

## Plant Variety Rights Review: What is Happening?

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### Summary

Plant Variety Rights (PVR) are an intellectual property Right specifically developed for plant breeders, providing a tool for the commercialisation of cultivars and the opportunity to make a return on their investment in developing new plant varieties. The review by Ministry of Business, Innovation and Employment (MBIE) began in 2017 and continued through 2018 with the public release of an issues paper in September 2018. Further consultation occurred with industry and Maori in 2019 and concluded with Cabinet approval for PVR in the Legislation Programme. The draft PVR Bill had the first reading in Parliament in May 2021.

The review has obligations under the Treaty of Waitangi, the 1991 UPOV Convention and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The Waitangi

Tribunal report for Wai262 has formed the basis of change in the management of applications for taonga species and the 1991 UPOV Convention has provided guidance and recommendations on what is included in the new law including the greater scope of Rights, the addition of Essential Derivation and limited Rights over harvested material.

MBIE, Intellectual Property Office of New Zealand (IPONZ) and Plant Variety Rights Office (PVRO) have also conducted an internal administrative review of Regulations and PVRO practice which has proposed changes in administrative and operational practice.

Obligations under the CPTPP have set a tight timeframe for introduction of the new law with the intention to be in force by end of 2021.

## INTRODUCTION

Plant Variety Rights (PVR) are an intellectual property Right specifically developed for plant breeders, providing a tool for the commercialisation of cultivars and the opportunity to make a return on their investment in developing new plant varieties. The existing law, coming into force in 1987, provides for the grant of a fixed term of intellectual property to breeders or owners over their new plant varieties. The exclusive grant of Rights applies to the production for sale and selling of propagating material of new cultivars, but this is now dated, with only a few minor amendments over the last thirty years. Industry has been calling for change for at least twenty years and now finally it is happening.

The current review has two main drivers; the obligations under the Treaty of Waitangi and those of the Comprehensive and Progressive Agreement for Trans -Pacific Partnership (CPTPP).

### WHAT HAS OCCURRED?

The review by Ministry of Business, Innovation and Employment (MBIE) began in 2017 and a consultation series of hui with Maori and meetings with industry occurred in 2018. This culminated with the public release of an issues paper in September 2018. Throughout 2019 there was further consultation with Maori, industry and other interested parties in order to develop and draft policy options. The final result was Cabinet approving the addition of PVR to the Legislation Programme in November 2019 and the first reading of the new PVR Bill in Parliament in May 2021.

In parallel to the main policy programme, MBIE, Intellectual Property Office of New Zealand (IPONZ) and Plant Variety Rights

Office (PVRO) have conducted an operational and administrative review of Regulations, Fees and PVRO practices. Regulations and Fees will require legislative change with probable implementation in 2022. Changes to or new practices and processes which do not require legislative change will be progressively applied to support the new law.

### The Treaty of Waitangi

In the middle 2011, Ko Aotearoa Tenei, the Wai 262 report was released to the public. The report is an extensive document and covered intellectual property and taonga works, genetic and biological resources of taonga species and the environment and matauranga Maori. Although a relatively small component in the context of the full report, PVR is specifically addressed and four recommendations in relation to PVR and taonga species were made.

1. The Commissioner of PVR be empowered to refuse a grant that would affect the kaitiaki relationship;
2. The Commissioner of PVR be supported by a Māori advisory committee;
3. A definition of ‘breed’ be included to clarify that a plant simply discovered in the wild would not be eligible for a PVR;
4. The Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community including Māori.

The four recommendations are the starting point for meeting the Crown’s obligations under the Treaty.

The second recommendation involves the establishment of a Maori Committee (MC) to work alongside the PVR Commissioner to ensure that kaitiaki relationships with taonga species are adequately considered with respect to PVR applications. The management of kaitiaki relationships is a key recommendation from the Wai 262 report. Engagement with Māori during the review period highlighted the importance of kaitiaki being involved with breeders of taonga species at an early stage, before any PVR application is made. The proposed Māori Committee should play a role in achieving this, fostering partnerships between native plant breeders and local Maori. At this time, the details of the way the Māori Committee will function have not been settled, but it is clear that the primary objective will be to ensure improved consideration for taonga species. The intention is for the Maori Committee to have responsibility for meeting all Treaty elements of any new law.

At this stage a formal definition of taonga species is not available however the species included in this group are likely to be all native or indigenous plants and a very limited number of others such as kumara (*Ipomea batatas*).

In a broader sense, there is uncertainty regarding how the proposed changes will practically impact PVR for taonga species. The proposals outline the intention for kaitiaki relationships to be acknowledged and addressed for taonga species which will require breeders using these species to engage with Maori as part of breeding actions and understand that the PVR application process will include submission of the variety to the Maori Committee.

Using application data from recent years it is estimated that around 7% of applications are belonging to taonga species,

in the order of 7-11 varieties per year will be required to be submitted to the MC. All other varieties, over 90% of applications, will not be submitted to the MC and there will be no Treaty of Waitangi provisions applied to applications for those varieties.

### **Convention of the International Union for the Protection of New Varieties of Plants (UPOV)**

Plant Variety Protection legislation in most countries is based on either the 1978 or 1991 Convention. The Convention consists of a series of Articles which list the requirements for national law compliance. At present, New Zealand's law is aligned with the 1978 Convention. The majority of UPOV member states are aligned with the 1991 Convention. To meet obligations under CPTPP trade agreement, the NZ PVR regime needs to be upgraded and give effect to 1991.

The 1991 Convention provides for stronger Rights, with the following of most significance:

1. Greater scope of protection
2. Essential Derivation
3. Rights over harvested material
4. Exception provisions for farmer saving of seed

### **SCOPE OF PROTECTION**

The scope of protection has been expanded from a focus on commercial propagation and the sale of propagating material including whole plants to a much broader objective of commercialisation or exploitation of the variety as a whole. The existing Rights over commercial propagation, reproduction and multiplication are retained and continue to encompass offering for sale, selling and

marketing of plants of the variety. The scope has been extended to include; conditioning for propagation, exporting, importing and stocking for any of these activities. All of these activities will now require the permission of the breeder.

An example of how the new law could make management of a Right easier is the situation where a breeder becomes aware of a nursery stocking one of the breeder's varieties. Under the current law the breeder would have to establish that the nursery was actually propagating and selling the variety in order to take infringement action. Under the new law, the presence or stocking of plants of the variety alone may be sufficient to initiate infringement action. In any infringement situation it is recommended to obtain professional legal advice.

A second example is the unauthorised export of plant material of a protected variety. Currently it is very difficult for export to be prevented because the variety owner would have to establish that commercial propagation of that material had occurred. Not an easy thing to do. The new law will remove the need to establish commercial activity because the export itself is an infringement and who propagated the material and how sold becomes a secondary matter.

## **ESSENTIAL DERIVATION**

This provision is an entirely new concept nationally and there is no current equivalent. The concept of one variety being essentially derived from another had its origins in genetic engineering and the concern that a commercially successful variety could be genetically engineered to create a different variety but remain genetically very similar to the initial variety. One variety being genetically similar to another is

not confined to genetic modification and could include in bred lines, repeated back crossing and sports (mutations). To address concerns, essential derivation provides the owner of a protected initial variety the possibility to share in the commercialisation of any other variety predominantly derived from that original variety. The derived variety must be distinct from the initial variety and can be protected.

Essential derivation is something of a balance between the important provision that protected varieties are freely available for further breeding and that of the second breeder acknowledging the contribution of the first variety to the second variety. The greatest challenge to Essential Derivation is the definition of a derived variety and how that determination is made. These aspects remain under international discussion and debate and currently there is some variation as to how Essential Derivation in individual national law, is defined and interpreted within the Article in the 1991 UPOV Convention.

## **HARVESTED MATERIAL**

Current PVR law is focused on commercial propagation activity and makes no specific provision for assertion of Rights over harvested material. Harvested material could include fruits, vegetables, cut flowers or grain. The 1991 Convention provides for the owner of a protected variety to have the possibility of asserting their Rights over harvested material, including entire or parts of plants, where there has been unauthorised use of propagating material. This can only be applied where the owner has been unable to assert their Rights at the propagation stage. This provision does not provide a choice for a breeder on when to assert Rights because the assertion of Rights over

harvested material is not acceptable if this could have been achieved at the propagation stage.

