MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Kris Faafoi	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Review of the Plant Variety Rights Act 1987: release of Options Paper for public consultation	**Date to be published**	5 August 2019

List of documents that have been proactively released		
Date	**Title**	**Author**
Considered by DEV on 26 June 2019	*Review of the Plant Variety Rights Act 1987: release of* Options *Paper for public consultation*	Office of the Minister of Commerce and Consumer Affairs
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Information redacted **YES**

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Some information has been withheld for the following reasons:

- Confidential advice to Government

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Review of the Plant Variety Rights Act 1987: release of Options Paper for public consultation

Proposal

1. To seek approval to release the *Review of the Plant Variety Rights Act 1987: Options Paper* (**Options Paper**) for public consultation (see **Annex 1**).

Executive Summary

2. The Options Paper is the second stage of the public consultation on the review of the *Plant Variety Rights Act 1987* (**PVR Act**), following the release of an Issues Paper in 2018. I am seeking agreement to release the Options Paper in July 2019. I then intend to return to Cabinet seeking policy decisions for changes to the PVR Act in November 2019, with the intention that a Bill be introduced to the House in May 2020.

3. The paper analyses options (and indicates preferred options) for:

   3.1 how New Zealand meets its obligations under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**) in relation to the 1991 version of the International Convention on the Protection of New Varieties of Plants (**UPOV 91**);

   3.2 how the Crown meets its obligations under the Treaty of Waitangi/Te Tiriti o Waitangi (the **Treaty**) in the PVR regime;

   3.3 how the requirements of UPOV 91 are implemented in the domestic PVR regime.

4. The analysis is supported by independent economic analysis commissioned by the Ministry of Business, Innovation and Employment (**MBIE**) and carried out by the Sapere Research Group.

5. The CPTPP requires New Zealand to either accede to UPOV 91, or "give effect" to it, within three years of the CPTPP coming into force for New Zealand (which was 30 December 2018). The CPTPP allows New Zealand to adopt measures "it deems necessary" to fulfil its obligations under the Treaty of Waitangi.

6. The preliminary analysis in the Options Paper indicates that the measures necessary for compliance with the Treaty (which include implementation of the Waitangi Tribunal's recommendations in *Ko Aotearoa Tēnei* (the **Wai 262 report**)) are not compatible with acceding to UPOV 91. I therefore indicate that my

preferred option in relation to the CPTPP is to utilise the exception New Zealand negotiated to "give effect" to UPOV 91.

7. The Options Paper also discusses how we implement the other provisions of UPOV 91, as required by the CPTPP. My preferred options for the key issues are broadly in line with our main trading partners and are supported by the economic analysis.

Background to the Plant Variety Rights Act Review

8. The *Plant Variety Rights Act 1987* (**PVR Act**) is currently being reviewed. The PVR Act provides for the grant of temporary intellectual property rights to plant breeders over new plant varieties they have developed. The rights prohibit other people from carrying out certain acts in relation to the propagating material (such as seeds or cuttings) of a protected variety. For example, a person cannot sell, nor produce for sale, propagating material of a protected variety without the authorisation of the PVR owner. This usually involves the payment of a royalty.

9. The purpose of the PVR regime is to incentivise the development and importation of new plant varieties. As with any intellectual property regime, it is important to strike the right balance between the interests of rights owners, rights users and other interested parties (such as consumers) so that there is a net benefit to New Zealand as a whole.

10. Aside from the need to modernise the regime, a key driver of the review is the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**). The CPTPP requires New Zealand to either accede to the 1991 version of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**), or "give effect" to it, within three years of the CPTPP coming into force for New Zealand (which was 30 December 2018). The PVR Act is based on an older version of UPOV (**UPOV 78**). UPOV 91 strengthens plant breeders' rights compared to UPOV 78.

11. Regardless of which option we choose, the CPTPP allows New Zealand to adopt measures "it deems necessary" to fulfil its obligations under the Treaty of Waitangi/Te Tiriti o Waitangi (the **Treaty**). How the Crown meets its Treaty obligations in the PVR regime 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**).

