

Plant Variety Rights Act 1987 review: Issues Paper – Submission template

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Organisation/iwi	Te Kahui Rongoa Trust (national collective of Maori healers)
Interest	Te Kahui Rongoa have an interest in the protection of taonga species and the rights of their members to continue to access, protect, breed and use taonga species in their work.

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Responses to Issues Paper questions

Your submission may respond to any or all of the questions from the Issues Paper. There is an additional box at the end for any other comments you may wish to make.

Text boxes will expand as you complete them.

Objectives of the PVR Act

1

Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?

The objectives of the PVR regime should also include the explicit protection of Maori rights and responsibilities granted in international agreements that the Crown is party to including UNDRIP, Mataatua Declaration etc. Although in some cases these agreements are non binding or aspirational, they were none the less agreed to by the Crown and therefore must be honoured accordingly.

Any revision of this Act should not deny Maori rights and responsibilities already agreed to in previous domestic or international agreements. Nor should it perpetuate the continued erosion of Maori rights.

A specific objective of the Act should be to ensure that Maori continue to have the unimpeded right to breed and trade new plant varieties as they have since arrival in Aotearoa. Maori have and continue to breed and trade special plant species for specific purposes including Karaka, Kumara, Harakeke etc. The right to continue to do so should not be impeded in any way by legislation. The granting of special rights to others (including those who might leverage Maori plant breeding material) should not deny Maori of their existing rights.

*It should also be noted that any urgency with which this Act is being reviewed in order to meet CPTTPA deadlines should not be at the expense of resolving issues associated with the Crown's obligations to Maori. Just because a long standing issue is difficult to resolve does not give right to continue to ignore or defer it pending other changes to legislation. There is obligation on the Crown to address these things as they arise by all means available to it.

2 Do you think the PVR regime is meeting these objectives? Why/why not?

No – see note above

3 What are the costs and benefits of New Zealand's PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.

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4 Do you think there would be a material difference between implementing a sui generis regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

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Farm-saved seed

5 Are there important features of the current situation regarding farm-saved seed that we have not mentioned?

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6 Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.

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7 Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

[Click here to enter text.](#)

8 Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

9 Do PVR owners use mechanisms outside the PVR regime to control farmers' use or saving of the seeds of their protected varieties? What are these?

[Click here to enter text.](#)

10 Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?

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11 What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

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Rights over harvested material

12 Are there important features of the current situation regarding rights over harvested material that we have not mentioned?

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13 Do you agree with our definition of 'harvested material'? Why/why not?

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14 Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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15 Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

Rights over similar varieties

16 Are there other important features of the current situation regarding distinctness that we have not mentioned?

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17 Are there other important features of the concept of EDVs that we have not mentioned?

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18 Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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19 Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

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20 How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?

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21 Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.

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22 Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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23 Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

24 How might technological change affect the problems/benefits of not having an EDV regime that you have identified?

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Compulsory licences

25 Are there important features of the current situation regarding compulsory licences that we have not mentioned?

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26 Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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27 Do you think there are benefits with the current compulsory licence regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

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Enforcement: infringements and offences

28 Are there important features of the current situation regarding infringements and offences that we have not mentioned?

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29 Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?

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30 How prevalent are PVR infringements and offences?

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31 Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

The purpose of the infringement provisions contained in the PVR Act is not clear. The current penalties do not provide an incentive to comply with or provide a deterrent for breaching the current legislation.

32 Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

[Click here to enter text.](#)

The kaitiaki relationship and the PVR Act

33 How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?

The current regime is prejudicial to our kaitiaki relationship. UPOV 91 and CPTTPA are both clear cases of how we empower Corporations to erode the rights of New Zealanders (Maori in particular) and our ability to manage our own domestic affairs/legislation i.e we either have a PVR that protects taonga species and no CPTTP (UPOV 91 or sui generis regime) or we continue to erode our rights to protect the biodiversity and sustainability of our taonga species by making the PVR legislation fit with these agreements.

Successive New Zealand Governments are rapidly acceding power to Corporates over the rights of New Zealanders to choose what we can and can't permit in Aotearoa, New Zealand. The PVR regime appears to be another example of domestic legislation being dictated to by international agreements.

The current review of the PVR Act is an opportunity for the Crown to explicitly acknowledge Maori roles and responsibilities as kaitiaki and their rights to continue traditional plant breeding and trading practices.

It is also an opportunity for the Crown to explicitly acknowledge the Crown's obligations to Maori under international agreements that give effect to Maori rights to continue to practice traditional plant breeding practices unimpeded by legislation. Nor should legislation impose deterrents to continued traditional practices by adding compliance costs in order to protect matauranga Maori from exploitation.

