to be factored in as issues arise in the drafting process.

Work underway in relation to regulations

153. A parallel policy process is underway to update administrative processes relating to the functioning of the PVR Office, and to identify and consult on new or amended regulations that the new PVR regime will require. This process may identify changes required to the primary legislation (e.g. regulation making powers), and it is likely that I will return to this Committee before the new Bill is introduced seeking additional policy decisions.

The Waitangi Tribunal proceedings on TPP (Wai 2522)

154. The TPP Claim is currently before the Waitangi Tribunal. The TPP claim was originally lodged in 2015 opposing the Crown's intention to conclude and sign the

TPP. In May 2016, the Tribunal released its report on the TPP, but adjourned inquiry into the Crown's engagement with Māori on how it would implement the PVR obligations, acknowledging that the Crown was still developing its engagement plan.

155. In February 2019, the Tribunal issued a Statement of Issues for Stage Two of the TPP claim. In relation to UPOV 91, it posed the issue as follows:

Is the Crown's process for engagement with Māori over the plant variety rights regime and its policy on whether or not New Zealand should accede to the Act of 1991 International Union for the Protection of New Varieties of Plants consistent with its Tiriti/Treaty obligations to Māori?

156. My officials have been working closely with the Tribunal and claimants throughout the review, keeping both updated with timelines and opportunities for engagement.
157. On the basis that I would be seeking policy decisions on the PVR Act review in November and introduction of a Bill in May 2020, the Tribunal scheduled a hearing on the UPOV 91 issue for 4-6 December 2019. This date was identified on that basis that policy decisions would be available for consideration at that time, but that there would remain time prior to introduction for the Tribunal to report.
158. I do not think the timing of this hearing poses any material risks to the PVR review process, including the timeline to meet our CPTPP obligations. Any findings of the Tribunal will be closely considered once they are released.
159. I propose to release this Cabinet paper to the Tribunal immediately following Cabinet consideration. This is so that both the Crown and claimants have sufficient time to prepare and provide submissions about the effect of the policy outcome on issues before Tribunal.

Consultation

160. MBIE has worked closely with the Ministry of Foreign Affairs and Trade throughout this review process to ensure that we meet our CPTPP obligations.
161. MBIE has also worked closely with both Te Puni Kōkiri and the Office of Māori Crown Relations – Te Arawhiti throughout the review process for guidance on the Crown's engagement with Māori.
162. MBIE has consulted on this paper with these agencies and, in addition, with the Ministry of Justice, the Ministry for Primary Industries, the Department of Conservation, the Ministry for the Environment, the Crown Law Office, Local Government New Zealand, the Treasury and the Department of the Prime Minister and Cabinet.

Financial Implications

163. The proposals in this paper relating to Treaty of Waitangi compliance will have financial implications for the PVR Office, for example related to the establishment and running of the Māori advisory committee. The PVR Office is funded by application and examination fees from applicants for a PVR grant, and a small

amount of Crown funding. At this stage IPONZ considers that any additional costs can be met within current baselines.

Legislative Implications

164. Legislation will be required to implement the proposals in this Cabinet paper. [REDACTED]
Confidential advice to Government [REDACTED]
165. Given the extent of the changes proposed, I consider it likely that a new Act will be required as opposed to simply amending the PVR Act.
166. The PVR Act is binding on the Crown and I see no reason to change that for the new legislation.

Impact Analysis

167. 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.

Human Rights

168. 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.

Gender Implications

169. No gender implications arise from the proposals in this paper.

Disability Perspective

170. No disability implications arise from the proposals in this paper.

Publicity

171. Following Cabinet consideration of this paper, a press release is intended to be issued that will highlight how these changes to the PVR regime meet both our Treaty of Waitangi and our CPTPP obligations.

Proactive Release

172. As discussed above, I propose that this Cabinet paper be released to the Waitangi Tribunal immediately after Cabinet decisions are made, and shortly thereafter (with redactions consistent with the Official Information Act 1982) on the MBIE website.