12. The review of the PVR Act began in February 2017 [CAB-16-MIN-0423 refers]. The first stage of the review was pre-consultation engagement with industry experts and Māori with expertise in PVRs and intellectual property. The engagement was run by the Ministry of Business, Innovation and Employment (**MBIE**) and included informal discussions, technical targeted workshops, targeted consultation on the draft PVR consultation documents, and work with advisors.

13. Following Cabinet approval [CAB-18-MIN-0434 refers], a discussion document seeking feedback on issues with the current PVR regime was released on 17 September 2018. Submissions closed on 21 December, and 36 submissions were received.

14. During the consultation period, MBIE held three industry-focused workshops and eight regional hui with Māori. MBIE also commissioned independent economic analysis into the current state of the plant varieties innovation system. This was carried out by the Sapere Research Group.

15. The development of the options presented in the attached Options Paper has been informed by the feedback received at the workshops/hui, analysis of written submissions, New Zealand's obligations under the CPTPP in relation to UPOV 91 and the Treaty, the Wai 262 report, and the independent economic analysis.

What we heard from submitters – general comments

16. There was almost universal support for the review with many industry stakeholders (mainly the plant breeders and researchers) expressing frustration that it had taken so long to get to this stage. A previous review in the 2000s was put on hold when negotiations for the Trans-Pacific Partnership Agreement (**TPP**) began.

17. Likewise, Māori expressed significant frustration about the lack of progress on the Crown's response to the Wai 262 report. However, there was also some positive acknowledgement of the opportunity for this review to address Treaty issues in the PVR regime.

18. PVR owners (including breeders, researchers and others) all strongly supported alignment with UPOV 91 as required by our CPTPP commitments. Almost all of New Zealand's main trading partners are UPOV 91 members. Some stakeholders suggested that the UPOV 91 standards should be seen as a minimum and New Zealand should consider strengthening rights beyond those required by UPOV 91.

19. The main claim made by PVR owners is that they are not receiving sufficient return on their investment in plant breeding under the current system and that innovation is being hampered as a result. In addition, they claimed that the weaker intellectual property protection of the current system discourages overseas breeders from bringing their new plant varieties to New Zealand.

20. I did not hear from as many users of varieties protected by PVRs (such as farmers and growers) as I would have liked, partly because of the concerns they have about how their views might impact their contractual relationships with the PVR owners. Growers are, understandably, more circumspect about the strengthening of rights for PVR owners. While they acknowledge the importance of encouraging innovation, some also cautioned that the PVR regime should not simply provide an opportunity for rent-seeking behaviour by plant breeders.

21. Māori were concerned about a broad range of issues relating to the protection of taonga species in New Zealand. Some of these concerns, such as the lack of a bioprospecting regime in New Zealand, are outside of the scope of the review. Others commented specifically on the lack of recognition of tikanga, mātauranga and te ao Māori in the current PVR Act.

22. There was broad support for the Wai 262 recommendations, though many commented that these needed to be supplemented with additional information requirements, such as disclosure of origin requirements, to improve transparency

and participation in the PVR regime. The key message, however, was that early, meaningful and ongoing engagement with kaitiaki by plant breeders is critical to addressing concerns around the protection of kaitiaki interests.

Engagement with Māori in the PVR review

23. My officials have had significant engagement with Māori at all stages of the review so far. There were initial discussions with experts in Māori intellectual property when the Issues Paper was being prepared (and these raised a number of issues in addition to the Wai 262 recommendations for consideration).

24. A Māori Engagement Plan was released alongside the Issues Paper. This was based on guidelines drawn up by the Office of Māori Crown Relations – Te Arawhiti. Eight regional hui were held during the Issues Paper consultation.

25. At several hui it was recommended that officials should work on the development of options with a smaller expert group, before once again engaging more widely with the release of the Options Paper. In response to this, MBIE held a two day "options development" hui in Wellington over 7/8 April, and continues to work with hui participants in the lead up to the public consultation on the Options Paper.

The Waitangi Tribunal proceedings on TPP

26. Also of relevance is the Wai 2522 claim (the **TPP Claim**) currently before the Waitangi Tribunal. The 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.

27. 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 Maori 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?

