

Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa

Submissions of Te Hunga Rōia Māori o Aotearoa – The Māori Law Society

Te rā 6 o Mahuru 2021

To: Ministry of Business, Innovation & Employment

Re: Consultation Paper Review of the Plant Variety Rights Act 1987: Proposed Regulations (Consultation Paper)

A. Kupu whakataki | Introduction

1. Te Hunga Rōia Māori o Aotearoa – the Māori Law Society (THRMOA) was formally established in 1988. Since then, the Society has grown to include a significant membership of legal practitioners, judges, parliamentarians, legal academics, policy analysts, researchers, and Māori law students. Our vision is Mā te Ture, Mō te Iwi – by the Law, for the People.
2. THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.
3. When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū and iwi, but rather, seeks to provide a whakaaro Māori based legal analysis and submissions on law reform.
4. THRMOA welcomes the opportunity to make written submissions to the Ministry of Business, Innovation & Employment on Consultation Paper Review of the Plant Variety Rights Act 1987: Proposed Regulations (Consultation Paper).

He whakarāpopototanga | Summary

5. This submission will make some general comments regarding our position on the reform generally as that pertains to the Wai 262 claim and the Waitangi Tribunal report *Ko Aotearoa Tēnei*. We then make some specific comments on the proposed regulations.

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(i) *General comments*

6. THRMOA does not support the proposed amendments to the Plant Variety Rights Act 1987 until the government completes a full review of the intellectual property laws because of the WAI 262 claim and the Tribunal report *Ko Aotearoa Tēnei* (Wai

262)¹, and the government completes its whole-of-government response as outlined in Te Pae Tawhiti².

7. One of the workstreams proposed within the whole-of-government response is the review of the Plant Variety Rights Act 1987. To carry out a review of this Act independent from the whole-of-government response is not consistent with the recommendations in the Tribunal's report or Te Pae Tawhiti.
8. THRMOA also repeats its previous submissions that a broader review is necessary to ensure intellectual property system fully recognises or protects traditional knowledge, mātauranga Māori, Māori relationships with native plant species, and therefore is not consistent with New Zealand's obligations under the Treaty of Waitangi (the Treaty), the Convention on Biological Diversity (CBD), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
9. THRMOA also notes this review does not include any consideration of New Zealand acceding to the Nagoya Protocol, which regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in genetic resources.
10. THRMOA considers this review should include consideration of New Zealand's position in relation to the Nagoya Protocol, including how New Zealand regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in genetic resources. The Nagoya Protocol is directly relevant to this Bill.
11. Finally, THRMOA notes the review does not include the development of a bioprospecting regime or any bioprospecting regime and access and benefit sharing (ABS) protocols that are Treaty compliant.
12. The above types of reforms were envisaged as part of the response to the WAI 262 report.
13. THRMOA encourages the Government to continue work in this area towards a fully inclusive intellectual property system including a fully inclusive PVR regime, that recognises and protects traditional knowledge and mātauranga Māori, recognises and protects Māori relationships, including kaitiaki relationships, with native species, is based on the principles of the Treaty including an ongoing partnership with Māori, gives effect to New Zealand's obligations under the CBD and UNDRIP, considers a review of New Zealand's accession to the Nagoya Protocol, and works with Māori to develop a bioprospecting regime and ABS protocols that are Treaty compliant.
14. THRMOA acknowledges the focus on the reform that seeks (in part) to respond to Wai 262.³ However, for this to happen in a meaningful way, there is a broader constitutional conversation that still needs to occur. This was a key aspect of Wai

¹ Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (WAI 262, 2011)

<<https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>>.

² <https://www.tpk.govt.nz/en/a-matou-kaupapa/wai-262-te-pae-tawhiti>.

³ Wai 262.

262, which sought constitutional review and focused on *true* partnership, with shared decision making between Māori and the Crown. In essence the claimants sought 'Māori control over things Māori'.

