



## COVERSHEET

<b>Minister</b>	Hon Dr David Clark	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Plant Variety Rights Bill: Approval for Introduction	<b>Date to be published</b>	22 June 2021

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
6 May 2021	Plant Variety Rights Bill: Approval for Introduction	Office of the Minister of Commerce and Consumer Affairs
6 May 2021	LEG-21-MIN-0051	Cabinet Office – Cabinet Economic Development Committee

### Information redacted

**YES**

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

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

## Plant Variety Rights Bill: Approval for Introduction

### Proposal

- 1 This paper seeks:
  - 1.1 approval for the Plant Variety Rights Bill (**the Bill**) to be introduced shortly after Cabinet consideration; and
  - 1.2 one policy decision relating to the review of the Plant Variety Rights Act 1987.

### Policy

- 2 The Plant Variety Rights (**PVR**) Act 1987 provides for the grant of fixed term intellectual property rights to plant breeders over new plant varieties they have developed. The rights exist in relation to the propagating material (e.g. seeds, cuttings etc.) of the variety but not harvested material of new varieties such as fruit or grains.
- 3 A review of the PVR Act began in February 2017 [CAB-16-MIN-0423 refers] with the aims of:
  - 3.1 meeting our obligations under the Treaty of Waitangi (**the Treaty**);
  - 3.2 meeting our obligations under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**) in relation to the 1991 revision of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**); and
  - 3.3 modernising a regime that is over 30 years old.
- 4 The review 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. This included releasing an Issues paper in September 2018 [CAB-18-MIN-0434 refers], an Options paper in July 2019 [CAB-19-MIN-0317 refers] and an Outstanding Issues paper in August 2020 [CAB-20-MIN-0364 refers].
- 5 Cabinet made two sets of policy decisions, in November 2019 and March 2021, which this Bill implements.

*The November 2019 decisions*

- 6 In November 2019, Cabinet agreed on the overall structure of the new PVR regime, including how we would meet our Treaty and CPTPP obligations [DEV-19-MIN-0301 and CAB-19-MIN-0593 refer]. Specifically, Cabinet agreed:
  - 6.1 that, consistent with the recommendations of the Waitangi Tribunal report *Ko Aotearoa Tēnei (Wai 262)*, the grant of a PVR could be refused if it adversely impacted kaitiaki relationships with taonga species;
  - 6.2 to establish a Māori Advisory Committee with, among other functions, a decision-making power in relation to the question of the impact of a PVR grant on kaitiaki relationships; and
  - 6.3 that, in relation to its CPTPP obligations, New Zealand would “give effect” to UPOV 91 as opposed to acceding to UPOV 91, on the grounds that the ability to refuse a PVR on the basis of its impact on kaitiaki relationships effectively added a new condition to the grant of a PVR and this is inconsistent with UPOV 91.
- 7 UPOV 91 strengthens plant breeders’ rights over their protected varieties. It also extends the scope of those rights when compared to the previous version of the Convention (UPOV 78), with which the PVR Act is aligned. Other than the provisions in the Bill giving effect to our Treaty obligations, the Bill aligns the PVR regime with the requirements of UPOV 91.

*The March 2021 decisions*

- 8 In March 2021, Cabinet made decisions on a few outstanding policy issues in the review [DEV-21-MIN-0026 and CAB-21-MIN-0063.02 refer]. These related to:
  - 8.1 outstanding Treaty of Waitangi issues, some of which were anticipated in the November 2019 Cabinet Paper; and
  - 8.2 operational issues arising from a parallel review of the processes of the PVR Office (the part of the Intellectual Property Office of New Zealand (**IPONZ**) that examines applications for PVRs).
- 9 The outstanding Treaty issues mostly arose from the decision to give the Māori Advisory Committee (**the Committee**) a decision-making power in relation to kaitiaki interests. The decisions set out a legislative framework for this decision-making process. The framework is consistent both with our obligations under the Treaty and the principles of natural justice, while also giving the Committee sufficient flexibility to develop its own processes consistent with tikanga.
- 10 Given that the Committee has a decision-making power, it is referred to in the Bill as the Māori Plant Varieties Committee.

- 11 The operational issues were raised in a survey responses from PVR stakeholders and feedback from the PVR Office. The policy decisions address these issues, modernising the processes of the PVR Office to reflect the changes in the plant breeding industry since the PVR Act came into force.
- 12 In relation to the outstanding Treaty issues, Cabinet agreed to empower the Committee to request further information and convene hui (Recommendation 17 [CAB-21-MIN-0063.02 refers]). I note that it is not intended that the Committee have coercive powers in support of this approach. The intention is simply to make it explicit in the Bill that the Committee can take an investigative approach to its decision-making.

