

Plant Variety Rights Act 1987 review: Options Paper

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Responses to questions in the Options Paper

1

Objectives of the PVR Act

Do you have any further comment to make on the objectives of the PVR Act?

We consider that in general the objectives of the PVR Act are sufficiently clear. However we continue to take the view that, as recorded by MBIE at 14(a)(i) and 14(a)(ii) of the Options Paper:

1. the word "dissemination" in objective (a) should be deleted and replaced with the word "use" to avoid the wrong impression that the objective is implying plant material should be distributed widely; and
2. the phrase "appropriate balance" requires greater clarity/context in order to be useful.

We also agree with MBIE's change of language from "Treaty consistency" to "Treaty compliance".

2

Meeting our CPTPP obligations

Do you agree with our analysis and conclusion of the CPTPP options? If not, why not?

[Insert response here]

3

Treaty compliance – criteria for analysis

Do you agree with the criteria that we have identified? Do you agree with the weighting we have given the criteria? If not, why not?

[Insert response here]

4

Treaty compliance – key terms

Do you agree with our proposed approach to these key terms?

Do you have any comments on the principles listed above and how they might apply in practice? For example, would it be useful to specifically list non-indigenous species of significance?

As set out at [28] of T&G's substantive submission document, Submission to Ministry of Business, Innovation and Employment on its Options Paper on the Review of the Plant Variety Rights Act 1987 (the "Main Submission"), T&G considers that it is vital to strive for certainty in this area, and that it is therefore important to receive clarification on (a) a definition for "indigenous species of significance"; (b) what will constitute taonga species and kaitiaki; and (c) how claims will be determined, and issues resolved, in the event that plant material is claimed to be taonga and kaitiaki. T&G considers that the relevant Treaty rights reflected in the PVR Act should be restricted to indigenous plant materials as defined at [102(a)] of the Options Paper.

5

Treaty compliance – options analysis

Do you agree with the proposed options? Are there alternatives we have missed?

Do you agree with our analysis and conclusions? If not, why not?

As set out at [30] of the Main Submission, until the uncertainties T&G identifies above are satisfactorily resolved it is difficult for T&G to state which of MBIE's listed options is preferable, except to note that if clarity on the above issues can be resolved, it is likely that Option 1 will be optimal.

6

UPOV 91 alignment – criteria for analysis

Do you have any comment to make about our approach to, and criteria for, the preliminary options analysis in this paper?

As set out at [26] and [27] of the Main Submission, T&G supports New Zealand's regime being consistent with UPOV 91, and does not have a strong view whether that occurs through accession or giving effect, provided that the outcome allows for enough flexibility to: (a) meet the Government's Treaty obligations; and (b) ensure that the PVR regime remains fit for purpose into the future (bearing in mind that UPOV 91 is now nearly three decades old).

7

Definitions – breed

Our preferred option is to incorporate the definition of "breed" that was considered in the previous review to address concerns around discovery of varieties in the wild.

Do you agree? If not, why not?

	<p>We support adopting the UPOV 91 definition of "breeder". This enhances consistency between the PVR Act and UPOV 91. Importantly, the UPOV 91 definition of "breeder" more clearly captures and includes the "development" aspect of the process.</p>
8	<p>Definitions – general</p> <p>Do you have any comments on the definitional issues discussed in this Part?</p>
	<p>We submit that the UPOV 91 definitions should be preferred wherever possible, to maximise international consistency and best-practice.</p>
9	<p>Scope of the breeder's right</p> <p>Do you have any comments about these new rights required by UPOV 91?</p>
	<p>We support the scope of rights set out in UPOV 91.</p>
10	<p>Exceptions to the breeder's right</p> <p>Do you have any comments about the exceptions required by UPOV 91?</p>
	<p>We support the exceptions set out in UPOV 91.</p>
11	<p>Term of the right</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p>As set out at [51] of the Main Submission, T&G submits that Option 3 is the most appropriate option. Investment in some varieties is naturally longer than others. For example, apple trees have a longer economic life than blueberry bushes, suggesting that logically the investment analysis will be different, and the corresponding incentive structure (i.e. the PVR) should be similarly different.</p>
12	<p>Essentially derived varieties</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p>T&G supports Option 1.</p>
13	<p>Rights over harvested material</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p>As set out at [46] to [50] of the Main Submission, T&G supports Option 3. It is important that rights over harvested material be extended to include harvested material, and products made from the harvested material, of protected varieties. Option 3 provides enhanced certainty for businesses, and is likely to encourage them to invest further in product quality and branding. It should not be rejected by MBIE on the basis of s 36(3) of the Commerce Act, at a time when MBIE is simultaneously consulting on the repeal of that subsection in a parallel review.</p>

