Personal Submission

MBIE Discussion Paper

Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues

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Introduction

I am making this submission in a personal capacity and not as a representative of any organisation of which I am a member or for any client. I have been involved in plant variety policy matters since I prepared submissions on the 1983 Bill (which was terminated by the 1984 election) and the 1985 Bill that led to the 1987 Plant Variety Rights Act. I was a member of an advisory group to the PVR Office after the UPOV 1991 treaty came into force. The draft proposed amendments to the 1987 Act to make it UPOV 91 compliant prepared by that committee were not acted upon because of the Wai 262 claim. Similarly the 2005 exposure draft bill (on which I made a submission) did not proceed. It has now been another nine years since the Wai 262 Report was published. It has been a long haul.

International Obligations

While it is extremely unlikely that any PVR dispute would be of sufficient importance for another CPTPP or TRIPS country member to contest the New Zealand law, this country places great importance in meeting our international obligations. The proposals in the discussion paper about the Māori PVR Committee's powers and procedures could be called into question under both CPTPP and TRIPS.

Annex 18-A of CPTPP allows New Zealand to adopt a *sui generis* PVR system that gives effect to UPOV 91. But that exception is subject to the limitation in paragraph 2:

> "Nothing in paragraph 1 shall preclude the adoption by New Zealand of measures it deems ***necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi***, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party."

In any CPTPP challenge the argument would be that New Zealand's obligations under the Treaty of Waitangi were determined by the recommendations of the Wai 262 Report. The recommendation on PVRs in that report was"

> "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 Crown's 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 relationships and the likely effects upon them, and then to balance the interests of kaitiaki against those of the PVR applicant and the wider public, the Commissioner of Plant Variety Rights should be supported by the same Māori advisory committee that we recommend becomes part of the patent regime."[1]

The proposal in the discussion paper is to do away with any role for the Commissioner or any need for the Māori PVR Committee to balance interests of kaitiaki against the

[1] Wai 262 Report, page 212

interests of the PVR applicant or of the public at large. The mandate of the Committee[2] is to consider only what is the effect a grant might have on the kaitiaki relationship and then to consider if it can be mitigated. If not, the variety may not be protected.

The Discussion Paper states that what it is proposing is "consistent with the principle that matters pertaining to kaitiaki relationships should only be considered by Māori."[3] Such a principle is consistent with the Wai 262 Report recommendations, but only as far as determining kaitiaki interests. The Wai 262 recommendation was that the interests of PVR applicants and those of the wider public should be balanced against the kaitiaki interests determined by the Māori PVR Committee and that the PVR Commissioner should be doing the balancing **supported by** the Māori PVR Committee.

The Wai 262 report warned against any interest, including kaitiaki interest being seen as a trump card.[4] In the process proposed in this discussion paper the kaitiaki interest is not just a trump card – it is a trump card dealt from a stacked deck.

TRIPS Article 41, paragraph 4 provides that:

> "Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, **of at least the legal aspects of initial judicial decisions on the merits of a case.**"

While TRIPS Clause 41.4 uses the word "review", it is clear from the wording "legal aspects of the merits of the case" that the intention is that there should be a substantive appeals on the merits of the case, not a just a judicial review of the procedures as proposed.

Initial Stage – Potential Unintended Consequences

Slides 4 and 5 shown at the 29 September hui outlined a pre-application stage and an application stage. It was not clear from the answers given to questions from the participants:

- When a PVR application would receive its filing date,[5] and
- Whether information supplied to the Māori PVR Committee would be held in confidence.

A filing date has important consequences under PVR law:

- Because it is a first to file system, it means that no later filed application can get a PVR grant for the same variety.

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[2] 2020 Discussion Paper, paragraph 55.
[3] 2020 Discussion Paper, paragraph 54
[4] Wai 262 Report, page 211
[5] The date it has been deemed to have been filed under section 5(4) of the PVR Act 1987

- It establishes a priority date which gives the applicant priority over any other later filed application for the same variety in any other UPOV country in which the applicant has filed an application within 12 months of the New Zealand filing.
- To be “new” a PVR application must be filed within 12 months of a first sale of the variety within New Zealand.
- Once a PVR grant has been made, the variety becomes (from its filing date) “a variety of common knowledge” from which all other varieties must show distinctness to be eligible for a PVR grant in other countries.

At the very first stage where a breeder has a candidate variety and seeks to identify kaitiaki with an interest there may well be a non-confidential disclosure of the variety. In the absence of any register of kaitiaki interests the applicant will have to disclose to at least one kaitiaki what the variety is, and unless the kaitiaki have agreed to non-disclosure, that information is no longer confidential. If the applicant asks the Māori PVR Committee to assist in finding kaitiaki with an interest, the Committee may be disclosing that information as well. That disclosure could jeopardise any US plant or utility patent application in the US. That is a filing date consideration because disclosure, after receiving a filing date, would not be prejudicial to a US plant patent application claiming priority from the New Zealand filing date.

