

Legislative statement: Plant Variety Rights Bill – Second Reading

Overview

The Plant Variety Rights Bill (the **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**).

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
- the establishment of a Māori Advisory Committee (**MPVC**) to advise the Commissioner of PVRs on this matter.

The Bill strengthens these recommendations by establishing the MPVC 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 obtained in New Zealand from either an indigenous plant species or one of a small number of non-indigenous plant species of significance to Māori, will first be considered by the MPVC. 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 MPVC 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 with Māori in general.

The MPVC can take an investigative approach to its decision-making, including requesting information from parties and convening hui if it considers these necessary. The MPVC must strive for a unanimous decision, but the Chair can accept a majority decision if 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 MPVC will inform the Commissioner of PVRs that the application can proceed to be tested against the standard criteria for a grant. Otherwise the MPVC 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 MPVC to reconsider its decision on the basis of new information that was not available to the MPVC when it made its initial decision. Decisions of the MPVC are appealable to the Māori Appellate Court.

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 their rootstock, and potatoes, 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.

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.

Amendments made by select committee

The Economic Development, Science and Innovation Committee (**EDSI Committee**) has examined the Bill and recommended that it be passed with some important amendments. The most notable amendments include:

Changes to the purpose clause

Clause 3 is the purpose clause. As introduced, the purpose of the bill is:

- to revise and consolidate the laws on plant variety rights in light of changes made to the UPOV Convention in 1991; and
- to give effect to the Crown's obligations under the principles of the Treaty of Waitangi to recognise in New Zealand law kaitiaki relationships with taonga species and mātauranga Māori.

The Committee recommended the following changes to the purpose clause to make the Bill's intention clearer:

- Amending clause 3 to recognise the Crown's obligations under the principles of the Treaty in relation to plant variety rights and specifying that these obligations are given effect to by Part 5. The purpose clause then lists "to protect kaitiaki relationships with taonga species and mātauranga Māori" as a specific purpose of the legislation.
- Amending clause 3(a) to expressly acknowledge the CPTPP, as this resolves the inconsistencies between New Zealand's different obligations by "giving effect" to UPOV 91 rather than acceding to it.
- Inserting clause 3(c) to include an express purpose of promoting innovation and economic growth and the need to balance the interests of plant breeders, growers, and society as a whole.

Appealing the Māori Plant Varieties Committee's decision

In recognising that Māori should be self-determining about issues affecting Māori, the Bill as introduced does not provide any right of appeal to decisions of the MPVC. The decisions will only therefore be subject to judicial review. The EDSI Committee considered that in keeping with good legislative practice, a general right of appeal to an appropriate body should be provided for. The Committee recommends inserting new clauses 68A to 68D that allow affected parties to appeal decisions of the Māori Plant Varieties Committee to the Māori Appellate Court. This right of appeal will be a general right of appeal, limited to certain decisions made under Part 5 of the Bill, which are set out in Schedule 1A.

Aligning the definition of "essentially derived varieties" with UPOV-91

The Bill as introduced includes a definition of an "essentially derived variety" (EDV) that mirrors the definition in the Australian Plant Breeder's Rights Act 1994. There were concerns raised by submitters that this definition is narrower than the UPOV-91 definition and would therefore weaken protections for plant breeders. The EDSI Committee recommends amending clause 7 to align the Bill's definition of EDV with the UPOV-91 definition on the basis that adopting the international standard wording of UPOV-91 would improve clarity and certainty for plant breeders.