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By email to PVRActReview@mbie.govt.nz

Business Law
Building, Resources and Markets
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INTRODUCTION

These submissions have been prepared on behalf of The New Zealand Institute of Patent Attorneys, Inc (NZIPA).

NZIPA is an incorporated body representing most Trans-Tasman patent attorneys registered and practising in New Zealand.

The current membership of NZIPA comprises 155 Fellows, 3 Honorary, 28 Students, 16 Non-resident, 15 Associates and 2 Retired.

Patent attorneys operate in the global arena across all sectors of industry to assist businesses in their key markets and to use intellectual property (IP) systems for strategic advantage. Patent Attorneys are qualified to, and regularly advise on, all intellectual property rights including patents, trade marks, designs, copyright and, pertinent to the Plant Variety Rights Act 1987 review, Plant Variety Rights.

ISSUES PAPER – REVIEW OF THE PLANT VARIETY RIGHTS ACT 1987

Most of the issues discussed in the Issues Paper relate to whether or not the rights of Plant Variety Rights (PVR) holders should be strengthened or not. Opinion on such issues will depend on whether an interested party is a rights holder or a user of any given plant variety. NZIPA members act for parties on both sides of these issues. Therefore, we are not making any submission on those issues.

Our comments are limited to certain points of clarity. We consider that a clearly drafted PVR Act will be of benefit to all users of the PVR system.

Rights over harvested material

New Zealand acceding to UPOV91, or introducing a *sui generis* regime that gives effect to UPOV91, will likely involve use of the UPOV91 wording with respect to rights over harvested material.

UPOV 91 Articles 14(1) and (2) set out the rights over harvested material as follows:

Article 14

(1) [Acts in respect of the propagating material]

(a) Subject to Articles [15] and [16], the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles [15] and [16], the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

Referring to Article (14)(2), we consider some of the terms lack clarity. For example:

- ‘obtained through the unauthorized use of propagating material of the protected variety’
- ‘unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material’.

These terms are open to differing interpretations, depending on the circumstances.

The drafting of a new New Zealand PVR Act provides an opportunity to achieve greater clarity with respect to such terms, and we consider this opportunity should be taken.

Rights over similar varieties and essentially derived varieties (EDVs)

New Zealand acceding to UPOV91, or introducing a *sui generis* regime that gives effect to UPOV91, will likely involve use of the UPOV91 wording with respect to rights over EDVs.

UPOV 91 Articles 14(5)(b) and (c) define an EDV as follows:

... a variety shall be deemed to be essentially derived from another variety (‘the initial variety’) when:

- (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression

of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,
(ii) it is clearly distinguishable from the initial variety and
(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

Again, we consider some of the terms in this definition lack clarity. For example:

- ‘predominantly derived’ (emphasis added)
- ‘essential characteristics’ (emphasis added)
- ‘clearly distinguishable’ (emphasis added)

These terms are also open to differing interpretations, depending on the circumstances.

If the new New Zealand PVR Act is to include protection for EDVs, the drafting of the new Act provides an opportunity to achieve greater clarity with respect to such terms, and we consider this opportunity should be taken.

CONCLUDING REMARKS

We would welcome the opportunity to discuss any aspect of our submission with the Plant Variety Rights Act 1987 review team.

Yours faithfully

A handwritten signature in blue ink that reads 'Duncan de Geest'.

Duncan de Geest
NZIPA Council Member

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