



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Commerce and Consumer Affairs
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List of documents that have been proactively released

Date	Title	Author
13 November 2019	Policy decisions for the review of the Plant Variety Rights Act 1987	Office of the Minister of Commerce and Consumer Affairs
13 November 2019	Plant Variety Rights Act 1987: Proposed Amendments: DEV-19-MIN-0301	Cabinet Office

Information redacted

Yes

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



Cabinet Economic Development Committee

Minute of Decision

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Plant Variety Rights Act 1987: Proposed Amendments

Portfolio Commerce and Consumer Affairs

On 13 November 2019, the Cabinet Economic Development Committee (DEV):

Background

- 1 **noted** that:
 - 1.1 a review of the Plant Variety Rights Act (PVR Act) began in February 2017, and that the review included consideration of the four recommendations relating to the plant variety rights regime contained in the Waitangi Tribunal's Wai 262 report *Ko Aotearoa Tēnei* (Wai 262) [EGI-16-MIN-0196];
 - 1.2 on 26 June 2019, DEV approved the release of an options paper on the review of the PVR Act, and invited the Minister of Commerce and Consumer Affairs to report back seeking policy decisions on amendments to the Act's regime in November 2019 [DEV-19-MIN-0177];
- 2 **noted** 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 **noted** 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 **noted** 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 paragraph 3 above to non-indigenous species;

Meeting CPTPP obligations in relation to UPOV 91

- 5 **noted** 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 **noted** that one of the measures deemed necessary to meet New Zealand's 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 that is not permitted under UPOV;
- 7 **agreed** that New Zealand meet its obligations under the CPTPP by adopting a *sui generis* regime to 'give effect' to UPOV 91;
- 8 **reaffirmed** New Zealand's commitment to the highest standards of plant variety rights protection and to remain a supportive and active member of UPOV;
- 9 **noted** 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 **noted** that the following four recommendations in the Wai 262 report on PVRs were taken to be the starting point for considering New Zealand's Treaty obligations in the PVR regime:
- 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 **noted** 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 **agreed** 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 **noted** that the term 'non-indigenous plant species of significance' only refers to a limited number of species;
- 14 **agreed** 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 **agreed** to clarify that a plant simply discovered in the wild would not be eligible for a PVR;

Disclosure requirements

- 16 **agreed** 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 **agreed** 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 **agreed** that the legislation set out a process for considering kaitiaki relationships, noting that this might include listing factors to be taken into account;
- 19 **agreed** 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 **noted** 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 referred to in paragraphs 17 and 19 above;
 - 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 **agreed** 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 **agreed** 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, be considered by the Māori advisory committee;
- 23 **agreed** that the members of the Māori advisory 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 **agreed** that determinations of the Māori advisory committee only be subject to judicial review (as opposed to appeal on merits);
- 25 **noted** that further consideration will be given to whether the International Property Office of New Zealand's internal hearings process would be suitable (with appropriate modifications) as a first step review of the determinations of the Māori advisory committee;

Objectives/purpose of the PVR Act

- 26 **agreed** 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 through the recognition and protection of kaitiaki relationships with taonga species and associated mātauranga Māori;

Requirements of UPOV 91

- 27 **noted** 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 that these are listed in Annex 1 to the paper under DEV-19-SUB-0301;
- 28 **noted** that some additional technical provisions are listed in Annex 2 to the paper under DEV-19-SUB-0301, some of which relate to the provisions listed in Annex 1 and others that relate to the policy proposals outlined below;
- 29 **agreed** to implement the proposals listed in Annex 1 and Annex 2 to the paper under DEV-19-SUB-0301;

Scope of the right

- 30 **noted** 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 that these are outlined below;

Term of the right

- 31 **agreed** 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 **noted** 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 **agreed** 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 **noted** that harvested material refers to any part of the plant that either:
- 34.1 cannot be used for propagating the variety; or
 - 34.2 can be used for propagating the variety but can also be used for some other purpose;
- 35 **agreed** that, consistent with the minimum requirement in UPOV 91, the new exclusive rights be extended to harvested material when:
- 35.1 the material was obtained through the unauthorised use of propagating material; and
 - 35.2 the breeder did not have a reasonable opportunity to exercise their rights in relation to that propagating material;