### **One further policy decision is sought in relation to the regulation-making power for PVR fees**

- 13 A review of PVR fees is currently under way. The current fees fall well short of recovering the full costs of the PVR regime and the current fee structure is very rigid. The review will consider a range of different options, including:
- 13.1 having both set fees and hourly charges for aspects of the work of the PVR Office in assessing PVR applications; and
- 13.2 renewal fees that increase the longer the PVR is in effect.
- 14 The second of these is inconsistent with Treasury guidelines, which stipulate that fees should be set so as to only recover the costs of the activity that the fees directly relate to. However, setting renewal fees in the manner proposed above will allow those fees to recover a share of costs incurred by the Commissioner in performing functions under the Act (including the cost of assessing applications).
- 15 A similar fees structure is in place in the patents regime and I consider there are good reasons for exploring this option in the fees review. It provides an increasing incentive on rights holders to let their rights lapse if they are no longer making use of them, meaning that the new variety then enters the public domain. It also allows the 'upfront' fees, such as the application fees, to be kept lower than might otherwise be the case, so as not to erect unnecessary barriers to breeders using the PVR system.
- 16 I propose that the regulation-making power for setting fees in the Bill be sufficiently flexible to encompass the two proposals above.

### **Aspects of the Bill that are likely to be contentious**

#### *Aligning our regime with UPOV 91*

- 17 In general, plant breeders will be happy that we are aligning New Zealand's regime with UPOV 91. Some remain concerned that not acceding to UPOV 91 will disadvantage New Zealand, as foreign breeders may prefer to protect their intellectual property in countries that are UPOV 91 members. In response to this I note first that it is important that we meet our Treaty obligations. I also note that we are still aligning our regime with UPOV 91 and

the benefits that breeders will receive from these stronger rights will outweigh any small cost there may be by not being a 'UPOV 91' country.

- 18 Some breeders consider that we should have gone further in extending the scope of PVRs. For example, they argued that we should:
- 18.1 extend the rights to include harvested material;
  - 18.2 not exempt farm-saved seed (the seed that farmers save from one season to plant the following season's crop); and
  - 18.3 adopt the UPOV 91 wording for the Bill's definition of an 'essentially derived variety' (**EDV** – this is a variety that is predominantly derived from an initial variety and retains the essential characteristics of that initial variety).
- 19 The arguments are primarily based on the need to make a sufficient return on the investment in plant breeding to encourage future innovation. However, an economic analysis of the plant varieties innovation system (commissioned by MBIE and carried out by the Sapere Research Group) concluded that New Zealand already has a "relatively healthy dynamic system for generating new cultivars". My view is that we are already significantly upgrading our regime to align with UPOV 91. Any further extension of rights risks giving more market power to PVR owners than is necessary to incentivise plant breeding in New Zealand or to encourage foreign breeders to release their new varieties here.
- 20 In relation to farm-saved seed, I understand that the main parties involved (Federated Farmers and the New Zealand Plant Breeding and Research Association) have had preliminary discussions on an industry-led approach and I support these continuing.

#### *Implementing our Treaty obligations*

- 21 Both breeders and Māori have expressed some concerns around how the Treaty provisions – particularly the Committee – will work in practice. Given the transformational change the regime is going through, this is not surprising. While the legislation will set the broad framework, more detailed operational matters will be set out in non-legislative instruments. These include for example, the terms of reference for the Committee, and the engagement guidelines for breeders and kaitiaki that the Committee will be required to develop. Breeders and Māori will have further opportunities to engage on these matters during the implementation stage of this review.

#### **Timing of the Bill – meeting our CPTPP obligations**

- 22 Under CPTPP, New Zealand is required to have the new regime in place by 30 December 2021. Due to COVID-19, consultation on the outstanding policy issues and drafting of the new legislation were considerably delayed. It is no longer possible to meet this deadline.
- 23 Due to the extraordinary circumstances arising out of COVID-19, the view of MFAT officials is that a short delay can be justified. However, it will be

important that we continue to make our best efforts to keep any delay to a minimum. With this in mind, I consider it important that, subject to Cabinet's agreement, we seek to introduce the legislation as soon as possible with a view that it be enacted before the end of this year. I anticipate that, on this timeline, the new regime would then be implemented by mid-2022.

- 24 I do not, however, propose shortening the time for select committee consideration of the Bill. There has been no time to release an exposure draft of the Bill and so I consider the full six months necessary for robust scrutiny of the new legislation.
- 25 MFAT officials, supported by MBIE, will keep our trading partners informed of the progress of the review.

### **Why a Bill is required**

- 26 A Bill is required because the current legislation does not meet our obligations under either the Treaty or CPTPP. The changes are significant, so a new piece of legislation is preferred to amending the existing legislation.

### **Impact analysis**

- 27 A regulatory impact statement was prepared for each of the two sets of Cabinet decisions in accordance with the necessary requirements. They were submitted at the same times that Cabinet approval of the policy relating to the Bill was sought.

### **Compliance**

- 28 The Bill complies with each of the following:
- 28.1 the principles of the Treaty of Waitangi;
  - 28.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993);
  - 28.3 the disclosure statement requirements;
  - 28.4 the principles and guidelines set out in the Privacy Act 1993;
  - 28.5 our obligations under CPTPP in relation to UPOV 91; and
  - 28.6 the Legislation Guidelines (2018 edition). Officials obtained advice from the Legislation Design and Advisory Committee before the policy approvals were sought from Cabinet, and I have taken this advice into account.

