LEGAL ADVICE

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3 May 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Plant Variety Rights Bill

Purpose

1. We have considered whether the Plant Variety Rights Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21920/3.6). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 19 (freedom from discrimination), and s 21 (unreasonable search and seizure). Our analysis is set out below.

Summary

4. The Bill replaces the Plant Variety Rights Act 1987 (the PVR Act) to update and modernise the plant variety rights regime and to give effect to the obligations of the Crown under the principles of the Treaty of Waitangi.

5. Our analysis largely focuses on the right to freedom of expression and the right to freedom from discrimination. We considered whether the various provisions of the Bill that require individuals to provide or disclose information in relation to 'plant variety rights' (PVRs) and compulsory licences, and in relation to hearings conducted by the Commissioner of Plant Variety Rights (the Commissioner), engage the right to freedom of expression. We also considered whether the appointment of a Māori plant variety committee and the qualifications for membership of this committee could constitute discrimination on the basis of race or ethnic origins.

6. We have concluded that, to the extent that the Bill limits these rights and freedoms under the Bill of Rights Act, these limits are justified, and the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

7. The PVR Act provides for the grant of intellectual property rights, called PVRs. Plant breeders and developers may apply for PVRs over new plant varieties they have developed. The purpose of the plant variety right (PVR) regime is to incentivise the development and importation of new plant varieties. The PVR Act is now over 30 years old and in need of modernisation to reflect the significant changes in the plant breeding industry over this time.

8. This Bill replaces the PVR Act in providing a framework for protecting intellectual property rights in plant varieties. The objective of the Bill is to protect intellectual property rights in

plant varieties and promote innovation and economic growth, by incentivising the development and use of new plant varieties. The aim is to provide an appropriate balance between the interests of plant breeders, growers and others, so that there is a net benefit to society as a whole.

9. The purpose of the Bill, as outlined in cl 3, is to:

   a. revise and consolidate the law on PVRs, in light of the changes made to the International Convention for the Protection of New Varieties of Plants in 1991 (UPOV 91)[1]; and

   b. give effect to the obligations of the Crown under the principles of the Treaty of Waitangi to recognise kaitiaki relationships with taonga species and mātauranga Māori in New Zealand law.[2]

10. The Bill provides for certain other matters, not directly related to UPOV 91, to modernise the regime.

Consistency of the Bill with the Bill of Rights Act

Section 14 - Freedom of expression

11. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.[3]

12. Various provisions of the Bill require individuals to provide or disclose information and these provisions *prima facie* limit the freedom of expression under s 14 of the Bill of Rights Act.

13. Under s 5 of the Bill of Rights Act, a limit on a right or freedom may be justified where the limit seeks to achieve, and is rationally connected to, a sufficiently important objective, impairs the right or freedom no more than reasonably necessary to achieve the objective, and is otherwise in proportion to its importance.[4]

Disclosure of information

14. Clauses 46, 69 and 107 require individuals to provide or disclose information in relation to PVRs and compulsory licences.[5] Many of these provisions substantially re-enact existing obligations under the PVR Act. The provisions are often related to specific timeframes that,

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[1] The PVR Act gives effect to the 1978 version of the International Convention for the Protection of New Varieties of Plants. Under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership, New Zealand is required to either accede to UPOV 91 or "give effect" to UPOV 91.

[2] The Waitangi Tribunal report Ko Aotearoa Tēnei (Wai 262) framed the Crown's Treaty obligations in the Plant Variety Rights regime as a requirement to provide a reasonable degree of protection for kaitiaki relationships with plants of taonga species.

3 *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

[4] See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

[5] A compulsory licence allows a licensee to carry out acts covered by a grant without the permission of the PVR owner.

if not met, may result in cancellation or nullification of an application. Information given to the Commissioner under cls 46 and 107 must be made publicly available.[6]

15. To the extent that such provisions engage the right in s 14, we consider that they are rationally connected to the Bill's objective of protecting intellectual property rights in plant varieties. We also consider that they are proportionate and limit the right to freedom of expression no more than is reasonably necessary. The information required under the Bill is regulatory in nature and of limited expressive value, applying only to those who are seeking to utilise the PVR regime. Further, the information is necessary to assist the Commissioner in performing their functions, in particular to the function of determining applications for PVRs and compulsory licences.

16. The requirement that certain disclosed information be published by the Commissioner, may disincentivise breeders from providing the information due to concerns around advantaging the competition. However, we consider the principle of transparency to be more important to the overall purpose of the PVR regime, as this may encourage flow-on innovation and growth for the regime.

Hearings and summons

17. Clause 118 provides that, before exercising a discretion under the Bill or regulation adversely to any applicant or other person, the Commissioner must give the person a reasonable opportunity to be heard.

18. Notably, cl 121 empowers the Commissioner to issue a summons to a person requiring that person to attend a hearing before the Commissioner to give evidence and produce documents or other information relevant to the hearing. It is an offence, under cl 124, to fail to provide this information, without sufficient cause. A person who commits such an offence is liable for a fine not exceeding $2,000 on conviction.

