This article was published and should be cited as:

Jocelyn Bosse (2023) ‘Seeds of Change: New Zealand’s *Plant Variety Rights Act 2022* and its implications for Australia’, *Australian Intellectual Property Law Bulletin* 35 (10): 189-191

Author pre-publication copy
published in *Australian Intellectual Property Law Bulletin*, vol 35(10), pp.189-191

Seeds of Change: New Zealand's *Plant Variety Rights Act 2022* and its implications for Australia

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Key points

Aotearoa New Zealand recently overhauled its system for intellectual property protection of new varieties of plants. Several requirements now incorporated into the *Plant Variety Rights Act 2022* (NZ) are designed to protect Māori rights and interests. These may be relevant to Australian plant breeders and intellectual property practitioners:

- *Watch for similar changes in Australia* – IP Australia is exploring how to improve the protection of Indigenous knowledge in the intellectual property system, which may be modelled after the approach in Aotearoa New Zealand. For example, the consultations have already suggested the establishment of an Indigenous Advisory Panel to provide guidance on plant breeder's rights, trade marks, designs, and patents.
- *Certain species are now subject to additional review* – the new Aotearoa New Zealand legislation provides for a Māori Plant Varieties Committee to advise on applications relating to plant varieties derived from "indigenous plant species" or "non-indigenous plant species of significance" from Aotearoa New Zealand.
- *Māori relationships to plants are now a factor in the decision to grant plant variety rights* – an application may be refused, or subject to conditions, if the grant of plant variety rights may have adverse effects on the relationships between Māori and their *taonga* (treasured and significant) plants.
- *Choose names carefully* – plant varieties are required to have a suitable denomination. Under the new legislation, a proposed denomination will not be approved if it is likely to be offensive to Māori.

Introduction

Plant variety rights (PVRs) – or plant breeder's rights, as they are known in Australia – are a *sui generis* form of intellectual property that aims to reward and encourage the development of new and improved varieties of plants. Like patents, PVRs are available through a system of registration from the relevant authority, such as IP Australia or the Intellectual Property Office of New Zealand (IPONZ). Famous examples of varieties that were subject to PVRs include the 'Cripps Pink' apple (better known as Pink Lady®) or the 'Honeycrisp' apple.[1]

After several decades of reviews and consultations, New Zealand enacted its new *Plant Variety Rights Act* in November 2022. The reform was motivated by New Zealand's treaty obligations under the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 1991),[2] the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership,[3] and the 1840 Treaty of Waitangi. The new scheme replaces the

Plant Variety Rights Act 1987, which aligned with the previous UPOV Convention (UPOV 1978).

Most of the requirements in the *Plant Variety Rights Act 2022* will be familiar to practitioners in Australia, which several decades ago enacted the *Plant Breeder's Rights Act 1994* (Cth) to implement UPOV 1991. However, New Zealand has also introduced additional requirements to respond to the Waitangi Tribunal's Wai 262 Report,[4] thereby providing enhanced protection for *taonga* (treasured and significant) species and *mātauranga Māori* (Māori traditional knowledge). Given the ongoing consultations by IP Australia to improve the protection of Indigenous knowledge in the intellectual property system, it is expected that the changes in New Zealand will influence the proposed reforms in Australia.

General Requirements

The new legislation has five main requirements to obtain PVR, which mirror those in UPOV 1991 and the *Plant Breeder's Rights Act 1994* (Cth). First, the variety must be *novel*, which means it must not have been distributed (such as being sold) "by, or with the consent of, the breeder" earlier than the relevant grace period.[5] Second, the variety must be *distinct*, which is defined as being "clearly distinguishable from any other plant variety whose existence is a matter of common knowledge at the application date".[6] The distinguishing characteristics might include flower colour, leaf shape, plant height, or disease resistance.

