



Summary of submissions on *Disclosure of origin of genetic resources and traditional knowledge in the patents regime: discussion paper*

1. Consultation on the *Disclosure of origin of genetic resources and traditional knowledge in the patents regime: discussion paper* (the **discussion paper**) closed on 21 December 2018.
2. The Ministry of Business, Innovation and Employment (**MBIE**) received nine submissions. Submitters included Māori organisations, members from the legal sector and academics.
3. A high-level summary of the submissions MBIE received is below.

Problem definition

4. The discussion paper identified two problems:
 - a. There is a potential for patent applications relevant to Māori interests, which should be considered by the Patents Māori Advisory Committee (**PMAC**), to be missed under the current patents regime.
 - b. There is not enough information available about how genetic resources and traditional knowledge are used in research.
5. Submissions received from Māori were supportive of the overall substance of the problems identified in the discussion paper.
6. Two submitters thought the scope of the problem definition was too narrow, which consequently limited the scope of the proposed options. University of Auckland Uniservices (Uniservices) submitted that the relevant problems are broader than a lack of information about the use of genetic resources and traditional knowledge in research. They consider there is a broader problem of a lack of transparency and trust, and misuse of taonga species and traditional knowledge.
7. A majority of the submitters thought the problems identified in the discussion paper should be addressed in the context of a wider discussion about Māori rights and consider the issues raised in the report on the Wai 262 inquiry, *Ko Aotearoa Tēnei* (the **Wai 262 report**).
8. Two submitters thought there was little evidence to prove that the problems identified in the discussion paper are real problems in New Zealand. However, at least one submitter may have misunderstood the problem definition. The lack of information about the use of genetic resources and traditional knowledge cited in the problem



definition refers to current and often non-traditional uses of these resources and knowledge. The government does not currently collect information that allows people (for example, kaitiaki) to follow-up on these uses where they may have interests or rights in the resources and knowledge.

Objectives of reform

9. Taking into consideration the broader objectives of the *Patents Act 2013*, the discussion paper identified the following objectives:
 - a. **Objective A:** Aid better quality decision-making in the patents regime.
 - b. **Objective B:** Obtain quality information about the use of genetic resources and traditional knowledge.
 - c. **Objective C:** Minimise compliance and administrative costs.
 - d. **Objective D:** Aligns with New Zealand's international obligations and interests.
10. Most submitters agreed with the objectives identified in the discussion paper but they noted the absence of an objective to give effect to the Treaty of Waitangi (the **Treaty**) and/or protecting Māori interests within the intellectual property system.
11. Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) was among the submitters who suggested one of the objectives should be to give effect to the Treaty principle of partnership, by recognising the importance of traditional knowledge in the science and research industries. Uniservices went further to suggest the objectives should include an aim to acknowledge Māori claims, such as the Wai 262 claim, and address past and present grievances by Māori relating to genetic resources and traditional knowledge.
12. New Zealand Institute of Patent Attorneys submitted that MBIE's approach and the objectives identified in the discussion paper are appropriate in the absence of public consultations on the Wai 262 report.
13. Te Kāhui Rongoā Trust was disappointed the objectives did not specifically refer to Māori interests. Instead of focusing on international compliance, they suggested the Government should focus on addressing the Crown's obligations under the Treaty of Waitangi and protect Māori knowledge and natural resources originating in New Zealand. They were concerned about extending proposed options to include genetic resources and indigenous people from around the world, which would artificially inflate the costs of the Crown meeting its Treaty obligations.

Options for reform

14. The discussion paper proposed the following options:



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- a. **Option 1:** Introduce a basic mandatory disclosure of country of origin requirement.
 - b. **Option 2:** Introduce a mandatory disclosure of source requirement.
 - c. **Option 3:** Introduce an access and benefit sharing compliance requirement.
15. Most submitters liked the options proposed in the discussion paper. They identified the practical implications of each option in the New Zealand context. Māori submitters were especially supportive and welcomed the introduction of a disclosure requirement to the patents regime.
 16. Submissions from the legal field thought the scope of the options proposed in the discussion paper were too narrow and suggested MBIE should have considered alternative options (for example, introducing a bioprospecting regime or a register of kaitiaki interests).
 17. Multiple submissions supported the introduction of a bioprospecting regime, which incorporates the Code of Professional Standards and Ethics in Science, Technology and Humanities of the New Zealand Royal Society. Submitters thought a general bioprospecting regime would be a more effective means of addressing concerns around misuse of genetic resources and traditional knowledge than the proposed disclosure of origin requirement.
 18. Doug Calhoun criticised MBIE's approach to the options in the discussion paper and the workshops. He thought the consultation focused on how to implement a disclosure requirement instead of whether there should be a disclosure requirement.

Assessment of options

19. MBIE assessed each option against the four objectives. Objective A and B were given a higher weighting to reflect their importance.
20. Most submitters, especially Māori, supported MBIE's assessment of the options. Both AJ Park and New Zealand Institute of Patent Attorneys provided anecdotal evidence in support of MBIE's assessment of Option 1. They noted that most applicants would not always know the country of origin of genetic resources they used. New Zealand Institute of Patent Attorneys noted that, once a patent application was filed, applicants would not be required to provide information about the origin until the examination, often six or more years from the original research. They submitted that, at this point, it might be practically impossible to determine the origin of a resource.
21. There was some disagreement about the weighting given to Objective C (compliance and administrative costs). AJ Park thought that it is important to minimise compliance and administrative costs. Te Hunga Rōia Māori o Aotearoa, however, questioned the analysis and believed Objective C was given a greater weighting than the discussion



paper purported to give. They thought that Option 2 was preferred on the basis that the costs associated with that option were lower.

