

Review of the Plant Variety Rights Act 1987

Options Paper - Comments

Part 5 – Treaty of Waitangi obligations

Tēna koutou katoa, ko Taranaki te maunga, ko Tangahoe te awa, ko Aotea te waka, ko Ngāti Ruanui, Ngā Ruahine Range ngā iwi, ko Lynell Tuffery Huria toku ingoa. E mahi ana āhau kei roto i te ao ture, ā, te ao mahi whakairo hinengaro. Tēnā koutou, tēnā koutou, tēnā tātou katoa.

I have been asked to provide an independent analysis of MBIE's options for Treaty of Waitangi compliance in the Plant Variety Rights Act review to help inform Māori organisations and individuals and assist their participation in the options paper consultation.

Introduction

The Plant Variety Rights Act (PVRA) is described as 'an Act to consolidate and amend the law relating to the granting of proprietary rights in respect of plant varieties'.

The PVRA forms part of our intellectual property regime and aims to incentivise the development and importation of new varieties of plants for commercial purposes and provides exclusive rights to plant breeders over the propagating material of those new plant varieties.

The PVRA is being reviewed to:

- 1) modernise the Act to recognise developments in the plant breeding industry over the last 30 years
- 2) reflect the Crown's obligations to Māori under the Treaty of Waitangi and give effect to the recommendations in the WAI 262 report
- 3) give effect to one of the Crown's obligations under the CPTPP, namely to (i) either accede to UPOV 91 or (2) give effect to UPOV 91.

Māori have stated that 'the existing system of IP rights strikes the wrong balance between commercial interests and the interests of kaitiaki' including any kaitiaki interests in plant varieties.

Māori, including the claimants in WAI 262, sought, amongst other things, amendments to our intellectual property regime, including amendments to the PVRA that would recognise kaitiaki interests in indigenous flora and fauna.

The Waitangi Tribunal in the WAI 262 report, Ko Aotearoa Tēnei, stated that the 'kaitiaki relationship with taonga species is entitled to a reasonable degree of protection' and made the following recommendations in relation to the PVRA:

- a. that the Commissioner of PVRs be empowered to refuse a PVR that would affect the kaitiaki relationship with taonga species
- b. that the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest

- c. to clarify the level of human input into the development of a plant variety for the purposes of PVR protection
- d. to enable the Commissioner to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori (offensive names).

In this paper, I consider whether the proposals in the Options Paper provide sufficient balance between commercial interests and the interests of kaitiaki in indigenous flora and fauna, gives effect to the recommendations in the WAI 262 report, and attains the goal of reflecting the Crown's obligations to Māori under the Treaty of Waitangi.

Proposals included in the Options Paper

The Options Paper states that:

In our view, the Treaty of Waitangi requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in the PVR regime. This requires a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR.

The recommended package of proposals to reflect the Crown's obligations to Māori under the Treaty of Waitangi in the Options Paper include three areas of specific reform and one general reform. These are discussed below.

1) Disclosure requirements

Proposals

The Options Paper proposes the introduction of new information disclosure requirements for breeders and PVR applicants to provide information about:

- a. the origin of the plant material used to develop their varieties, including whether the new variety is derived from plant material either from an indigenous species or non-indigenous species of significance
- b. who the kaitiaki are
- c. any engagement the breeder has had with kaitiaki
- d. the breeder's assessment of whether kaitiaki interests would be affected by the commercialisation of the new variety.

If this information is not provided, then the application will lapse and will not proceed to grant.

Comments

A compulsory disclosure requirement will likely lead to the breeders or PVR applicants to engage with kaitiaki and consider the impact on kaitiaki relationships with indigenous species or non-indigenous species of significance.

While the Commissioner of Plant Variety Rights could decline to grant the PVR if the disclosure requirements are not met, the proposal alone does not empower the Commissioner of Plant Variety Rights to refuse to grant the PVR if the grant of the PVR would adversely affect the kaitiaki relationship with taonga species.

It is important for the package of reforms to include the disclosure requirement and the ability for the Commissioner of Plant Variety Rights to refuse a PVR based on the contents within the disclosures, and this is one of the proposals discussed below.

I also consider some investment in upskilling breeders and kaitiaki will be necessary as part of the transition process to ensure engagements between breeders and kaitiaki are mana-enhancing.