In the absence of a NZ Bioprospecting regime the PVR Act review provides an opportunity for the Crown to ensure kaitiaki rights associated with the granting of PVR rights over taonga derived species.

Crown obligations to Maori kaitiaki rights and matauranga should not be limited to the Treaty of Waitangi or the Wai262 report recommendations. They must include related agreements the Crown has entered into.

The PVR review is also an opportunity for the Crown empower the Commissioner to deny a PVR that has the potential to affect Maori kaitiaki relationships. There is no honour in perpetuating terms of earlier agreements (UPOV 78 and/or 91) when we know them to fundamentally deny Maori rights under both domestic and other international agreements. At what point do we commit to righting the wrong?

34 What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.

If the protection of taonga species cannot reasonably be assumed by the granting of a PVR, it should not be granted.

No PVR should be granted to any breeder where a new species has the potential to threaten the survival in the wild of a taonga species. There is no reason that any potential for natural cross breeding with taonga species could not be tested as part of the current approval process. To encourage development of new varieties with no regard for their potential effect on taonga species is to encourage risk to the future sustainability of our taonga and biological diversity, including already threatened species. To declare this is outside the scope of the PVR regime is to deny the Crown's obligations to protect taonga species by all means possible and obligations under the 1992 Convention on Biological Diversity.

While it is agreed that any person can legally develop plants that may threaten taonga species it is important to note that this legislation provides incentive for new plant variety breeding and as such must assume some responsibility for the protection of our taonga species and the kaitiaki rights of Maori.

For the PVR Act to give effect to UPOV 91 (sui generis or otherwise) is to deny Maori kaitiaki interest over indigenous plant species. Undoing this via the CPTTPA exemption does not nullify the UPOV 91 requirement with trading partners outside of the CPTTPA or perhaps even CPTTPA trading partners.

35 What role could a Māori advisory committee play in supporting the Commissioner of PVRs?

The role of a Maori advisory committee within the PVR regime must include the option of power of veto over any PVR applications derived from taonga species as it deems appropriate, other wise there is little point. Any such Committee must also be madeup of those with Maori credentials for the role rather than Crown appointment.

36 How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?

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'Discovered' varieties

37 Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?

Under the current PVR legislation there is a risk that traditionally derived varieties from taonga species could be granted PVR. For example, if a whanau have a karaka tree from an old Maori plantation bred to bear exceptionally large berries, how would that whanau know if anyone had applied for a PVR over the progeny of this tree, claiming they had developed it rather than the whanau over generations, unless someone told them they could no longer use the berries as breeding material? Any new legislation must protect Maori against this happening.

Offensive names

38 What characteristics might make a variety name offensive to a significant section of the community, including Māori?

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Transparency and participation in the PVR regime

39 What information do you think should/should not be accessible on the PVR register? Why?

The PVR register must include searchable mandatory information about whether or not a variety is derived from a NZ taonga species. The definition of taonga species would be integral to the legislation.

40 As a plant breeder, do you gather information on the origin of genetic material used in plant breeding?

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Other Treaty of Waitangi considerations

41

What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?

In order to honour the Crown's Treaty of Waitangi obligations ABS or Bioprospecting legislation is urgently required.

The Crown's objective through the PVR regime of promoting innovation and economic growth by incentivising the development and dissemination of new plant varieties has the potential to further threaten taonga species. Just because ABS or Bioprospecting legislation does not fit neatly into existing Ministerial portfolio's is not a reason to defer or ignore the urgent need for such legislation. It is difficult for Te Kahui Rongoa to support the proposed changes to the PVR regime in the absence of any such ABS or bioprospecting provisions in the proposed amendment or concurrent initiatives to this effect.

To say that regulation associated with the discovery and subsequent use of indigenous genetic material and the protection of matauranga Maori associated with plant breeding and protection rights is outside the scope of the PVR regime is unacceptable.

If the protection of taonga species from increased risk posed by the further promotion of PVRs cannot be included in the revised legislation then some other form of legislation must be accelerated with the same urgency to protect our taonga species, such as New Zealand bioprospecting laws.

Additional issues

42

Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?

The Crown is currently considering whether New Zealand should adopt a disclosure of origin in its patents regime. This absolutely needs to be included in all forms intellectual property legislation involving Maori kaitiaki rights, including the PVR regime.

Other comments

43

Are there any additional comments you wish to make about the PVR Act review Issues Paper?

With regard to extending protection under the PVR Act review to Essentially Derived Varieties – It is unclear whether or not the PVR owner of an initial variety will have rights over a second variety that has naturally occurred (ie. naturally hybridised with a PVR species) if the variation between the two is marginal (ie. a single phenotypical characteristic)? Any naturally occurring species (irrespective of its origins) should not be subject to PVR, CPTTPA obligations or not.