

Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa

Submissions of Te Hunga Rōia Māori o Aotearoa – The Māori Law Society

Te rā 20 o Haratua 2021

To: Ministry of Business, Innovation & Employment and Intellectual Property Office of New Zealand

Re: Review of the Plant Variety Rights Act 1987: Exposure Draft of the Plant Variety Rights Regulations 2022 (Exposure Draft) and Review of Plant Variety Rights Fees (Fees Review)

A. Kupu whakataki | Introduction

1. Te Hunga Rōia Māori o Aotearoa – the Māori Law Society (THRMOA) was formally established in 1988. Since then, the Society has grown to include a significant membership of legal practitioners, judges, parliamentarians, legal academics, policy analysts, researchers and Māori law students. Our vision is Mā te Ture, Mō te Iwi – by the Law, for the People.
2. THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.
3. When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū and iwi, but rather, seeks to provide a whakaaro Māori based legal analysis and submissions on law reform.
4. THRMOA welcomes the opportunity to make written submissions to Ministry of Business, Innovation, & Employment on the Exposure Draft and Fees Review.

He whakarāpopototanga | Summary

5. This submission will make some general comments regarding our position on the reform generally as that pertains to the Wai 262 claim and the Waitangi Tribunal report *Ko Aotearoa Tēnei*. We then make some specific comments on the proposed regulations and the fees review.

Ngā tāpaetanga a THRMOA | THRMOA Submissions

(i) *General comments*

6. THRMOA does not support the proposed amendments to the Plant Variety Rights Act 1987 until the government completes a full review of the intellectual property laws because of the Wai 262 claim and the tribunal report *Ko Aotearoa Tēnei* (Wai

262)¹, and the government completes its whole-of-government response as outlined in Te Pae Tawhiti².

7. One of the workstreams proposed within the whole-of-government response is the review of the Plant Variety Rights Act 1987. To carry out a review of this Act independent from the whole-of-government response is not consistent with the recommendations in Wai 262 and Te Pae Tawhiti.
8. THRMOA also repeats its previous submissions that a broader review of the intellectual property system is necessary to ensure intellectual property system fully recognises or protects traditional knowledge, Mātauranga Māori, Māori relationships with native plant species, and therefore, is not consistent with the New Zealand's obligations under the Treaty of Waitangi (the Treaty), the Convention on Biological Diversity (CBD), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
9. THRMOA also notes this review does not include any consideration of New Zealand acceding to the Nagoya Protocol, which regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in genetic resources.
10. THRMOA considers this review should include consideration of New Zealand's position in relation to the Nagoya Protocol, including how New Zealand regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in genetic resources. The Nagoya Protocol is directly relevant to this review.
11. Finally, THRMOA notes the review does not include the development of a bioprospecting regime or any bioprospecting regime and access and benefit sharing (ABS) protocols that are Treaty compliant.
12. The complete family of reforms were envisaged as part of the response to the Wai 262 report.
13. THRMOA encourages the Government to continue work in this area towards a fully inclusive intellectual property system including a fully inclusive PVR regime, that recognises and protects traditional knowledge and mātauranga Māori, recognises and protects Māori relationships, including kaitiaki relationships, with native species, is based on the principles of the Treaty including an ongoing partnership with Māori, gives effect to New Zealand's obligations under the CBD and UNDRIP, considers a review of New Zealand's accession to the Nagoya Protocol, and works with Māori to develop a bioprospecting regime and ABS protocols that are Treaty compliant.
14. THRMOA acknowledges the focus on the review of the Plant Variety Rights Act 1987 seeks to (in part) respond to Wai 262. However, for this to happen in a meaningful way, there is a broader constitutional conversation that needs to occur. This was a

¹ Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (WAI 262, 2011).

² Te Puni Kōkiri (2019) Wai 262 – Te Pae Tawhiti The role of the Crown and Māori in making decisions about taonga and mātauranga Māori.

key aspect of Wai 262, which sought constitutional review and in particular focused on true partnership, with shared decision making between Māori and the Crown. In essence the claimants sought 'Māori control over things Māori'.