Farm saved seed

- 36 **noted** 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 **noted** 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 **agreed** that the optional exception provided by UPOV 91 be implemented for farm saved seed;
- 39 **agreed** 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 **noted** 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 these are outlined below;

Compulsory licences

- 41 **noted** 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 **noted** that, when considering the condition referred to in paragraph 41.2 above, 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 **noted** that the options paper referred to in paragraph 1.2 above recommended the status quo but that, having listened to submitters, the Minister of Commerce and Consumer Affairs considers that a more nuanced approach is needed;

- 44 **agreed** that the three year period remain but that, 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 **agreed** that a compulsory licence can only be granted when it is in the public interest to do so;

- 46 **agreed** that the legislation 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, 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 **noted** that there a number of technical amendments relating to compulsory licences proposed in Annex 2 to the paper under DEV-19-SUB-0301 (referred to in paragraphs 28-29 above) that also respond to issues raised by submitters and will make the system for applying for compulsory licences clearer and more robust;

Infringements

- 48 **noted** 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 **noted** that:

49.1 a key concern of submitters was the cost of enforcing rights in the Courts;

49.2 this concern is also common across intellectual property regimes and there are currently no clear options for lowering these costs;

50 **agreed** that the 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 **agreed** 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 **noted** 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 **agreed** to repeal the offence provisions in the PVR Act as they are effectively covered in other legislation such as the Fair Trading Act 1986, or there are alternative means of sanctioning the behaviour;

54 **agreed** that supplying false or misleading information with a PVR application be grounds for nullification of a PVR grant;

Additional issues

55 **noted** that the PVR Act does not cover algae;

56 **agreed** that algae (which includes seaweed) also be included in the plant varieties that can attract PVR protection;

57 **noted** 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 **agreed** that infringement actions can only be commenced after a grant is made, although they can apply to actions that occurred after the application was made and before the PVR was granted;

Transitional provisions

59 **noted** 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 **noted** that consistency with other similar legislation (in this case other intellectual property legislation) is considered to be 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 **noted** 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 **noted** that this process may identify changes required to the primary legislation (e.g. regulation making powers), and that it is likely the Minister of Commerce and Consumer Affairs will report back to DEV before the new Bill is introduced seeking additional policy decisions;

The Waitangi Tribunal proceedings on TPP (Wai 2522)

- 63 **noted** that the Wai 2522 inquiry (the TPP Claim) is currently before the Waitangi Tribunal;
- 64 **noted** that the Waitangi 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 **noted** that this will give the Waitangi Tribunal time to report back before legislation is introduced to Parliament;
- 66 **noted** that the Minister of Commerce and Consumer Affairs does not consider the timing of this hearing poses any material risks to the PVR review process, including the timeline to meet New Zealand's CPTPP obligations, and that any findings of the Waitangi Tribunal will be closely considered once they are released;
- 67 **noted** that the paper under DEV-19-SUB-0301 will be released, with appropriate redactions, to the Waitangi 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;

Financial implications

- 68 **noted** 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 **noted** that the proposals in the paper under DEV-19-SUB-0301 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;

Legislative implications

- 70 Confidential advice to Government

- 71 **noted** that, given the extent of the changes proposed, it is considered likely that a new Act will be required, as opposed to simply amending the PVR Act;
- 72 **noted** that the PVR Act is binding on the Crown and that there is considered to be no reason to change that for the new legislation;
- 73 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 74 **authorised** the Minister of Commerce and Consumer Affairs to make decisions consistent with the overall policy decisions in the paper under DEV-19-SUB-0301 on any issues which arise during the drafting process.

Janine Harvey
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Dr Megan Woods
Hon Chris Hipkins
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Shane Jones
Hon Kris Faafoi
Hon Willie Jackson
Hon James Shaw
Hon Julie Anne Genter
Hon Eugenie Sage

Officials present from:

Officials Committee for DEV

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