Third, the variety must be *uniform*, which means that the key characteristics of the variety should appear without too much variation between individual plants.[7] Fourth, the variety must be *stable*, which means that the key characteristics should remain unchanged when the variety is propagated through the generations.[8]

The fifth requirement is that the variety must be given a suitable *name* (called the "variety denomination") which is "not liable to mislead or cause confusion about the characteristics, value, or identity of the plant variety" and which is "different from any denomination that designates an existing plant variety of the same or a similar species".[9] If the breeder has already applied for or obtained PVR in another country, the same denomination must be used in New Zealand, unless the overseas denomination would not meet the domestic criteria.[10]

Protecting Significant Plants

The updates to the PVR system were delayed partly in anticipation of the outcome in the Wai 262 Claim. In 1991, the Wai 262 "Indigenous Flora and Fauna Claim" was filed with the Waitangi Tribunal on behalf of six Māori *iwi* (tribes). The claim argued that the New Zealand government's policies and laws breached the Treaty of Waitangi, which provided that Māori would retain *tino rangatiratanga* (sovereignty and self-determination) over their *taonga* (treasured and significant) plant species and *mātauranga Māori* (Māori traditional knowledge).[11] The Wai 262 Claim arose amidst global concerns that the intellectual property system facilitated the misappropriation of native plants and Indigenous knowledge, reflected in Australia with the controversy over patent applications relating to the Kakadu plum (*Terminalia ferdinandiana*).[12] The Wai 262 Report was finally released in 2011 and recommended that the New Zealand legislature should introduce legislation providing a power for IPONZ to refuse a PVR if it would affect *kaitiaki* (guardian, trustee, custodian, or caretaker) relationships with *taonga* species, based on the advice of a Māori advisory committee.[13]

The *Plant Variety Rights Act 2022* implemented these recommendations by providing for a Māori Plant Varieties Committee,[14] similar to the Māori Advisory Committees for trade marks and patents.[15] The new Committee may advise IPONZ about PVR applications relating to "indigenous plant species" that are native to New Zealand, such as *pōhutukawa* / New Zealand Christmas bush (*Metrosideros excelsa*), as well as "non-indigenous plant species of significance" that were brought to New Zealand from other parts of the Pacific region before 1769, such as *kūmara* / sweet potato (*Ipomoea batatas*).

If a new variety is derived from one of those species using plant material from New Zealand,[16] and if the grant of PVR could have adverse effects on *kaitiaki* relationships with the plant, the Committee may advise that conditions should be imposed to mitigate the adverse effects of the PVR, or that the PVR application be refused.[17]

Implications for Australian Breeders

A large number of species are native to both Australia and New Zealand, such as *mānuka* / tea tree (*Leptospermum scoparium*). Therefore, breeders should be aware that the PVR applications made in New Zealand may be subject to these additional requirements and scrutiny by the Māori Plant Varieties Committee if the plant material was obtained from New Zealand.

Breeders should also be aware that IP Australia is undertaking consultations for their "Indigenous Knowledge Project" to improve the protection of Indigenous knowledge in the intellectual property system. They are exploring the introduction of a requirement in the *Plant Breeder's Rights Act 1994* (Cth) to disclose the source of plant material or Indigenous knowledge used to develop a new plant variety, as well as establishment of an Indigenous Advisory Panel to advise on applications.[18] The changes in New Zealand may also prompt a conversation about adopting a ground for refusal to grant plant breeder's rights if it could have adverse effects on Aboriginal and Torres Strait Islander peoples' relationships to native plants.

Choosing a name – Indigenous words and traditional knowledge

As for the naming of new varieties, the control over Indigenous words and traditional knowledge has been an ongoing issue for the intellectual property system. Consider, for example, the long-running trade mark disputes between Australian and New Zealand honey producers about the use of the name "Mānuka honey" (more commonly known as tea tree in Australia).[19]

To address this issue in the context of variety denominations, the *Plant Variety Rights Act 2022* has introduced a new condition: the variety denomination may not be approved if it "would be likely to offend a significant section of the community, including Māori", informed by the advice of the Māori Plant Varieties Committee.[20]

While IP Australia's consultations have discussed issues about inappropriate or offensive use of Indigenous knowledge in trade mark applications,[21] there has not yet been discussion in relation to plant variety denominations. Currently, the *Plant Breeder's Rights Act 1994* (Cth) requires that a variety denomination not contain "scandalous or offensive matter".[22] However, the seeds of change have been planted in New Zealand that may provide the impetus to consider similar protections for Indigenous peoples in the Australian plant breeder's rights system.

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[1] EU PVR Application No. 19951039 for 'Cripps Pink', filed 29 August 1995 (expired 1 August 2022); PINK LADY is a registered trade mark, e.g. AU Trade Mark No. 1280838 (filed 14 January 2009); AU PBR Application No. 1995/097 for 'Honeycrisp', filed 3 March 1995 (granted 2 October 2002).
[2] *International Convention for the Protection of New Varieties of Plants*, opened for signature 19 March 1991, [2000] ATS 6 (entered into force 24 April 1998).
[3] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) Annex 18-A.
[4] Waitangi Tribunal Report 2011 (Wai 262 Report) *Te Taumata Tuatahi: A report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*. *Te Taumata Tuatahi*, available at https://forms.justice.govt.nz.
[5] *Plant Variety Rights Act 2022* (NZ) s 33, for distribution in New Zealand, one year before the priority date; for distribution in another territory, 6 years before the priority date for a woody plant or its root stock or a potato, or 4 years before the priority date for other plants.
[6] *Plant Variety Rights Act 2022* (NZ) s 34(1).
[7] *Plant Variety Rights Act 2022* (NZ) s 35.
[8] *Plant Variety Rights Act 2022* (NZ) s 36.
[9] *Plant Variety Rights Act 2022* (NZ) s 37(1).
[10] UPOV 1991, Article 20(5).
[11] D Jefferson, "Treasured relations: Towards partnership and the protection of Māori relationships with *taonga* plants in Aotearoa New Zealand" (2022) 25 *Journal of World Intellectual Property* 374.
[12] J Lai, D Robinson, T Stirrup, H Tualima, "Māori knowledge under the microscope: Appropriation and patenting of mātauranga Māori and related resources" (2019) 22 *Journal of World Intellectual Property* 205
[13] Ko Aotearoa tēnei: a report into claims concerning New Zealand law and policy affecting Māori culture and identity. Te taumata tuarua. Volume 1, 212.
[14] *Plant Variety Rights Act 2022* (NZ) s 57.
[15] *Trade Marks Act 2002* (NZ) s 177; *Patents Act 2013* (NZ) s 225.
[16] *Plant Variety Rights Act 2022* (NZ) s 55.
[17] *Plant Variety Rights Act 2022* (NZ) ss 66-67.
[18] IP Australia Consultation Report, *Enhance and Enable: Indigenous Knowledge Consultations 2021* (September 2022), available at www.ipaustralia.gov.au
[19] J Lai, *Mānuka honey: who really owns the name and the knowledge* (6 November 2018), available at https://theconversation.com/manuka-honey-who-really-owns-the-name-and-the-knowledge-105508.
[20] *Plant Variety Rights Act 2022* (NZ) ss 37(3), 58(c).
[21] D Robinson, M Raven and J Hunter, "The limits of ABS laws: Why Gumbi Gumbi and other bush foods and medicines need specific indigenous knowledge protections" in Kamalesh Adhikari and Charles Lawson (eds), *Biodiversity, Genetic Resources and Intellectual Property: Developments in Access and Benefit Sharing* (Taylor & Francis, 2018); B John and M Gandhi "Evaluating proposed reforms of Australia's IP system to protect indigenous knowledge" (2020) 33(2) *IPLB* 25.
[22] *Plant Breeder's Rights Act 1994* (Cth) s 27(5)(c).