28. Hearings are scheduled to commence in December 2019. However, claimants would prefer that consideration be given to this issue prior to Cabinet making policy decisions in November 2019. There remains some uncertainty as to whether the scope is limited to engagement only, or also includes policy in relation to UPOV 91. The Crown has requested clarification from the Tribunal on this.

29. In general, I am confident that MBIE's engagement process is Treaty compliant. However, should the Tribunal wish to make recommendations to the Crown on its process, doing so in advance of Cabinet policy decisions would permit the Crown to respond without affecting our CPTPP timeline.

30. The Crown has proposed to the Tribunal that we could agree to an early hearing on the conditions that (i) the hearing is on the Crown's engagement only (not policy), and (ii) the hearing is conducted in a manner akin to judicial review

(avoiding a full discovery process, which is resource-intensive). We have not yet had a decision from the Tribunal in response.

Next stage in the review: Options Paper consultation

31. The next stage in the review is for public consultation to be carried out on options for change to the PVR regime. I am seeking agreement for the attached Options Paper to be publicly released in early July 2019 and for MBIE to carry out public consultation for a period of two months. Confidential Advice to Government

32. I intend to return to Cabinet seeking policy decisions on changes to the PVR regime in November 2019 in order for a Bill to be drafted and introduced by May 2020.

Key features of the PVR Act Review Options Paper

33. The Options Paper addresses:

    33.1 whether to "accede" to UPOV 91 or "give effect" to UPOV 91 (as per the CPTPP obligation);

    33.2 how to make the regime compliant with the Treaty;

    33.3 what changes are required to bring the regime in line with UPOV 91.

34. Some changes to the PVR regime are dictated by UPOV 91 – such as the extended exclusive rights it provides for. Other provisions of UPOV 91 still leave some domestic flexibility (over and above that required to meet our Treaty obligations) as to how they are implemented.

35. The Options Paper indicates preferred options where these are supported by the analysis.

CPTPP obligations in relation to UPOV 91

36. Two key (and related) questions in the review are how we meet our Treaty obligations in the PVR regime and how we meet our CPTPP obligations in relation to UPOV 91.

37. New Zealand can choose not to accede to UPOV 91 if we consider that a particular measure is necessary to meet our Treaty obligations and this measure is incompatible with UPOV 91. What is "necessary" is for New Zealand to determine, and cannot be challenged by our CPTPP partners through the disputes process. In this situation, we can "give effect" to UPOV 91 and still meet our CPTPP obligations.

38. At this preliminary stage, the measures I consider necessary to meet our Treaty obligations (which include giving effect to the Wai 262 recommendations on PVRs) are not compatible with acceding to UPOV 91. Therefore my preferred option, as

indicated in the Options Paper, is that New Zealand should instead "give effect" to UPOV 91. Treaty compliance is discussed further in the next section.

39. This means that the regime would look like UPOV 91 for over 90 per cent of PVRs (as well as the great majority of our trade relating to plant varieties), but would implement additional protections in relation to new varieties where there is a kaitiaki interest, consistent with the Treaty.

40. Some stakeholders have argued that accession to UPOV 91 is important as it makes it clear to our trading partners what protections for PVRs our regime provides. They consider that we risk overseas breeders not bringing their new varieties to New Zealand if we are not a "UPOV 91 country".

41. Our CPTPP obligations do not permit New Zealand to take into account economic considerations when deciding which CPTPP option to choose, nor would I propose weighing these against Treaty considerations. However, I note that the independent economic analysis commissioned by MBIE to support the review did not bear out these concerns.

42. New Zealand is still under UPOV 78 (which falls well short of UPOV 91 in terms of PVR protection) whereas most of our key trading partners acceded to UPOV 91 many years ago. Despite this, the report concluded that there is no evidence that New Zealand is currently missing out on new plant varieties either through foreign breeders not bringing their intellectual property here, or through domestic research and development being hampered by insufficient return on investment in breeding programmes.

43. I also note that, while accession to UPOV 91 is not a common feature of Free Trade Agreements, it has already been proposed in the European Union Free Trade Agreement negotiations and may be raised in others in the future. If Cabinet agrees to this option when final policy decisions are made, we will need to ensure we continue to seek equivalent "give effect to" carve outs in current and future trade negotiations.

