

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

## **Review of the Plant Variety Rights Act 1987 and disclosure of origin: release of discussion papers**

### **Proposal**

- 1 To seek approval to publicly release the three attached consultation documents:
  - 1.1 *Review of the Plant Variety Rights Act 1987: Issues Paper* (see **Annex 1**);
  - 1.2 *Māori Engagement Plan: Issues Stage* (see **Annex 2**);
  - 1.3 *Disclosure of origin of genetic resources and traditional knowledge in the patents regime: Discussion Document* (see **Annex 3**).

### **Executive Summary**

- 2 The Plant Variety Rights Act 1987 (**PVR Act**) provides for the grant of temporary intellectual property rights to plant breeders over new plant varieties they have developed. Collectively, these are known as plant variety rights (**PVRs**). The purpose of the PVR regime is to incentivise the development and importation of new varieties of plants.
- 3 The PVR Act is over thirty years old and has only had minor amendments since it was passed. The regime plays an important role in the agriculture and horticulture sectors. We need to ensure it strikes the right balance between the interests of rights holders, Māori, farmers and growers, and the wider New Zealand economy. We want New Zealand to achieve the maximum economic benefit from the regime, while meeting its Treaty of Waitangi and international obligations.
- 4 In August 2016, Cabinet agreed to begin a review of the PVR Act [CAB-16-MIN-0423 refers]. The review was launched by the Ministry of Business, Innovation and Employment (**MBIE**) in February 2017.
- 5 How we meet New Zealand's obligations to Māori under the Treaty of Waitangi in the PVR regime is an important feature of this review. The issues paper uses the Waitangi Tribunal's (the **Tribunal**) report, *Ko Aotearoa Tenēi: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (**Wai 262 report**) as the framework to consider these obligations. The Wai 262 report contains four recommendations relating to the PVR regime.
- 6 New Zealand's PVR obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) are also a key driver in this review. Under the CPTPP, New Zealand is required to either give effect to, or become a party to, the most recent version of the International Convention for the Protection of New Varieties of

Plants (**UPOV 91**). In meeting these obligations, New Zealand may adopt measures it deems necessary to fulfil its obligations under the Treaty of Waitangi. New Zealand must meet its obligations within three years of the CPTPP entering into force for New Zealand.

- 7 MBIE has undertaken pre-consultation engagement with industry and Māori experts, and this has informed the development of an issues paper and a Māori engagement plan.
- 8 The purpose of the issues paper is to collect information and evidence on how the PVR Act is functioning and to identify what problems there may be with the current regime. It identifies the areas of policy flexibility under UPOV 91 and discusses the Tribunal's Wai 262 recommendations in some detail. The Māori engagement plan sets out how MBIE intends to engage with Māori on the issues paper – in particular, through regional hui. Māori are invited to contribute to the plan of engagement for later stages of the review. MBIE has undertaken targeted consultation on these documents, as appropriate, with industry, Māori and technical experts. I seek Cabinet approval to release these two PVR Act review consultation documents for public consultation.
- 9 I also seek Cabinet approval to release a discussion document on the related issue of disclosure of origin requirements in the patents regime. Patent disclosure of origin requirements are a key proposal being discussed in international negotiations on the protection of traditional knowledge. A patent disclosure of origin requirement was also recommended by the Tribunal in the Wai 262 report. Consultation on the disclosure of origin discussion document will inform the Government's domestic and international approach to this issue.
- 10 The PVR Act review provides an opportunity to discuss this issue with the public and, in particular, Māori. The discussion document seeks the public's opinions on whether New Zealand should adopt a disclosure of origin requirement for patents, and if so, how this would look in practice. Three policy options are included in the discussion document. The discussion document indicates that MBIE's provisional preferred option is to introduce a new disclosure of origin requirement which requires patent applicants to disclose the country of origin of genetic resources or traditional knowledge used in their inventions or, if this information is unavailable, the direct source of these (option 2). This would balance the provision of high-quality information in the patent regime, without creating a significant burden on, or deterrent for, patent applicants.
- 11 Once public submissions have closed, officials will undertake further work before finalising their advice to me. The next stage of the PVR Act review will be to develop options for change that address the issues identified through this initial consultation process, that are appropriate for New Zealand, and that take into account the Crown's obligations under the Treaty of Waitangi.