22. Te Hunga Rōia Māori o Aotearoa was also one of several submitters who considered that the costs might be overstated. Submitters were critical of the figures used in the Castalia report and submitted that relying on these figures in the options assessment overstated the negative impacts of Option 3. Te Hunga Rōia Māori o Aotearoa suggested MBIE should undertake further research to fully understand the administrative and compliance costs of Option 3.

Preferred options

23. Following an analysis of the options, MBIE identified Option 2, a mandatory disclosure of source requirement, to be the preferred option.
24. Submitters generally agreed Option 2 was the preferred option of the three presented. However, most submitters viewed Option 2 to be an interim step towards implementing Option 3.
25. Submitters acknowledge that, in the absence of a domestic Access and Benefit Sharing (ABS) regime, Option 3 is not appropriate for New Zealand in the current context. Te Hunga Rōia Māori o Aotearoa, for example, prefers Option 3 but considers Option 2 to be the minimum acceptable standard to protect traditional knowledge and Mātauranga Māori. In their view, New Zealand should aspire to Option 3 and if Option 2 was to be implemented, it should be an interim step in the journey to full disclosure and compliance with international bioprospecting and the creation of a domestic ABS regime.
26. AJ Park and Doug Calhoun did not support any of the options proposed noting that the costs outweigh any potential benefits of introducing a disclosure requirement. AJ Park submitted that information likely to be provided by applicants will not be comprehensive or useful to the Intellectual Property Office of New Zealand or third parties, as a disclosure of origin requirement relating to patent applications will only cover a small subset of uses of taonga species. Similarly, Mr Calhoun did not support the introduction of a disclosure requirement because he thought it was not necessary to achieve the objectives and address the problem identified in the discussion paper. In his view, Objective A can be met by clarifying the relationship between section 15(1) and section 226(a) of the Patents Act 2013 and Objective B has already been met by the current regime.

New Zealand's approach to international discussions

27. Most submitters agreed that New Zealand should support the introduction of an international disclosure of origin requirement. Te Rūnanga o Ngāi Tahu noted that an



international disclosure requirement could incentivise international researchers to consult and share benefits with ngā iwi Māori and facilitate a positive relationship between both parties.

28. While Mr Calhoun supported New Zealand's engagement in international discourse, he considered that New Zealand's ability to engage in and influence the negotiations in this area is limited in the absence of a Government response to the Wai 262 report.
29. Mr Calhoun also thought that there is an inherent tension between the international approach and New Zealand's approach to a disclosure of origin requirement. In his view, New Zealand's approach has focused on maintaining kaitiaki relationships, whereas international discourse has centred on access and benefit sharing. In light of this, and to ensure kaitiaki interests are not compromised, Mr Calhoun suggested the Government should consider whether a Treaty of Waitangi exclusion clause (like the provision for plant variety rights in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) is necessary when negotiating an international disclosure requirement.

Key design features for a disclosure of origin requirement

30. The key design features outlined in the discussion paper are 'subject matter', 'trigger' and 'penalties'. Design features determine the scope and nature of a potential disclosure of origin requirement for genetic resources and traditional knowledge.
31. Submitters generally preferred broad definitions and norms consistent with the World Intellectual Property Organisation (WIPO) and other international jurisdictions. Uniservices noted that this area of law is well developed in countries such as China, Brazil, South Africa and many European countries. In their view, New Zealand should look to those countries and WIPO for definitions and norms to deliver legislation that balances commercial and cultural interests.

Subject matter

32. While most submitters preferred a broad subject matter definition, submissions received from the legal sector sought explicit definitions that would enable them to distinguish what falls within the scope of the disclosure requirement.
33. The legal sector was concerned about including resources like microorganisms within the definition of 'genetic resources'. They considered this could be problematic as microorganisms are not bound to national borders and evolve rapidly. New Zealand Institute of Patent Attorneys suggested that if resources like marine species, viruses and microorganisms are included in the subject matter definition, it may be difficult, or even impossible in some cases where a resource is accessed outside of national jurisdiction, to determine their country of origin. They suggested a disclosure of source regime would be more appropriate for these resources.



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34. AJ Park suggested that a disclosure requirement that is limited to New Zealand-sourced genetic resources or traditional knowledge would be more beneficial and reduce the burden on patent applicants.

Trigger

35. The discussion paper sought feedback on whether a “utilisation”, “derivation” or “based on” formulation would be appropriate for triggering a disclosure requirement for the use of genetic resources and traditional knowledge.
36. Submitters preferred a different trigger for genetic resources and traditional knowledge.
37. In relation to genetic resources, the legal sector preferred the trigger for a disclosure to be limited to inventions that directly result from use of genetic resources. They believe this would make it easier to identify when a duty to disclose is triggered.
38. In relation to traditional knowledge, Te Hunga Rōia Māori o Aotearoa and Te Rūnanga o Ngāi Tahu submitted that the trigger for disclosure should be wide enough to encompass any traditional knowledge or Mātauranga Māori irrespective of whether it had a material influence on the final product. The New Zealand Institute of Patent Attorneys supported this approach, noting that if an invention is informed by traditional knowledge in any way, then this knowledge has contributed to the invention.

Penalties

39. MBIE proposed the following consequences for a false or incomplete declaration:
- a. Application is not processed until the correct information is provided.
 - b. Scope of the patent is narrowed or revoked if the patent would not have been granted if accurate information was provided.
40. Submitters agreed with the sanctions proposed in the discussion paper.

Additional comments

41. The New Zealand Law Society noted that MBIE should consider and avoid any potential conflict of laws issues that may arise as a result of any future response or implementation of recommendations made in the Wai 262 report. Conflict of laws issues arise where there are inconsistencies between two regimes that address the same issue.