14	<p>Farm saved seed</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p>T&G supports Option 2(ii), but submit that this Option should be effected with sufficient flexibility to allow for opt-in on a case by case basis, rather than applying rigid and inflexible rules.</p>
15	<p>Compulsory licences – general issues</p> <p>Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?</p> <p>Other than the two substantive issues below, are there other issues we have missed?</p>
	<p>As set out at [36] to [38] of the Main Submission, T&G is strongly of the view that a public interest test is the most intellectually coherent and fit for purpose test. It best gives effect to UPOV 91 (which expressly uses the language of public interest). It brings New Zealand in line with those trading partners who have become UPOV members of made substantive amendments to their regimes since 1991. And it would best give effect to the Government's Treaty obligations, because it would have the flexibility to fold in Treaty considerations into its accompanying guidance criteria.</p>
16	<p>Compulsory licences – grace period</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>
	<p>As set out at [31] to [33] of the Main Submission, T&G does not support Option 1. It submits that consistent with Option 3, the grace period after the granting of a PVR during which a compulsory licence application cannot be filed should logically be adjusted depending on: (a) the crop type; and (b) the timeline within which the PVR owner is likely to be able to reap the benefit of the PVR. It is not appropriate to rely on the discretion of individual Commissioners in suggesting that this legislative detail is not necessary in practice.</p>
17	<p>Compulsory licences – section 21(3)</p> <p>Do you agree with the proposed options? Are there alternatives we have missed?</p> <p>Do you agree with our analysis and conclusions? If not, why not?</p>

As set out at [39] to [45] of the Main Submission, T&G strongly believes s 21(3) should be repealed, because as presently drafted it (a) irrationally prioritises certain commercial models over others (to New Zealand's economic detriment); and (b) facilitates third party free riding on investments by innovators.

MBIE appears to be concerned with the misuse of an economic monopoly. The conferral of a statutory IP monopoly not equate to an economic monopoly in most circumstances, and even where it does, competition law exists to protect the public against abuses of economic monopolies.

With a public interest test, the perceived need for s 21(3) – i.e. to enable the public to obtain the benefit of 'locked up' varieties – would therefore fall away, as would its corresponding distracting focus on the form of the commercial model employed by the IP holders to commercialise their products.

Enforcement – infringements

18

Do you agree with the discussion and the proposals in relation to the four issues discussed above? If not, why not?

Should the PVR Act provide that infringement disputes be heard in the District Court?

Are there others issues relating to infringements that we have missed?

T&G supports MBIE's positions stated at paragraphs [413], [423], and [430] of this section.

Enforcement – offences

19

Do you agree with the proposed options? Are there alternatives we have missed?

Do you agree with our analysis and conclusions? If not, why not?

T&G supports Option 3 provided that MBIE is correct in its statement at [447] that "The behaviours (b) - (d) and (f) in the list above could be considered breaches of the Fair Trading Act...".

Exhaustion of the breeder's right

20

Do you have any comments about the exhaustion provision required by UPOV 91?

T&G supports adoption of the UPOV 91 exhaustion provision.

Cancellation and nullification of the breeder's right

21

Do you have any comments about the cancellation and nullification provisions required by UPOV 91, and MBIE's additional proposals discussed in this section?

