Combined Proceedings IPPS 73:163-168. 2023.

A New Plant Variety Rights Law

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Keywords: Plant Variety Rights Act, Treaty of Waitangi, principles of The Treaty, UPOV Convention, indigenous plant species, scope of protection, essential derivation, harvested material, examination and testing, costs of protection, infringements, parallel laws

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 new law meets 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.

The new law provides a more comprehensive coverage of administrative elements including objection process, use of Hearings, rules of evidence, the Right to be heard and appeals. The examination and

testing process in practical terms is largely unchanged with some new provisions regarding the payment of fees, the supply of photos and access to plant material for variety testing. Infringement provisions are clearly set out and cover what is authorisation of the breeder, what constitutes an infringement, when an action can be taken and types of relief.

For the next twenty-five or more years there will be two parallel PVR laws in operation. All varieties granted or applied for under the PVR Act 1987 will continue unchanged because there are no retrospective provisions in the PVR Act 2022. The benefits of the new law will only apply to applications and grants under the PVR Act 2022.

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 PVR Act 1987 provided for the grant of a fixed term of intellectual property to breeders or owners over their new plant varieties, with an exclusive grant of Rights only applying to the production for sale and selling of propagating material of new cultivars. This now superseded law had become dated, had not kept up with new breeding and plant technologies and has had minimal amendment over the last thirty-five years. A new law is now finally a reality, bringing with it new obligations, requirements, and opportunities.

THE NEW LAW

Initial discussions on a new law began in the mid 1990's and progress was slow and challenging over the intervening decades. Momentum picked up in 2017 with the beginning of a series of consultations and huis spread over several years, a Bill was drafted in 2020, the first reading of the new PVR Bill occurred in Parliament in May 2021 and passed the third reading on 16 November 2022. The final step was the PVR Act 2022 (the Act) and the associated PVR Regulations 2022 coming into force on 24 January 2023.

The purpose of the new law is to provide an effective and relevant plant variety rights system that revises and consolidates the law on plant variety rights, consistent with New Zealand's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in relation to the 1991 UPOV Convention, to protect kaitiaki relationships with taonga species and mātauranga Māori in the plant variety rights system and to promote innovation and economic growth in New Zealand by providing incentives for the development and use of new plant varieties while maintaining an appropriate balance between the interests of plant breeders, growers, and others so there is a net benefit to society as a whole

The Treaty of Waitangi

Ko Aotearoa Tenei, the Wai 262 report, provided the basis for the way in which PVR and taonga species were handled and central to meeting the Crown's obligations under the Treaty. The report is an extensive document and covered intellectual property and taonga works, genetic and biological resources of taonga species and the environment and mātauranga Māori. Although

a relatively small component in the context of the full report, PVR is specifically addressed and the four recommendations in relation to PVR and taonga species were incorporated into the new law.

Part 5 of the Act recognises and respects The Treaty of Waitangi and provides for the additional procedures which will apply to applications for varieties belonging to taonga species. A key provision is the requirement to establish the Māori Plant Varieties Committee (MPVC). The functions of the MPVC will be

i. To administer additional procedures for applications for taonga species
ii. To recognise, protect and determine kaitiaki relationships
iii. To advise the Commissioner on mātauranga Māori in the plant variety rights scheme
iv. To refuse a grant of Rights for a variety that has adverse effect on kaitiaki relationships

The MPVC is currently in the process of being established and is anticipated to be in place late in 2023. One of its first tasks will be to set out how it will function and to draft guidance regarding how plant breeder's and Māori will engage with the MPVC. Engagement with Māori during the PVR 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 MPVC will play a central role in fostering partnerships between native plant breeders and local Māori.

Taonga plant species

The MPVC has responsibility for all applications for varieties belonging to taonga species. The Act has no formal definition of taonga species and refers to indigenous plant species and non-indigenous plant species of significance. Indigenous plant species include all native plant genera and species and non - indigenous plant species include species brought to New Zealand in waka by early Māori. The list of non - indigenous plant species of significance is limited and included in the Regulations.

Varieties belonging to indigenous plant species or non - indigenous plant species of significance which are bred outside of New Zealand will not be required to be considered by the MPVC.

Impact on native plant breeding

The new law will require breeders using these species to have a level of engagement with Māori as a part of breeding activities and be aware that the PVR application process will include submission of the variety to the MPVC. The MPVC is now in the process of being established and at the present time there is a level of uncertainty regarding how the MPVC will carry out its work and how this important change will practically impact PVR for taonga species. The Act requires that kaitiaki relationships be acknowledged and addressed for taonga species and the MPVC and native plant breeders should aim to develop a collaborative way of working together for mutual benefit.

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 MPVC. All other varieties belonging to non-indigenous species, over 90% of applications, will not be submitted to the MPVC 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. The majority of UPOV member states are aligned with the 1991 Convention and the PVR Act 2022 upgrades New Zealand law to this standard.

The 1991 Convention provides for stronger Rights and introduces the novel concept of essential derivation.

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 whole variety. 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 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, which the breeder did not know about. Under the new law, the presence or stocking of plants of the variety alone may be sufficient to initiate a conversation between the breeder and the nursery. There would be no need to first establish that the nursery was commercially propagating and selling the variety in order to potentially take infringement action.

A second example is the unauthorised export of plant material of a protected variety. The new law will remove the need to establish commercial propagation activity because the export itself is an infringement and who carried out the unauthorised propagation and how sale of the material occurred becomes a secondary matter.

The greater scope of protection has required an understanding of what is propagating material and what is harvested material. Due to modern propagation techniques identifying the two types is not so straightforward. The Act provides a definition of propagation material but does not provide a definition of harvested material. Harvested material is perhaps a more legal concept, not a technical one, and takes into account the intent of the user and what is usual or standard practice for the species concerned.

Essential Derivation

This provision is an entirely new concept nationally and there is no current equivalent in any other intellectual property. The concept of an essentially derived variety (EDV) has its origins in genetic engineering and the concern that a commercially successful variety could be genetically engineered by another breeder to create a different variety but remain genetically very similar, with essentially the same characteristics as 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 mutations. In recent years, the development of new breeding technologies such as gene editing has brought more attention on essential derivation. 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 determined distinct from the initial and all other varieties 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. The Convention Article sets the framework for defining an EDV, which is mirrored in PVR Act 2022, however some national laws have a narrower and restricted interpretation where other national laws interpret the same Article in a broader sense. At the present time there is no consensus and discussion and debate regarding EDVs continues.

Harvested Material

The Act makes specific provision for assertion of Rights over harvested material because the scope of protection now covers broader commercial exploitation of propagating material and not just commercial sales as in the old law. 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.

Examination and Variety Testing

The existing examination and variety testing system will largely continue as it is with no substantive operational changes. The updated law provides the Plant Variety Rights Office with improved administrative options and sets out more clearly the processes involved. The new law also makes it clear that a growing trial is necessary for all applications and that DUS testing is an essential legal requirement but retains the existing flexibility available with respect to testing arrangements.

The new legal provisions will be noticeable to applicants during application with set time limits for the payment of trial or examination fees, changes to the requesting of plant material and photo requirements for applications for vegetable and potato varieties.

Cost of protection

In parallel with the development and drafting of the new law, PVR fees have also been under scrutiny. It was obvious early on that the cost of running a viable PVR scheme was not being met by fees paid by applicants and an increase was necessary. In addition, applicants expressed some confusion regarding the types of fees and when they are paid.

The PVR Regulations 2022 set out the new fees with the aim of providing a clearer fee set. There is a single application fee for all plant species and a single examination fee charged towards the end of examination, prior to a decision. Trial fees will be charged when testing begins and are based on the plant species and testing arrangement.

Hearings

The new law provides for a more transparent and clearer process for a breeder or a third party to object to the granting of a Right. During the review there was some criticism that the previous process for objections was unclear. The new provisions include the possibility of using the Intellectual Property Office of New Zealand (IPONZ) hearings systems. The hearings system is entirely separate from PVRO and potentially provides greater objectivity and neutrality.

The Hearings provisions in the new law are just one part of a more comprehensive coverage of related administrative process and the right of objectors to Rights to be heard. The provisions include timeframes for actions to occur, rules of evidence, proceedings process and appeals.

Infringements

The new Act provides guidance for infringement actions as seen in other intellectual property legislation. Part 3 specifically sets out details regarding what is a Right's holders authorisation and defines what may constitute an infringement. In addition, the types of relief are stated and when infringement proceedings can begin. Under the PVR Act 1987 it is possible to take infringement action at any time from the date of application. This includes provisional protection, during examination and testing, and after the Right's has been issued. The PVR Act 2022 limits when infringement proceedings can be taken to after the Right's decision only. This can be retrospective to include infringements during provisional protection but action during provisional protection itself is not permitted. The onus remains on the variety owner to assert their Right and use civil action when they think their rights have been infringed, in common with other intellectual property regimes.

Parallel laws

It is important to recognise that the PVR Act 2022 has no retrospective elements and any grant of Rights made under PVR Act 1987 will continue under that law for the life of that Right. This includes existing applications made before the new law came into force and grants for these varieties made in the future will be under the PVR Act 1987.

Taking into account the length of testing and if made, the term of grant, there will likely still be varieties protected under PVR Act 1987 into the 2040's.

Further Information

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

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