### **Consultation**

- 29 MBIE has worked closely with the Ministry of Foreign Affairs and Trade throughout this review process to ensure that we meet our CPTPP obligations.

- 30 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.
- 31 MBIE has consulted on the policy implemented in this Bill 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 Prime Minister and Cabinet.
- 32 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, an Options paper in July 2019 and an Outstanding Issues paper in August 2020.
- 33 It was decided to not release an exposure draft of the Bill before introduction. This decision reflects the need to make our best endeavours to meet our CPTPP obligations, which require the new regime to be implemented by 30 December 2021.
- 34 The proposals in this paper have undergone consultation with the Government caucus and the Green Parliamentary caucus in accordance with the Co-operation Agreement.

### **Binding on the Crown**

- 35 In the November 2019 Cabinet paper it was noted that the current PVR Act is binding on the Crown and there was no reason to change that in the new legislation [DEV-19-MIN-0301 and CAB-19-MIN-0593 refer].

### **Creating new agencies or amending law relating to existing agencies.**

- 36 The Bill does not create a new agency or amend the law relating to an existing agency.

### **Allocation of decision making powers**

- 37 The Bill does not involve the allocation of decision-making powers between the executive, the courts and tribunals. It does establish a Māori Plant Varieties Committee to make decisions in relation to kaitiaki interests in the PVR regime.

### **Associated regulations**

- 38 The Bill will require new regulations to support the primary legislation. They will predominantly be concerned with the processes around consideration of applications for a PVR grant. They will be modelled, where appropriate, on the Patents Regulations 2014 as many of the processes are common across the two regimes. I intend to consult on these while the Bill is before select committee, and seek policy decisions around October 2021.

- 39 Drafting of these regulations is likely to be a fairly significant task. Taking into account the 28 day rule, I anticipate these will come into effect in mid-2022.
- 40 A review of PVR fees is also currently underway, and new fees regulations will be required. This review needs to address the significant shortfall in cost recovery in the PVR regime. I intend to consult on different approaches to reforming PVR fees alongside the consultation on the new regulations. A specific proposal will then be developed following feedback from stakeholders and put to stakeholders in the fourth quarter of 2021. I intend for the new fees regime to come into effect alongside the new regulations in 2022.

### **Other instruments**

- 41 The Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

### **Definition of Minister/department**

- 42 The Bill does not include a definition of department.
- 43 The Bill includes a definition of Chief Executive, carried over from the current PVR Act.

### **Commencement of legislation**

- 44 Once the Bill is enacted, it will come into force in three stages:
- 44.1 Some provisions will commence on the day after Royal Assent. These include the provisions establishing the Committee so that members can be appointed, the Terms of Reference can be finalised and work can commence on developing guidelines for breeders and kaitiaki.
- 44.2 The bulk of the provisions will commence once the new regulations are ready to come into force. This will be the point after which all applications for PVRs will be considered under the new provisions. This date will be appointed by Order in Council once it is clearer when the supporting regulations will be ready.
- 44.3 The provisions relating to consideration of PVR applications by the Māori Committee will come into force on a date appointed by Order in Council. This date will be no less than one year, and no more than two years after Royal Assent. Breeding new varieties often takes many years, and breeding programmes which may give rise to applications that will need to be considered by the Committee may already be underway. This time period will give breeders the time they need to understand their new obligations and to engage with kaitiaki (where relevant) prior to filing their applications.
- 45 The explanatory note to the Bill sets out the reasons for commencement by Order in Council.

## Parliamentary stages

Confidential advice to Government

- 47 I propose that the Bill be referred to the Economic Development, Science and Innovation Committee for six months.

## Proactive Release

- 48 I intend to release this paper proactively within 30 business days. The content relating to the Legislation Programme will be redacted.

## Recommendations

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

Confidential advice to Government

- 2 **note** that the Bill gives effect to:
- 2.1 the Crown's obligations under the Treaty of Waitangi; and
  - 2.2 New Zealand's obligations under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership in relation to the 1991 revision of the International Convention for the Protection of New Varieties of Plants;

### *Policy proposal*

- 3 **agree** that the regulation-making power for setting fees within the plant variety rights regime is sufficiently flexible to encompass:
- 3.1 setting fees and hourly charges for aspects of the work of the PVR Office in assessing applications; and
  - 3.2 renewal fees that recover a share of the costs incurred by the Commissioner in performing functions under the Act, and recover those costs at a level that provides an appropriate incentive for rights holders to let PVRs lapse;
- 4 **note** that, while the Māori Plant Varieties Committee can take an investigative approach to decision-making, including requesting further information and convening hui, (as Cabinet agreed in Recommendation 17 of the Cabinet paper seeking further policy decisions in the PVR review [CAB-21-MIN-0063.02 refers]), it is not intended that the Committee have coercive powers in support of this approach;

*Approval for introduction*

- 5 **approve** the Plant Variety Rights Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 6 **agree** that the Bill be introduced shortly after Cabinet consideration;
- 7 **agree** that the government propose that the Bill be:
  - 7.1 referred to the Economic Development, Science and Innovation Committee for consideration; and
  - 7.2 enacted by the end of 2021.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs