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Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington 6140
New Zealand

C/o pvractreview@mbie.govt.nz By email

Tēnā koe

Submission on the exposure draft of the proposed PVR Regulations

1. We attach a submission on the exposure draft of the proposed PVR Regulations.

I roto i ngā mihi,

Te Horipo Karaitiana
Chief Executive | Tāngata Huawhenua - Māori Horticulture Council Aotearoa Incorporated

Submission to the Ministry of Business, Innovation and Employment regarding the exposure draft of the proposed Plant Variety Rights Regulations

Tāngata Huawhenua – Māori Horticulture Council Aotearoa Incorporated

Introduction

2. Tāngata Huawhenua – Māori Horticulture Council Aotearoa Incorporated ('**Tāngata Huawhenua**') was established as an incorporated society in December 2021. Tāngata Huawhenua's members comprise a range of Māori and iwi-based organisations who are committed to supporting Māori in horticulture.

3. Tāngata Huawhenua was established to represent, promote and advocate for Māori in the horticulture and land-based industries in Aotearoa by creating a positive industry profile and business environment for Māori, including whānau, hapū and iwi.

4. Tāngata Huawhenua would like to provide this submission on the exposure draft of the Plant Variety Rights Regulations 2022 (the '**Draft Regulations**'), in the context of the Plant Variety Rights Bill 2021 (the '**Bill**') as a whole.

5. Our submission will focus on two key matters relating to the Draft Regulations, namely:

   (a) general comments concerning Wai 262 and the issues regarding Plant Varity Rights (**PVR**) regime as well as the intellectual property system as a whole.[1] Although the Bill has passed its second reading, the issues we raise in terms of the Draft Regulations are connected to the drafting in the proposed statutory framework; and

   (b) the list of non-indigenous plant species of significance (**NISS**) contained at Schedule 2 of the Draft Regulations.

Submissions

General comments regarding Wai 262

6. The Draft Regulations are governed by the Bill. The purpose of the Bill as amended by the Economic, Science and Innovation Select Committee currently includes to protect kaitiaki relationships with taonga species and mātauranga Māori in the plant variety rights system.[2] Further, clause 3A of the Bill provides that the Plant Variety Rights Act:

> …recognises and respects the Crown's obligations under the principles of Te Tiriti o Waitangi/the Treaty of Waitangi in relation to the law on plant variety rights, through the provisions of Part 5 and related provisions that support the purpose of Part 5.

[1] Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and identity (WAI 262, 2011).
[2] Plant Variety Rights Bill 2021, cl 3.

7. Clause 3A is confined, in that it simply declares that the Bill "recognises and respects the Crown's obligations under the principles of Te Tiriti o Waitangi". This drafting restricts the general application of Te Tiriti o Waitangi and is out of step with modern Treaty jurisprudence. It does not explicitly require a decision-maker to have regard to or give effect to Te Tiriti.

8. Part 5 contains additional provisions that apply to indigenous plant and NISS and provides that Part 5:

> recognises and respects the Crown's obligations under the principles of Te Tiriti o Waitangi/the Treaty of Waitangi through protecting kaitiaki relationships with taonga species and mātauranga Māori in the plant variety rights system, by:
>
> a) providing additional procedures that will recognise and protect kaitiaki relationships; and
>
> b) providing for a Māori Plant Varieties Committee to administer those procedures, to make determinations about kaitiaki relationships, and to have advisory functions; and
>
> c) enabling the nullification or cancellation of PVRs that have adverse effects on kaitiaki relationships.

9. While we consider the purposes of the Bill and Part 5 are positive and while not explicit, the commentary clarifies that the Bill is intended to (at least in part) respond to Wai 262.However, the reform only responds to one small part of Wai 262 and therefore is inherently limited. There is still a broader conversation that needs to occur regarding the constitutional arrangements and in particular the need for the Crown to give effect to the rights and responsibilities of Māori as guaranteed by Te Tiriti. The current arrangements do not reflect true partnership – this was a key aspect of Wai 262, which stressed true partnership and real shared decision making between Crown and Māori. In essence the claimants sought Māori control over Māori things.

10. Further, the claimants also sought a new framework and associated legislation to protect and promote taonga species as the current intellectual property framework does not fully recognise or protect traditional knowledge, mātauranga Māori, and Māori relationships with taonga plants. As such, any amendments to the current system are inherently limited as they are simply tinkering with a system that is unable to fully realise Māori aspirations regarding taonga plants.

11. As such, an overhaul of the entire intellectual property framework is required to ensure a fully inclusive and constructive framework that recognises and protects traditional knowledge, mātauranga Māori, and Māori relationships with taonga species, and is consistent with Te Tiriti, is required.

12. We note further that the Government launched its whole of Government response to Wai 262 – Te Pae Tawhiti[3] - in 2019 with the specific intention of discussing the longstanding issues raised in Wai 262. We consider such a response is integral to this particular reform and as such it is disappointing that Te Pae Tawhiti has shared little public information on progress since 2020. As such, to continue to reform any aspect of the intellectual property framework without progressing this response risks perpetuating the issues with the current system and creating further Te Tiriti grievances.

13. Finally, we note, that issues concerning the protection of mātauranga Māori and the use and development of taonga species is relevant to the Nagoya Protocol and the development of an access and benefit-sharing regime where genetic resources are used. Therefore, we consider that any review of the PVR regime and the broader intellectual property regime should further consider New Zealand's position regarding the Nagoya Protocol and specifically how New Zealand regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in genetic resources.