### **Background to the PVR Act review**

- 12 The PVR Act provides for the grant of temporary intellectual property rights to plant breeders over new plant varieties they have developed. New plant varieties can improve on existing performance (e.g. disease resistance) to meet commercial and consumer needs. The purpose of the plant variety right regime is to incentivise the development and importation of new plant varieties. An example of a protected variety is the kiwifruit variety 'Zesy002' which is commonly sold under the brand SunGold®.
- 13 The PVR Act is over thirty years old and has only had minor amendments since it was passed. The industry has changed in this time and this review provides an opportunity to

find the right balance between the interests of plant breeders, growers, Māori, consumers and other interested groups – such that there is a net benefit to society as a whole.

- 14 While a review started in the late 1990s, it was put on hold in advance of the release of the Wai 262 report and then again while the Trans-Pacific Partnership (**TPP**) was being negotiated.
- 15 In August 2016, Cabinet agreed to begin a review of the PVR Act [CAB-16-MIN-0423 refers]. Cabinet also agreed for the Wai 262 recommendations to be considered as part of the PVR Act review [CAB-16-MIN-0423 refers]. The review was launched by MBIE in February 2017.
- 16 Meanwhile, obligations under the TPP, which are now contained in the CPTPP, require New Zealand to either ratify UPOV 91 or adopt a *sui generis* (standalone) regime that gives effect to UPOV 91. The CPTPP terms protect the right of the New Zealand Government to adopt any policy it considers necessary to give effect to its obligations under the Treaty of Waitangi.
- 17 The CPTPP also sets a timeline for the PVR obligations to be fulfilled. New Zealand will have three years from when the CPTPP comes into force for New Zealand (likely to be late 2018/early 2019) to complete the review.

#### *Review process*

- 18 The first stage of the PVR Act review consisted of pre-consultation engagement with industry experts and Māori who have expertise in PVRs and intellectual property. The engagement included informal discussions, technical targeted workshops, targeted consultation on the draft PVR consultation documents, and work with advisors.
- 19 Pre-consultation engagement has enabled MBIE to build an understanding of possible issues with the regime, develop networks with those interested in the review and plan an effective review process.
- 20 MBIE has now developed two consultation documents which I seek approval to release for public consultation:
  - 20.1 *Review of the Plant Variety Rights Act 1987: Issues Paper* (see **Annex 1**);
  - 20.2 *Māori Engagement Plan: Issues Stage* (see **Annex 2**).
- 21 The consultation process will also include a series of regional hui and public meetings.

#### **Review of the Plant Variety Rights Act 1987: Issues Paper**

- 22 The issues paper (attached in **Annex 1**) seeks the public's views on whether there are problems with the PVR regime that should be addressed. Questions in the issues paper are targeted at drawing out how the PVR regime operates in practice, the key issues with the regime and the opportunities for change.
- 23 Parts 1 and 2 of the issues paper discuss the purpose and context of the PVR Act review, and explore the objectives of the PVR regime. The main issues that MBIE heard about during the pre-consultation engagement are discussed in detail in Parts 3 and 4, and are summarised below. Some additional minor issues are covered in Part 5.

### *Main issues in the PVR regime*

- 24 Part 3 of the issues paper sets out particular issues raised by industry relating to New Zealand's PVR regime, and bringing this regime in line with UPOV 91. These are:
- 24.1 **Farm-saved seed:** Should the regime include a mechanism to allow PVR owners to collect a royalty when farmers and growers save and use seed they have grown themselves?
  - 24.2 **Rights over harvested material:** How far, if at all, should rights of PVR owners extend beyond reproductive material (e.g. seeds) to harvested material (e.g. apples or grain) of a variety protected by a PVR?
  - 24.3 **Rights over similar varieties:** Are there problems with how a PVR is currently granted for new varieties and whether the PVR regime appropriately recognises similar varieties?
  - 24.4 **Compulsory licences:** Is the current compulsory licence system fit-for-purpose?
  - 24.5 **Enforcement of plant variety rights:** Are there any problems with the current enforcement mechanisms?

### *PVRs and the Treaty of Waitangi*

- 25 Part 4 of the issues paper discusses the Crown's obligations to Māori in the PVR regime under the Treaty of Waitangi. MBIE has used the Wai 262 report to structure this discussion and this part seeks submitters' views on the Tribunal's four recommendations relating to PVRs. These recommendations are:
- 25.1 to empower the Commissioner of Plant Variety Rights to refuse to grant a PVR if it would affect kaitiaki (guardian) relationships with taonga species;
  - 25.2 to have a Māori Advisory Committee assist the Commissioner of Plant Variety Rights to determine whether the grant of a PVR would affect the kaitiaki relationship;
  - 25.3 to clarify that mere discovery is insufficient to justify a claim to ownership of a new variety and that there must be human input into the development of a variety;
  - 25.4 to enable the Commissioner of Plant Variety Rights to refuse a proposed name for a plant variety if its use would be likely to offend Māori.
- 26 This part seeks to understand the issues that the Tribunal's recommendations intended to address. MBIE's pre-consultation engagement highlighted the importance of getting a proper understanding of the issues behind the recommendations. It also explores the relationship between the recommendations and UPOV 91. Whether it is possible to meet the Crown's Treaty obligations and ratify UPOV 91 is an important issue for this review.
- 27 Part 4 also considers feedback that MBIE received in pre-consultation workshops on whether there are other Treaty of Waitangi considerations which were not discussed in the Wai 262 report.

### *Consultation*

- 28 MBIE consulted on the issues paper with Te Puni Kōkiri (**TPK**), the Ministry of Justice (**MoJ**), the Ministry of Foreign Affairs and Trade (**MFAT**), the Ministry for Primary Industries (**MPI**), the Department of Conservation (**DoC**), the Ministry for the Environment (**MfE**), and the Treasury. Minor changes to the discussion of New Zealand's international obligations were suggested and incorporated.
- 29 MBIE also undertook targeted consultation on the issues paper with Māori who have expertise in PVRs and intellectual property, selected industry experts and other technical experts.
- 30 The majority of the feedback received during the targeted consultation period was positive. Some changes were made to the issues paper to correct factual inaccuracies and ensure that discussion about the costs and benefits of the review was appropriately balanced.

### **Māori Engagement Plan: Issues Stage**

- 31 The Māori engagement plan (attached in **Annex 2**) sets out MBIE's intended process for engagement with Māori on the issues paper and was developed using feedback received in the pre-consultation engagement process.
- 32 It provides an overview of what engagement has already happened in the review and details the review process going forward. It also provides detail on how Māori are able to take part in the engagement process at the issues stage.
- 33 The Māori engagement plan is intended to be a living document. It invites feedback from interested parties to inform the plan for engagement with Māori once options for change are developed following consideration of feedback received on the issues paper. An updated Māori engagement plan for the options stage will be released concurrently with an options paper in the first half of 2019.

### *Consultation*

- 34 MBIE consulted TPK, MoJ, MFAT, MPI, DoC, MfE and the Treasury on the Māori engagement plan. In general, agencies provided positive feedback and have supported the approach MBIE intends to take.
- 35 MBIE also undertook targeted consultation on the Māori engagement plan with Māori who have expertise in PVRs and intellectual property and incorporated feedback received.

### **The Waitangi Tribunal proceedings on TPP**

- 36 The issue of how the Crown engages with Māori on the PVR regime insofar as it relates to the TPP (now CPTPP) obligations is currently the subject of a Tribunal claim (Wai 2522). The claim was originally lodged in 2015 opposing the Crown's intention to conclude and sign the TPP.
- 37 In May 2016, the Tribunal released its report on the TPP, but adjourned inquiry into the Crown's engagement with Māori on how it would implement the PVR obligations, acknowledging that the Crown was still developing its engagement plan.

- 38 The proceedings are ongoing. The Tribunal may maintain oversight of the Crown's engagement with Māori on the implementation of the CPTPP PVR obligations until an inquiry is completed or claimants discontinue their claims. The Tribunal could make recommendations on how the Crown engages with Māori on this issue. Timing means that this is unlikely to impact consultation on the issues paper, but it could impact subsequent engagement. My officials are working closely with Crown Law and MFAT, and will keep me updated as the Tribunal process continues.
- 39 When released, the Crown will provide the Tribunal with the Māori engagement plan as part of the Tribunal's inquiry.

