

19 April 2022
Hon Dr David Clark
Minister of Commerce and Consumer Affairs

By email: d.clark@ministers.govt.nz

Tēnā koe Minister Clark

Further feedback on the Plant Variety Rights Bill

1. I am writing to you as President of the New Zealand Law Society | Te Kāhui Ture o Aotearoa, regarding the Plant Variety Rights Bill (**Bill**) which is currently awaiting second reading.
2. Last year, the Law Society, with the assistance of its Intellectual Property Law (**IPL**) Committee, made a submission on that Bill with input from the IPL Committee (a copy of the submission is appended to this letter). That submission included a recommendation to amend clause 14 of the Bill which provides that a plant variety right (**PVR**) gives the PVR holder the exclusive right to undertake, or authorise another person to undertake, various restricted acts which are set out in subclause (3).
3. We recently stated in an email to Zespri and T&G Global (which we understand was provided to you) that we maintained that recommendation. However, upon further consideration we now revise our recommendation and propose a more limited clause.

Original recommendation and Court of Appeal decision

4. The Law Society submitted that the word “authorise” in clause 14 should be clarified to avoid the problems with the Plant Variety Rights Act 1987 illustrated in the *Zespri v Gao* High Court decision.¹ We recommended amending clause 14 by inserting the following new subclause (4):

(4) Authorising another person to undertake a restricted act includes:

- a. Where the restricted act occurred in New Zealand but the authorising party was outside New Zealand at the time of authorising; and*
- b. When the authorising party was in New Zealand at the time of authorising but the restricted act occurred outside the jurisdiction and would have been a restricted act had it occurred in New Zealand.”*

5. The *Zespri* matter was before the Court of Appeal at the time our submission was filed. The Court has since issued its decision,² and determined that the authorisation of acts which

¹ *Zespri Group Limited v Gao & Ors* [2020] NZHC 109.

² *Gao v Zespri Group Ltd* [2021] NZCA 442.

occur outside New Zealand are not justiciable before the New Zealand Courts (even if the authorisation is made by someone in New Zealand).

6. In making that determination, the Court of Appeal looked to the provisions of the current Plant Variety Rights Act which do not apply extra-territorially, and only provide for the grant of exclusive rights to authorise others to sell, and to propagate a plant variety commercially in New Zealand. Importantly, the Court then considered the text of the 1978 International Convention for the Protection of New Varieties of Plants (**1978 Convention**).³ The Court concluded that PVRs are limited territorially, and the grant of a PVR in one member state does not imply the grant of a PVR (and consequently, the right to authorise a person to undertake a restricted act) in another member state.
7. We acknowledge that the Plant Variety Rights Bill seeks to give effect to a revised iteration of the 1978 Convention (**the 1991 Convention**).⁴ However, the 1991 Convention retains the above position on the territorial nature of PVRs.⁵ Accordingly, the Bill (and its recognition of the 1991 Convention) will not expand the courts' jurisdiction to make decisions in respect of restricted acts which occur outside New Zealand, the Courts' position on that jurisdiction having now been settled in *Gao*.

Revised recommendation

8. As a result, the Law Society withdraws its previous recommendation to amend clause 14 to recognise that authorisation includes restricted acts which have been authorised by a person in New Zealand but occur outside of New Zealand (proposed new clause 14(4)(b) in paragraph 4 above).
9. We now suggest that clause 14 should be amended to only include the following new subclause 3A:
 - (3A) *Authorising another person to undertake a restricted act includes where the restricted act occurred in New Zealand but the authorising party was outside New Zealand at the time of authorising.*
10. This amendment would expressly grant the courts jurisdiction over restricted acts which occur in New Zealand and have been unlawfully authorised by an individual who is outside New Zealand.⁶ We believe this amendment will ensure that the principal actors who actively solicit acts in New Zealand, or fund such activities, are not immune from liability for authorising infringement.
11. The Law Society's written submission canvassed similar issues which currently arise under the Copyright Act 1994 because of unclear drafting as to what constitutes 'authorisation' under that Act (and we note that MBIE's review of the Copyright Act recognised that these

³ International Convention for the Protection of New Varieties of Plants (2 December 1961, revised on 23 October 1978).

⁴ International Convention for the Protection of New Varieties of Plants (2 December 1961, revised on 19 March 1991).

⁵ See, for example, Article 11, which continues to provide that a breeder who has filed an application for the protection of a variety in one member state enjoys a right of priority for the same variety in other member states.

⁶ This would include, for example, circumstances where potential growers in competing countries coerce or pay growers in New Zealand to smuggle plant varieties out of New Zealand.

issues need to be addressed).⁷ The lack of clarity in the Plant Variety Rights Bill will result in similar shortcomings if clause 14 is enacted in its current form.

12. We therefore invite you to consider our revised recommendation and make appropriate amendments to the Bill to ensure there is clarity and certainty as to the scope of what could be considered to be lawful authorisation under the proposed new legislation.
13. We would be happy to meet with you to discuss this feedback further, and to provide further feedback on any revised drafting or new clauses of the Bill. Please do not hesitate to contact us via the Law Society's Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).
14. As a courtesy, a copy of this letter has also been provided to the Economic Development, Science, and Innovation Select Committee.

Nāku iti noa, nā



Jacquie Lethbridge
President

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Encl: Law Society submission on the Plant Variety Rights Bill, dated 1 July 2021.

⁷ Ministry of Business, Innovation and Employment *Issues Paper: Review of the Copyright Act 1994* (November 2018) at [190].