Recommendations

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

1. **note** that a review of the Plant Variety Rights Act (**PVR Act**) began in February 2017, and Cabinet agreed that the review would include consideration of the four recommendations on the PVR Act of the Waitangi Tribunal's Wai 262 report *Ko Aotearoa Tēnei* (**Wai 262**) [CAB-16-MIN-0423 refers];
2. **note** that New Zealand's obligations under Article 18.7 (and Annex 18-A) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) require New Zealand to either accede to the 1991 revision of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**), or adopt a *sui generis* regime to "give effect" to it, within three years of the CPTPP coming into force for New Zealand (that is, by 30 December 2021);
3. **note** that, under the CPTPP, New Zealand can adopt "measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party";
4. **note** that New Zealand can rely on the general Treaty of Waitangi (**the Treaty**) exception clause in Article 26.9 of the CPTPP to extend the protection referred to in recommendation 3 to non-indigenous species.

Meeting our CPTPP obligations in relation to UPOV 91

5. **note** that the PVR Act is consistent with the previous iteration of the UPOV convention, **UPOV 78**, and that UPOV 91 significantly strengthens plant breeders' rights;
6. **note** that one of the measures I deem necessary to meet our Treaty obligations – implementing the Wai 262 recommendation to introduce a power to refuse a grant of a PVR if kaitiaki relationships are affected – effectively introduces an additional condition for a PVR grant which is not permitted under UPOV;
7. **agree** that New Zealand meets its obligations under the CPTPP by adopting a *sui generis* regime to "give effect" to UPOV 91;
8. **reaffirm** New Zealand's commitment to the highest standards of plant variety rights protection and to remaining a supportive and active member of UPOV;
9. **note** that it is possible that future work – such as that envisaged in the whole-of-government response to Wai 262 – may provide sufficient protection for taonga species in other legislation such that accession to UPOV 91 might be possible.

Proposals for Treaty of Waitangi compliance

10. **note** that the four recommendations in the Wai 262 report on PVRs were taken to be the starting point for considering our Treaty of Waitangi obligations in the PVR regime. These are that:

- 10.1. The Commissioner of PVRs be empowered to refuse a grant that would affect the kaitiaki relationship;
 - 10.2. The Commissioner of PVRs be supported by a Māori advisory committee;
 - 10.3. A definition of 'breed' be included to clarify that a plant simply discovered in the wild would not be eligible for a PVR;
 - 10.4. The Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community including Māori.
11. **note** that in addition to these four recommendations, Māori emphasised the importance of:
- 11.1. Early, meaningful and ongoing engagement with kaitiaki;
 - 11.2. Consideration of kaitiaki interests at all stages of the breeding and PVR process in a meaningful and mana-enhancing way.

Definitions

12. **agree** that, rather than defining terms such as 'kaitiaki' and 'taonga', the new legislation refer to 'indigenous plant species' and 'non-indigenous plant species of significance' to indicate when kaitiaki interests need to be considered;
13. **note** that the term 'non-indigenous plant species of significance' only refers to a limited number of species;
14. **agree** that, a suitable regulation-making power be included so that, following consultation, regulations can clarify which plant genera and species are covered by UPOV 78 and which attract the extra protections;
15. **agree** to clarify that a plant simply discovered in the wild would not be eligible for a PVR.

Disclosure requirements

16. **agree** that breeders be required to indicate if they are working with indigenous species or non-indigenous species of significance and, if they are, disclose:
 - 16.1. if there are kaitiaki identified, who the kaitiaki are;
 - 16.2. a summary of their engagement with kaitiaki and the outcome of that engagement including, where relevant:
 - 16.2.1. an assessment from kaitiaki of the potential impact if a PVR is granted;
 - 16.2.2. any consideration given to mitigating those impacts;
 - 16.2.3. whether or not agreement was reached on the grant of a PVR.

Decision-making powers

17. **agree** that a new power be introduced to allow a PVR grant to be refused if kaitiaki relationships would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant;
18. **agree** that the legislation set out a process for considering kaitiaki relationships, noting that this might include listing factors to be taken into account;
19. **agree** that the Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community, including Māori.

