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OFFICE OF THE MINISTER OF COMMERCE AND CONSUMER AFFAIRS

Chair

Cabinet Economic Growth and Infrastructure Committee

Plant Variety Rights Act review

Proposal

1. I seek Cabinet approval to begin a review of the Plant Variety Rights Act 1987.

Executive Summary

2. Under the Trans-Pacific Partnership Agreement (**TPP**), New Zealand is required to either accede to the most recent version of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**) or, under a New Zealand-specific approach, implement a plant variety rights system that gives effect to UPOV 91.
3. I seek Cabinet decisions regarding the early stages of the implementation process for these changes.
4. The changes are not required until three years after the agreement has entered into force for New Zealand (with entry into force expected to occur late 2017/early 2018). However, making these changes will be a significant legislative project, requiring a wholesale review of the Plant Variety Rights Act 1987 (**PVR Act**).
5. Given the importance of ensuring New Zealand's compliance with the TPP, the need to reform the PVR Act, the difficult issues that will need to be considered, and the relevance of the review to the wider Crown/Māori relationship, I propose that the review be started as soon as practicable.
6. I therefore intend to direct my officials to convene some targeted engagement in the form of workshops with key stakeholders in the plant breeding, horticultural and agricultural industries, and separate workshops with experts on Māori intellectual property and plant variety rights.
7. These engagements would allow the Government to build and manage relationships with interested parties, and gain a better understanding of their perspectives and the key issues, in advance of a public consultation process through the release of a discussion document.
8. In particular, the workshops with Māori intellectual property and plant variety rights experts would:
 - 8.1 be used to gain input on both substantive issues and possible options for wider consultation with Māori;
 - 8.2 include consideration of the four recommendations relating to the plant variety rights regime contained in the Waitangi Tribunal's (**the Tribunal**) WAI 262 report; and

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- 8.3 include two additional WAI 262 recommendations relating to mandatory disclosure of origin, and the consideration of Māori traditional knowledge by patent examiners.

9.

S6(a)

Update to the Waitangi Tribunal

10. In its *Report on the Trans-Pacific Partnership Agreement*, the Waitangi Tribunal directed the Crown to provide an update and timeline regarding the Ministry of Business, Innovation and Employment's (MBIE) plan of engagement with Māori on the changes to the PVR Act and whether New Zealand should accede to UPOV 91.
11. If Cabinet agrees with the proposals outlined above, the Tribunal will be updated on the proposed approach as set out in the draft memorandum in Annex 1.

Background

12. Under the TPP, New Zealand is required to either accede to UPOV 91 or, under a New Zealand-specific approach, implement a plant variety rights system that gives effect to UPOV 91. Either option will involve a wholesale review of the PVR Act. The plant breeding, horticultural and agricultural industries, Māori and members of the wider public will have an interest in the outcomes.
13. When implementing either option, TPP expressly allows New Zealand to adopt any measure that it deems necessary to protect indigenous plant species in fulfilment of the Crown's obligations under the Treaty of Waitangi. However, implementing a plant variety rights regime that gives effect to UPOV 91 (rather than acceding to UPOV 91) would provide greater flexibility to the Crown in considering how it meets its obligations under the Treaty of Waitangi.
14. This flexibility allows the Government to take account of the interests that Māori claim over plant species and the recommendations the Waitangi Tribunal made in its report, *Ko Aotearoa Tēnei: a Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (the **WAI 262 report**). Four of the Tribunal's recommendations related to changes to the plant variety rights regime.
15. New Zealand must meet its TPP plant variety rights obligations within three years of the date that the agreement enters into force for New Zealand. Working on the basis that TPP could enter into force in late 2017 or early 2018 (once signatories complete their domestic processes necessary to ratify the agreement), New Zealand would be required to implement its plant variety rights obligations by late 2020 or early 2021.
16. In its recent *Report on the Trans-Pacific Partnership Agreement*, the Waitangi Tribunal considered the following issues:
- 16.1 whether the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be; and