[Insert response here]

Extending coverage to algae

22

Do you have any comments to make about whether or not algae should be included within the definition of "plant" for the purposes of the PVR regime?

[Insert response here]

23

Provisional protection

Do you agree with our preferred option for dealing with provisional protection? If not, why not?

T&G supports retention of the status quo, in which the breeder can institute proceedings post-PVR grant for the period from the application filing date.

24

Transitional provisions

What is your view on the options presented here in relation to this issue? Are there alternatives we have missed?

How should transitional provisions apply to EDVs?

T&G supports Option 1.

Other comments

[Insert response here]

Submission to Ministry of Business, Innovation and Employment on its Options Paper on the Review of the Plant Variety Rights Act 1987

9 September 2019

INTRODUCTION

1. T&G Global Limited ("**T&G**") is grateful for the opportunity to submit on the Review of the Plant Variety Rights Act 1987 Options Paper (the "**Options Paper**").
2. T&G is a significant participant in New Zealand's fresh produce industry, operating at different levels of the supply chain in respect of various fresh produce varieties. T&G consolidates approximately 7 million cartons of pipfruit in New Zealand and represents over 30% of the New Zealand apple export volume. T&G also invests in new fresh produce varieties and is very focused on innovation and adding value. It is continually scouring the globe to discover new fresh produce varieties to bring reliability and excitement to the fresh produce sector.
3. T&G fulfils a number of roles in the New Zealand economy. It is a plant breeder, developer, licensee and licensor, and it has a strong vested interest in the continued success of growers, supply chain entities, marketers, and other individuals and groups who leverage innovation to generate economic value. Together with its partner growers, T&G grows fresh produce, including pipfruit, grapes, citrus, kiwifruit, asparagus, berries, summerfruit and tomatoes, in more than 20 countries around the world.
4. Over the years T&G has made significant investments in the development programmes for various plant varieties – growing strong and iconic branding for these varieties by ensuring high levels of quality / availability to market.
5. T&G supports the review of the Plant Variety Rights Act 1987 ("**PVR Act**") to recognise the Wai 262 recommendations, and considers that a strong, sensible and globally-aligned New Zealand PVR Act is essential to support not only continued grower profitability in New Zealand but also to foster continued innovation investment by providing a return on investment security. This ensures New Zealand remains an attractive market for leading innovation investment, especially in the premium produce that the global consumer demands.
6. This submission sets out T&G's views on key issues in the Options Paper. Its position on the full set of questions asked in the Options Paper is set out in the **appended** template.

EXECUTIVE SUMMARY

The broader review context

7. T&G is concerned that four simultaneous intellectual property-related reviews are taking place simultaneously, without any attempt to achieve coherence between them. These are:
 - (a) the Wai 262 report and related work;
 - (b) the omnibus Intellectual Property Laws Amendment Bill;

- (c) MBIE's consultation on the *Review of section 36 of the Commerce Act and other matters* (which considers the repeal of the Commerce Act 1986's intellectual property exemptions); and
 - (d) the current PVR Act review.
8. Failing to achieve coherence across these conceptually-linked reviews presents a high risk of the various reviews achieving materially worse outcomes for New Zealand consumers, innovators, growers, marketers and customers than the status quo.

Specific submissions on the Options Paper

UPOV 91

9. T&G supports New Zealand's regime being consistent with UPOV 91. This would:
- (a) meet New Zealand's obligations under the CPTPP; and
 - (b) bring New Zealand back in line with the other developed economies that have already acceded/given effect to UPOV 91.
10. T&G does not have a strong view as to whether New Zealand accedes or gives effect to UPOV 91, provided that the Government's ultimate choice allows for enough flexibility to:
- (a) meet its Treaty of Waitangi obligations; and
 - (b) ensure that the PVR regime remains fit for purpose into the future (bearing in mind that UPOV 91 is now nearly three decades old).

Treaty claims

11. T&G supports the inclusion of Treaty principles in the PVR Act.
12. A clearer definition of indigenous species of significance for Maori should be provided. Additionally, it will be important to receive clarification on:
- (a) what will constitute taonga species and kaitiaki; and
 - (b) how claims will be determined, and issues resolved, in the event that plant material is claimed to be taonga species and kaitiaki.

The compulsory licencing provision

13. The grace period after the granting of a PVR during which a compulsory licence application cannot be filed should logically be adjusted depending on:
- (a) the crop type; and
 - (b) the timeline within which the PVR owner is likely to be able to reap the benefit of the PVR.
14. The compulsory licence provisions in the PVR Act should be amended to restrict exports.
15. A compulsory licence should not be granted unless the applicant has made reasonable efforts to obtain a licence.

16. A public interest test should be adopted, and any other test is too narrow. A public interest test:
- (a) best gives effect to UPOV 91, and therefore international best practice;
 - (b) is the most intellectually coherent framework for determining whether a PVR should be restricted; and
 - (c) would best give effect to the Government's Treaty obligations.
17. S 21(3) is an international oddity that prejudices certain commercial models over others, and thereby distorts the market. Defences of the subsection are based on a misunderstanding of the distinction between economic and statutory monopolies. A public interest test would render s 21(3) unnecessary.

Rights over harvested material

18. It is important that rights over harvested material be extended to include harvested material, and products made from the harvested material, of protected varieties.
19. MBIE's concern that Option 3 would give rise to market power the misuse of which would be protected by the IP exemption in the Commerce Act is unfounded. It is also illogical to use the existence of that exemption as justification for rejecting an otherwise efficiency-enhancing option, while at the same time consulting on the repeal of that same exemption in a parallel MBIE review (the *Review of section 36 of the Commerce Act and other matters*).

Term of the right

20. T&G supports the grant of a PVR period being extended to a minimum of 25 years for trees and vines, and 20 years for all others respectively, with provision for extensions to the maximum term under specified conditions (i.e. to reflect the variety in question) (Option 3).

SUBMISSION ON THE BROADER REVIEW CONTEXT

21. T&G is concerned that that concurrent reviews/legal changes are taking place in respect of intellectual property policy settings simultaneously, but without sufficient focus on harmonising the policy objectives and balancing of competing interests across those reviews. In addition to the current review of PVRs:
- (a) the Waitangi Tribunal has prepared a report, Wai 262, which makes a series of recommendations as a starting point for thinking about the PVR Act from a Treaty perspective, and which forms part of a broader process by the Tribunal to develop a position on taonga plant species;
 - (b) submissions have recently closed on the omnibus Intellectual Property Laws Amendment Bill, which proposes to make amendments to the Patents Act 2013, the Trade Marks Act 2002, and the Designs Act 1953; and
 - (c) MBIE is currently consulting on a *Review of section 36 of the Commerce Act and other matters*. In addition to contemplating a reform of New Zealand's misuse of market power section, this review also considers whether the intellectual property ("IP") exemptions in the Commerce Act should be repealed. These provisions

exempt certain forms of IP-related conduct from the operation of certain competition laws.

22. The core considerations of each of these reviews trespass overtly onto the scope and operation of PVRs. So much so, that following Australia's recent repeal of the (roughly analogous) IP exemptions in its competition law, in the Australian Competition and Consumer Commission's Guidelines on the repeal of those provisions use the specific example of plant variety rights to demonstrate how its approach to enforcing competition laws may change post-repeal.¹
23. It is incoherent from a policy perspective to undertake reviews of conceptually interconnected policies simultaneously, without connecting up those reviews, and expressly acknowledging the disconnect is likely to significantly exacerbate the uncertainty for businesses, who must now navigate an IP landscape that has been subject to not one, but four recent unconnected reviews. The current approach presents a high risk of the various reviews achieving materially worse outcomes for New Zealand consumers, innovators, growers, marketers and customers than the status quo.
24. More specific examples of the adverse effects of allowing a disconnect to arise between these reviews are also highlighted in the body of this submission.
25. Fundamentally, and while appreciating that the timetable within which New Zealand must achieve compliance with the CPTPP is abridged, T&G requests that MBIE takes a more holistic approach to its concurrent reviews affecting the IP sphere, and strives for a clear and cohesive policy structure across all reviews that takes into account the relevant interests of affected parties.