Māori advisory committee

20. **note** that the Wai 262 report recommended that:
 - 20.1. The Commissioner of PVRs be supported by a Māori advisory committee when considering matters under the new powers in recommendations 17 and 19;
 - 20.2. The Committee should have an advisory rather than “directive” role;
 - 20.3. The Chair of the committee should “sit alongside” the Commissioner “to ensure a Māori voice is at the table when competing interests come to be balanced”.
21. **agree** that a Māori advisory committee be established with a broad set of functions, including:
 - 21.1. Developing and maintaining guidelines for breeders and kaitiaki on engagement;
 - 21.2. Providing advice to breeders and kaitiaki before an application for a PVR is made;
 - 21.3. Providing advice to the Commissioner on:
 - 21.3.1. Whether the use of registration of a variety name is likely to be offensive to Māori;
 - 21.3.2. Any information that may be relevant to the Commissioner’s consideration of the five standard conditions for a PVR grant;
 - 21.4. Making a determination on whether kaitiaki relationships would be affected by the grant of a PVR and, if so, whether these impacts could be mitigated to a reasonable extent so as to allow the grant.
22. **agree** that all applications or varieties belonging to either indigenous plant species or non-indigenous plant species of significance, and denominations (names) that are derived from Māori language, are considered by the Committee;

23. **agree** that the members of the Committee be appointed by the Commissioner and be required to have relevant expertise including in relation to mātauranga Māori, te ao Māori, tikanga Māori and taonga species;
24. **agree** that determinations of the Committee only be subject to judicial review (as oppose to appeal on merits);
25. **note** that further consideration will be given to whether the IPONZ internal hearings process would be suitable (with appropriate modifications) as a first step review of the determinations of the Committee.

Objectives/purpose of the PVR Act

26. **agree** that a purpose statement be included in the new legislation that captures the intent of the following elements:
 - 26.1. Promoting innovation and economic growth by incentivising the development and use of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and others so that there is a net benefit to society as a whole;
 - 26.2. Compliance with New Zealand's international obligations;
 - 26.3. Compliance with the Treaty of Waitangi through the recognition and protection of kaitiaki relationships with taonga species and associated mātauranga Māori.

Requirements of UPOV 91

27. **note** that there are a number of provisions in UPOV 91 that leave no domestic policy flexibility regarding how they are implemented – including the new exclusive rights – and these are listed in **Annex 1**;
28. **note** that some additional technical provisions are listed in **Annex 2**, some of which relate to the provisions listed in **Annex 1** and others which relate to the policy recommendations that follow;
29. **agree** to implement the recommendations listed in **Annex 1** and **Annex 2**.

Scope of the right

30. **note** that there a number of provisions in UPOV 91 where there is some flexibility as to how, or whether, they are implemented in domestic legislation and recommendations on these follow.

Term of the right

31. **agree** to adopt the minimum terms provided for in UPOV 91, namely:
 - 31.1. 25 years for woody plants or rootstock;
 - 31.2. 20 years for all other plants.

Essentially derived varieties (EDVs)

32. **note** that UPOV 91 requires that the new exclusive rights are extended to EDVs, which are varieties that are “essentially derived” from an initial variety;
33. **agree** that, similar to the Australian PVR legislation, an EDV is defined as a variety which only changes the initial variety in a trivial or insignificant way.

Rights over harvested material

34. **note** that harvested material refers to any part of the plant that either (i) cannot be used for propagating the variety, or (ii) can be used for propagating the variety but can also be used for some other purpose;
35. **agree** that, consistent with the minimum requirement in UPOV 91, the new exclusive rights to be extended to harvested material when (i) the material was obtained through the unauthorised use of propagating material, and (ii) the breeder did not have reasonable opportunity to exercise their rights in relation to that propagating material.