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- 16.2** what Māori engagement and input is now required over steps needed to ratify the TPPA (including by way of legislation and/or changes to Government policies that may affect Māori).
- 17.** On the second matter, the Tribunal acknowledged that the Crown was still developing its implementation process in relation to engagement on the plant variety rights changes. The Tribunal adjourned its inquiry on the issue of engagement on plant variety rights with a view to assessing whether further steps might be necessary once further information was available. It directed the Crown to file an update and timeline on its plan of engagement with Māori over the changes to the plant variety rights regime and whether or not New Zealand should accede to UPOV 91.
- 18.** The Tribunal originally directed the Crown to file its update by Friday 17 June 2016. This was extended to Friday 26 August 2016 after the Crown filed the memorandum attached as Annex 2. The memorandum outlined MBIE's intention to hold targeted initial discussions on the most effective way to engage with Māori on the PVR Act review with: the Māori Economic Development Advisory Board, the Māori advisory committees constituted under the Patents Act 2013 and Trade Marks Act 2002, and WAI 262 claimant groups.
- 19.** It also stated that these process-oriented discussions would enable Cabinet decisions to be sought regarding engagement on the PVR Act review. MBIE officials have now held these initial targeted discussions, which have informed the recommendations on Māori engagement contained in this paper.

Comment

- 20.** A decision is needed on whether to begin the PVR Act review now or delay it until the next Parliamentary term. There are several reasons to begin it now:
- 20.1** *TPP compliance:* The PVR Act must be brought into line with UPOV 91 by late 2020 or early 2021 to comply with TPP obligations (assuming TPP comes into force for New Zealand in late 2017 or early 2018). Failing to implement the changes in time would put New Zealand in breach of its TPP obligations.
- 20.2** *Better outcomes:* Bringing the PVR Act into line with UPOV 91 will involve some difficult policy decisions and opposition to the proposed changes. The earlier the review begins, the more time the Government has to address the issues that arise and engage with stakeholders and Māori on them. Delaying the review would risk having to rush the process later on to meet the TPP deadline. That may lead to lower-quality regulatory outcomes (potentially including higher costs for the economy) and disaffected stakeholders and Māori.
- 20.3** *Act in need of reform:* The PVR Act was passed in 1987 and is ripe for review. A review was put off in 2007, in part because the Waitangi Tribunal had not yet reported on the WAI 262 claims. More recently it was delayed until the TPP negotiations had concluded. The plant breeding industry has been seeking a review of the Act for a number of years. Given the importance of agriculture and horticulture to the New Zealand economy, it is important to ensure the plant variety rights regime is fit for purpose. For example, a review would enable the Government to consider – and if

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necessary, react to – the plant breeding industry’s claims that we are missing out on plant improvements because foreign plant breeders do not to bring their new plant varieties here given the comparatively low levels of protection.

- 20.4** *Crown/Māori relationship*: In evidence filed as part of the TPP proceedings, and at the TPP roadshows and TPP hui, the Government has committed to consulting with Māori on the PVR Act changes, and has stated that the timeframe will provide plenty of time to do so. Early engagement would demonstrate the Government’s commitment to engaging with Māori on the PVR Act review.
- 21.** Delaying the start of the review until 2017 would risk creating timing pressure later in the process. Lack of engagement on plant variety rights issues for several months is likely to frustrate key stakeholders and Māori.
- 22.** I therefore propose that we begin the PVR Act review now, through the following process:
- 22.1** Stage one of the PVR Act review would involve two streams of technical, targeted engagement in the form of workshops with:
- 22.1.1 key stakeholders in the plant breeding, horticultural and agricultural industries; and
 - 22.1.2 experts on Māori intellectual property and plant variety rights, including some WAI 262 claimant groups or their counsel.
- 22.2** Stage two would likely involve the release of a discussion document to the wider public, and would include additional consultation with Māori. The form of stage two will be informed by the workshops at stage one of the review.
- First stage of the review: targeted workshops*
- 23.** The technical, targeted workshops would enable the Government to facilitate early dialogue on the key issues in the review and inform the Government’s preparation of a discussion document for general public release.
- 24.** Key objectives for the workshops would be to:
- 24.1** establish and/or maintain constructive relationships with stakeholders and Māori who have an interest in the plant variety rights regime;
 - 24.2** convey that the Government considers the PVR Act review a priority and values the views of stakeholders and Māori in the policy development process; and
 - 24.3** build stakeholders’, Māori participants’ and officials’ knowledge and understanding of plant variety rights issues to inform the wider substantive consultation process.
- 25.** There would also be a further objective for the workshops with Māori intellectual property and plant variety rights experts. These workshops would also be used as a means of gaining input on the nature of any further engagement with Māori (in

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addition to public consultation on a discussion document). I intend that this process will inform officials' advice at the conclusion of the first stage of the review on the form of broader Māori engagement at the second stage of the review.