### **Patent disclosure of origin requirements**

- 40 When agreeing to launch the PVR Act review, Cabinet also agreed that MBIE consult on whether New Zealand should adopt a disclosure of origin requirement in its patents regime [CAB-16-MIN-0423 refers]. A disclosure of origin requirement would require patent applicants to disclose the origin of genetic resources and/or traditional knowledge used in their inventions.
- 41 The Tribunal recommended the adoption of a patent disclosure of origin requirement in the Wai 262 report. Patent disclosure of origin requirements are a key proposal on the protection of traditional knowledge being discussed in the World Intellectual Property Organization, the World Trade Organization and free trade agreement negotiations. Domestic policy work in this area will help to inform New Zealand's approach to this issue at both the domestic and international levels.

#### *Disclosure of origin of genetic resources and traditional knowledge in the patents regime: Discussion Document*

- 42 The Disclosure of Origin discussion document (attached in **Annex 3**) considers whether New Zealand should adopt a disclosure of origin requirement in its patents regime. Unlike the PVR Issues Paper, the discussion document sets out and analyses possible options that could be adopted.
- 43 MBIE's preliminary preferred option is to have a new disclosure of origin requirement which requires patent applicants to disclose the country of origin of genetic resources or traditional knowledge used in their inventions or, if this information is unavailable, the direct source (Option 2). Provisional analysis suggests that this option best balances the objectives of information availability and high-quality decision-making in the patents regime, with the need to minimise compliance costs.

#### *Economic Evaluation of Disclosure of Origin Requirements*

- 44 MBIE commissioned an economic evaluation of the disclosure of origin requirements considered in the Disclosure of Origin discussion document. The economic evaluation examines the costs and benefits to New Zealand's economy to adopt each option analysed in the discussion document. It has been used in MBIE's analysis of the options, and MBIE intends to release it in conjunction with the discussion document.
- 45 The analysis concluded that the option that included requirements for applicants to demonstrate compliance with access and benefit sharing obligations in the country of origin (Option 3) would involve higher costs (both to applicants and the Intellectual Property Office of New Zealand) than the remaining two options. Options 1 and 2 only

required country of origin information (with Option 2 requiring slightly more information than Option 1). The costs associated with these two were broadly similar. However, the report also considered that the overall magnitude of costs over the 30 year period considered was small (approximately \$7.5 million for Option 3 compared to approximately \$1.5 million for Options 1 and 2).

### *Consultation*

- 46 MBIE consulted TPK, MoJ, MFAT, MPI, DoC, MfE and the Treasury on the Disclosure of Origin discussion document.

### **Consideration of Māori traditional knowledge by patent examiners**

- 47 In addition to the Wai 262 recommendation on disclosure of origin, the original Cabinet paper seeking agreement to commence the review also sought agreement to progress a further Wai 262 recommendation on consideration of Māori traditional knowledge by patent examiners [EGI-16-MIN-0196, recommendation 7.2 refers]. This was an error in the original Cabinet paper. While the Tribunal did discuss this issue in the Wai 262 report, it did not, in fact, make a substantive recommendation on it.
- 48 Māori traditional knowledge is already considered to some extent by patent examiners. If an applicant has identified that an application involves Māori traditional knowledge, or the invention appears to have been derived from Māori traditional knowledge, then the application is referred to the Patents Māori Advisory Committee (**PMAC**).
- 49 I do not think that this issue needs to be addressed in this review. The focus of this review is on legislative changes. A disclosure of origin requirement would strengthen the examination process by more readily bringing issues relating to Māori traditional knowledge to the attention of patent examiners for subsequent referral to the PMAC. Any further training of patent examiners is an operational matter for the Intellectual Property Office of New Zealand.

### **Opportunities for the public to have its say**

- 50 I am keen to get feedback from the public on the issues discussed in these three documents. To achieve this, there will be a number of ways the public will be able to provide feedback:
- 50.1 by making a formal submission through the MBIE website. I expect industry bodies to respond predominantly through this avenue;
  - 50.2 by attending the regional hui that MBIE is organising, where the key issues raised in the issues paper and discussion document will be debated. I expect Māori who are interested in the review to prefer responding through this avenue;
  - 50.3 by attending the public meetings MBIE is organising, where the key issues raised in the issues paper and discussion document will be discussed; and
  - 50.4 by meeting with MBIE officials in person, via teleconference or videoconference.

## **Next steps**

- 51 Subject to Cabinet approval, the three papers will be released for public consultation for 13 weeks. MBIE, along with other agencies including TPK, will run a series of regional hui and public meetings in October/November 2018 to hear the views of Māori and industry stakeholders. Submissions will close mid-December 2018.
- 52 MBIE will consider the feedback received and will develop an options paper outlining possible options for change to the PVR regime. MBIE will also develop a Māori engagement plan for the consultation on these options. I intend to seek permission in the first half of 2019 for release of an options paper and Māori engagement plan for the options stage to consult on any proposed changes to the PVR Act.
- 53 I intend to seek policy decisions on the proposed disclosure of origin requirement in early 2019.

## **Consultation**

- 54 MBIE consulted TPK, MoJ, MFAT, MPI, DoC, MfE, the Treasury and the Department of Prime Minister and Cabinet on this paper.

## **Financial Implications**

- 55 There are no fiscal implications from the proposals in this paper.

## **Human Rights**

- 56 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## **Legislative Implications**

- 57 There are no legislative implications from the proposals in this paper, though I do anticipate legislative change once policy decisions are made by Cabinet.

## **Regulatory Impact Analysis**

### *Review of the Plant Variety Rights Act 1987: Issues Paper*

- 58 A regulatory impact analysis is not required for the issues paper as the proposals are not seeking policy decisions or proposing to narrow options at this stage.

### *Māori Engagement Plan: Issues Stage*

- 59 The Māori engagement plan does not require a regulatory impact analysis as the document does not contain any potential regulatory implications.

### *Disclosure of origin of genetic resources and traditional knowledge in the patents regime: Discussion Document*

- 60 The Regulatory Quality Team at the Treasury has determined that the regulatory decisions sought in this paper are exempt from the requirement to provide an Impact Assessment as the relevant issues have been addressed in the discussion document.

### **Gender Implications**

61 No gender implications arise from the proposals in this paper.

### **Disability Perspective**

62 No disability implications arise from the proposals in this paper.

### **Publicity**

63 To date, the review has received a low level of media interest, but this may increase with the release of the consultation documents.

64 I will issue a press release, and MBIE will publish the PVR Act Review issues paper, Disclosure of Origin discussion document, and Māori engagement plan and related resources on its website. MBIE will advise interested parties by email when the consultation materials are released. I will release a media statement to encourage Māori and the public to take the opportunity to make a submission.

65 I intend to proactively release and publish this Cabinet paper on MBIE's website, with any necessary redactions consistent with the Official Information Act 1982.

## Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), New Zealand must either accede to, or give effect to, the 1991 version of the International Convention for the Protection of New Varieties of Plants, within three years of the CPTPP entering into force for New Zealand;
- 2 **agree** to release the attached *Review of the Plant Variety Rights Act 1987: Issues Paper*;
- 3 **agree** to release the attached *Māori Engagement Plan: Issues Stage*;
- 4 **agree** to release the attached *Disclosure of origin of genetic resources and traditional knowledge in the patents regime: Discussion Document*;
- 5 **note** that the issue of consideration of Māori traditional knowledge by patent examiners [EGI-16-MIN-0196, recommendation 7.2 refers] will not be addressed in this review;
- 6 **authorise** the Minister of Commerce and Consumer Affairs to make editorial or minor content changes to these consultation documents prior to their public release;
- 7 **note** that the consultation documents will be released for public consultation for a period of 13 weeks;
- 8 **agree** to this Cabinet paper being published on the Ministry of Business, Innovation and Employment's website, with any necessary redactions consistent with the Official Information Act 1982;
- 9 **note** that the Minister of Commerce and Consumer Affairs intends to seek Cabinet agreement for release of an Options Paper to consult on any proposed changes to the PVR Act in the first half of 2019;
- 10 **note** that the Minister of Commerce and Consumer Affairs intends to seek Cabinet agreement on policy decisions for disclosure of origin in early 2019.

Authorised for lodgement

Hon Kris Faafoi

**Minister of Commerce and Consumer Affairs**