

Departmental Disclosure Statement

Plant Variety Rights Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

6 May 2021

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	5
Part Three: Testing of Legislative Content.....	7
Part Four: Significant Legislative Features	10

Part One: General Policy Statement

This Bill replaces the Plant Variety Rights Act 1987. The PVR Act is now over 30 years old and has not kept up with changes in the plant breeding industry. The Bill modernises the regime and implements:

- the Crown’s obligations under the Treaty of Waitangi in relation to the plant variety rights (**PVR**) regime
- New Zealand’s obligations under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**) in relation to the 1991 version of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**).

The Treaty of Waitangi and the PVR regime

The Waitangi Tribunal report *Ko Aotearoa Tēnei* (**Wai 262**) framed the Crown’s Treaty obligations in the PVR regime as a requirement to provide a reasonable degree of protection for kaitiaki relationships with taonga species. Guided by the recommendations made in Wai 262, the Bill implements this protection by:

- Incentivising plant breeders to seek to engage early with kaitiaki if the new variety they wish to seek a PVR for may involve a taonga species
- Establishing a Māori Plant Varieties Committee (**the Committee**) to assess the impact of the grant of a PVR on kaitiaki relationships and make a determination on whether or not the PVR application should proceed
- Requiring that the Committee will consider all applications for a new variety, where that variety is wholly or partly derived from either an indigenous plant species or a non-indigenous plant species (a short list to be set in regulations covering taonga species that came on the migrating waka), and where that material was sourced in New Zealand.

“Giving effect” to UPOV 91

The PVR Act 1987 is aligned with the previous version of the UPOV Convention, UPOV 78. Under UPOV 78, the focus of a PVR was on the commercialisation of the propagating material of new varieties. UPOV 91 significantly expands the scope of a plant variety right to cover a broad spectrum of acts in relation to the propagating material. It also introduces the concept of an ‘essentially derived variety (**EDV**)’ which is a variety predominantly derived from an initial variety that retains the essential characteristics of that initial variety. The intent of this is to recognise the intellectual property in the initial variety.

Under CPTPP, New Zealand is required to either accede to UPOV 91 or “give effect” to UPOV 91. The intent was to give New Zealand sufficient domestic policy space to implement its Treaty of Waitangi obligations. The ability to refuse a PVR on the basis of its impact on kaitiaki relationships effectively adds a new condition for the grant of a PVR and this is inconsistent with UPOV 91. This Bill, therefore, “gives effect” to UPOV 91 by aligning the regime with UPOV 91 to the full extent possible while also meeting our Treaty of Waitangi obligations.

UPOV 91 has some flexibility in how its provisions are implemented in domestic legislation. The Bill implements these provisions as follows:

- Extending the term of protection for woody plants to 25 years (the minimum required by UPOV 91) while retaining the term of 20 years for other species.
- Extending the rights to harvested material only when the rights holder has not had a reasonable opportunity to assert their rights in relation to the propagating material from which it is derived.
- Exempting farm-saved seed (the seed that farmers save from one season's crop to plant the next season's crop) from coverage of a PVR (while providing that regulations may limit this exemption in the future).
- Defining an 'essentially derived variety (**EDV**)' as a variety that does not exhibit any important (as opposed to cosmetic) features that differentiate it from the initial variety it was derived from. There is still significant debate within the international plant breeding community as to how to define an EDV and the intent of this approach is to provide greater clarity on this question.

Other matters

The Bill provides for certain other matters not directly related to UPOV 91, modernising the regime to include:

- Introducing a public interest test for compulsory licences
- Repealing the offence provisions in the PVR Act 1987 as these are adequately covered by other pieces of legislation
- Clarifying the infringement provisions and providing remedies consistent with other intellectual property regimes
- Clarifying that all applications for a PVR require a growing trial and empowering the Commissioner of PVRs to direct the type of growing trial
- Introducing a general right to be heard whenever the Commissioner of PVRs exercises a discretionary power
- Providing that, consistent with other intellectual property policy regimes, appeals to a decision of the Commissioner are heard at the High Court
- Clarifying a number of procedural issues relating to the PVR regime, including aligning processes with processes in the Patents Act 2013 where appropriate.

Commencement

The provisions of the Bill will commence in three stages:

- The Māori Plant Varieties Committee will be established following Royal Assent so that its Terms of Reference can be finalised and work can commence on developing guidelines for breeders and kaitiaki.
- The bulk of the provisions will then commence by Order in Council once the new regulations are ready to come into force.
- The provisions relating to consideration of applications by the Committee will commence by Order in Council no less than one year (and no more than two years) after Royal Assent to give breeders sufficient time to understand their new obligations and to engage with kaitiaki (where relevant) prior to filing their applications.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>“What is Really Driving Innovation in our Plant-based Sectors? An economic analysis for the Review of the Plant Variety Rights Act 1987”, Sapere Research Group, May 2019, available at: https://www.mbie.govt.nz/assets/72ecc56436/what-is-really-driving-innovation-in-our-plant-based-sectors.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	YES
<p>The Bill gives effect to New Zealand’s obligation 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). The relevant Articles are 18.7.2 and Annex 18-A. The text can be found here: https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/18.-Intellectual-Property-Chapter.pdf</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	YES
<p>Comprehensive and Progressive Agreement on Trans-Pacific Partnership National Interest Analysis, MFAT, March 2018, available at: https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Final-National-Interest-Analysis-8-March.pdf</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Regulatory Impact Assessment: Review of the Plant Variety Rights Act 1987, MBIE, November 2019, available at: https://www.treasury.govt.nz/publications/risa/regulatory-impact-assessment-review-plant-variety-rights-act-1987</p> <p>Regulatory Impact Assessment: Review of the Plant Variety Rights Act 1987 – outstanding policy issues, MBIE, March 2021, available at: https://www.mbie.govt.nz/dmsdocument/13850-regulatory-impact-statement-review-plant-variety-rights-act-1987-outstanding-policy-issues</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The two Regulatory Impact Statements listed above did not meet the threshold for RIA team assessment and were instead assessed by MBIE's Regulatory Impact Analysis Review Panel. Their comments are repeated below:</p> <p>Review of the Plant Variety Rights Act 1987 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.</p> <p>Review of the Plant Variety Rights Act 1987 – outstanding policy issues MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
--

A key aim of the Bill is to give effect to New Zealand's obligation 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**). Under Annex 18-A of CPTPP, New Zealand could either accede to UPOV 91, or give effect to UPOV 91 through a *sui generis* plant variety rights (**PVR**) regime. The second option was negotiated to ensure sufficient domestic policy space for the Crown to meet its obligations under the Treaty of Waitangi. During the policy process it was determined that acceding to UPOV 91 was inconsistent with meeting Treaty obligations and so the Bill "gives effect" to UPOV 91. In practice this means that the Bill is consistent with UPOV 91 other than to the extent necessary to meet our obligations under the Treaty of Waitangi.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Aside from meeting CPTPP obligations, the main aim of the Bill is to meet our obligations under the Treaty of Waitangi in relation to plant variety rights. The starting point for considering these obligations was the recommendations made in the Waitangi Tribunal report *Ko Aotearoa Tēnei*, also known as the **Wai 262 report**. The Bill gives effect to these recommendations, and, in some places, goes further. The policy decisions that the Bill implements were considered by the Waitangi Tribunal in a three day hearing on the PVR review in December 2019 as Stage 2 of the Wai 2522 enquiry. The Tribunal found no breach of the Treaty in either those policy decisions or the Crown's engagement with Māori during the review.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
---	------------

If the Attorney-General agrees to waive legal privilege, the advice will be accessible from:
<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>Clause 27 Types of relief available for infringement of a plant variety right The remedies in the Bill are slightly different from those provided in the PVR Act 1987. The ones in the Bill are aligned with those in the Patents regime.</p> <p>Clause 124 Offence of failing to comply with summons The Bill introduced new provisions relating to hearings. This offence is consistent with the provisions in the Patents regime.</p> <p>Clauses 141-142 Breach of confidentiality and remedies The Bill provides for an obligation of confidentiality in relation to any information shared between breeders and Māori (in their capacity as kaitiaki relating to a new plant variety) prior to a PVR application being filed. The Bill provides that a breach of confidentiality be a civil matter considered at the High Court with the same remedies as a PVR infringement.</p> <p>Clause 125 Appeal to the High Court The Bill provides that appeals to a decision of the Commissioner be heard at the High Court, consistent with other intellectual property regimes. In the PVR Act 1987 appeals were heard at the District Court.</p> <p>Schedule 2 Appeals Decisions of the Māori Plant Varieties Committee are only subject to judicial review, and so are not listed as appealable decisions in this Schedule. Throughout the review we have been guided by the principle that matters relating to Māori interests should be determined by Māori and the Committee has been established for that purpose. We are satisfied that, in this context, an appeal on either fact or law is inappropriate. We note that the Bill provides for an internal review process by the Committee on the basis of further information that was not available to the Committee when it made its initial decision.</p> <p>Note: The PVR Act 1987 provided for a number of offences relating to matters such as (for example) providing misleading information with an application, or false representation. The Bill does not carry these offences over as they are adequately dealt with under other legislation, for example the Fair Trading Act 1986.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice has been consulted at all stages of the review as part of agency consultation on Cabinet papers.</p> <p>Specific consultation was also undertaken on (i) the offence in clause 124, (ii) moving appeals to the High Court (clause 125), and (iii) the remedies for breach of confidentiality (clauses 141-142).</p> <p>The Ministry of Justice is comfortable with these provisions.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clauses 128-130 The Bill provides that the Commissioner of Plant Variety Rights must publish a register of all PVRs containing certain information set out in primary and secondary legislation.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Office of the Privacy Commissioner asked us to consider a number of issues – both legislative and operational – regarding the PVR register. These included consideration of whether addresses and nationality of natural persons needed to be published. We agreed that nationality did not need to be published, but that it was important for third parties to be able to contact rights holders. We noted that there was no requirement for an address to be a residential address, but proposed adding a suppression mechanism (cf s102(3) of the Fisheries Act 1996) so that the Commissioner of PVRs could remove an address on the application of any person if a person’s safety was at risk.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>There have been three rounds of public consultation, and one further hui with Māori, during the development of the policy that this Bill implements:</p> <p>Issues Paper – released September 2018. The aim of this paper was to refine the problem definition, particularly in relation to getting a better understanding of our Treaty of Waitangi obligations. Consultation included 8 regional hui and 3 industry meetings. 36 written submissions were received.</p> <p>Options development hui – held in April 2019 to engage with the Māori organisations and individuals we had engaged with during the Issues Paper consultation. The aim was to discuss the development of options to meet our Treaty obligations to inform the Options Paper.</p> <p>Options Paper – released July 2019. This paper put forward options for meeting our treaty obligations and our obligations under CPTPP. Where supported by the analysis the paper indicated preferred options. Consultation included a two day hui held in Wellington bringing industry stakeholders and Māori organisations and individuals together to discuss the proposals in the Options paper. 53 written submissions were received.</p> <p>Outstanding Issues Paper – released August 2020. This paper put forward options on a number of outstanding policy issues related to (i) implementing our Treaty of Waitangi obligations, and (ii) operational matters relating to the processes of the PVR Office (the part of IPONZ that assesses PVR applications). Consultation include one virtual hui and one virtual industry meeting. 23 written submissions were received.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill’s provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	YES
Part 7 - Compulsory licence Part 7 of the Bill provides for compulsory licences. These require the holder of the plant variety right to licence their plant variety if the Commissioner of Plant Variety Rights considers that it is in the public interest to do so. These are a common feature of intellectual property regimes, and reflect that, in return for the granting of the statutory property right, the rights holder has an obligation to make their invention (in this case, the new plant variety) available to the public so that New Zealand as a whole can benefit from that invention. The Bill sets out the criteria that the Commissioner must consider when considering an application for a compulsory licence. The Bill also provides for a right to be heard (in clause 102) for both parties (the applicant for the compulsory licence and the rights holder) before the Commissioner makes a decision on whether to grant a compulsory licence. Decisions in relation to compulsory licences are appealable to the High Court.	

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
Clause 150(2) - Regulation-making power for fee setting The Bill amends the regulation-making power for setting PVR fees. At the time of introduction of the Bill, PVR fees are in the process of being reviewed. It is important that the fee setting power is sufficiently flexible enough to accommodate a range of options for setting PVR fees. This includes a power to allow fees to recover a share of costs incurred by the Commissioner in performing functions under the Act, and to set fees at a level that provides an appropriate incentive for applicants to let their rights lapse if they no longer benefit from them. Similar provisions exist in the Patents regime. Once the review of fees is complete, these will be set out in regulations.	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<p>Clause 124 Offence of failing to comply with summons</p> <p>The Commissioner of Plant Variety Rights has a quasi-judicial function. They can hear and rule on proceedings in relation to plant variety rights. They can conduct hearings and administer oaths to any witness in proceedings before them. Like a number of entities that can conduct hearings, they can summons people to attend.</p> <p>It is an offence if a person “without sufficient cause” does not comply with a summons (clause 124). A person who commits the offence is liable on conviction to a fine not exceeding \$2,000. This is consistent with another Act that pertains to intellectual property rights, the Patents Act 2013.</p> <p>The offence is a strict liability offence: it does not have a ‘mens rea’, or mental, element. However, it does provide that the person is not liable if they have an excuse. If they can present credible evidence that they had ‘sufficient cause’ not for attending (meet the ‘evidential burden’) then the prosecution must then disprove the existence of the excuse beyond reasonable doubt (meet the legal burden). The offence does not reverse the legal burden of proof.</p> <p>It is justifiable that the offence does not contain a mens rea element. Whether a person intended to not attend, is a matter that is overly onerous for the prosecution to prove. The defendant does not have to present any evidence for their reason for not attending. The defendant is well positioned to provide evidence for why they did not attend. An evidential burden on the defendant strikes an appropriate balance.</p> <p>The strict liability nature of the offence is also mitigated by the bill:</p> <ul style="list-style-type: none"> • setting out detailed requirements for a summons (including the fact it must specify the penalty for failure to attend) • providing that a person cannot be convicted of an offence if witnesses’ fees, allowances, and expenses to which the person is entitled to for appearing have not been paid prior to the hearing. 	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
Part 5 – Additional provisions that apply to indigenous species and nonindigenous species of significance The Crown’s Treaty of Waitangi obligations require the PVR regime to provide a reasonable degree of protection for kaitiaki relationships with taonga species. To give effect to this, Part 5 of the Bill establishes a Māori Plant Varieties Committee that will make a determination on whether or not kaitiaki relationships will be affected by the grant of a PVR. If they will be affected and these effects cannot be mitigated, the PVR application will not proceed further. Otherwise, the application will proceed for testing by the Commissioner of PVRs against the standard criteria for a PVR grant. The Bill sets out factors for consideration when making this determination, and provides that a decision of the Committee can be reconsidered by the Committee on the basis of new information that was not available at the time it first considered the application. A decision of the Committee can also be judicially reviewed.	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Clause 15 - the “farm saved seed” exception.</p> <p>Farmers do not breach a PVR granted under the Bill if they save and sow the seeds of the protected variety. Clause 15(4) provide that regulations can specify plant varieties to which this exception does not apply.</p> <p>In general, PVR owners consider that farmers should pay a fee to save and sow seeds. Farmers are less enthusiastic, although they acknowledge that paying a fee may increase the incentive to plant breeders to develop improved plant varieties. In New Zealand PVR owners and farmers have been negotiating in an attempt to come to a consensus on the payment of fees for use of saved seed by farmers of varieties to be protected by PVRs granted under this bill. Although there is some common ground between the two groups, there is still some divergence of views on the issue. Discussions are continuing. More developed views of the parties, and potential consensus, will be considered by the Government in the future.</p> <p>Clause 15(4) allows the Bill to proceed through Parliament without waiting for farmers and PVR owners to potentially reach consensus over saved seed. (The bill has to proceed in a timely manner because of New Zealand’s obligations under the CPTPP.) The Bill’s default exception is the same as the situation for PVRs granted under the current Act: farmers may save and sow seed without paying a fee to the PVR owner.</p> <p>Clause 54 - Definition of non-indigenous plant species of significance</p> <p>‘Non-indigenous plant species of significance’ refers to plant species that came over on the migrating waka and so are not indigenous to New Zealand but are still taonga to Māori. Applications for plant varieties derived from these species will be considered by the Māori Plant Varieties Committee. Clause 54 provides that the list of non-indigenous plant species of significance will be set in regulations. This allows for the possibility that subsequent research may identify additional plant species that fall into this category.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>In general, the Bill takes an approach of seeking to align the processes in the PVR regime with processes in the Patents Act where appropriate. Many of the processes around PVRs both pre- and post- grant are the same across both regimes. Examples include the hearings process, the process for consideration of compulsory licence applications, the processes for consideration of objections pre- and post- grant, and the processes for cancellation/nullification/restoration of grants. As a result, the regulation-making powers in the Bill are modelled on those in the Patents Act. There is one further regulation-making power for prescribing matters relating to the Māori Plant Varieties Committee, but at this stage no regulations are anticipated as the Bill takes the approach of leaving process matters to the Committee to determine.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO