Plant Variety Rights Act 1987 review: Issues Paper – Submission template

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Responses to Issues Paper questions

Your submission may respond to any or all of the questions from the Issues Paper. There is an additional box at the end for any other comments you may wish to make.
Text boxes will expand as you complete them.

Objectives of the PVR Act	
1	Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?

It is MBIE's intention to bring the PVR Act more in line with UPOV 91 which is expected to encourage investment in the New Zealand plant breeding industry, as well as the importation of new varieties into NZ. This will in effect, incentivise the development of new plant varieties that can benefit NZ by giving rights holders an opportunity to get a return on the investment they make in that development.

The Wai 262 report emphasised the importance of the kaitiaki relationship with taonga species. Although one of the objectives of the PVR Act includes consistency with the Treaty of Waitangi (the Issues Paper signals opportunities for the 'new' PVR regime to be consistent with the NZ's Treaty obligations) overall, the PVR regime (objectives, application process, etc) is weak in incorporating the recommendations set-out in the WAI 262 report, and providing provisions relating to Treaty principles.

Our submission recommends ways in which this can and should change. As the PVR regime stands, the key problem for Ngāti Ruanui is that we have very little or no control over our relationship with taonga species.

2	Do you think the PVR regime is meeting these objectives? Why/why not?

No.

The PVR regime (including the objectives, application process, etc) is weak in providing for mana whenua's relationship with taonga and mātauranga Māori, as set-out in the WAI 262 report. To address this, we recommend that the PVR regime and process include (but not limited to) taonga species, iwi participation through a devolved approach, mātauranga Māori framework, co-management, and benefit sharing.

In terms of the inclusion of taonga species, the dilemma is defining where the property line, in the form of PVR/intellectual property rights granting 'patent' rights over tikanga, mātauranga Māori. It is our preference that taonga species be excluded with the PVR regime in its current state or in the absence of recommended measures.

A devolved (bottom-top) approach could be addressed by including consultation with affected mana whenua and provisions for written approval of affected mana whenua (to be provided by applicants) with the PVR application process. We believe that the tangata whenua views expressed in WAI 262 claim against modification of flora (and fauna) are economically disadvantageous to us but economically favourable for 'patent' holders, commercial businesses. In the absence of iwi participation and free prior informed consent (FPIC) also known as written approval, the Government's obligations to abide with the Treaty principles are not met. FPIC is in accordance with the United Nations Declaration on the Rights of Indigenous People which NZ supports.

Mana whenua expects to be consulted regarding applications. The purpose for consultation is to provide the applicant (Maori Advisory Committee and Commissioner) with an outline of the cultural concerns raised by specific proposals. Ngāti Ruanui believes that education may be one of the keys to facilitate a better consultation and engagement process for both affected mana whenua and applicants. Applicants need a clearer understanding of the reasoning behind consultation requirements. We recommend a 'best practice' consultation model be used by applicants and mana whenua. A good reference is Ngāti Ruanui's Best Practice Guidelines for Engagement with Māori.

A mātauranga Māori framework will enable consideration of Te Ao Māori (Māori worldview) which encapsulates mana whenua's tangible and intangible associations with taonga species, particularly, indigenous flora. This could be applied by requiring a Cultural Impact Assessment (prepared by affected mana whenua) which identifies cultural values affected by the proposal and measures to avoid effects. Recommended measures could form part of the conditions applied with the PVR licence.

Where a PVR application relates to taonga species, the application of a 'co-management' approach will give effect to, and in particular, kaitiakitanga and tino rangatiratanga principles of the Treaty. In terms of decision-making, we recommend that more information needs to be provided relating to the Māori Advisory Committee (number of members, credentials, etc). In our view, the members (all or at least half of the members) should be appointed by iwi authorities and/or the Iwi Leader's Group.

PVR is a form of intellectual property rights on plant species (includes indigenous taonga). In essence, Ngāti Ruanui sees this as another form of colonialist 'enclosure' ideology where taonga species (variety) are being captured and enclosed by 'patents' and private ownership and control (for commercial gain). We are concerned that, in the absence of recommended changes, traditional use of taonga species (varied form) by mana whenua will become 'hot properties' of PVR owners and licence holders.

We recommend that besides the above inclusion, the PVR regime includes provisions for 'benefit sharing' arrangements, particularly when taonga species are involved. This could be in the form of royalties, contributions or funding to be provided to affected mana whenua. The United Nation Convention on Biological Diversity and the United Nations World Intellectual Property

Organisation actively encourage 'benefit-sharing' arrangements where mana whenua are given a share of any profits from taonga species and their products.

We call on the Government to establish a register of taonga species (provided by respective mana whenua of each rohe) to ensure that they are documented to avoid 'exploitation' or misappropriation of taonga Māori by PVR owners and licence holders for their own purposes. Furthermore, the PVR system should incentivise conservation of taonga species.