2) Decisions relating to kaitiaki interests

Proposals

The Options Paper puts forward three options to address situations where engagement between breeders or PVR applicants and kaitiaki have not achieved a genuine balance of interests, including when kaitiaki interests are adversely affected, and how the PVRA could deal with those scenarios.

The options put forward are:

- Option 1 introduce a new power to limit the exercise of a PVR over a variety if the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee consider that kaitiaki interests are affected by the grant of a PVR
- Option 2 introduce a new power to allow the refusal of a PVR by the Commissioner of PVRs and the Chair of the proposed PVR Māori advisory committee if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant
- Option 3 introduce both the Option 1 and Option 2 powers.

Comments

The differences between these proposals affect when the Commissioner of Plant Variety Rights can refuse the grant of a PVR if kaitiaki interests are adversely affected, whether the PVR should be granted and limited post-grant (option 1), whether the impact can be mitigated to a reasonable extent pre-grant and allows the PVR to advance to grant (option 2), or whether a combination of both tools is needed (option 3).

The Options Paper favours a regime that looks at the impact on kaitiaki relationships before the grant of the PVR and considers whether those impacts can be mitigated to a reasonable extent such as to allow the grant (option 2). The reasons given for supporting option 2 are:

- a. option 1 would prioritise the interests of breeders and PVR applicants over kaitiaki, and therefore, is not mana-enhancing
- b. option 2 is likely to achieve the same outcome as option 1, but reinforces the need for breeders and PVR applicants to balance kaitiaki interests through all stages of the PVR process
- c. option 3 provides the most options for kaitiaki but introduces uncertainty for breeders and potentially disincentivises breeders from applying for PVRs, thereby removing any ability for kaitiaki to engage with breeders and PVR applicants.

The advantage of option 1 is that PVR applicants are able to achieve a granted PVR quickly and efficiently. In some cases, these efficiencies can also lead to a wrongful monopoly being granted until an opposition is filed. In general, it is more difficult to have a granted right revoked or removed. The disadvantage of this option is that kaitiaki interests are only considered after the PVR right is granted, which I agree is not likely to be considered a mana-enhancing process.

The advantage of option 2 is kaitiaki are empowered during the application process to stop the grant of PVRs that adversely affect kaitiaki interests. However, a common drawback of a pre-grant opposition system is that it may cause undue delays in the grant of legitimate rights. This option allows kaitiaki interests to be considered while the PVR grant is progressing.

The advantage of option 3 is kaitiaki are empowered throughout the application process and also after the granted PVR to raise concerns that a PVR grant adversely affects kaitiaki interests. The proposal concludes option 3 is likely to disincentivise breeders, introduce more ambiguity, and increase compliance costs.

However, our current intellectual property legislative frameworks, including the PVR framework, provides for pre and post grant objections in a number of instances.

To ensure our PVRA considers kaitiaki interests in a meaningful and mana-enhancing manner and provides a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, then option 3 or a combination of options 1 and 2 is more likely to achieve this.

3) Decision-makers and advisors

Proposals

The Options Paper proposes the establishment of a PVR Māori advisory committee, to:

- a. develop guidelines for breeders and kaitiaki on engagement
- b. provide advice to breeders and kaitiaki at the pre-application stage
- c. provide advice to the PVR office, the Commissioner of Plant Variety Rights, and the Chair of the Māori advisory committee, on whether variety names are likely to be offensive to Māori
- d. provide advice to the PVR office, the Commissioner of Plant Variety Rights, and the Chair of the Māori advisory committee on information disclosed by the breeder and whether all relevant criteria have been disclosed and met
- e. provide advice to the PVR office, the Commissioner of Plant Variety Rights, and the Chair of the Māori advisory committee as to whether kaitiaki interests would be adversely affected by the grant of a PVR over the relevant variety, including whether the PVR should be limited, whether the impact can be mitigated to a reasonable extent such as to allow the grant, or a combination of both.

Comments

The PVR Māori Advisory Committee proposed in the Options Paper is a stand-alone Committee, independent of any other Committee established under another piece

of intellectual property legislation, and for that part, is different to the committee recommended in the WAI 262 report.

Having said that, the role of the Committee is similar to that envisaged in the WAI 262 report, which is 'to understand the nature of those [kaitiaki] relationships and the likely effects upon them, and then to balance the interests of kaitiaki against those of the applicant and the wider public'.

In the Options Paper, the Advisory Committee would perform this adjudicative role as well as a facilitative role that was envisaged in the Commission proposed in Chapter 2 of the WAI 262 report.

The elevation of the Chair of the Māori Advisory Committee alongside the Commissioner of Plant Variety rights with equivalent standing to determine whether a PVR should be granted gives the Committee a stronger adjudicative role that will ensure kaitiaki interests are considered in a meaningful and mana-enhancing manner and provide a genuine and balanced consideration of the interests of kaitiaki at this stage of the PVR process.

The PVR Māori Advisory Committee will also have the ability to advise on whether a variety name would be considered offensive to Māori, which is consistent with one of the recommendations in the WAI 262 report.

4) Definition of breed

Proposals

In Part 7 of the Options Paper, there is also a recommendation to include a definition for 'breed' in the PVRA to clarify that a plant discovered in the wild cannot get a PVR, as human input is required to develop a new cultivar.

Comments

This proposal is also consistent with one of the recommendations in the WAI 262 report and is essential to protecting kaitiaki interests in taonga species.

Proposals not included in the Options Paper

It is important to recognise the Options Paper and this review is limited to reviewing the PVRA.

Given the limited scope of the review, the review does not deal with the broader issues raised in the WAI 262 claim, all the recommendations in the WAI 262 report, or the submissions made during consultation on the Issues Paper.

It is worthwhile noting some of these broader issues here.

No general Treaty of Waitangi clause

The Options Paper proposes several specific reforms to the PVRA, which go beyond the recommendations in the WAI 262 report.

One submission proposed the inclusion of an overarching Treaty clause that requires the Act to be interpreted and administered in accordance with the principles of the Treaty of Waitangi (similar to the clause found in the Conversation Act 1987).

We have seen many different attempts to give effect to the Treaty of Waitangi within our legislation, including the use of general overarching Treaty clauses, the use of purpose

statements within legislation, and through the use of specific reforms, such as those that are proposed in the Options Paper.

Given that a lot of the recommendations and proposals in the Options Paper to give effect to the Treaty of Waitangi are world-leading, new, and untested, including an overarching Treaty clause and/or a purpose statement will help to instil the reforms across the PVR framework.

Scope of proposals

As stated, the proposals in the Options Paper only deal with amendments to the PVRA and do not attempt to address any other issues raised in the WAI 262 claim, the WAI 262 report, or the submissions filed in response to the Issues Paper, including issues and identified in the rest of New Zealand's intellectual property, bioprospecting, or genetic modification frameworks, New Zealand's obligations under the United Nations Declaration on the rights of Indigenous Peoples, the CBD, the Nagoya Protocol, or the Bonn Guidelines, government funding of Māori research and science, or protection of rongoā Māori.

The breadth of recommendations in the Options Paper goes some way to deal with some of these issues, and if these proposals go ahead, could also inform further discussions in these areas.

I also understand the government is considering a whole of government approach to respond to the broader issues raised in the WAI 262 report. This work is being led by the Minister for Maori Development and announcements on this approach are expected in the coming weeks.

Despite the imminent launch of broader work in this area, the government has decided to proceed ahead with this review, due, in part, to its CPTPP obligations.

In my view, moving forward with these initial proposals represents a positive step for the recognition of kaitiaki interests in our PVR framework and does not prevent the broader work stream from proceeding.

Engagement process

One concern I have is the need for Māori to engage again on this issue when the broader whole of government approach work begins. I understand the government is conscious of the commitment required from Māori to engage in these processes, and has supported Māori, where possible, to be a part of this review.

I consider it is important for the government to continue to be conscious of the time and effort involved and continue to support and empower Māori to engage in the next consultation process.

Lack of definitions for 'taonga species', 'kaitiaki', or 'kaitiaki interests'

One of the consistent themes raised throughout the consultation process of this review to date is a request for the terms 'taonga species' and 'kaitiaki' to be defined. The Options Paper does not provide any definitions for these terms. Instead, the Options Paper suggests these terms would be better defined as part of the wider review by the Minister of Māori Development, allowing for more work to be carried out in this area. For the reasons discussed above, a second review of the PVRA is not ideal.