15. THRMOA also notes there has been no mention of *Te Pae Tawhiti*, the whole of Government response to Wai 262 that was released in 2019, throughout the entire review of the Plant Variety Rights Act 1987. The response in *Te Pae Tawhiti* was created with the aim of discussing longstanding issues raised by Wai 262 and *Ko Aotearoa Tēnei*. Notwithstanding the direct relevance of *Te Pae Tawhiti* to the matters addressed in this review, there has been little to no information released since 2020.

16. However, THRMOA would also like to note that it considers that this review is positive in many respects and does go some way to addressing the issues and recommendations identified in Wai 262. For example, we support the establishment of the new Māori Plant Varieties Committee and its ability to decline a PVR on the basis of its negative impact on kaitiaki relationships.

(ii) *Non-Indigenous Plant Species of Significance*

17. THRMOA does not support the proposed list of Non-Indigenous Plant Species of Significance (NISS) in Schedule 2. THRMOA repeats their submission that the Plant Variety Rights Act needs to recognise and provide protection for kaitiaki relationships with taonga species as proposed in Wai 262. If the government had completed its full review of the intellectual property laws and its whole-of-government response to the recommendations in Wai 262, then terms such as 'taonga species' would be defined, and there would not be any need to introduce and define additional terms to create further uncertainty.

18. THRMOA does not support the current list of NISS being a closed list or the limitation to species that arrived in New Zealand on the migrating waka. Whether a species is a taonga is not confined to whether it arrived in Aotearoa on the originating waka. For example, taonga species would have included species gifted between iwi, hapū, and whānau as well as species taken to new locations because of historical hekenga (migrations).

19. THRMOA acknowledge there may be challenges with an open list, however we consider there are greater risks from a Te Tiriti perspective with a closed list. Further, we consider that any challenges with an open list can be adequately ameliorated with the right systems in place. Wai 262 provided guidance on such issues, which included being able to identify the appropriate person with the necessary mātauranga who can recognise the existence of a kaitiaki relationship. The Māori Plant Variety Committee will likely be able to assist with such challenges.

20. THRMOA also note that this proposed framework is unable to protect known taonga for Māori, for example Māori potatoes. This reflects the inherent limitation with this reform, which is attempting to amend a system that isn't fully inclusive of Māori rather than create a new system that is fully inclusive and reflects the vision in Wai 262.

21. THRMOA has supported the regulations allowing for Māori to easily apply to amend and adapt the list of NISS, or perhaps the Māori PVR Committee having the ability

to amend and adapt the list of non-indigenous species of significance without the need for a legislative amendment or amendment to the regulations. However, it will be difficult to amend the NISS list while it remains in regulations without mechanisms contained within those regulations to enable amendment.

(iii) *Fees review*

22. THRMOA supports setting the revised fees at a level that ensures the PVR regime is accessible to as many New Zealanders as possible, and THRMOA supports the use of additional government funding to keep the fees increase within a more equitable range.

In Closing

23. THRMOA acknowledges the important work undertaken thus far and supports the Government's continued focus on fulfilling its obligations under the Treaty with this review. However, we note that most of the submissions we have made above are repeated from previous submissions made by THRMOA and Māori in general, and these concerns remain unanswered. THRMOA remain of the view that more work is required to ensure a fully inclusive intellectual property regime that reflects the vision in Wai 262 and ensure that kaitiaki relationships are fully recognised and protected.
24. THRMOA expects to be informed regarding this kaupapa, including any progress and developments and any further consultation.
25. Should you have any pātai or wish to discuss any aspect of our submissions, please feel free to contact Lynell Tuffery Huria at lynell@kahuilegal.co.nz.

Ngā mihi nui ki a koutou



Lynell Tuffery Huria
On behalf of THRMOA