(ii) *Proposed Regulations*

15. THRMOA does not support the proposed definitions for 'indigenous plant species' or 'non-indigenous species of significance' (NISS), because the Plant Variety Rights Act needs to recognise and provide protection for kaitiaki relationships with taonga species as proposed in Wai 262. If the government had completed its full review of the intellectual property laws and its whole-of-government response to the recommendations in Wai 262, then terms such as 'taonga species' would be defined, and there would not be any need to introduce and define additional terms to create further uncertainty.
16. THRMOA does not support the current list of NISS being a closed list or the limitation to species that arrived in New Zealand on the migrating waka. Whether a species is a taonga is not confined to whether it arrived in Aotearoa on the originating waka. For example, taonga species would have included species gifted between iwi, hapū and whānau as well as species taken to new locations because of historical hekenga (migrations).
17. We acknowledge that there may be challenges with a closed list, however we consider there are greater risks from a Te Tiriti perspective with a closed list. Further, we consider that any challenges with an open list can be adequately ameliorated with the right systems in place. Wai 262 provided guidance on such issues, which included being able to identify the appropriate person with the necessary mātauranga who can recognise the existence of a kaitiaki relationship. The Māori Plant Variety Committee (Committee) will likely be able to assist with such challenges.
18. THRMOA also notes that the requirement for the variety to be a species may result in the exclusion from protection of taonga for Māori, for example by the exclusion of Māori potatoes. This reflects again the inherent limitation with this reform, which is attempting to amend a system that isn't fully inclusive of Māori rather than create a new system that is fully inclusive and reflects the vision in Wai 262.
19. THRMOA supports the regulations allowing for Māori to easily apply to amend and adapt the list of non-indigenous species of significance, or perhaps the Māori PVR Committee having the ability to amend and adapt the list of non-indigenous species of significance without the need for a legislative amendment or amendment to the regulations. However, it will be difficult to amend the NISS list while it remains in regulations without mechanisms contained within those regulations to enable amendment.
20. THRMOA strongly recommends the regulations listing NISS enter into force with the Bill's non-Treaty provisions. THRMOA is concerned there could be a multitude of applications featuring NISS filed while the non-Treaty provisions are not in force, and these applications could adversely impact on kaitiaki relationships with those species. As such, the Government must ensure that kaitiaki relationships are protected to uphold its obligations under Te Tiriti to actively protect Māori.



21. We also note we question the necessity for any delay in the Treaty provisions within the Plant Variety Rights Bill (Bill), noting we do not agree with the reasons put forward in the Bill regarding the reason for the delay being to give time to form the Committee, to prepare guidelines for breeders and kaitiaki, and to allow plant breeders working with these species time to adapt their processes to the new requirements in the Bill. This reform has been ongoing for some time and the Committee already exists (albeit with limited powers). As noted in our submission on the Bill, we consider there should be interim measures in place during this delay to ensure kaitiaki relationships are protected. Such protections would require the NISS list to be in place.
22. To enable the drafting of the PVR registrations, THRMOA supports the adaption of corresponding provisions in the Patents Regulations 2014 and the proposed outline of the regulations.
23. THRMOA supports the PVR regulations prescribing a period for submitting a replacement denomination of three months and that there be a provision for extensions of time available for up to three months.
24. THRMOA supports MBIE's proposed time limits for provision information and propagating material in relation to a PVR application.
25. THRMOA supports MBIE's proposed time limit of two months for paying trial or examination fees and the proposed extensions.
26. THRMOA does not support the regulations empowering the Commissioner to set the conditions of a growing trial or have the sole discretion to select the report from any overseas trials. THRMOA recommends the regulations provide for an agreement to be reached between the Commissioner and the applicant on the best conditions for a growing trial, and which overseas report should be selected if the applicant has access to one or more reports. We also note that where kaitiaki relationships exist, there should be a requirement to seek input of the necessary kaitiaki where growing trials are proposed.
27. THRMOA supports the proposed procedure for dealing with compulsory license applications.
28. THRMOA supports the proposed procedure for objections before grant.
29. THRMOA has no view on the proposed time periods for providing information or propagating material relating to a granted PVR.
30. THRMOA notes generally that any prescribed time periods must reflect the need to undertake any consultation with the relevant kaitiaki.
31. Finally, THRMOA notes our concern that the stated aims of the regulations contained within the Consultation Paper do not include upholding Te Tiriti. This concern is exacerbated by the issues with the Treaty clause within the Bill and the ramifications of a closed NISS list. As such, we remind the Government that it must tread carefully to ensure it upholds its Te Tiriti obligations and that no further grievances are caused.



In Closing

32. THRMOA acknowledges the important work undertaken thus far and supports the Government's continued focus on fulfilling its obligations under the Treaty with this Bill. However, we note that more work is required to ensure a fully inclusive intellectual property regime that reflects the vision in Wai 262 that ensure that kaitiaki relationships are fully recognised and protected.
33. THRMOA expects to be informed regarding this kaupapa, including any progress and developments and any further consultation.
34. Should you have any pātai or wish to discuss any aspect of our submissions, please feel free to contact Lynell Tuffery-Huria at lynellhuria@gmail.com.

Ngā mihi nui ki a koutou

Lynell Tuffery-Huria
On behalf of THRMOA