Te Hunga Rōia Māori o Aotearoa, the Māori Law Society

Submissions on the Review of the Plant Variety Rights Act 1987

21 December 2018

Introduction

This submission is made for and on behalf of Te Hunga Rōia Māori o Aotearoa, the Māori Law Society (THRMOA) and addresses Māori interests regarding the review of the Plant Variety Rights Act 1987.

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 *Ma te Ture, Mo te Iwi – By Law, for the People.*

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.

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 highlight areas of concern, and suggest further reform options where appropriate.

THRMOA welcome the opportunity to respond to the request for submissions from the Ministry of Business, Innovation, and Employment (MBIE) on the document entitled *Issues Paper, Review of the Plant Variety Rights Act 1987*.

There is a need for a review of this legislation, given that it has not been reviewed in over 30 years.

There is also a need to review this legislation considering the recommendations in the Waitangi Tribunal's report, *Ko Aotearoa Tēnei* (WAI 262).[1]

There is also a need to review the impact this legislation has had on Māori, the impact this legislation has had on Māori relationships, including kaitiaki relationships, with native plant species, and the impact this legislation has had on traditional knowledge and mātauranga Māori associated with native plant species.

There is also a need to ensure the Plant Variety Rights (PVR) regime is consistent with New Zealand's obligations under Te Tiriti o Waitangi/Treaty of Waitangi (TOW), the Convention on Biological Diversity (CBD), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

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[1] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and identity* (WAI 262, 2011). The WAI 262 report can be accessed here: https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/.

Finally, there is a need to review, develop, and establish a bioprospecting regime and access and benefit sharing (ABS) protocols for Aotearoa/New Zealand that are TOW compliant.

General Overview

It is THRMOA's view the intellectual property system, and in particular, the Plant Variety Rights Act 1987 has not and does not fully recognise or protect traditional knowledge, mātauranga Māori, Māori relationships with native plant species, and is not consistent with New Zealand's obligations under TOW, CBD, and UNDRIP.

THRMOA notes this review does not include any consideration of New Zealand's accession to the Nagoya Protocol, which regulates the discovery and subsequent use of genetic resources and protects traditional knowledge in genetic resources.

THRMOA is of the view 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 traditional knowledge and mātauranga Māori in genetic resources.

Finally, THRMOA notes the review does not include the development of a bioprospecting regime or any ABS protocols that are TOW compliant.

THRMOA is of the view this review should include consideration of a bioprospecting regime and ABS protocols that are TOW compliant.

The above types of reforms were envisaged as part of the response to the WAI 262 report.[2]

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 TOW including an ongoing partnership with Māori, gives effect to New Zealand's obligations under 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 TOW compliant.

Question 1: Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?

The objectives of this review are to develop a modern, fit-for-purpose PVR regime that:

a. promotes innovation and economic growth by incentivising the development and dissemination of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and society as a whole;
b. complies with New Zealand's international obligations; and
c. is consistent with the Treaty of Waitangi.

THRMOA agrees that if we have a PVR regime, then it must be consistent with TOW. However, we consider that being consistent with TOW encompasses many

[2] At 96.

associated obligations that would benefit from explicit reference. Being consistent with TOW includes:

- recognising and protecting traditional knowledge and mātauranga Māori
- recognising and protecting Māori relationships, including kaitiaki relationships, with native species
- giving effect to TOW principles, and in particular, the principles of partnership, active protection, and tino rangatiratanga over taonga
- giving effect to New Zealand's obligations under CBD and UNDRIP
- considering a review of New Zealand's accession to the Nagoya Protocol
- establishing a bioprospecting regime and ABS protocols that are TOW compliant.

Every reference to consistency with the TOW in this submission should be read as encompassing the above associated obligations.

Question 2 - Do you think the PVR regime is meeting those objectives? Why/Why not?

THRMOA's view is the PVR regime is not consistent with TOW.

