

Legislative statement: Plant Variety Rights Bill – First Reading

Overview

The Plant Variety Rights Bill replaces the Plant Variety Rights Act 1987. The Bill implements:

- the Crown's obligations under the Treaty of Waitangi in relation to the plant variety rights (**PVR**) regime, and
- New Zealand's obligations under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**) in relation to the 1991 version of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**).

It also modernises a regime that is now over 30 years old.

The Treaty of Waitangi and the PVR regime

The Waitangi Tribunal considered the Crown's obligations in relation to the PVR regime in the Wai 262 report *Ko Aotearoa Tēnei*. The key recommendations were that the regime be amended to include:

- the ability to refuse the grant of a PVR if this would affect kaitiaki relationships with taonga species, and
- a Māori Advisory Committee to advise the Commissioner of PVRs on this matter.

The Bill strengthens these recommendations by establishing a Māori Plant Varieties Committee with a decision-making, rather than advisory, power. The Bill sets out the expertise required when appointing members of the Committee.

All applications for a PVR that involve plant material sourced in New Zealand from either an indigenous plant species or one of a small number of non-indigenous species of significance to Māori, will first be considered by the Committee. Breeders are required to disclose with their application if their candidate variety sits in one of these groups.

Breeders are encouraged, prior to filing an application, to seek to identify kaitiaki and engage with them. The Bill requires them to disclose certain information from this engagement with their application, if any has taken place. Any information shared at this stage is considered confidential, with civil penalties available if that confidence is breached.

If specific kaitiaki have asserted a kaitiaki relationship in relation to the plant variety that is the subject of the application, the Committee will assess the impact of the grant of a PVR on that relationship. The Bill sets out a list of factors that must be considered as part of this assessment. Otherwise, the Committee will consider the impact of the grant of a PVR on kaitiaki relationships as understood by Māori generally.

The Committee can take an investigative approach to its decision-making, including requesting information from parties and convening hui if it considers these necessary. The

Committee must strive for a unanimous decision, but the Chair can accept a majority decision of consensus is not possible.

If there is no kaitiaki relationship, or there is unlikely to be any impact on kaitiaki relationships, or any impact can be mitigated, the Committee will inform the Commissioner of PVRs that the application can proceed to be tested against the standard criteria for a grant. Otherwise the Committee will inform the Commissioner that the application must be declined. If certain conditions are agreed to mitigate any impacts, the Committee can inform the Commissioner of PVRs that these be made a formal condition of the PVR grant.

Any person can, within 10 working days, request the Committee to reconsider its decision on the basis of new information that was not available to the Committee when it made its initial decision. Appeals to a decision of the Committee are not available, though a decision can be judicially reviewed.

CPTPP obligations in relation to UPOV 91

The current PVR Act is aligned with an earlier version of the UPOV convention, UPOV 78. Under the CPTPP, New Zealand is required to either accede to UPOV 91 – the most recent version of the convention – or give effect to UPOV 91 through a *sui generis* system. This was negotiated to ensure that New Zealand had flexibility to meet its Treaty of Waitangi obligations. The provisions giving effect to the Treaty of Waitangi effectively add a new condition for a PVR grant and this is not permitted under UPOV 91, and so the Bill gives effect to UPOV 91. What this means is that the new PVR regime will be consistent with UPOV 91 except for the additional protections required by the Treaty of Waitangi.

UPOV 91 strengthens plant breeders' rights and extends the scope of those rights. In relation to the key provisions of UPOV 91, the Bill:

- extends the exclusive rights to include production or reproduction; conditioning; selling or offering for sale; importing or exporting; and stocking for any of these purposes
- provides exceptions to the rights for private and non-commercial use; experimental purposes; and breeding other varieties
- extends the terms of a PVR consistent with the minimum requirements in UPOV 91 (25 years for woody plants and vines, 20 years for all others)
- extends the rights to cover harvested material, but only to the minimum extent required by UPOV 91 (which is when the right's holder has not had a reasonable opportunity to assert their rights in relation to the original propagating material from which that harvested material was produced)
- exempts farm-saved seed from coverage of the new rights (while also providing regulation-making powers to limit that exemption in the future if a case is made to do so)

- extends the rights to cover plant varieties that are essentially derived from a variety that is already protected by a PVR by defining an essentially derived variety as one that adds no important new features to the original variety.

Other matters

The Bill provides for certain other matters not directly related to UPOV 91 that modernise the PVR regime, including:

- introducing a public interest test for compulsory licences
- repealing the offence provisions in the PVR Act 1987 as these are adequately covered by other pieces of legislation
- clarifying the infringement provisions and providing remedies consistent with other intellectual property regimes
- clarifying that all applications for a PVR require a growing trial and empowering the Commissioner of PVRs to direct the type of growing trial
- introducing a general right to be heard whenever the Commissioner of PVRs exercises a discretionary power
- providing that, consistent with other intellectual property policy regimes, appeals to a decision of the Commissioner are heard at the High Court
- clarifying a number of procedural issues relating to the PVR regime, including aligning processes with processes in the Patents Act 2013 where appropriate.

Commencement

The provisions of the Bill will commence in three stages:

- The Māori Plant Varieties Committee will be established following Royal Assent so that its Terms of Reference can be finalised and work can commence on developing guidelines for breeders and kaitiaki.
- The bulk of the provisions will then commence by Order in Council once the new regulations are ready to come into force.
- The provisions relating to consideration of applications by the Committee will commence by Order in Council no less than one year (and no more than two years) after Royal Assent to give breeders sufficient time to understand their new obligations and to engage with kaitiaki (where relevant) prior to filing their applications.