SPECIFIC SUBMISSIONS ON THE OPTIONS PAPER

UPOV 91

26. UPOV 91 is an internationally-recognised benchmark of best practice in the PVR space. As it has previously submitted, T&G supports New Zealand's regime being consistent with UPOV 91. This would:
 - (a) meet New Zealand's obligations under the CPTPP; and
 - (b) bring New Zealand back in line with the other developed economies that have already acceded/given effect to UPOV 91.
27. T&G does not have a strong view as to whether New Zealand accedes or gives effect to UPOV 91, provided that the Government's ultimate choice allows for enough flexibility to:
 - (a) meet its Treaty of Waitangi obligations; and
 - (b) ensure that the PVR regime remains fit for purpose into the future (bearing in mind that UPOV 91 is now nearly three decades old).

¹ Australian Competition and Consumer Commission, Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth), 30 August 2019, accessed at <https://www.accc.gov.au/publications/guidelines-on-the-repeal-of-subsection-513-of-the-competition-and-consumer-act-2010-cth>, at Example 3.

Treaty claims

28. As it has expressed previously, T&G supports the inclusion of Treaty principles in the PVR Act. However, as with any material change to an existing law, it will be vital that the relevant language incorporating those Treaty rights are clearly defined. In particular, T&G considers that a clearer definition of indigenous species of significance for Maori should be provided. Additionally, it will be important to receive clarification on:
- (a) what will constitute taonga species and kaitiaki; and
 - (b) how claims will be determined, and issues resolved, in the event that plant material is claimed to be taonga species and kaitiaki.
29. T&G considers that the relevant Treaty rights reflected in the PVR Act should be restricted to indigenous plant materials as defined at [102(a)] of the Options Paper.
30. Until the uncertainties described above are more satisfactorily addressed, it is difficult for T&G to state which of MBIE's listed options is preferable, except to note that if clarity on the above issues can be resolved, it is likely that Option 1 will be optimal.

The compulsory licencing provision

The grace period should be adjusted for different varieties

31. T&G does not support Option 1. It submits that consistent with Option 3, the grace period after the granting of a PVR during which a compulsory licence application cannot be filed should logically be adjusted depending on:
- (a) the crop type; and
 - (b) the timeline within which the PVR owner is likely to be able to reap the benefit of the PVR.
32. As MBIE has previously been advised, hard wood crop types take longer to reach a level of maturity that allows the PVR holder to harvest sufficient propagating material to place it on the market.
33. T&G notes MBIE's view that the Commissioner would be unlikely to grant a compulsory licence in circumstances where the PVR holder is not able to produce reasonable quantities of propagating material available for purchase. However, T&G does not agree that it is appropriate to leave this question to the discretion of individual Commissioners. In the interests of certainty and transparency, it is preferable for the grace period to be bespoke according to variety.

The compulsory licence provisions in the PVR Act should be amended to restrict exports

34. Particularly given the small size of the New Zealand market, T&G considers it important to have protections against the export of propagating material to propagate the variety. This allows innovators to invest in the development and commercialisation of material without fear of misappropriation.

A compulsory licence should not be granted unless the applicant has made reasonable efforts to obtain a licence

35. T&G agrees with MBIE's proposal at [360] that the PVR Act provide that a compulsory licence must not be granted unless the applicant can show that their reasonable efforts to obtain a licence from the PVR owner on reasonable terms and conditions have been unsuccessful. This proposal:
- (a) is consistent with other jurisdictions, including the United Kingdom, Singapore, Japan, and the EU; and
 - (b) more appropriately calibrates the threshold that a third party should be required to meet in order to obtain a compulsory licence.

