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Te Kāhui Ture o Aotearoa

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17 September 2020

Corporate Governance and Intellectual Property
Policy, Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

By email: PVRActReview@mbie.govt.nz

Re: Review of the Plant Variety Rights Act 1987 – Outstanding Policy Issues, discussion paper

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (Law Society) appreciates the opportunity to comment on the *Review of the Plant Variety Rights Act 1987 – Outstanding Policy Issues discussion paper* (discussion paper). The Law Society's Intellectual Property Law Committee has considered the discussion paper and responses to the consultation questions are set out below.

Definitions

1. *Do you agree with our proposed definition of 'indigenous plant species'? If not, do you have an alternative to propose?*

   No. The Law Society submits that instead a Kaitiaki register should be established.

   While the definition may be satisfactory to botanists for the purposes of taxonomy, it is of little use for breeders. Breeders will need to know whether the species of a potential new variety is a taonga species in which one or more kaitiaki have an interest before they can begin any breeding process. The discussion paper admits that "the definitions of these categories are yet to be determined."[1]

   The Wai 262 report acknowledged the problem and recommended a kaitiaki register:

   > "We have in mind a register that allows kaitiaki communities to record their status in respect of particular taonga species within or sourced from their rohe. There may well be multiple registrations, and we do not apprehend that a decision would be required as to which of the kaitiaki registrants should have priority unless a patent or PVR application makes that necessary. Rather, the register would be designed to help those in research and development working with in situ and ex situ examples of taonga species to know who claims an interest and who should be consulted".[2]

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1 *Discussion Paper| Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues*, MBIE, (August 2020), (discussion paper), paragraph 14.

2 *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Waitangi Tribunal (2011), (Wai 262 Report): https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356416/KoAotearoaTeneiTT2Vol1W.pdf, p 207.

Such a register would provide far more clarity than the definition proposed by MBIE, which gives no clue as to the identity of individual taonga species and their associated kaitiaki.

2. *Do you agree that 'non-indigenous species of significance' be listed in regulations and that the list reflect the table above? If not, why not? Are there species that should be on that list that are not?*

The Law Society supports identifying non-indigenous species of importance in regulations but repeats its endorsement of a register as set out in the answer to Q1.

Disclosure obligations and confidentiality

3. *Are there any confidentiality considerations in relation to the additional information required under the new disclosure obligations? If so, how should this information be treated?*

The Law Society submits that information about kaitiaki and their relationship to taonga species should not be held in confidence. Such information would serve the same purpose as the register discussed in response to Q1.

Māori Advisory Committee - appointments

4. *Do you agree with the proposal to change the name of the Committee to the 'Māori PVR Committee'? If not, do you have any other recommendations?*

Yes.

5. *Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose?*

The Law Society has no comment on the appointment process itself.

However, the Law Society questions the proposed size (5 members) of the committee and how it is to be funded. The PVR Office currently has four examiners and an assistant commissioner. The current fees were set in 1999.[3] The PVR Office "depends heavily on cooperation with other parties to operate effectively and efficiently … includ[ing] cooperation with applicants, experts, Crown Research Institutes, variety collection holders, and academics."[4] In other words, it is cross-subsidised by services outside its fee revenues.

The third guiding criterion in the discussion paper is that the options relating to Treaty compliance should minimise additional compliance costs.[5] A committee of 5 members would double the numbers of the PVR Office employees processing PVR applications for varieties of taonga species. If a strict user pays policy applied, that could double the fees for such applications. Cross-subsidisation has apparently served to fund the PVR Office over the last 21 years, but the discussion paper does not explain whether cross-subsidisation is to continue to minimise additional compliance costs in future, or whether the PVR Office is to be funded by user fees or a government subsidy.

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3 Plant Variety Rights (Fees) Order 1999, commenced 1 July 1999.

4 Plant Variety Rights Office Technical Focus Group Meeting | Key Discussion Points, (12 June 2019), paragraph 7: https://www.iponz.govt.nz/assets/pdf/PVR/Technical-guidance/pvr-tfg-12-june-19-meeting-report-final.pdf

5 Discussion paper, paragraph 24.

6. *Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose?*

The Law Society endorses the recommendation in paragraph 51 of the discussion paper that there should be some legal experience among the members of the committee. The nature of the issues that will be considered by the Committee, whether in an advisory or decision-making role, could include complex legal issues.

Māori Advisory Committee – decision making processes

7. *Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not?*

The first sentence in the question is incomplete. Presumably that sentence should have the words "should proceed" or, something similar, after "application".