THRMOA is of the view the government needs to firstly meet its obligations to Māori under TOW, before meeting any of the remaining objectives.

Question 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.

THRMOA is of the view there are significant costs to Aotearoa/New Zealand, and in particular, Māori, if we do not implement a PVR regime that is consistent with TOW.

THRMOA is of the view there will be minor costs associated with implementing and being consistent with UPOV 91. Those minimal costs will include administrative costs in changing a regime. A consideration of the differences between UPOV 91 and the current regime (summarised at Annex 1 of the issues paper) demonstrates that Aotearoa/New Zealand has very little to do to transition to a UPOV 91 regime

Further, THRMOA is of the view that if New Zealand continues to operate a PVR regime that is inconsistent with TOW, that allows the misuse and misappropriation of our native species, traditional knowledge, mātauranga Māori, and in particular, our traditional knowledge and mātauranga Māori associated with our native plant species, then the costs to New Zealand, and in particular, Māori, are immeasurable.

In terms of WAI 262, the relationship will continue as one of grievance rather than one of partnership.[3]

[3] At 204.

Question 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?

THRMOA's view is there is a material difference between implementing a *sui generis* regime that gives effect to UPOV 1991 and becoming a party to UPOV 91, because a *sui generis* regime can provide the opportunity for New Zealand to develop our PVR regime in a manner that is consistent with TOW.

Questions 5-11: Farm-saved seed

THRMOA has no view on the issues surrounding the use and regulation of farm-saved seed, except to repeat the view that our PVR regime must be consistent with TOW.

Questions 12-15: Harvested material

THRMOA has no view on the issues surrounding the use and regulation of farm-saved seed, except to repeat the view that our PVR regime must be consistent with TOW.

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

To comply with and give effect to TOW, THRMOA is of the view the distinctness requirement must include:

- exceptions in relation to native plant species
- recognition and protection mechanisms for Māori relationships, including kaitiaki relationships, with native plant species
- recognition and protection mechanisms for any traditional knowledge and mātauranga Māori associated with native plant species
- the introduction of a bioprospecting regime and ABS protocols that are TOW compliant.

In the 2005 draft reform of the PVR Act, the draft Bill outlined changes to the definition of 'owner' so that plant varieties must be specifically bred to qualify for a PVR and 'discovered' varieties would no longer apply.

These reforms were endorsed in the WAI 262 report.

THRMOA supports these amendments as these amendments will go some way to ensuring our PVR regime is TOW compliant.

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

To comply with and give effect to TOW, THRMOA is of the view the concept of Essentially Derived Varieties (EDVs) must include:

- exceptions in relation to native plant species
- recognition and protection mechanisms for Māori relationships, including kaitiaki relationships, with native plant species
- recognition and protection mechanisms for any traditional knowledge and mātauranga Māori associated with native plant species

- the introduction of a bioprospecting regime and ABS protocols that are TOW compliant.

In the 2005 draft reform of the PVR Act, the draft Bill outlined changes to the definition of 'owner' so that plant varieties must be specifically bred to qualify for a PVR and 'discovered' varieties would no longer apply.

These reforms were endorsed in the WAI 262 report.

THRMOA supports these amendments as these amendments will go some way to ensuring our PVR regime is TOW compliant.

Question 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.

THRMOA is of the view there are significant problems with the current approach for assessing distinctness, because the current system allows PVR owners to monopolise variations of native plant species. This regime is not consistent with TOW.

THRMOA is of the view that if New Zealand continues to operate a PVR regime that is inconsistent with TOW, allows the misuse and misappropriation of our native species, traditional knowledge, mātauranga Māori, and in particular, our traditional knowledge and mātauranga Māori associated with our native plant species, then the costs to New Zealand, and in particular, Māori, are immeasurable.

Question 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.

THRMOA is of the view there are no benefits to Māori if we maintain the current approach for assessing distinctness.

THRMOA is of the view, we must move to a PVR regime that is consistent with TOW.