"Public interest" is the right test; any other test is too narrow

36. T&G has previously submitted in favour of a public interest test. There are numerous benefits of such a test:
- (a) **It best gives effect to UPOV 91, and therefore international best practice:** Public interest language is expressly included in UPOV 91. In a material change of language from its counterpart in UPOV 78, Article 17 of UPOV 91 provides:

17 Restrictions on the exercise of the Breeder's Right

- (1) [Public interest] Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest.

Jurisdictions which became UPOV members or which made substantive amendments to their PVR regimes after 1991 have consequently reflected this best practice test in their national laws:

- (i) In the EU (which became a member of UPOV in 2004), Article 21 of the relevant legislation states:

Compulsory licences shall be granted to one or more persons by the Office, on application by that person or those persons, **but only on the grounds of public interest** and after consulting the Administrative Council...

The Implementing Rules (Commission Regulation (EC) No 874/2009) of Regulation 2100/94, established under Article 114, provide:

- 1. The decision to grant a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall contain a statement setting out the public interest involved.
- 2. The following grounds may in particular constitute a public interest:
 - (a) The protection of life or health of humans, animals or plants;
 - (b) The need to supply the market with material offering specific features;

- (c) The need to maintain the incentive for continued breeding of improved varieties.
 - (ii) In Japan, the Plant Variety Protection and Seed Act 1998 states that a person may seek a compulsory exploitation right "where the exploitation of the variety is especially necessary for the reason of the public interest".²
 - (iii) In Singapore, the Plant Varieties Act (2004) states that a compulsory licence will be granted where "the grant of compulsory licence is in the public interest."
- (b) **A public interest test is the most intellectually coherent framework for determining whether a PVR should be restricted:** As MBIE is aware, IP rights including PVRs are statutory monopolies granted to incentivise innovation, on the reasoning that such innovation is in the public interest. However, as Sapere correctly observes in its economic report to MBIE on this review, there can be a tension between the interests of the IP owner (which requires a statutory monopoly as incentive to innovate) and follow-on innovators (who may require access to the creation in order to develop secondary innovations). A compulsory licence regime sets the point at which it is socially optimal to undercut the IP owner's interest in favour of the follow on innovator(s). Where the setting of access rules necessarily must weigh these competing claims in a way where one party's gain is another's loss, the appropriate question to ask is what calibration best serves the public interest.

T&G does not agree with MBIE's suggestion that the current s 21 language achieves the public interest. Currently, s 21 prescribes a blunt test that asks only whether the relevant reproductive material is available. It does not ask whether that material should be made available, or in other words, if the public interest is served by its availability. This is the distinction between the NZ regime and its more sophisticated EU counterpart, which, as noted above, sets out three criteria against which the public interest is assessed in respect of the issuance of a compulsory licence:

- (i) the protection of life or health of humans, animals and plants;
- (ii) the need to supply the market with material offering specific features; and
- (iii) the need to maintain the incentive for continued breeding of improved varieties.

The distinction is important. The New Zealand test rests on the assumption that if material is unavailable then the public interest must be served by issuing a compulsory licence. This assumption does not necessarily logically follow, particularly when paired with s 21(3) (see our commentary below), and the test therefore necessarily fails to achieve the right calibration of the balance between the rights of IP holders and follow-on innovators, because it is logically bound to result in situations where an IP holder's PVRs are curtailed purely on grounds of unavailability, despite the fact that availability is neither necessary nor in the public interest.

² <https://www.upov.int/upovlex/en/details.jsp?id=6977>

As an example, consider the recent EU decision NCL 001 (16 March 2018).³ In that case, the applicant had applied for a compulsory licence for the 'Ben Starav' blackberry variety on the basis that (among other factors) it had unique characteristics that were not met by other varieties, and that there was a corresponding need to supply the market with that cultivar. In New Zealand it could be argued that evidence of the unavailability of the Ben Starav variety on the New Zealand market in reasonable quantities and of reasonable quality would be sufficient to require the Commission to order a compulsory licence.