The list of considerations does not take into account what the Wai 262 Report recommended:

> *"*In respect of PVRs, while Māori have no proprietary rights in taonga species, the cultural relationship between kaitiaki and taonga species is entitled to reasonable protection. We support the Crown's proposed changes to the Plant Variety Rights Act, but recommend that any new PVR legislation also include a power to refuse a PVR if it would affect kaitiaki relationships with taonga species. In order to understand the nature of those relationships and the likely effects upon them, and then to balance the interests of kaitiaki against those of the PVR applicant and the wider public, the Commissioner of Plant Variety Rights should be supported by the same Māori advisory committee that we recommend becomes part of the patent regime."[6]

This paragraph is unclear. The second sentence suggests that there should be an unconditional power to refuse a PVR application if it would affect a kaitiaki relationship. But the third sentence suggests that it is for the Committee first to determine the kaitiaki relationships, and then for the Commissioner, supported by the Committee, to balance of the interests of kaitiaki against those of the PVR applicant and the wider public.

The ambiguity, however, is clarified by the discussion that preceded it:

> "Accordingly, we recommend several changes to bioprospecting, GM, and IP legislation to ensure the kaitiaki relationship with taonga species and mātauranga Māori receives a reasonable degree of protection. Just what is reasonable requires case-by-case analysis, a full understanding of the level of protection required to keep the kaitiaki relationship safe and healthy, **and a careful balancing of all competing interests**. These include the interests of IP holders, the public good in research and development, knowledge, and the species itself. **None of these, including the kaitiaki interest, should be treated as an automatic trump card**.[7] [Emphasis added]

The list of considerations in the discussion paper does not include any balancing of interests. The process proposed does not include any involvement of the PVR Commissioner. If only the matters in the list were to be considered, and if the Commissioner were to be excluded, as

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6 Wai 262 report, p 212

7 Wai 262 report, p 211

proposed, the kaitiaki interest could be considered to be an automatic trump card, contrary to what the Wai 262 Report recommended.

The Law Society submits that there should be a careful balancing of all competing interests, and that the PVR Commissioner should be involved in that balancing exercise.

8. *Are there any additional factors that should be added to the list of relevant considerations?*

Please refer to the answer to Q7.

9. *Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not*

Option 2 seems to be incomplete. Presumably what was meant was that the Committee would make its determination on the basis of information supplied by both the kaitiaki and the applicant.

The Law Society agrees that the committee should take an investigative approach as outlined in option 1. However, the suggestion that "if information is not provided within the prescribed period, the application would lapse"[8] needs to be clarified. As it currently reads, an application could lapse if the kaitiaki had not supplied requested information even if the breeder had. If that was intended, it would be another automatic trump card.

10. *Do you agree that the Committee should be required to reach a unanimous decision and only in the event that, despite all efforts, a decision cannot be reached can the Chair of the Committee allow a decision to be made by either a consensus or a vote (Option 3)? If not, why not?*

The Law Society sees no reason why the committee should not determine issues by a majority in the same way as a panel of judges would in a court decision. And, as in court decisions, if there are dissenting views these should be set out in separate dissenting decisions.

11. *Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose?*

The Law Society does not agree with either Option 1 or Option 2

There are three considerations in this question. Is the Committee to have decision-making powers? Is the PVR Commissioner to be excluded from the decision-making process? What is meant by "mitigation"?

Paragraphs 57 to 66 of the discussion paper all set out options for making decisions. But Option 2 would not allow the Committee to make a decision, which does not follow from the preceding discussion. If the Committee were not able to make decisions, the discussion paper acknowledges that kaitiaki could stall the application by refusing to agree to even a minor mitigation proposal. The alternative suggested for an applicant is to proceed without PVR protection.[9] With respect, this result would amount to the kaitiaki interest being treated as a trump card – exactly what the Wai 262 Report cautioned against.[10]

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8 Discussion paper, paragraph 58a.

9 Discussion paper, paragraph 74

10 Please refer to the answer to Q7 above.

The Wai 262 Report recommended that the PVR Commissioner should be the decision maker supported by the Committee, not that determinations should be made by the Committee alone.[11]

The word "mitigation" is not defined in the discussion paper. It is defined in the Oxford English Dictionary as: "the action of reducing the severity, seriousness, or painfulness of something." The emphasis on mitigation in the discussion paper implies a presumption that any PVR grant must impose an adverse effect on the kaitiaki relationship that must be mitigated. This presumption is not what the Wai 262 Report recommended. It recommended a process:

> "… to ensure the kaitiaki relationship with taonga species and mātauranga Māori receives a reasonable degree of protection. Just what is reasonable requires case-by-case analysis, a full understanding of the level of protection required to keep the kaitiaki relationship safe and healthy, **and a careful balancing of all competing interests**. These include the interests of IP holders, the public good in research and development, knowledge, and the species itself."[12] [Emphasis added]

Assessing whether mitigation is adequate is not the same as a careful balancing of all interests. A careful balancing requires the decisionmaker to start with an open mind. Assessing the adequacy of mitigation does not.

The Law Society repeats its submission that there should be a careful balancing of all competing interests, and that the PVR Commissioner should at least be involved in that balancing exercise, and adds that decisions should be made if the parties cannot agree.[13]

Post-determination considerations

12. Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose?

<u>Proposal – judicial review only</u>

The discussion about what happens after a decision has been made on the kaitiaki condition, is predicated on a Cabinet decision that committee determinations are to be subject only to judicial review, rather than an appeal on merits.[14] The 2019 Options Paper stated that administrative law and policy considerations would need to be considered further.[15] The discussion paper now announces there has been a Cabinet decision that determinations will be subject only to judicial review, because the courts are said to be "not well placed" to make substantive decisions on kaitiaki relationships.[16]

This decision appears to have been made without consultation. The Law Society is making its submission now.

The Law Society considers that decisions such as those on kaitiaki relationships (whether made by the committee as proposed in the discussion paper or by the Commissioner with advice from the Committee) should be appealable, for the following reasons:

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11 Wai 262 report, p 212. Please also refer to the answer to Q7 above.
12 Wai 262 report, p 211. See also the response to Q7 above.
13 Please also refer to the answer to Q7 above.
14 Discussion paper at paragraphs 20, 77.
15 *Options Paper | Review of the Plant Variety Rights Act 1987*, MBIE, July 2019. Paragraph 120
16 Discussion paper, paragraph 20

- These are decisions that can have a significant impact and a right of appeal should be provided to those affected. The right of appeal would mirror the appeal rights on other decisions on PVRs.
- A court in a judicial review case considers a much narrower range of issues than in an appeal. In particular, in judicial review the court is unable to consider substantively whether a decision is correct.
- Relying on judicial review as the sole ground of challenge for administrative decisions is generally not considered to be legislative best practice. Allowing a right of appeal would be consistent with the Legislation Guidelines: http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/ (in particular see Part 2 of Chapter 28).
- The Law Society disagrees that the courts are not well placed to make substantive decisions on kaitiaki relationships. The courts have been interpreting the role of the Treaty of Waitangi based on a principle of partnership for well over thirty years.[17]

The Law Society submits that determinations should be based not only on kaitiaki relationships and possible mitigations, but on a balancing of the kaitiaki interests and all other interests, and that the determinations should involve the PVR Commissioner as well as the Committee. This balancing is something the courts do across a wide range of areas and is a task they are fully competent to do.

A time limit on judicial review proceedings?

Further, regardless of whether there is a right of appeal, the Law Society submits that no time limit for the bringing of judicial review should be imposed. A time limit is being considered because "*it would not be in the interest of either the breeder or the PVR office for testing to commence, only to have the determination reversed on review*" [discussion paper, at [86]].

Judicial review is a fundamental part of New Zealand's constitutional settings and the Legislation Guidelines caution against restrictions on the right of judicial review (see Part 1 of Chapter 28). The Legislation Design & Advisory Committee have noted that "Restrictions placed upon the right should be rare and limited to cases where finality is critical and be proportionate to that objective".[18]

We appreciate there is a desire for certainty when determining whether an application can proceed to testing by the PVR Office. However, as the Legislation Guidelines note, procedural restrictions that limit the ability of the courts to judicially review a decision interfere with the courts' constitutional role as interpreters of the law and so undermine the rule of law. Such restrictions also raise issues as to whether legislation is consistent with s 27(2) NZBORA. Imposing a time limit on judicial review must be limited to cases where finality is critical, and the Law Society does not consider that to be the case here. In any event, the courts are able

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17 Waitangi Tribunal, *Report on the Crown's Review of the Plants Variety Rights Regime – Pre-publication Version*, (Wai 2522 report), (15 May 2020): https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_159436138/CPTPPA%20Pre-pub%20W.pdf Chapter 2 of that report traces the development of the principle of partnership through court decisions and Waitangi Tribunal Reports.

18 Legislation Guidelines 2018 edition, Chapter 28.1; see: supplementary materials.

to decline relief where there is an unexplained or unjustified delay in bringing judicial review proceedings. (This is also discussed at Q14 below.)

MBIE's preferred option (Option 3) – first stage review of Committee determinations

Setting those issues aside, the Law Society supports having a first stage review of determinations (whether of the Committee or, as the Law Society prefers, the Commissioner). One of the objectives of the discussion paper is to minimise additional compliance costs.[19] In the interests of doing this the Law Society submits there should be a right to a hearing on any determination about kaitiaki relationships, in the same way that hearings are provided for under both the patents and trade marks regimes.