- 26.** I consider that keeping key interested parties informed about, and involved in, the PVR Act review through the proposed targeted workshop process will help to facilitate constructive engagement once wider public consultation begins.

Scope of engagement with Māori

- 27.** The Tribunal considered plant variety rights in the WAI 262 report. It recommended that the PVR Act be amended to:
- 27.1** prohibit the Commissioner of Plant Variety Rights from approving a name for a plant variety if the name would be likely to offend a significant section of the community, including Māori;
 - 27.2** require that plant varieties are specifically bred to qualify for a plant variety right (i.e. so that 'discovered' varieties would no longer qualify);
 - 27.3** empower the Commissioner of Plant Variety Rights to refuse to grant a plant variety right if the grant would affect kaitiaki (guardianship) relationships with taonga species¹; and
 - 27.4** constitute a Māori advisory committee that would advise the Commissioner of Plant Variety Rights on whether to refuse to grant a plant variety right on the basis that it would affect kaitiaki relationships with taonga species.
- 28.** I propose that these recommendations be included within the scope of the PVR Act review.
- 29.** The last review of the PVR Act was delayed until the WAI 262 report was released and New Zealand has negotiated a specific exception to its TPP plant variety rights obligations to enable the Tribunal's recommendations to be considered. In this context, I do not consider it a feasible option not to consider the WAI 262 recommendations as part of the PVR Act review.
- 30.** Similar initiatives to the above recommendations have already been implemented (or are in the process of being implemented) in other intellectual property legislation. For example:
- 30.1** The Commissioner of Trade Marks cannot register a trade mark if its name would be likely to offend a significant section of the community, including Māori.
 - 30.2** The Geographical Indications (Wine and Spirits) Registration Amendment Bill, currently before the Primary Production Select Committee, contains a provision that will amend the Geographical Indications Act 2006 to prevent

¹ "Taonga species" was the term used in the WAI 262 report. The term used in the TPP is "indigenous plant species".

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a geographical indication being registered if its name would be likely to offend a significant section of the community, including Māori.

- 30.3** The Commissioner of Patents can refuse to grant a patent if its commercial exploitation would be contrary to Māori values.
- 30.4** Māori advisory committees operate under both the Trade Marks Act 2002 and the Patents Act 2013, to advise Commissioners whether proposed trade marks are likely to be offensive, or whether commercial exploitation of inventions proposed for patent registration would be likely to be contrary to Māori values, respectively.

Inclusion of two additional WAI 262 recommendations

- 31.** I propose including two additional WAI 262 intellectual property matters for engagement with Māori at stage one of the Review. These are:

Mandatory disclosure of origin

- 31.1** The Waitangi Tribunal recommended that a new requirement be added to the Patents Act 2013 that patent applicants disclose if Māori traditional knowledge or taonga species have contributed to a claimed invention. At the international level, this is referred to as 'mandatory disclosure of origin'. The Tribunal envisioned that information would assist patent examiners to determine whether the criteria for granting a patent has been met, and the Commissioner of Patents would determine the consequences of non-disclosure on a case-by-case basis.

31.2 S6(a)

31.3 S6(a)

31.4 S6(a)

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S6(a)

31.5

S9(2)(j)

31.6

S9(2)(j)

Consideration of Māori traditional knowledge in patent applications

- 31.7** The Waitangi Tribunal recommended the provision of a mechanism to ensure that patent examiners consider pre-existing Māori traditional knowledge in making decisions about whether claimed inventions meet criteria for patentability, including if an invention is novel or involves an inventive step.
- 31.8** No legislative change would be required to implement this recommendation. A mechanism would need to be included in the Intellectual Property Office of New Zealand's (**IPONZ's**) internal guidelines to ensure that relevant traditional knowledge was considered when examining patent applications.
- 31.9** There would also be scope to consider in the engagement whether there would be benefit in working with TPP partners to ensure that Māori traditional knowledge is taken into account when they are examining patent applications in their jurisdiction. Under Article 18.16.2 of TPP, TPP Parties agree to "endeavour to cooperate... to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources".