In the EU however, as observed by Frantzeska Papadopoulou:⁴

Taking into consideration that it has been shown that there are a number of available blackcurrant varieties, and that the characteristics of importance from a public interest perspective are shared by several other varieties of blackcurrant, the CPVO concluded that there is no need to supply the market with [the cultivar in question].

The EU approach is clearly more optimal. It looks past the inadequate proxy of unavailability to ask whether the public interest would in fact be served by greater availability (i.e. whether the interests of all stakeholders indicate that the right outcome for New Zealand is availability) and, in so doing, strikes a much more coherent balance between the rights of IP holders with those of follow-on innovators.

- (c) **A public interest test would better give effect to the Government's Treaty obligations:** An EU-style public interest test would have the flexibility to incorporate New Zealand-specific public interest factors in its accompanying guidance. In particular, it would be a simple matter to include the interests of tikanga Maori as a factor to be considered when assessing the public interest.

37. In light of the above, T&G supports the inclusion of a public interest test modelled on the EU's test, which could add in the first limb relevant Treaty considerations as follows:

The public interest is assessed in respect of the issuance of a compulsory licence by balancing the following three criteria:

- (i) the protection of obligations of the Crown under the Treaty of Waitangi, or of life or health of humans, animals and plants;
- (ii) the need to supply the market with material offering specific features; and
- (iii) the need to maintain the incentive for continued breeding of improved varieties.

38. Whichever test is adopted, T&G submits that a greater level of statutory guidance is required as to when and how Commissioners should exercise their discretion to grant a compulsory licence. Given the importance of the role and the balancing of commercial as well as consumer interests, T&G submits that experience in the plant-based IP sphere must be a prerequisite for appointment as Commissioner.

³ <http://ipkitten.blogspot.com/2018/04/public-interest-in-plant-variety-rights.html>

⁴ Ibid.

Section 21(3) should be repealed

39. Section 21(3) is a peculiarity in international PVR legislation, which appears to be unique to New Zealand. T&G submits that s 21(3) is flawed in several respects.
40. First, the "form over function" approach of s 21(3) has the practical effect of dis-incentivising certain commercial models over others. In particular, many of the commercialisation models adopted by PVR owners recognise the value that is achieved by maintaining sufficient control over the licencing so that appropriate standards and levels of quality can be brought to bear, maximising the brand and overall value of the complete product. The prospect of third parties free riding on this investment, and potentially degrading the standards and quality levels established by the PVR holder, significantly lessens the confidence that PVR holders can have in earning a return on investment and maintaining strong brand value, and therefore lessens the likelihood that such investment will occur at all. Many PVR holders therefore manage both the growing of the plants and the harvested material, using contracts to manage relationships. Retaining s 21(3) means that these rational commercial models will effectively result in a PVR being cut to three years, which is insufficient to achieve a reasonable return.
41. Second, the claimed justification for favouring retention of s 21(3) at [393] derives from concern that certain commercial arrangements could lead to higher prices for consumers because "the seller may have an effective monopoly over produce of that species".
42. In order to charge supracompetitive rents a firm must supply a product for which no readily substitutable alternative exists, such that it is possible to raise prices without fear of losing customers to an alternative product. This is an economic monopoly. PVRs, and all IP rights, only convey a statutory monopoly, which is occasionally, but rarely, coterminous with an actual economic monopoly. This is not a mistake that would be made in considering reform of s 36 of the Commerce Act. In this respect, this misunderstanding of the economic, as compared with statutory monopoly effect of an intellectual property right demonstrates why it is so important to ensure that the various intellectual property reforms are run with a consistent policy framework.
43. The distinction also provides another example of the desirability of a public interest test. In asking whether market needs to be supplied with the variety in question, the test would focus on protecting against the harms of the economic monopoly, rather than the lack of prima facie harm of a statutory monopoly with no economic detriments attached. This is demonstrated by the EU compulsory licencing decision referenced above. As noted by Frantzeska Papadopolou:⁵

An important question that the CPVO answered is whether alternatives to the variety are an important part of the evaluation whether to grant a compulsory license. The CPVO concluded that although the determination of the existence of alternatives belongs to competition law (theory of essential facilities), it is also important for the determination of whether the requirements for the grant of a compulsory license are fulfilled.