In addition, objections before grant are provided for under the current Act.[20] The discussion paper is silent on the possibility that a third party might want to make an objection before grant about kaitiaki interests. The potential objector might be kaitiaki from another rohe, or a plant breeder with a different variety of the same species. The Law Society submits that this possibility should be provided for.

13. *Do you have any thoughts about either the timeframe for initiating this first stage review or the proposal of adding a person to the Committee when they are reviewing a determination, and who might be appropriate?*

The Law Society suggests that if there is to be a time frame for initiating the first stage review, it should be 20 working days.

14. *Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not?*

As noted in the answer to Q12, the Law Society submits that no time limit should be imposed for initiating judicial review.

15. *What do you think is an appropriate timeframe for an aggrieved party to notify Commissioner and the Committee of their intention to seek judicial review?*

Please refer to the answer to Q14.

16. *Do you agree with our preferred option and process for objections after grant in relation to the kaitiaki condition (Option 2)? If not, why not? Is there an alternative you wish to propose?*

The Law Society submits that all objections after grant should be treated in the same way no matter what the ground of objection is. The kaitiaki condition determination should be appealable in the same way as any decision on novelty, distinctness, uniformity or stability.

Information available to the public

17. *What are your views of the problem identified by MBIE?*

The problem identified by MBIE may be of concern to some plant breeders but requirements of UPOV 91 should also be taken into account. The scope of the breeder's right is set out in article 14. It does not include the right to confidentiality of the breeding history of the variety. Article 15 specifically allows the use of protected varieties for breeding other varieties. Article

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19 Discussion paper, paragraph 24.

20 Plant Variety Rights Act 1987, s 6.

12 requires PVR applicants to "furnish all the necessary information, documents or material for the purposes of examination." This can be seen to be the quid pro quo for obtaining a PVR grant. Disclosure has been available in New Zealand for plant variety rights under UPOV 78 and the disadvantage of this to breeders does not seem to outweigh the public interest in having the information available.

A further consideration is that if the breeding information is to be kept confidential, it would be unavailable to kaitiaki with a potential interest as well.

18. *What do you think about the options outlined by MBIE? What would be your preferred option and why? Are there other options that could be adopted?*

For all the reasons set out in answer to Q17, the Law Society prefers Option 1.

19. *If you support Option 3 what timeframe would you suggest for the information to be made public and why?*

Please see the response to Q18.

Supply of plant material in relation to a specific application

20. *Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why?*

This is a practical matter for PVR applicants to respond to.

Provision of propagating material for comparison and reference purposes

21. *What are your views of the problem identified by MBIE?*

22. *Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?*

These are practical issues for PVR applicants.

23. *Do you agree that if material is not provided lapse or cancellation could occur? Can you think of other ways to enforce this requirement? What is the appropriate timeframe?*

The provision of propagating material is required under article 12 of UPOV 91. The new Act is supposed to be compliant with UPOV 91 in all respects except for Treaty compliance, so Option 2 must be required.

Should growing trials be optional or compulsory?

24. *What are your views of the problem identified by MBIE?*

25. *Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?*

These are practical issues for PVR applicants.

Who should conduct growing trials?

26. *What are your views of the problem identified by MBIE?*

27. *Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?*

These are practical issues for PVR applicants.

Trial and examination fees

28. What are your views of the problem identified by MBIE?

The Law Society agrees with the description of the problem.

29. Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

The Law Society supports Option 3 which is analogous to the requirement to request examination under section 64 of the Patents Act 2013.

30. What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3?

An appropriate time frame would be two months from the date the direction is given, consistent with the time frame under regulation 72 of the Patents Regulations 2014 for requesting examination of patent applications.

Hearings and appeals relating to decisions of the Commissioner of PVRs

31. Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the Patents Act 2013? If not, why?

Yes. And it should include a right to be heard about kaitiaki issues as well.

32. What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why?

The filing fees for appeals to the High Court are higher than for the District Court (although the difference may not be material), and preparation and associated costs will be the same regardless of which court is hearing the appeal. There does not appear to be any rationale for PVR appeals to be to a different forum than other intellectual property right appeals or infringement proceedings. Accordingly, the Law Society recommends PVR appeals should be to the High Court.

(We also note that it would be rare for any court to be familiar with plant variety rights, but to date two PVR infringement decisions have both been heard in the High Court and one has been appealed to the Court of Appeal.)

The Law Society hopes these comments are helpful, and if further discussion would assist please contact the convenor of the Law Society's Intellectual Property Law Committee, Greg Arthur, via Law Reform Adviser Emily Sutton (emily.sutton@lawsociety.org.nz).

Yours faithfully

Frazer Barton
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