Non-indigenous plant species of significance

14. Schedule 2 of the Draft Regulations provides a list of 10 NISS. NISS is defined in the Bill as a plant species:[4]

    (a) believed to have been brought to New Zealand before 1769 on waka migrating from other parts of the Pacific region; and

    (b) listed in the regulations as a NISS.

15. We do not support the approach in the statute towards the protection of plants that have significance for Māori as kaitiaki, and therefore do not support the list as currently drafted. This is because the ability of Māori to assert a kaitiaki relationship in Part 5 are limited to "indigenous plant species", which is defined as "endemic to New Zealand or has arrived in New Zealand without human assistance"[5] and "non-indigenous plant species" (defined above).[6] Māori cannot legally assert a kaitiaki relationship with any plants that have been introduced after 1769. An exhaustive list of NISS effectively means that the relationship of Māori as kaitiaki is frozen in time and unable to develop or adapt to changing circumstances.

16. Further, the list as currently drafted excludes a range of taonga plants that do not fit within the definition of "species" such as the range of Māori potatoes and kanga (corn). Potatoes are defined according to cultivar rather than species as all potatoes

[3] Te Puni Kōkiri (2019) Wai 262 – Te Pae Tawhiti The role of the Crown and Māori in making decisions about taonga and mātauranga Māori.
[4] Plant Variety Rights Bill 2021, cl 54.
[5] Clause 54.
[6] Clause 4(3).

are the same species, while kanga is defined according to subspecies. However, the restriction of the list to species excludes cultivars of Māori potatoes and subspecies of kanga (among other plants) notwithstanding the general recognition of the importance of these plants as taonga to Māori.

17. The presence of an exhaustive list also arguably generates issues in future if variations of the species on the current list are subsequently developed. Entirely new species that might be developed from an NISS or other taonga species will be excluded from the regime notwithstanding their significance as taonga for Māori. As such, the list of NISS must be able to include future species on the list to ensure the whakapapa of the species and the associated kaitiaki relationship is properly recognised.

18. Further, another key element of Wai 262 was Māori control over matters Māori. As such, the mana of determining the presence of kaitiaki relationships and the list of taonga should rest with whānau, hapū and iwi. The presence of an exhaustive list does not acknowledge the mana of those exercising kaitiakitanga over a taonga species, which undermines a key aspect of introducing such a framework in Wai 262, which was to acknowledge kaitiaki relationships with taonga.

19. While we appreciate open definitions create challenges, we consider an exhaustive list creates more risks, particularly regarding the Government's ability to discharge its Te Tiriti obligations and in particular the duty to actively protect Māori (and kaitiaki relationships with taonga). Further, such a list does not recognise the claims of the Wai 262 claimants and the recommendations contained in that report, demonstrating further that the PVR reform has significant limitations in respect of responding to the issues raised in Wai 262 and implementing the recommendations made by the Tribunal.

20. We would recommend that Part 5 remain open ended and is not limited to indigenous species nor NISS, but could apply to any species or varieties. We believe that any concern of floodgates is mitigated by the clear onus upon Māori, whānau, hapū or iwi to establish and satisfy the Māori Plant Varieties Committee that such a relationship exists as per clause 61 of the Bill. Kaitiakitanga is not a given.

21. Further, another safeguard that could alleviate any concerns regarding open definitions and the determination as to kaitiaki relationships could include enabling the Māori Plant Varieties Committee to amend and adapt the list of NISS following the consideration of the views of iwi, hapū and whānau.

22. Importantly, the Tribunal provided guidance regarding definitions that could alleviate some of the concerns with open definitions. The Tribunal provided that evidence of a body of knowledge regarding the taonga species and the interaction between kaitiaki and that species would be required to establish the presence of a kaitiaki relationship. As such, those exerting a kaitiaki relationship would need to be able to demonstrate the relationship by providing adequate evidence of such a body of knowledge, which could include the presence of waiata, karakia, whakataukī, purakau and whakairo relating to the specific taonga and the relationship with that taonga.

23. We note that the Consultation Paper Review of the Plant Variety Rights Act 1987: Proposed Regulations noted that the presence of the list in the regulations would not preclude it from amendment or adaptation over time.[7] Our concerns regarding an exhaustive list are not alleviated by this qualification as the reality is that once a list is prescribed in regulations it will be difficult to amend. Therefore, we consider an approach that remains flexible is preferable and also does not risk excluding from the list the full range of taonga species.

24. We understand that a significant number of Māori organisations, such as Wakatū Incorporation and Te Hunga Rōia Māori o Aotearoa also raised similar concerns with an exhaustive list. Therefore, we consider it incumbent on the Government to ensure that the list does not impact its ability to fulfil its Te Tiriti obligations to Māori and in particular its obligations to actively protect kaitiaki relationships with taonga. We consider an exhaustive definition runs such a risk.

Conclusion

25. In our view there are more fundamental issues with the approach of the overarching legislation and how it interacts with the Regulations. Further work is required on the NISS list and in particular the establishment of an open list that is more flexible and able to adapt to changing circumstances. Further, we consider that this further work should include substantive engagement with whānau, hapū and iwi, as well as Māori generally to ensure the NISS is reflective of traditional understandings regarding taonga species (and taonga plants generally) and kaitiaki relationships. As noted above we consider this requires a NISS that is open, flexible, able to accommodate future variations, and ultimately places the mana with whānau, hapū and iwi to determine kaitiaki relationships.

26. While the reform of the PVR system does include some positive aspects and we acknowledge the Government's intention to respond (at least in part) to Wai 262, we consider more work is required to address the risks to the protection of traditional knowledge, mātauranga Māori and kaitiaki relationships.

27. We look forward to being involved further with this reform.

28. If you have any pātai please do not hesitate to contact us.

[7] At [124].