An example may be where the owner of a pineapple variety protects the variety in New Zealand and then uses that Right to manage the importation of fruit of that variety from a Pacific Island nation. The owner may assert their Rights in New Zealand on the imported fruit because the Pacific Island may not have a PVR scheme and the owner was unable to do this at the time of propagation.

### **FARM SAVED SEED**

Farmers have traditionally freely saved seed for centuries and for crops such as cereals is an important source of seed for planting in the next season. The greater scope of Rights does mean that stocking seed with the intention of future sowing is no longer possible and requires an optional exemption from the Right. This optional exemption will provide for this practice to continue, but variety owners may have a mechanism which could provide for the possibility of asserting their Right over the saved seed. The details of the mechanism have yet to be finalised.

### **POST GRANT ACTIVITY**

Post grant activity includes compulsory licences and infringement matters. Changes have been proposed in all areas with compulsory licences the most contentious.

The purpose of a compulsory licence provision is to ensure that a protected variety of potential or known value to the public cannot be locked up and encourages commercialisation and public benefit. Compulsory licences can be applied after a certain period to any variety that is deemed to be not sufficiently available and the

public is missing out. An applicant can apply to the PVR Commissioner and if certain criteria are met, including assessment of public good, could potentially receive a licence which would require the variety owner to make propagating material available to the applicant under terms and conditions set by the PVR Commissioner.

Infringements have also been under scrutiny with industry expressing dissatisfaction with the current Act which provides no guidance for infringement actions as seen in other IP legislation. In common with other intellectual property regimes, the onus is on the variety owner to assert their Right and use civil action when they think their rights have been infringed. The cost of Right enforcement is an issue, in common with other intellectual property types. New legislation could include explanation on the grounds for infringement and remedies that may be considered.

### **ADMINISTRATIVE AND OPERATIONAL REVIEW**

In parallel to the primary policy changes, a review has been carried out of PVRO operational practices and procedures, in particular, practices which are more frequently encountered by users and are more likely to have familiarity with. Examples are organisation of growing trials for DUS testing and timetable for payment of trial or examination fees. In most respects, the user interaction with the online system and PVRO itself is intended to continue largely as it is now. The improvements identified by the review fall into two groups, ones that impact users directly or those that are more for PVRO internal processes. For the future an applicant will likely notice changes in areas such as:

- i. Contact address requirements
- ii. Time limits for the payment of trial or examination fees
- iii. Photo requirements for vegetable and potato varieties
- iv. Changes to the requesting of plant material and organisation of testing
- v. Website improvements for an improved user-friendly experience

A particular area of consideration has been arrangements for and organisation of growing trials for DUS testing. The current law reflects how things were done in the 1980's and does not fit well the situation of today with greater application numbers and for most genera significantly more potential similar varieties for evaluation. Access to plant material of similar varieties has become increasingly challenging over the last decade due to variety commercialisation models which integrate propagation, production and sales. For varieties managed in this way, the only source of propagating material is often the owner or licensed agent.

### **Future Timetable**

With the Bill in Parliament, the aim is to have a new law in force by end of 2021, with new Regulations in operation by the middle of 2022. The timetable cannot be altered due to the CPTPP requirements that all necessary law be in place within three years of the New Zealand signing in December 2018.

### **Cost of protection**

The PVR scheme is almost entirely funded by users and only receives Government funding for the cost of UPOV membership. All other operational activities are intended to be covered by fees under cost recovery. The overall Act review will include an evaluation of revenue through fees and PVRO expenditure. Such an assessment was last conducted in the early 2000's and is arguable long overdue. Further information regarding the fees review will be available later in 2021.

### **FURTHER INFORMATION**

More information on Plant Variety Rights in New Zealand may be found at the following links:

Plant Variety Rights (IPONZ website):  
<https://www.iponz.govt.nz/about-ip/pvr/>

The Plant Variety Rights Act review:  
<https://www.iponz.govt.nz/about-ip/pvr/pvr-act-review/>