3	What are the costs and benefits of New Zealand's PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.

The current PVR regime does not meet the Government's Treaty obligations. It is paramount that these obligations are adequately articulated through the PVR regime and must be met. A cost and benefit analysis on this basis is irrelevant.

Resourcing for affected mana whenua is an impediment to full and meaningful consultation/engagement. The PVR regime does not provide some resource for mana whenua in this regard. We recommend that the MBIE further explore available options for better supporting and resourcing affected mana whenua to facilitate improved participation outcomes.

4	Do you think there would be a material difference between implementing a sui generis regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

We support a sui generis regime that gives effect to UPOV 1991. In our view, this regime will meet the NZ government's Treaty obligations, subject to recommended changes. In doing such, the Government should provide for iwi resourcing (cost of Technical and Cultural Experts/Advisors' time in assessing PVR applications).

Farm-saved seed

5	Are there important features of the current situation regarding farm-saved seed that we have not mentioned?

Please refer to our comments on questions 1 to 4 where farm saved seeds involve taonga species.

6	Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.

Benefit sharing, in the case of taonga species, could be in the form of royalties, funding or contributions that could promote mana whenua's continued associations with taonga species and mātauranga Māori. Monetary contributions could be used by affected mana whenua to aid any conservation programmes or conduct research work on taonga species in accordance with mātauranga, tikanga and te ao Māori framework, and intergenerational principles.

Additionally, please refer to our comments on questions 1 to 4 where farm saved seeds involve taonga species.

7	Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Please refer to our comments on questions 1 to 4 where farm saved seeds involve taonga species.

8	Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

Farm-saved seed arrangements are practical and cost-effective for farmers. However, we believe that it is appropriate for the PVR regime to set controls (including 'benefit sharing') which protects PVR owners and affected mana whenua (in terms of taonga species) with respect to farm-saved seeds. At this stage, only farmers are benefiting from the current practice.

9	Do PVR owners use mechanisms outside the PVR regime to control farmers' use or saving of the seeds of their protected varieties? What are these?

We are not aware of existing mechanisms being undertaken outside the PVR regime. However, as mentioned above, we believe that the PVR regime should include controls with respect to farm-saved seeds including benefit sharing.

10	Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?

The farmer's PVR licence should reflect (but not limited to) farm-saved seed arrangements, the purpose of sowing, and for how long sowing can be undertaken in accordance with the conditions set-out in the PVR licence and agreements with PVR owners and affected mana whenua, in the case of taonga species. This approach is efficient, will not require permission every sowing season, provided that there are no changes to the nature, character and intensity of the activity.

11	What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

Ngāti Ruanui is interested in working with the Government in developing a mandatory royalty scheme (any form of monetary benefit, funding or contributions for affected mana whenua) in the next stage of the consultation process.

Rights over harvested material	
12	Are there important features of the current situation regarding rights over harvested material that we have not mentioned?

Please refer to our answers under questions 1 to 4.

13	Do you agree with our definition of 'harvested material'? Why/why not?

Please include reference to taonga species.

14	Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Please refer to our answers under questions 1 to 4.

15	Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

Please refer to our answers under questions 1 to 4.

Rights over similar varieties	
16	Are there other important features of the current situation regarding distinctness that we have not mentioned?
Tikanga maori knowledge framework underpins mana whenua's association with taonga species, particularly the concepts of whakapapa (geneology), mauri (life principle) and kaitiakitanga (guardianship). As well as referring to familial links such as whanau (family), hapu (sub-tribe) and iwi (tribe). We are concerned that changes to the phenotype of taonga species, particularly distinctness could impact on mauri and therefore tikanga maori. On this regard, we recommend that the requirements to gain a PVR on taonga species tikanga maori knowledge framework, an assessment tool that incorporates affected mana whenua's values and beliefs into a framework to help identify cultural impacts.	
17	Are there other important features of the concept of EDVs that we have not mentioned?
Please refer to our answers on questions 1 to 4.	
18	Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
Please refer to our answer on question 16.	
19	Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
The current approach does not take into account mana whenua's relationship with taonga species and tikanga maori knowledge framework.	
20	How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?
Please refer to our answer on question 16.	
21	Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.
None.	
22	Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
Please refer to our previous answers.	
23	Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
Please refer to our previous answers	
24	How might technological change affect the problems/benefits of not having an EDV regime that you have identified?
Please refer to our previous answers.	

Compulsory licences	
25	Are there important features of the current situation regarding compulsory licences that we have not mentioned?
Please refer to our previous answers.	
26	Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
Pleae refer to our previous answers.	
27	Do you think there are benefits with the current compulsory licence regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.
Please refer to our previous answers.	