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

THRMOA is of the view that as technological changes occur, we will see an increase in the ability of plant breeders to develop varieties quickly and efficiently without consideration or regard for Māori or Māori relationships with native species.

For this reason, it is important the PVR regime protects native species and is consistent with TOW.

Question 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.

THRMOA is not aware of any examples of free-riding off a variety.

Question 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.

THRMOA is of the view there are significant problems with not having an EDV regime, because the current system allows PVR owners to monopolise variations of native plant species. This regime is not consistent with TOW.

However, THRMOA does not think the introduction of an EDV regime will address these problems or ensure our PVR regime is consistent with TOW. First and foremost, the PVR regime must be consistent with TOW.

THRMOA is of the view that if New Zealand operates a PVR regime that is inconsistent with TOW, allows the misuse and misappropriation of our native species, traditional knowledge, mātauranga Māori, and in particular, our traditional knowledge and mātauranga Māori associated with our native plant species, then the costs to New Zealand, and in particular, Māori, are immeasurable.

Question 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.

THRMOA is of the view there are no benefits to Māori if we maintain the current regime, but does not advocate for the introduction of an EDV regime either.

THRMOA is of the view, we must move to a PVR regime that is consistent with TOW.

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

THRMOA is of the view that as technological changes occur, we will see an increase in the ability of plant breeders to develop varieties quickly and efficiently without consideration or regard for Māori or Māori relationships with native species.

For this reason, it is important the PVR regime protects native species and is consistent with TOW.

Question 25-27: Compulsory licences

THRMOA is of the view that some clarity around the factors that determine whether a compulsory licence will be granted will help to address the issues identified.

THRMOA repeats its view that any regime surrounding compulsory licences must also be consistent with TOW.

Question 28-32: Enforcement: infringements and offence

THRMOA is of the view that some clarity around the factors that determine infringement and offences would create a more robust PVR regime.

THRMOA repeats its view that any regime surrounding infringements and offences must also be consistent with TOW.

Question 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?

THRMOA is of the view these issues were discussed in detail in evidence and arguments in the WAI 262 claim, and it is not necessary to canvass them again.

The WAI 262 report stated:

> 'In respect of PVRs, while Māori have no proprietary rights in taonga species, the cultural relationship between kaitiaki and taonga species is entitled to reasonable protection. We support the Crowns' proposed changes to the Plant Variety Rights Act, but recommend that any new PVR legislation also include a power to refuse a PVR if it would affect kaitiaki relationships with taonga species. In order to understand the nature of those relationship and the likely effects upon them, and then to balance the interest of kaitiaki against those of the PVR applicant and the wider public, the Commissioner of PVRs should be supported by the same Māori advisory committee that we recommend becomes part of the patent regime.'[4]

THRMOA repeats its view that any PVR regime must be consistent with TOW.

This view is consistent with the recommendations from the WAI 262 report.

Question 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.

THRMOA is of the view these problems and examples were also discussed in detail in evidence and arguments in the WAI 262 claim, and it is not necessary to canvass them again.

THRMOA is also of the view that if New Zealand continues to operate a PVR regime that is inconsistent with TOW, that allows the misuse and misappropriation of our native species, traditional knowledge, mātauranga Māori, and in particular, our traditional knowledge and mātauranga Māori associated with our native plant species, then the costs to New Zealand, and in particular, Māori, are immeasurable.

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

THRMOA is of the view this point was discussed in the WAI 262 report.[5] In particular, the WAI 262 report envisaged the role of a Māori advisory committee for the PVR regime is to advise the Commissioner on kaitiaki relationships with taonga species, the nature of those relationships and the likely effects.

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[4] At 97.
[5] At 94.

Question 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?

THRMOA is not aware of and does not have any examples of this system working in the industry.

Question 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?

THRMOA refers you to paragraphs 72 and 73 of the discussion document, where you identified 20 native species that have had PVRs derived from them, made up of 98 PVR grants.