Given the consequences (outlined above) of a filing date it is apparent that the later a filing date is granted the more dire are the consequences for an applicant. It is submitted that any applicant should be entitled to file an application and be granted a filing date at any stage of the Māori PVR Committee process provided that the application meets all the other PVR requirements for being given a filing date. It is not unusual for PVR applications to remain pending for years while awaiting comparative trials. There seems to be no good reason why the Committee process could not proceed at the same time as the other eligibility criteria are being determined. If the kaitiaki condition is not met after a filing date has been granted the application would lapse.

Applicants might choose to delay seeking a filing date until after the Māori PVR Committee process, but under the process proposed, applicants would not have this choice.

Fees

At the hui it was stated that the matter of funding had not been determined. However, in the 27 November Cabinet Paper at paragraph 69 it is stated that the costs of the Māori PVR Committee could be met from within current IPONZ baselines. During the hui it was pointed out that the current fees use a graduated scale with applicants for varieties of herbage, agricultural crops, vegetables and fungi paying larger fees that for varieties of other types of plants. This suggests that a premium fee is contemplated.

What needs to be made clear is:

- Whether there will be a premium fee payable by PVR applicants for varieties of indigenous species;
- Whether there will be a fee payable by kaitiaki to assert their interests before the Māori PVR Committee;
- When that fee would be payable (if the proposed pre-application procedure is put in place);
- How much of the Māori PVR Committee's cost will be covered by the current IPONZ baselines; and,
- Whether any Māori PVR Committee premium fee would be waived if the applicant and kaitiaki can come to an agreement on the kaitiaki condition without reference to the Māori PVR Committee.

Reality Check

Slide 8 of the hui presentation listed the six most common indigenous species for which PVRs have been granted. Of these five are primarily ornamentals sold mainly for gardens or landscaping purposes. Manuka trees are the exception. They are a source of honey and varieties which express compounds with elevated medicinal properties are the most valued.

The Sapere Report released along with the PVR Options Paper in July 2019 is a snapshot of the New Zealand plant breeding industry. Part 4.4 of that report examined ornamentals, trees and other plants. Two observations are relevant here. One is that over the time period of 1976 to 2018 the number of PVRs for such varieties peaked in 2005 and have been declining ever since.[6] The second is that the top 5 breeders had only 17.1% of PVRs in the ornamentals and trees sector.[7] The corollary is that the holders of the other 81.9% of PVRs in the sector are likely to be SMEs. The New Zealand market for ornamental plants is limited by both population and by urbanisation – not many ornamentals in high rise apartments. That may explain the declining number of ornamental PVRs.

Since first PVR application was filed in 1975 there has never been an appeal from a decision of a PVR commissioner to refuse an application.[8] The reality is that no plant breeder has considered an appeal to be sufficiently important to their business to spend money on legal fees to do so. While the new act should provide the legal apparatus for appeals in case the circumstances should change in future, the law should recognise that the majority of PVR applicants are unlikely to ever use appeal or review provisions of whatever nature. And if the perceived costs are too high, breeders will stop filing applications for indigenous varieties altogether in New Zealand. Indeed, the discussion paper and the slides encourage this by mentioning that a breeder may choose to continue without a PVR grant. Is this really a desired policy objective when the whole PVR scheme was designed to encourage plant breeding?

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[6] Sapere Report, p 42

[7] Sapere Report, p 43

[8] There has been one compulsory licence decision and its appeal and one objection after grant decision by any PVR commissioner as well as two PVR infringement cases decided by the courts..

Alternative Proposal

The indigenous variety scheme would be more likely to find acceptance if were set up as two distinct processes. In the first process the Māori PVR Committee would act as a referral service to connect a breeder with the relevant kaitiaki and as a mediation service once a connection had been made. If the breeder and kaitiaki cannot agree within a set time limit, then the applicant could choose to require the Māori PVR Committee to make a decision. The referral and mediation service would cost either a minimal or no fee. The distinct decision process would cost a fee reflecting the complexity of the decision-making process. This would allow SME breeders an opportunity to know at an early stage at minimal cost whether the kaitiaki condition has been met. If it has not been met after mediation, they can still opt to seek a decision, but based on past experience it is unlikely that there would be many applications for decisions. The sunk costs would be acceptable.

To tie this in with the earlier parts of this submission, the breeder should be given the opportunity to make a full PVR application (and be granted a filing date) at the same time as requesting that Māori PVR Committee make a decision. The Commissioner should be a part of the decision-making body and the decision should be made by balancing of all of the kaitiaki, breeder and the wider public interests.