Farm saved seed

36. **note** that, while farmers are currently free to save seed from one season’s crop to plant the next season’s crop, the new exclusive rights in UPOV 91 would require farmers to seek the authorisation of the PVR owner for this;
37. **note** that UPOV 91 provides an optional exception for members that would remove farm saved seed from coverage of the new exclusive rights, subject to whatever limitations each member chooses to implement;
38. **agree** that the optional exception provided by UPOV 91 is implemented for farm saved seed;
39. **agree** that a regulation making power be included that would permit limitations to be placed on this exception, including in relation to:
 - 39.1. the varieties covered by the exception;
 - 39.2. the requirement to pay remuneration;
 - 39.3. differentiation according farm size;
 - 39.4. specification of an amount of produce to which the exception applies.

Post grant issues

40. **note** that there a number of issues that only arise after a grant has been made and that are not (or are only minimally) prescribed by UPOV 91 and that recommendations on these follow;

Compulsory licences

41. **note** that, under the PVR Act, the Commissioner of PVRs can grant a compulsory licence (meaning that the licensee can carry out the acts covered by the grant without the permission of the PVR owner) if:
- 41.1. Three years have passed since the PVR was granted, and
 - 41.2. The PVR owner has not made reasonable quantities of propagating material available at a reasonable price.
42. **note** that, when considering the condition in recommendation 41.2, under section 21(3) of the PVR Act, the Commissioner is required to ignore propagating material that has been made available subject to the condition that any of all of the produce must be sold or offered to a specified person;
43. **note** that the Options paper recommended the status quo, but having listened to submitters I consider that a more nuanced approach is needed;
44. **agree** that the three year period remains but, to meet the concerns raised, the Commissioner be required to consider whether the PVR owner has had sufficient time to make reasonable quantities of material available;
45. **agree** that a compulsory license can only be granted when it is in the public interest to do so;
46. **agree** that the legislation provides a non-exhaustive list of matters that constitute the public interest that the Commissioner must consider when deciding whether or not to grant a compulsory license, including:
- 46.1 Whether the market was being supplied with reasonable quantities of propagating material of a reasonable quality of the variety concerned at a reasonable price;
 - 46.2. Whether the market was being supplied with reasonable quantities of harvested produce of the variety concerned of a reasonable quality and at a reasonable price;
 - 46.3. The need to ensure that innovation in plant breeding is encouraged;
 - 46.4. The need to protect the life or health of humans, animals or plants.
47. **note** that there a number of technical amendments relating to compulsory licences proposed in **Annex 2** (refer recommendations 28-29) that also respond to issues raised by submitters and will make the system for applying for compulsory licences clearer and more robust.

Infringements

48. **note** that, as with other intellectual property regimes, the onus is on the rights' holder to enforce their rights through civil actions when they think their rights have been infringed;

49. **note** that a key concern of submitters was the cost of enforcing rights in the Courts, that this is also common across intellectual property regimes and there are currently no clear options for lowering these costs;
50. **agree** that grounds of an infringement be clarified by providing that a PVR is infringed if a person does any of the acts over which the PVR owner has exclusive rights.
51. **agree** that the remedies for infringement of a PVR include:
- 51.1. An award of damages; or
 - 51.2. An account of profits; and/or
 - 51.3. An injunction.

Offences

52. **note** that the PVR Act provides for a number of offences, mainly relating to false representation or provision of false or misleading information, and that the maximum fine is \$1000;
53. **agree** to repeal the offence provisions in the PVR Act as they are effectively covered in other legislation such as the Fair Trading Act, or there are alternative means of sanctioning the behaviour;
54. **agree** that supplying false or misleading information with a PVR application be grounds for nullification of a PVR grant.

Additional issues

55. **note** that the PVR Act does not cover algae;
56. **agree** that algae (which includes seaweed) also be included in the plant varieties that can attract PVR protection;
57. **note** that UPOV 91 requires provisional protection of rights be provided for the period between the filing of an application and the grant of a PVR;
58. **agree** that infringement actions can only be commenced after a grant is made, though they can apply to actions that occurred after the application was made and before the PVR was granted.

Transitional provisions

59. **note** that transitional provisions will be determined during the drafting process, but should take account of (at least) the following:
- 59.1. that acts in relation to a specific protected variety (or an EDV) that were not an infringement before the new legislation comes into effect should not become an infringement after;

- 59.2. the need to establish the Māori advisory committee with sufficient time to be ready to support the new Treaty compliance provisions;
- 59.3. that breeders will require sufficient time to prepare for the new Treaty compliance provisions;
- 59.4. moving to new procedural rules in a timely manner.