Treaty obligations in the PVR regime

44. I consider that the Treaty requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in the PVR regime. This requires a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR.

45. My intention is to set up a regime that encourages early and meaningful engagement between plant breeders and kaitiaki when a breeding programme is likely to involve or impact species in which there are kaitiaki interests.

46. The Options Paper proposes a package of three proposals covering:

    46.1 a new information disclosure requirement for breeders;

    46.2 a new decision-making process to allow consideration of kaitiaki relationships;

46.3 a new decision-maker and new Māori advisory committee to assist decision making.

47. The new information disclosure requirement would include providing evidence of engagement with kaitiaki where applicable and the outcome of that engagement. The role of the Māori advisory committee would extend to providing guidance and facilitating early engagement between plant breeders and kaitiaki, as well as providing advice to the Commissioner of PVRs. The Chair of the committee would sit with the Commissioner on decisions relating to species in which there are kaitiaki interests.

48. The analysis in the Options Paper focuses on the second proposal as this is key to UPOV 91 compliance. There are three options for this proposal:

48.1 Option 1: introduce a new power to limit the exercise of a PVR if kaitiaki interests are affected by the grant of the PVR;

48.2 Option 2: introduce a new power to allow the refusal of a PVR if kaitiaki interests would be negatively affected and the impacts cannot be mitigated;

48.3 Option 3: introduce both of the Option 1 and Option 2 powers.

49. Option 2 is the preferred option. It represents a genuine consideration of kaitiaki interests, as opposed to the post-grant consideration of Option 1. It also reflects the main recommendation of the Waitangi Tribunal in the Wai 262 report and is consistent with similar provisions in other intellectual property legislation. It provides the degree of protection of kaitiaki interests necessary to meet our Treaty obligations (which Option 1 does not) without creating too much uncertainty for breeders (which Option 3 might). At this stage, I consider Option 2 necessary to meet the Crown's Treaty obligations in the PVR Act.

50. As I discussed above, the implication of this option is that New Zealand cannot accede to UPOV 91, but must instead "give effect" to UPOV 91.

Aligning the regime with UPOV 91

51. The main provisions of UPOV 91 where there remains policy flexibility as to how they are implemented are:

51.1 the extension of rights to "essentially derived varieties (**EDVs**)";

51.2 the extension of rights to harvested material;

51.3 farm saved seed.

The extension of rights to essentially derived varieties

52. An EDV is a variety that retains the "essential characteristics" of the variety it was derived from. The provisions were introduced in UPOV 91 to address concerns that breeders could change an insignificant feature of a variety (such as a feature of no commercial value) and then market it in direct competition to the original variety, that the original breeder may have invested significant time and money developing.

53. The UPOV 91 definition of an EDV is ambiguous, and, while many member states have simply replicated this definition in their legislation, I prefer an approach similar to the Australian regime that focuses on "copycat" varieties. These are varieties that only vary in an insignificant way from the variety they were derived from. An example might be a new apple variety whose only difference is leaf shape.

54. If a breeder has added new commercially significant features to an initial variety, but the new variety still retains the original characteristics, I do not think this should be an EDV. An example might be a new apple variety that differs in colour or size. I am concerned that making the definition too broad in this manner could discourage innovation.

The extension of rights to harvested material

55. UPOV 91 requires member states to extend rights to harvested material (i.e. the produce grown from the original propagating material) if the harvested material was (i) obtained through the unauthorised use of the propagating material, and (ii) the PVR owner had not had a "reasonable opportunity" to assert their rights in relation to the propagating material. An example of this is if produce is grown in a country where the variety is not protected and then imported into New Zealand.

56. In addition, UPOV 91 has certain optional provisions to extend these rights further. Often PVR owners assert control over harvested material through contract. Other than extending the right to the extent that UPOV 91 requires, I see no compelling case to extend the rights further.

Farm saved seed

57. The issue of farm saved seed is an important one for the arable and pastoral sectors. It refers to the tradition of farmers saving seed from one season's crop to plant the next season's crop. Under the current PVR Act farmers are free to save (but not sell) seed of proprietary varieties and sow it without the authorisation of the breeder.