THRMOA understands that to date no one has considered whether these PVRs are granted for taonga species or have any impact on the Māori relationship with these species.

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

THRMOA is of the view there are many names that would be considered offensive to Māori if registered as a PVR name. For example, names of tupuna, names of geographical significance, and there will be many others. These names need to be considered on a case-by-case basis.

The government previously proposed an amendment to the Plant Variety Rights Act that would enable Māori to object to registration of variety names that are considered offensive.

The WAI 262 report also supported this amendment.[6]

THRMOA supports the introduction of legislation that enables Māori to prevent the registration of variety names that are considered offensive to Māori.

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

THRMOA is of the view that to enable Māori to easily access information from the PVR register, it is important the register includes information that is relevant to Māori, including the Māori name of any native plant species and if the variety is derived from a taonga species.

THRMOA also supports the introduction of a disclosure of origin of genetic resources and traditional knowledge in the PVR regime, because this goes some way towards recognising and protecting traditional knowledge, mātauranga Māori, Māori relationships, including kaitiaki relationships, with native plant species, and is consistent with New Zealand's obligations under TOW, CBD, and UNDRIP.

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

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[6] At 94.

THRMOA has no comment except to recommend the PVR regime introduce a disclosure of origin of genetic resources and traditional knowledge, because this goes some way towards recognising and protecting traditional knowledge, mātauranga Māori, Māori relationships, including kaitiaki relationships, with native plant species, and is consistent with New Zealand's obligations under TOW, CBD, and UNDRIP.

Question 41: What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?

THRMOA is of the view that conducting this review in isolation of a considered review of:

- the intellectual property system
- the bioprospecting regime in New Zealand
- the introduction of an ABS regime
- New Zealand's obligations under CBD and UNDRIP
- possible accession to the Nagoya Protocol

does not enable the government to fully recognise or protect traditional knowledge, mātauranga Māori, or Māori relationships with native plant species.

THRMOA is of the view that all these factors should be considered as part of this review to ensure the approach taken is holistic.

THRMOA encourages the government to continue work in this area towards a fully inclusive intellectual property system including a fully inclusive PVR regime, that is consistent with TOW, 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 TOW including an ongoing partnership with Māori, gives effect to New Zealand's obligations under 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 TOW compliant.

Question 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?

THRMOA encourages the government to continue its work on enhancing the science and research industries that will supplement this work, and help deliver on the proposed objectives, including considering:

- the funding of research and development with a focus on Māori research and development, particularly around native plant species

- incorporation of mātauranga Māori within the discipline of science and research, and the promotion of its understanding and use by science students (particularly post-graduate students) and in research, particularly around native plant species

- the promotion of and assistance with, collaboration between scientists, researchers, and iwi organisations, particularly around native plant species

- the consideration of having a Māori advisor on ethics committees for science projects and research projects (or a standalone committee that can address

issues of tikanga that could arise in various projects), particularly around native plant species

- the creation of a New Zealand bioprospecting and ABS policy

- the incorporation of Mātauranga Māori in the education programs that include consideration of native species, such as the biological and ecological science disciplines

- equal recognition given to Māori names of native species alongside common and species

- accession to the Nagoya Protocol.

More information can be found in our previous submissions on the Bioprospecting Discussion Document in October 2007 and the Patents Bill in 2 July 2009, which can be found on our website at http://www.maorilawsociety.co.nz/law-reform-submissions/.

In Closing

Te Hunga Rōia Māori o Aotearoa are grateful for the opportunity to comment on this kaupapa and we hope our submissions assist with the important mahi the Ministry is tasked with undertaking. Should you have any pātai or wish to discuss any aspect of our submissions, please feel free to contact Lynell Tuffery Huria on or Toni Love on .

Ngā mihi nui ki a koutou

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Lynell Tuffery-Huria and Toni Love
On behalf of THRMOA