Enforcement: infringements and offences	
28	Are there important features of the current situation regarding infringements and offences that we have not mentioned?
We recommend that the PVR regime incorporates the infringements and offence provisions set-out in the Resource Management Act 1991 (RMA), or similar.	
29	Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?
As previously mentioned Ngāti Ruanui has not be involved or made aware of any PVR applications in the past.	
30	How prevalent are PVR infringements and offences?
Not applicable.	
31	Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
Yes, we recommend that the MBIE consider a similar approach as set-out in the RMA.	
32	Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
Please refer to previous comments.	

The kaitiaki relationship and the PVR Act

33	How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?

Tikanga Māori knowledge has been given tremendous exposure in the WAI 262 case. The WAI 262 Claim relates specifically to New Zealand's indigenous flora and fauna and the knowledge and uses of that biodiversity. The claim's central purpose is to demonstrate the significance of this knowledge to Māori and the need to protect it appropriately. As previously mentioned (refer to our answers on previous questions), we are concerned about the lack of recognition given to tikanga, mātauranga and te ao Māori, impact on mauri (varying taonga species), mana whenua's kaitiaki responsibilities and the Government's Treaty obligations.

34	What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.

Please refer to our answers on previous questions.

Overall, we are concerned that patenting inventions/varieties derived from taonga flora infringes kaitiaki rights conferred by the Treaty of Waitangi.

In tikanga Māori knowledge conception of the world, life forms have a whakapapa back to Atua (the Gods), and each life form, in this case taonga species, has its own mauri. We are concerned that changes on the phenotype of our taonga would impact on mauri.

We recommend that the PVR regime includes our recommendations to address our concerns.

35	What role could a Māori advisory committee play in supporting the Commissioner of PVRs?

We propose that the following functions of the Māori Advisory Committee (but not limited to): Provide advice to the Commissioner as to whether the application is derived from or appears to be derived from traditional knowledge, indigenous taonga, etc; provide advice that gives effect to the information and recommendations contained in the Cultural Impact Assessment (prepared by affected mana whenua); outcomers of consultation; provide advice as to whether the commercial purpose of the application is or is likely to be contrary to mana whenua values.

36	How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?

Currently, Ngāti Ruanui has not been involved with any applications relating to the development of plant varieties.

'Discovered' varieties

37	Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?

As previously mentioned, Ngāti Ruanui has not been involved or made aware of any applications relating to the development of plant varieties.

Offensive names

38	What characteristics might make a variety name offensive to a significant section of the community, including Māori?

We recommend that proposed names be provided to affected mana whenua for comments prior to finalising the variety name.

Transparency and participation in the PVR regime

39	What information do you think should/should not be accessible on the PVR register? Why?

Please refer to our previous comment.

Overall the PVR process should include contact details of iwi authorities within their respective rohe. This will assist in the consultation process.

Furthermore, we recommend that the PVR regime develops a resource that is available to applicants that provides information on tikanga Māori; continue to actively promote and educate applicants and funding providers on the need to factor into funding applications adequate resources to facilitate meaningful iwi/Māori consultation; develop a process to enable iwi/Māori to input into controls (management of cultural, tangible and intangible/spiritual effects, etc) applied by the decision-maker; promote and where appropriate, facilitate the establishment and/or maintenance of relationships between affected mana whenua and applicants.

The controls should provide for (but not limited to) the recognition of the local rünanga within the area, management of cultural, tangible and intangible effects, impact on kaitiakitanga, on-going involvement of affected mana whenua in monitoring the implementation and progress of conditions applied in a PVR licence.

40	As a plant breeder, do you gather information on the origin of genetic material used in plant breeding?

Not applicable.

Other Treaty of Waitangi considerations

41	What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?

The Protocol incorporating Maori Perspectives in Part V Decision Making (page 22) outlines the following Treaty of Waitangi principles as derived from The Court of Appeal decision in New Zealand Māori Council v Attorney General 1987:

1) the obligation to act reasonably, in the utmost good faith and in a manner consistent with partnership;

2) the requirement to make informed decisions;

3) the obligation to actively protect Māori interests; and

4) the obligation on the Crown to not unduly impede or diminish its capacity to provide redress where a valid Treaty grievance is established.

We recommend that this be included with the PVR regime.

Additional issues	
42	Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?
None.	

Other comments

43	Are there any additional comments you wish to make about the PVR Act review Issues Paper?
In August 2016, Cabinet decided to launch a review of the PVR Act. MBIE began the review in 20 February 2017. The first stage of the review was the pre-consultation phase. This included information-gathering, planning, engagement with some interested groups, and development of this Issues Paper. We note that MBIE has not engaged with Te Runanga o Ngati Ruanui Trust during the pre-consultation phase in accordance with the Treaty partnership obligation between the Crown and mana whenua.	