The Options Paper then suggests principles that will help guide breeders when a kaitiaki interest may exist. These principles introduce new terms and definitions for 'indigenous plant material' and 'non-indigenous species of significance' and are set out below.

- 1) Presumption of kaitiaki interest in plant material originating in NZ from indigenous plant species (indigenous plant material).
- 2) Whānau, hapū, or iwi who hold mana whenua over the rohe in which the plant material has been sourced may have a kaitiaki interest in indigenous plant material.
- 3) Whānau, hapū, or iwi may have kaitiaki interests in plant material from species that are not strictly indigenous to NZ (non-indigenous species of significance).
- 4) Whānau, hapū, or iwi who hold mana whenua over the rohe where a new variety was developed may have a kaitiaki interest in the new variety if the regional origin of the indigenous plant material or non-indigenous species of significance is not known.

Not including definitions for 'taonga species', 'kaitiaki', or 'kaitiaki interests' is likely to frustrate the implementation of some of the recommendations in this review.

The creation of new terms with new definitions is likely to potentially introduce more ambiguity.

Given the time it has taken to respond to the recommendations in the WAI 262 report, these definitions could and should have been completed in time for this review.

Mātauranga Māori

The Options Paper currently makes no recommendations in relation to the recognition or protection for mātauranga Māori, mātauranga Māori in taonga species, or kaitiaki relationships with mātauranga Māori.

This approach is consistent with the Tribunals key finding that the Treaty does not guarantee ownership in taonga species (or mātauranga Māori relating to taonga species). Instead, the Treaty guarantees tino rangatiratanga, which only requires recognition and protection of kaitiaki relationship with taonga species and mātauranga Māori.

To respond in a meaningful and mana-enhancing way that facilitates protection of kaitiaki interests, there is a need for the government to clarify its role in the recognition and protection of mātauranga Māori, mātauranga Māori in taonga species, and kaitiaki relationships with mātauranga Māori.

International instruments

One of the reasons given for the PVRA review is to amend the PVRA to meet New Zealand's obligations under the CPTPP in relation to the UPOV 91.

I note here that the CPTPP is currently subject to its own independent inquiry before the Waitangi Tribunal. I understand a report from the Tribunal on this inquiry is expected before a Bill is considered by government that will give effect to the changes proposed in this review.

I also note the scope of this review does not respond to, or address, any of the recommendations raised in Chapter 8 of the WAI 262 report, which included a number of recommendations for a Treaty compliant process when New Zealand accedes to binding and non-binding international instruments.

Conclusion

To reflect the Crown's obligations to Māori under the Treaty of Waitangi and give effect to the recommendations in the WAI 262 report, the Options Paper proposes to introduce:

- a. a new disclosure requirement
- b. a new power to allow the refusal of a PVR if kaitiaki interests are negatively affected or the impact could not be mitigated to allow the grant
- c. a new PVR Māori Advisory Committee that has facilitative and adjudicative functions including additional powers for the Chair of the PVR Māori Advisory Committee
- d. a new definition for breed to exclude plants found in the wild.

The proposals introduce additional functions for the PVR Māori Advisory Committee and additional powers for the Chair of the PVR Māori Advisory Committee that go beyond the recommendations in the WAI 262 report.

I acknowledge this review is limited in its scope and is unable to address the systemic inconsistencies identified by Māori in the intellectual property, bioprospecting, and genetic modification frameworks, New Zealand's obligations under the United Nations Declaration on the rights of Indigenous Peoples, the CBD, the Nagoya Protocol, or the Bonn Guidelines, government funding of Māori research and science, protection of rongoā Māori, protection and recognition of mātauranga Māori, or a Treaty compliant process when New Zealand accedes to binding and non-binding international instruments.

These wider issues are likely to be considered in the review of the WAI 262 report being carried out by the Minister of Māori Development, and the proposals in this Options Paper could be helpful in informing that review.

Overall, these proposals address some of the issues raised in the WAI 262, can easily be implemented as part of this review, and do not prevent the wider issues being addressed in the second work stream that will ensure a Treaty compliant PVR framework.

Based on this conclusion, I recommend that the proposals in this Options Paper be supported.

Nāku iti noa, nā



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