In fact, where alternatives exist, the need to supply the market with the specific plant variety becomes much more difficult to prove. In support of this argument, the CPVO points to the ruling of the German Federal Court of Justice ruling of 11 July 2017 regarding a patent on the antiviral agent "Raltegravir". There, the Court stated that "a compulsory licence cannot be granted if the public interest

⁵ Ibid.

can be satisfied with other, essentially equivalent alternatives". It is interesting how the CPVO chose to seek guidance by reference to parallels between patents and intellectual property rights. Moreover, this decision points to the growing importance of competition law principles in the application and interpretation of intellectual property law provisions.

44. With a public interest test, the perceived need for s 21(3) – i.e. to enable the public to obtain the benefit of 'locked up' varieties – would therefore fall away, as would its corresponding distracting focus on the form of the commercial model employed by the IP holders to commercialise their products.
45. T&G submits that it is not appropriate to rely on the fact that there have been few applications under s 21 as evidence that the concerns of breeders are unfounded. To the extent that applications have historically been rare, T&G considers that this is attributable more to a lack of understanding within the industry as to the ability to apply for a compulsory licence, rather than to a lack of inclination. As a result of the Wai 262 and PVR Act reviews however, it is reasonable to assume that public understanding of the compulsory licence provisions has been materially increased, which is likely to stimulate the rate of future applications. Indeed, T&G understands that this point was specifically made at the recent hui at which MBIE was present.

Rights over harvested material

46. T&G supports Option 3 as set out at [273] of the Options Paper.
47. It is important that rights over harvested material be extended to include harvested material, and products made from the harvested material, of protected varieties. Increasingly, commercial strategies rely not simply on the sale of propagating material but the commercialisation of harvested material to consumers or processors. An extension of the right over harvested material is therefore essential to preserve and strengthen the viability of these business models. It would also allow PVR owners to ensure the end-to-end quality and reputation of that harvested material, and therefore incentivise PVR owners to invest further in those aspects.
48. MBIE's concern in relation to this option appears to be that PVRs exercise control over the harvested material of protected varieties through contractual arrangements, which, despite those arrangements generally being subject to the misuse of market power provision of the Commerce Act, may be exculpated in the specific case of PVRs by virtue of s 36(3) of the Commerce Act (which provides an exception to the misuse of market power provision for actions taken to enforce an IP right).
49. This example clearly demonstrates T&G's concern expressed above that several reviews affecting IP rights are being conducted simultaneously, with no effort to achieve coherence between those reviews. As set out in paragraphs 19 and 21(c) above, MBIE is consulting on the removal of the Commerce Act's IP exemptions, including s 36(3). It is therefore entirely incoherent to use the continued existence of s 36(3) as the key justification for rejecting a proposed statutory amendment in another review being performed concurrently by MBIE. Option 3 provides enhanced certainty for businesses, and is likely to encourage them to invest further in product quality and branding. It should not be rejected by MBIE on the basis of s 36(3) of the Commerce Act, at a time when MBIE is simultaneously consulting on the repeal of that subsection.
50. Contradictions of this nature make it vitally important that all of MBIE's concurrent IP-related reviews "talk to each other" and strive for some kind of overarching coherence.

Term of the right

51. T&G supports the grant of a PVR period being extended to a minimum of 25 years for trees and vines, and 20 years for all others respectively, with provision for extensions to the maximum term under specified conditions (i.e. to reflect the variety in question) (Option 3). Investment in some varieties is naturally longer than others. For example, apple trees have a longer economic life than blueberry bushes, suggesting that logically the investment analysis will be different, and the corresponding incentive structure (i.e. the PVR) should be similarly different.

CONCLUSION

52. T&G is grateful for the opportunity to submit to MBIE on the Options Paper.
53. All enquiries on the submission may be directed to:

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