58. The extended rights under UPOV 91 mean that farmers could not save seed without the authorisation of the PVR owner. However, UPOV 91 also provides an optional exception for saved seed that member states can implement. As far as I am aware, all UPOV 91 members have implemented the exception. While the European Union has put limits on the exception by requiring a royalty payment on farm saved seed, and Canada is currently consulting on this issue, most member states do not require a royalty to be paid on farm saved seed.

59. Plant breeders consider that the returns they are missing out on by not being able to collect a royalty on farm saved seed are threatening innovation and discouraging overseas breeders from bringing new varieties. There is currently little evidence to support this claim, but I acknowledge that the regime needs to be flexible to meet future needs. Federated Farmers recognises that there may be a case in some instances, and under certain circumstances, for royalty payments on saved seed. There have been initial discussions between breeders (represented by the New Zealand Plant Breeding and Research Association (**NZPBRA**)) and Federated Farmers on this issue, but many outstanding issues remain.

60. My preferred option, therefore, is that farm saved seed is exempted from coverage of the new rights under UPOV 91, meaning that famers can continue to use saved seed without the authorisation of the breeder. I also consider that we should provide that limitations on this exception (such as excluding certain varieties from the exception) could be made in regulations at a future time should the case be made.

61. This approach is consistent with the status quo and the views of farmers as expressed by Federated Farmers. It is also similar to the approach taken in Australia, though no regulations have been made there to date. I also encourage ongoing discussions between the NZPBRA and Federated Farmers, perhaps with the facilitation of officials if necessary.

Consultation

62. MBIE has consulted on this paper with Te Puni Kōkiri, the Ministry of Justice, the Ministry of Foreign Affairs and Trade, the Ministry for Primary Industries, the Department of Conservation, the Ministry for the Environment, the Office of Māori Crown Relations – Te Arawhiti, the Crown Law Office, Local Government New Zealand, the Treasury and the Department of the Prime Minister and Cabinet.

63. There were no substantive comments on the content of this Cabinet paper.

Financial Implications

64. There are no fiscal implications from the proposals in this paper.

Legislative Implications

65. There are no legislative implications from the proposals in this paper, though I do anticipate legislative change once policy decisions are made by Cabinet.

Impact Analysis

66. MBIE's Regulatory Impact Analysis Review Panel has determined that the decisions sought in this paper are exempt from the requirements to provide an Impact Assessment as the relevant issues have been addressed in the discussion document.

Human Rights

67. The proposals in this paper are consistent with the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*.

Gender Implications

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

Disability Perspective

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

Publicity

70. MBIE will publish the Options Paper and related resources on its website. MBIE will advise interested parties by email when the consultation materials are released. I will release a media statement Confidential Advice to Government and encourage Māori and the public to take the opportunity to make a submission.

Proactive Release

71. I propose that this Cabinet paper be proactively released, with any redactions as appropriate under the *Official Information Act 1982*, on the MBIE website, soon after the release of the Options Paper.

Recommendations

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

1 **note** that under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**), New Zealand must either accede to, or give effect to, the 1991 version of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**), by 30 December 2021.

2 **note** that regardless of which option we choose, the CPTPP allows New Zealand to adopt measures it deems necessary to fulfil its obligations under the Treaty of Waitangi/Te Tiriti o Waitangi (the **Treaty**).

3 **note** that the preliminary analysis in the *Review of the Plant Variety Rights Act 1987: Options Paper* (the **Options Paper**) indicates that the measures necessary to meet our Treaty obligations are not compatible with acceding to UPOV 91 and so New Zealand should instead meet its CPTPP obligations by "giving effect" to UPOV 91.

4 **agree** to release the attached Options Paper for public consultation.

5 **authorise** the Minister of Commerce and Consumer Affairs to make editorial or minor content changes to the Options Paper prior to its public release.

6 **note** that release of the Options Paper will be Confidential Advice to Government open for a period of two months.

7 **note** that I intend to return to Cabinet with a paper seeking policy decisions on amendments to the PVR regime in November 2019.

Authorised for lodgement

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs