



Key themes from regional hui with Māori on the *Review of the Plant Variety Rights Act 1987: Issues Paper*

Overview

1. The Ministry of Business, Innovation and Employment (**MBIE**) is reviewing the *Plant Variety Rights Act 1987 (PVR Act)*. An Issues Paper was released for public consultation on 17 September 2018, and submissions closed on 21 December 2018.
2. A key element of this review is to understand (i) what the issues for Māori are with the current regime, and (ii) how we might make a new regime compliant with the Treaty of Waitangi.
3. During the consultation period, we held and participated in a number of hui to discuss these issues. The hui were held in Kaikohe, Auckland, Hamilton, Tauranga, Gisborne, Hastings, Hāwera and Christchurch.
4. This document is a record of the comments and questions that were raised during those hui.

Summary of format of each hui

5. With two exceptions (Christchurch and Auckland), the hui were facilitated by Rauru Kirikiri. Each hui had a broadly similar agenda, though participants also led the conversation to areas of concern they considered most important.
6. Broadly, each hui covered:
 - a. An overview of the PVR Act
 - b. Why we are reviewing the Act
 - c. What the issues are for Māori with the process of plant breeding and granting of PVRs
 - d. The Wai 262 recommendations on PVRs.
7. The format of this document follows this structure, with comments and questions brought together in themes under each of these headers.
8. Each hui was accompanied by a powerpoint. [View the powerpoint.](#)

Understanding the PVR regime

Context

At the hui, we set out some of the key elements of the regime and what it takes for a new plant variety to be granted a PVR. Key points are:

- When we are talking about plant varieties, we are talking about cultivars (cultivated varieties), not botanical varieties that can be discovered in the wild.
- The main purpose of the regime is to incentivise the development of new cultivars by providing breeders with intellectual property rights relating to the commercialisation of those cultivars so that they can recoup the investment they have made in breeding.
- These rights must be balanced with the interests of growers and consumers so that there is a net benefit to New Zealand as a whole.
- There are five criteria that a new cultivar must meet in order to be granted a PVR. It must be new (in a commercial sense), distinct from other known varieties, uniform within generations and distinct across generations, and must have an acceptable denomination (the name by which it is known). No other criteria are permitted under **UPOV** (the international agreement governing plant variety rights, of which New Zealand is a member).
- The property rights relate primarily to commercialisation of the propagating material of the variety, rather than the produce of the variety. There are also some exceptions to the rights (e.g. non-commercial use and use in breeding programmes).

Comments/questions from participants

- Concern was raised about international researchers and industry. Would the PVR Act protect plant varieties that are being exploited overseas (e.g. exploitation of rongoā in Germany and Japan)? (MBIE: The PVR regime is a domestic regime, but NZ can influence international discussions through international fora.)
- A question was raised about a variety thought to be extinct (white ngutu kākā) but brought back when some seeds were discovered – would this be considered distinct? (MBIE: No, this would be considered a variety of common knowledge.)
- Does the regime include GM (genetic modification) breeding? Should it expressly exclude GM? What rules apply to a PVR application if the breeder is trying to get GM approval as well? (MBIE: The PVR regime is neutral to breeding methods. GM plants are regulated under the *Hazardous Substances and New Organisms Act*.)
- Is the genome part of how a new variety is assessed? (MBIE: No, PVRs look at morphological and physiological differences.)
- How do the DUS (distinct, uniform and stable) criteria cope with regional variations? The same plant could look quite different when grown under different conditions in a different region. For example, East Cape mānuka would not have the same level of triketones if replanted somewhere else.
- Would subspecies of plants that grow in a valley in the wild be able to be granted a PVR? (MBIE: No, they would be considered a variety of common knowledge.)
- Can a PVR be granted to a group of interests, e.g. a number of iwi? (MBIE: Yes, a PVR is granted to a legal person.)
- Could there be a mechanism where an “affected person” with a strong interest (like under the *Resource Management Act*) would be required to give written approval before a PVR is granted?
- How hard is to test for physiological (as opposed to morphological) differences?

- Does the PVR regime have anything to do with Monsanto? (MBIE: As a seed company they can apply for PVR.) Concern was expressed that the CPTPP gives rights to multinationals, but not Māori.
- It was noted that the Commissioner of PVRs used to have detailed botanical knowledge – where is the specific knowledge close to decision makers now?

The review process/UPOV 91

Context

There are two key reasons for reviewing the PVR Act:

- to modernise the legislation (the current regime is over 30 years old), including ensuring compliance with the Treaty of Waitangi
- to meet our obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**), namely either:
 - to accede (i.e. sign up) to **UPOV 91** (the most recent international agreement on plant variety protection), or
 - give effect to UPOV 91 (i.e. not fully sign up to UPOV 91, but to align the regime as close as possible to UPOV 91).

The choice was negotiated to ensure that New Zealand had the policy flexibility to meet its obligations under the Treaty of Waitangi.

Comments/questions from participants

The review process

- Does not signing up to UPOV 91 mean we are not a member, and are newer versions of the agreement being negotiated? (MBIE: We are still a member of UPOV, but our regime would only be formally compliant with UPOV 78. At this stage, no new agreement is being negotiated.)
- We should look to other regimes, e.g. Canada, to see how indigenous interests are protected.
- Will the review impact the *Resource Management Act*? (MBIE: No.)
- Are there any plans to review the *Native Plants Protection Act*? (MBIE: This was discussed a couple of years ago but, as far as we are aware, has not been progressed.)
- Information should be sent out before each hui so that people can read it before they come. It should be in a helpful, concise format.
- Some form of advisory body/expert reference group should be set up to assist with the review process.

Recognising Māori interests in the review

- Where are the internal people at MBIE with expertise in issues relating to Māori interests? Who at MBIE can bring a Māori lens/perspective to the review? There is no comfort that Māori views will be considered in the whole process (including the 'internal' policy process at MBIE).
- There should have been more consultation with iwi during the development of the Issues paper. Could use networks like the Iwi Leaders Group Technical Advisors.
- The process may stop some bad things from happening, but not all. We want to ensure that our flora and fauna are protected, but the review cannot guarantee that. If the Treaty of Waitangi was being honoured, we wouldn't even be here.

- We should be referring to “Te Tiriti” not “the Treaty”. Similarly when referring to the indigenous people of New Zealand, should use “tangata whenua”.
- Ngāpuhi in the Treaty context is very different to the rest of Aotearoa. The Waitangi Tribunal ruled that they didn’t cede sovereignty because they didn’t know what it was. Dominion comes from the rangatiratanga. Taonga tuku iho is a divine inheritance handed down from God.
- We need to recognise all that was given to us in the first place. Ranginui and Papatūānuku are the beginning and the end. And the kaitiaki relationship begins with recognition of this.
- If the Crown recognised that the Treaty of Waitangi guarantees tino rangatiratanga over taonga species, we would be in a very different space.
- Give the lack of action on Wai 262 since the report came out, there is scepticism about this work leading to meaningful outcomes, though there is also a sense of opportunity in this kaupapa. It is important that this work sits in a wider process to address Wai 262.
- How will the Treaty of Waitangi be acknowledged in any legislation arising from this review process? Section 4 of the *Conservation Act* is a good start, but we should always be aiming to lift the bar higher.
- The work needs to recognise the place of the Mataatua Declaration.

Plant breeding and PVRs – what are the issues for Māori?

Context

At the hui, we set out the key stages for developing a new cultivar and obtaining a PVR over it. Broadly speaking, these are:

- Plant material tends to be sourced either from cultivation (e.g. the nursery), or from the wild.
- A breeding programme will look to select desirable genetic traits – this generally takes place via selective propagation (modern techniques such as use of genetic markers can speed up this process). Some new techniques involve directly changing the genetic make-up of plants – genetically modified organisms are regulated under the *Hazardous Substances and New Organisms Act*.
- Applying for a PVR to the PVR Office (which is part of the Intellectual Property Office of New Zealand, IPONZ) once the breeder thinks their new cultivar will meet the five tests discussed above.
- The PVR office tests the new variety and, if it meets the criteria, recommends to the PVR Commissioner that a PVR be granted.

Comments/questions from participants

Focus on commercialisation

- The focus of the Act is on commercialisation. Should the Act have purposes beyond this, e.g. biodiversity, preservation of genetic resources? And, if not, where else should these things be covered? The first priority should be the wellness of the whenua, then the economy.
- This is a modern invention by Pākehā that things have to be registered to be able to use it.
- How do we consider the impact on native species when other species are brought in? e.g. what if there is a risk of displacement – should this be considered as part of the application process? For example, there are unique strains of mānuka in Gisborne and there is a concern that cultivars from other areas could cross-contaminate these unique strains.

- Where is the right to introduce something new into the environment? This affects whakapapa of our flora, our connection to the ecosystem.
- Mauri attached to the rongoā is missing when people are commercialising varieties. It is attached to the taonga.
- What is the point of creating new plant varieties? Do we actually need them? How is it going to benefit Papatūānuku? What benefit is there from another variety of apple?

Recognition of Māori interests in the regime

- There is no reference to Māori interests or the Treaty of Waitangi in the PVR Act.
- What do we mean by 'indigenous'? Only plants that exist pre-1840? Plant species naturally adapt, so less significance should be placed on dates, if that's the case.
- How does plant breeding and getting a PVR affect the mauri of a plant?
- Why isn't there consideration of the Māori point of view at the examination stage? Where are the safeguards for Māori in the current regime?
- The example of the red horopito was cited. This gained a PVR under the name "Red Leopard", but was already known to Māori. Hopefully the Wai 262 recommendations would prevent this from happening in the future.
- Need to ensure adequate protection of indigenous rights in plants, e.g. kawakawa and mānuka – they should have the same protection that Zespri get for gold kiwifruit.
- How can Māori interests be protected in the harvesting of plant products?
- Modification of taonga species can be concerning. An example of a company trying to genetically modify mānuka to have a longer flowering period was cited. There is little power to stop this from happening. It was also noted that a Māori collective (Horouta Mānuka Company) had been working with Plant and Food to breed Mānuka for a longer flowering period.

Access and benefit sharing

- If, for example, someone wants to take propagating material from a puriri tree – what benefit sharing is there? NZ needs to have a bioprospecting regime so that there are formal access and benefit sharing requirements in relations to NZ's genetic resources.
- How do we stop overseas investors from coming in and developing a new variety and then getting a PVR?
- What is the role of the Department of Conservation in relation to native species on conservation land?
- Do people breed varieties for rongoā? Each whanau held their own areas they would go to gather plants, they did not need to grow or harvest them. Need to protect this and prevent others from commercialising.
- Rongoā is not currently found in the western mainstream, but if it was, we could see commercialisation on a grand scale. How can we have proactive protections when this happens?
- The abuse of harakeke was noted. And an example given of the collection of bales of kawakawa being sent to Auckland and sold to make balm, but Māori not getting anything, while using all their aroha.
- If there is whakapapa back to a certain rohe, should there not be a percentage going back to the iwi/hapū? It was suggested that a Māori Advisory Committee (as recommended in Wai 262 – see next section) could advise on this.
- Is there anything in NZ law that says who owns indigenous plant species? (MBIE: this generally depends on where the material is found. If it is on private land it is the owner of that land. There are also some specific pieces of legislation that govern access to indigenous plant material, e.g. the *Te Urewera Act*.)

- Being able to trace how a plant is accessed is important.
- If there was some form of benefit sharing, how would this work? How would you determine who should receive benefits when iwi and plants have moved around so much historically?
- Companies have crossed two existing rīwai to create new varieties and have commercialised them – this is a concern.
- It was suggested that the traditional Māori use of resources is similar to the modern concept of production and incentives – the first Māori applied a process to a natural resource to obtain a benefit (e.g. boiling mānuka leaves to create a medicinal drink). A similar process is now used to patent products but without consideration of past Māori practices.

Other

- If a variety becomes a weed, is there any mechanism in the PVR Act that makes the PVR owner responsible for it? (MBIE: No, this would potentially be covered by the *Hazardous Substances and New Organisms Act*.)
- Is it appropriate to use overseas testing reports?

The Wai 262 report and its recommendations on PVRs

Context

At the hui, we discussed the four recommendations from the Wai 262 report relating to the PVR regime, along with other issues that had been raised in some of our pre-consultation engagement meetings.

The four Wai 262 recommendations are:

- Allow the Commissioner of PVRs to refuse to grant PVRs if kaitiaki relationships with taonga species would be affected.
- Allow the Patents Māori Advisory Committee to advise the Commissioner of PVRs on whether kaitiaki relationships with taonga species would be affected.
- Prohibit approval of plant variety names that would likely offend a significant section of the community, including Māori.
- Clarify that plant varieties must be specifically bred (as opposed to simply discovered) to qualify for a PVR.

We also discussed issues relating to transparency and participation within the regime, for example:

- The lack of information on the PVR register that IPONZ maintains (e.g. the Māori names for plants, whether indigenous plant material was used in the development of the new cultivar)
- Disclosure of origin requirements for the PVR regime – could assist referral to Māori Advisory Committee, and collect more information about the use of taonga species and mātauranga Māori in the development of new cultivars).

Comments/questions from participants

Taonga species

- Is there a list of taonga species? Is this the right term, what are we talking about? What are we taking to constitute taonga, and what does this mean in the context of Wai 262?

- Relates to things Māori have traditionally used/grew up with. Things that have a purpose – use and relationship nexus.
- Can a taonga species only be indigenous? Can be non-indigenous – e.g. Blue Eucalyptus gum leaves incorporated into rongoā, and kumara.
- The difference between taonga and indigenous species is important.
- The Act should also consider when commercialisation of a species that is not taonga might impact a taonga species.
- What is the relationship between a taonga species and a new cultivar?
- There's taonga not only in the species but in the customary rights associated with them.
- Some deeds of settlement list taonga species, but any definition should not be limited to those covered by deeds of settlement.
- Having a list of all indigenous species and known taonga species would be helpful. This list could also include rongoā species and those species which should be off limits to any manipulation or commercialisation. It was noted that the Ministry of Health used to have a National Rongoā Group that had a lot of information about rongoā from different regions.

Kaitiaki

- Kaitiaki should be able to get some form of right over a discovered variety to prevent others from getting a PVR. Is there scope for extending the rights to cover traditional varieties?
- How does a newly developed variety affect the kaitiaki relationship with the plant? What is considered as “affecting the kaitiaki interest”?
- Is kaitiakitanga the right concept for judging whether something is appropriate or not?
- The primary kaitiaki responsibility is protection of the environment.
- Shouldn't limit kaitiakitanga like it has been under the *Resource Management Act*.
- There are some indigenous species that are endemic to all of NZ. Could there be a decision that all Māori, not just one particular iwi, have a kaitiaki relationship with an indigenous species?

Māori Advisory Committee

- Would the Māori Advisory Committee (MAC) have the specialist knowledge required? Should there be a specific one for PVRs? There was general agreement that a MAC was a good idea, as how else can the Commissioner of PVRs know?
- How is the MAC appointed? Who's on it? Is the Patent MAC the right one? Members should be appointed by Māori. (MBIE: The usual Government appointments process is currently used.)
- MAC isn't helpful if it is just backend.
- Is a MAC necessary? Could just use TPK's Te Kāhui Māngai and talk to people directly.
- Who sets the rules/terms of reference of MACs? IPONZ?
- Needs to be a very flexible process – might not be clear what you need to do, but the MAC can guide you.
- How are hapū rights protected by the MAC in terms of representation? Perhaps the MAC guidelines should make it clear that they are mainly conduits to figure out who is affected by an application.
- Tensions may arise when you have different iwi with different views – how do we accommodate this?
- MAC shouldn't be a tickbox exercise, must have follow through, must have teeth, shouldn't replace consultation with Māori.
- How does the MAC get triggered? Only mana whenua can say that their values have been affected. Timing and resourcing should be taken into account as iwi may need to complete a cultural impact assessment.

- If a species from one iwi is brought to another rohe, who should be consulted? May need to look at genomes at this point.
- Māori want governance over their own taonga.

Application process

- Like the RMA process, tangata whenua should be informed when an application for a PVR is made.
- Need something stronger to encourage better behaviour from breeders. Have to have the right incentives – if they don't act in the right way, then MAC will not agree to the PVR.
- There is no current requirement to consult with Māori. The application process should ask whether kaitiaki have been consulted and if the answer makes a difference as to whether a PVR is granted, this should encourage engagement.
- However, if the process appears too hard, breeders may simply not apply for a PVR.
- Engagement as early as possible is critical and this will require a long term education process so that both breeders and iwi/hapū are aware of the process.
- Some seed banks (e.g. administered by CRIs, and Koanga Gardens in Wairoa) have good rules in place and are leading the way in engaging with Māori.
- Referring to the first recommendation – need to have stronger language than “allow”.
- Need to create a registration and engagement process when considering the granting of a right, including things like specifying the plant, location and “owner”. Ownership is spiritual for Māori.
- Cultivated varieties derived from traditional varieties that are known to Māori shouldn't have a PVR granted over them, or at least the consent of local iwi should be required first.
- If there is a risk to a native species from cross-pollination from a new variety, then that variety should not be granted protection.
- Keeping people informed of developments that may affect them is important. Ngā Whenua Rāhui could help here. The list of post-settlement governance entities could also be a useful starting point.

Disclosure of origin

- A disclosure of origin requirement would give the PVR Act more teeth.
- Hard to identify origin/tangata whenua/kaitiaki. Nurseries will propagate plants from different areas, and for some species the rohe is not important.
- What constitutes ‘origin’? What is the point about knowing the origin?
- Could people be required to identify the whakapapa of plants? Disclosure of origin requirements would be an important component of a new regime.
- Trying to define what we mean by ‘origin’ is particularly problematic? One suggestion was to refer to our state of knowledge at 1840.
- This would improve traceability and protect against people who try and market their product as something it's not.
- What level of specificity should be required? General region? Though things may be contentious around border areas.

Other issues

- What are the criteria for what is considered an offensive name? Are there guidelines and, if so, who approves these? Applications should be considered on a case-by-case basis.
- In relation to offensive names, the example of a Holland Lily called “Captain Māori” was cited.
- These recommendations still do not provide positive protection. They are the ambulance at the bottom of the cliff.

- Does the Crown have responsibility to put in place a Commissioner for Taonga, not just PVRs?
- It is important to change the attitude of industry and research so they better understand the role that Māori can bring to the table. It is difficult to look at the PVR Wai 262 recommendations in isolation from the rest of the report – nothing has been done to regulate access. Could use the *Te Urewera Act* as an example for controlling access.