Reform of the Native Plants Protection Act 1934

- 32.** Cabinet has agreed to include in the legislative programme a reform of the Native Plants Protection Act 1934. This reform is intended to facilitate more effective protection of native plants, replacing the current, outdated regime.
- 33.** The plant variety rights and plant protection regimes are related. The plant protection regime primarily affects the collection and management of plants in the wild or where they could affect wild populations, and the export of native plants. The controls on export may also provide an avenue to protect iwi intellectual property interests, and taonga/kaitiaki interests in particular species, such as pingao used in weaving. The plant variety rights regime affects the use and propagation of new plant varieties.

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34. My officials are discussing the review of the Native Plants Protection Act with officials from the Department of Conservation to explore the interrelationship between the two regimes and regulatory reviews.

Second stage of review: release of discussion document

35. To comfortably meet the expected TPP implementation deadline, the Government should aim to pass the plant variety rights reform bill by the end of 2019 or in the first quarter of 2020 (allowing six months after the reform bill is passed for legislation to be brought into force).
36. Accordingly, I am aiming to begin stage two of the review, which will include the release of a discussion document, in the fourth quarter of 2017 at the latest. This timing would leave between two and two and a half years to develop the policy, consult with stakeholders and Māori, prepare a bill for introduction and complete the Parliamentary process. While achievable, the timeframe would be tight.
37. S6(a)
38. S6(a)

Update to Waitangi Tribunal

39. The Crown is required to file an update and timeline with the Tribunal regarding its engagement with Māori on the changes to be made to the PVR Act and whether New Zealand should accede to UPOV 91.
40. MBIE intellectual property policy (IP) officials have held a number of informal discussions about how the Government can most effectively engage with Māori on the PVR Act review. MBIE IP officials have spoken with parties who have expertise, or specific interest, in Māori intellectual property or Māori economic development (see paragraphs 44-45 overleaf for a list of those officials spoke with), as well as officials from Te Puni Kōkiri and Te Kupenga (MBIE's Māori Economic Development Unit).
41. Key points arising from MBIE IP officials' discussions on how to facilitate a good engagement process with Māori on the PVR Act review have included:
- 41.1 the difficulty inherent in consulting on a subject of such a specialised nature;
 - 41.2 the importance of the Crown properly understanding the scope of plant variety rights issues that may be of interest to Māori and how they could affect kaitiaki relationships with taonga species;

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- 41.3 the importance of not overburdening Māori with engagement on a topic many Māori may not be informed about before the Crown has properly formulated its proposals, has clarity on how the proposals are likely to affect Māori, and can express this in a way that will be most easily understood and facilitate constructive discussion;
- 41.4 given the specialist nature of the area, that the engagements might be best conducted in places like *whare wānanga* (tertiary institutions), rather than on *marae*, to encourage attendance by technical experts, such as academics, scientists and lawyers;
- 41.5 the review process – and engagement with Māori – would be best facilitated if the Crown and Māori experts in the area could agree on what the issues, risks and opportunities are, which could then form the basis of a wider consultation with Māori.

Next steps

- 42. If Cabinet agrees with the proposals in this paper, officials will provide an update to the Waitangi Tribunal on MBIE's plan of engagement with Māori. A draft copy of the update is attached as Annex 1. The key messages to be conveyed are:
 - 42.1 The Crown has actively sought information and advice from Māori regarding the proposed consultation process, which has been considered in the decisions about engagement.
 - 42.2 There will be opportunities for Māori to provide both procedural and substantive input throughout the review process.
 - 42.3 The Crown intends to engage constructively with Māori as its Treaty partner in this review and keep the lines of communication open throughout the process.
- 43. Officials will then start preparing for the workshops with industry and Māori intellectual property and plant variety rights experts.

Consultation

Targeted discussions with Māori experts

- 44. In their targeted discussions, which have informed the proposals relating to engagement with Māori, MBIE officials spoke with:
 - a. Cletus Maanu Paul and Hema Wihongi, Chair and Secretary respectively of Ngā Kaiāwhina a WAI 262;
 - b. Pania Tyson-Nathan, Chief Executive of NZ Māori Tourism and member of the Māori Economic Development Advisory Board;
 - a. Lynell Tuffrey Huria, Special Counsel, AJ Park; and
 - b. Professor Pare Keiha and Karen Te O Kahurangi Waaka, Chairs of the Patents, and Trade Marks, Māori advisory committees respectively.

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45. Officials sought to speak with the Māori Economic Development Advisory Board, but were unable to do so as the Board's July meeting was postponed. As noted above, they were able to speak with board member, Pania Tyson-Nathan. Officials also sought discussions with Maui Solomon, counsel for WAI 262 claimants with expertise on Māori intellectual property and plant variety right issues. He was unable to speak with us before this Cabinet paper was submitted.

Departmental consultation

46. The Ministry of Foreign Affairs and Trade, Ministry for Primary Industries, Ministry of Justice, Department of Conservation, Te Puni Kōkiri and the Crown Law Office were consulted on the proposals of this paper.
47. The Department of Prime Minister and Cabinet has been informed.

Financial Implications

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

Human Rights

49. There are no Human Rights Act 1989 or Bill of Rights Act 1990 implications from the proposals in this paper.

Legislative Implications

50. There are no immediate legislative implications from the proposals in this paper.
51. Policy approvals to consult on specific changes to the plant variety rights regime will be made after we have completed the initial stage of the review.

Regulatory Impact Analysis

52. Regulatory impact analysis requirements are not applicable to the proposals in this paper.

Gender Implications

53. There are no gender implications from the proposals in this paper.

Publicity

54. No publicity is proposed for this paper or its proposals.
55. However, MBIE's update to the Waitangi Tribunal will be a public document and distributed to claimants in the recent TPP Waitangi Tribunal claim.

Recommendations

Minister for Commerce and Consumer Affairs recommends that the Committee:

Trans-Pacific Partnership Agreement and plant variety rights

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1. **note** that New Zealand is required to either accede to the most recent version of the International Convention for the Protection of New Varieties of Plants (UPOV 91), or implement a plant variety rights regime that gives effect to UPOV 91, within three years of the Trans-Pacific Partnership Agreement (TPP) entering into force;
2. **note** that implementing the second option (a plant variety rights regime that gives effect to UPOV 91) would provide greater flexibility to the Crown in considering how it meets its obligations under the Treaty of Waitangi;
3. **note** that changing the plant variety rights regime will be a significant legislative project that will require a wholesale review of the Plant Variety Rights Act 1987;

Plant Variety Rights Act review process

4. **agree** to begin a review of the Plant Variety Rights Act;
5. **agree** that the first stage of the review will consist of targeted, technical workshops with industry and Māori intellectual property and plant variety rights experts;
6. **note** that the second stage of the review would likely involve the release of a discussion document to the wider public, and wider consultation with Māori;
7. **S6(a)**
8. **S6(a)**

Engagement with Māori

9. **agree** that engagement with Māori on the review include consideration of:
 - 9.1 the four recommendations relating to the plant variety rights regime contained in the Waitangi Tribunal's WAI 262 report; and
 - 9.2 two additional WAI 262 recommendations relating to mandatory disclosure of origin, and the consideration of Māori traditional knowledge by patent examiners;
10. **note** that the workshops with Māori intellectual property and plant variety rights experts will be used to gain input on possible options for wider consultation with Māori;
11. **note** that:
 - 11.1 the first stage of the Plant Variety Rights Act review will overlap with the review of the Native Plants Protection Act 1934;
 - 11.2 the two regimes are related – the plant protection regime primarily affects the collection of plants in the wild or where they could affect wild

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populations, and the export of native plants, while the plant variety rights regime affects the use and propagation of new plant varieties;

12. **note** that Ministry of Business, Innovation and Employment and Department of Conservation officials will explore the interrelationship between the plant variety rights, and plant protection, regimes and regulatory reviews, and provide advice to the relevant Ministers;

Update to the Waitangi Tribunal

13. **note** that the Crown is required to file an update and timeline with the Waitangi Tribunal regarding its engagement with Māori on the changes to be made to the plant variety rights regime and whether New Zealand should accede to UPOV 91;
14. **note** that Ministry of Business, Innovation and Employment officials have held a number of informal discussions with experts in Māori intellectual property and Māori economic development about how to best facilitate effective engagement with Māori in the Plant Variety Rights Act review; and
15. **agree** that if the proposals in this paper are agreed to, the Waitangi Tribunal will be updated along the lines of the memorandum attached as Annex 1.

Authorised for lodgement

Hon Paul Goldsmith

Minister for Commerce and Consumer Affairs

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Annex 1: Draft memo to the Waitangi Tribunal

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Annex 2: Memo to the Waitangi Tribunal seeking extension. 13 June 2016