Other matters

- 60. **note** that I consider consistency with other similar legislation (in this case other intellectual property legislation) an important feature of any regulatory regime and would contribute to reducing business compliance costs for PVR applicants and owners, as well as third parties, and that this preference should be factored in as issues arise in the drafting process;
- 61. **note** that a parallel policy process is underway to update administrative processes relating to the functioning of the PVR Office, and to identify and consult on new or amended regulations that the new PVR regime will require;
- 62. **note** that this process may identify changes required to the primary legislation (e.g. regulation making powers), and it is likely that I will return to this Committee before the new Bill is introduced seeking additional policy decisions.

The Waitangi Tribunal proceedings on TPP (Wai 2522)

- 63. **note** that the Wai 2522 inquiry (the **TPP Claim**) is currently before the Waitangi Tribunal;
- 64. **note** that the Tribunal has scheduled a hearing on the Crown's engagement with Māori and its policy on how it meets its CPTPP obligation in relation to UPOV 91 for 4-6 December 2019;
- 65. **note** that this will give the Tribunal time to report back before legislation is introduced to Parliament;
- 66. **note** that I do not consider the timing of this hearing poses any material risks to the PVR review process, including the timeline to meet our CPTPP obligations, and that any findings of the Tribunal will be closely considered once they are released;
- 67. **note** that I propose to release this Cabinet paper, with appropriate redactions, to the Tribunal immediately following Cabinet consideration, so that both the Crown and claimants have sufficient time to prepare and provide submissions about the effect of the policy outcome on issues before Tribunal, and then shortly after on the MBIE website.

Financial implications

- 68. **note** that the PVR Office is funded by application and examination fees from applicants for a PVR grant and a small amount of Crown funding;

69. **note** that the proposals in this paper relating to Treaty of Waitangi compliance will have financial implications for the PVR Office, for example related to the establishment and running of the Māori advisory committee, but that IPONZ considers that, at this stage, these costs can be met from within current baselines.

Legislation

70. Confidential advice to Government
71. **note** that, given the extent of the changes proposed, I consider it likely that a new Act will be required as opposed to simply amending the PVR Act;
72. **note** that the PVR Act is binding on the Crown and I see no reason to change that for the new legislation;
73. **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to these recommendations;
74. **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 Kris Faafoi

Minister of Commerce and Consumer Affairs

Annex 1: Table of provisions in UPOV 91 that New Zealand is required to implement

UPOV 91 Provision	Summary of provision	Comment
Article 1	Sets out definitions of terms used (e.g. breeder, variety etc).	We must ensure our definitions are consistent with UPOV 91.
Article 4	National treatment – ensures equivalent treatment of nationals of all contracting parties.	PVR Act already covers this, but check to ensure consistency.
Articles 5 - 9	Sets out conditions of protection (novelty, distinctness, uniformity and stability).	Some changes to terminology in current PVR Act required.
Article 14(1)	Sets out the scope of the breeder's right in relation to propagating material.	UPOV 91 significantly strengthens breeders' rights compared to the PVR Act, the main change being from a narrow focus on reproduction for sale to commercial exploitation of the variety as a whole.
Article 15(1)	Sets out the exceptions to the breeder's right when propagating material can be used without authorisation (e.g. for breeding new varieties).	These are slightly narrower than the PVR Act. Notable change is from "non-commercial use" to "private and non-commercial use". This may impact e.g. local councils that use plants for public planting.
Article 16	Sets out when the right is exhausted (essentially once the material of the protected variety is placed on the market with the consent of the PVR owner, unless it is to be used to further propagate the variety).	PVR Act does not explicitly have an exhaustion provision, though has an exception with a similar effect. Need to ensure legislation is consistent with this UPOV 91 provision.
Articles 21 - 22	Sets out the conditions under which the right can be (respectively) nullified and cancelled. If a right is nullified it is deemed never to have been granted – equivalent to revocation of a patent. If a right is cancelled, it ceases to be in force from that point.	The PVR Act has provisions that cover some aspects of these UPOV 91 provisions, but there is no equivalent of nullification. Need to ensure legislation is consistent with these UPOV 91 provisions. Grounds for cancellation in the PVR Act should be retained to the extent that they are consistent with Article 22 of UPOV 91. Some additional technical provisions related to nullification and cancellation are proposed in Annex 2 .