19. The Bill only requires information necessary to assist the Commissioner in performing their functions in relation to these hearings and only applies to those who are in a position to give evidence or produce information where the Commissioner intends to exercise their discretion. We consider that cl 121 is intended to strengthen the ability for affected parties to be heard, which could act as an additional safeguard to ensure that the Commissioner is exercising their discretion appropriately.

20. We therefore consider that the power to issue a summons is rationally connected and proportionate to the Bill's objective of protecting intellectual property rights in plant varieties and limit the right to freedom of expression no more than is reasonably necessary.

21. Overall, we consider that the limits imposed by the Bill on the freedom of expression are justified under s 5 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

22. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).

[6] Although, under cl 107 the information does not need to be made publicly available if the Commissioner has reasonable grounds to believe the information should not be made publicly available.

23. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:[7]

    a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act; and, if so

    b. does the distinction involve disadvantage to one or more classes of individuals?

24. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.[8]

Appointment of a Māori plant variety committee

25. Subpart 2 of Part 5 of the Bill provides for the establishment of a Māori plant varieties committee (the Committee). The Committee's primary function is to assess the impact of a grant of PVR on kaitiaki relationships and make a determination on whether or not the PVR application should proceed as a result of that assessment.[9]

26. We note that there is no obligation to appoint a committee to assess impact on non-Māori traditions, nor is the Committee instructed to advise on how a PVR regime may affect non-Māori traditions, which could be of equal importance to non-Māori groups. At first glance, it could appear that the creation of the Committee could constitute discrimination on the basis of race or ethnic origins. However, for the reasons that follow, we do not consider that this is the case.

27. First, the establishment of the Committee does not result in a disadvantage to any class of people. The role of the Committee is not to provide a specific advantage to Māori, but to ensure that the regime provides protection for kaitiaki relationships with taonga species of plants, thereby upholding the Crown's obligations under the Treaty of Waitangi. There is a general public interest in ensuring that the Commissioner is appropriately advised of all relevant considerations in their decision-making.

28. Second, Māori have a broader right to active participation within the Māori-Crown partnership; a right that arises from the Treaty of Waitangi. The Treaty creates a basis for civil government, based on protections and acknowledgement of Māori rights and interests within New Zealand's shared citizenry.[10] The Court of Appeal has also commented on this right in *New Zealand Maori Council v Attorney-General.*[11] The Court said that "[t]he duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent."[12]

29. Finally, the Cabinet Manual states that "in some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one

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[7] See, for example, *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

[8] See, for example *McAlister v Air New Zealand* above n 6 at [40] per Elias CJ, Blanchard and Wilson JJ.

[9] Plant Variety Rights Bill, cl 57: the Commissioner must consider, but is not bound by, the advice given by the Committee.

[10] Cabinet Office Circular CO (19) 5.

[11] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 647.

[12] At 664.

another is appropriate."[13] Measures designed to afford Māori their right to partnership are not disadvantageous to any comparable group. We consider that appointing the Committee is an appropriate recognition of the Māori-Crown relationship.

30. For these reasons we consider that the Bill does not engage the right to freedom from discrimination under s 19 of the Bill of Rights Act.

Membership of Māori plant varieties committee

31. Clause 55 of the Bill provides for the appointment and membership of the Committee. Relevantly, cl 55(3) provides that a person must not be appointed as a member of the committee unless, in the opinion of the Commissioner, the person is qualified for appointment. In determining this, the Commissioner must have regard to the person's knowledge of mātauranga Māori (Māori traditional knowledge), tikanga Māori (Māori protocol and culture), te ao Māori (the Māori world view), and taonga species.

32. This provision could be seen as giving rise to indirect discrimination on the basis of race or ethnic origins, because Māori are more likely than non-Māori to have knowledge of mātauranga Māori, tikanga Māori, te ao Māori, and taonga species. This could arguably disadvantage non-Maori in their ability to be appointed as a member of the Committee.

33. To the extent that this could be potential discrimination, we consider it to be justified because it is important that members of the Committee are qualified to provide advice to the Commissioner on the impact a PVR application may have on kaitiaki relationships and whether an application should proceed as a result of that assessment - a key consideration for the Crown when meeting its obligations under the Treaty of Waitangi. Without this knowledge, a member of the Committee would have difficulty performing this function. Further, the requirement does not prevent non-Māori from being appointed, it simply requires them to have the relevant knowledge.

Section 21 – Right to be secure against unreasonable search and seizure

34. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search or seizure, including of property. However, this section has not been interpreted as a general protection of property rights, in the absence of reasonable expectations of privacy.[14]

35. Part 7 of the Bill provides a process where the Commissioner can grant a compulsory licence for a plant variety to a person without the consent of the PVR holder. The compulsory licence has the effect as if it were a licence entered into by agreement between the PVR holder and the licensee.[15] Because a PVR is personal property,[16] this potentially affects the PVR holder's property rights.

36. However, there does not appear to be significant privacy interests in relation to rights to use specific plant varieties for commercial purposes. We conclude that the granting of compulsory licences under Part 7 does not engage s 21 of the Bill of Rights Act.

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[13] Cabinet Manual 2017, p. 2.

[14] See *R v Williams* [2007] NZCA 52 at [48]; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) [18.7.1].

[15] Plant Variety Rights Bill, cl 101(4).

[16] Clause 19.

Conclusion

37. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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