Annex 2: Table of additional technical recommendations

Summary of technical recommendations	Comment
<p>In relation to nullification and cancellation of grants (Articles 21 and 22 in UPOV 91), I recommend that the PVR Act be amended to include:</p> <ul style="list-style-type: none"> • Explicit procedures – including for hearings – to be followed by the Commissioner when considering applications for nullification or cancellation • A power for the courts to nullify or cancel PVRs. 	<p>These additional recommendations would bring the PVR regime in line with the Patents regime. The NZ Law Society commented on the deficiencies in the PVR Act around procedures related to cancellation, including the inability of the courts to cancel grants.</p>
<p>I recommend that provision be made for restoration of lapsed applications and cancelled PVR grants (and that the latter replace the current s16(3) in the PVR Act), when the action that led to the lapse or cancellation was unintentional. As with cancellation, nullification and objections before grant, restoration should be accompanied by appropriate procedural conditions.</p>	<p>There are currently no provisions to enable an application that has lapsed, or a grant that has been cancelled to be restored (Though in the case of cancellation, the grantee is given notice of the intent to cancel and has 28 days to respond.) The PVR Act is also unclear what matters the Commissioner must take into account when considering cancelling a PVR which is unfair on all parties. The Patents Act provides for restoration of patents that have lapsed due to non-payment of a renewal fee and the lapse was unintentional.</p>
<p>Article 21(1)(iii) of UPOV allows for the transfer of the right to the person entitled to it if the PVR owner is not entitled to it. There is a similar provision in the s63 of the Patents Act and I recommend that this be followed when implementing this UPOV provision.</p>	<p>This is a point of clarification noted in the Law Society submission.</p>
<p>If the power to refuse a grant on the basis that it impacts kaitiaki relationships is agreed – and given that the grounds for nullification included in UPOV 91 include that the conditions for a grant were not met – I recommend that this be included as a basis to nullify a PVR.</p>	<p>This is inconsistent with Article 21 of UPOV, which prohibits additional grounds for nullification. However, it is consistent with the intent of the nullification provision and the proposed new condition for the grant of a PVR.</p>
<p>I recommend that the provision in the PVR Act allowing objections before grant be retained, and the grounds made consistent with those for nullification. The procedural conditions proposed for cancellation and nullification should also apply.</p>	<p>UPOV 91 does not have a provision for pre-grant objections but they exist in the current PVR Act and it makes sense that they are retained.</p>
<p>I recommend that explicit procedures – including hearings – in relation to compulsory licences be prescribed in regulations.</p>	<p>Submitters commented that current procedures are not clear.</p>
<p>I recommend that a compulsory licence not be granted unless the applicant can show (i) they have made a reasonable effort to obtain a licence on reasonable terms, and (ii) have not been able to obtain such a licence within a reasonable time.</p>	<p>This will make it clear that compulsory licences will not be granted unless the applicant has made reasonable efforts to obtain a license from the PVR owner on reasonable terms. The PVR Act does not currently impose this requirement.</p>

<p>I recommend that compulsory licences limit the use of the propagating material to propagating the variety in New Zealand.</p>	<p>This is consistent with the Patents Act. Compulsory licences are about provision of the innovation to the NZ market. Allowing compulsory licensees to export propagating material could unreasonably prejudice the interests of the PVR owner and does not benefit NZ.</p>
<p>I recommend that compulsory licences be non-exclusive.</p>	<p>If a compulsory licence were exclusive, even the PVR owner would need the permission of the compulsory licensee. While it is unlikely that the Commissioner would grant an exclusive licence, this provision would make this clear.</p>

PROACTIVELY RELEASED