

Presentation to the WIPO Seminar on Intellectual Property and Genetic Resources, January 20 – 22 2021

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INTRODUCTION

This presentation discusses the consultation on disclosure of origin requirements for patent applications that was conducted by the New Zealand Ministry of Business, Innovation and Employment in late 2018. New Zealand's patent legislation currently does not contain any disclosure of origin provisions.

CONSULTATION ON DISCLOSURE OF ORIGIN REQUIREMENTS

1. In September 2018 the Ministry released a consultation document on possible options to introduce a disclosure of origin regime in New Zealand's patent legislation¹.
2. Also released at the same time, was an economic evaluation of the disclosure of origin scenarios discussed in the consultation document².

The Consultation Document

3. The consultation document presented three options for disclosure of origin:
 - i. Disclosure of country of origin, if known: patent applicants would be required to disclose the country of origin of any genetic resources and/or traditional knowledge used in their inventions. If the country of origin is not known or not applicable, applicants may make a declaration to that effect.
 - ii. Disclosure of source: as in option (i) applicants must still disclose the country of origin. If this is not known, or not applicable, they would have to make a declaration to that effect, *and* disclose known information about the source of the genetic resources. For example, the source might be a gene bank. Where traditional knowledge is involved, applicants would have to disclose the indigenous people or local community who supplied the knowledge. If this information is not known or applicable, the source of the knowledge (for example a publication) would have to be disclosed.
 - iii. Disclosure of compliance with access and benefit sharing requirements: Applicants would be required to disclose:

¹ The discussion document can be found at: <https://www.mbie.govt.nz/dmsdocument/3706-disclosure-of-origin-discussion-paper>

² The economic evaluation can be found at: <https://www.mbie.govt.nz/assets/137b70a333/castalia-economic-assessment-evaluation-disclosure-origin-requirements.pdf>

- a. the country of origin of the genetic resources, if applicable
 - b. the indigenous people or local community who supplied the traditional knowledge, if applicable; and
 - c. evidence of compliance with access and benefit sharing legislation of the country of origin of the genetic resources and/or traditional knowledge, if applicable.
4. The Ministry indicated that it preferred option (ii). Option (ii) was considered to strike a good balance between the provision of quality information about the use of genetic resources and traditional knowledge through the patents regime, without creating a significant deterrent or burden for patent applicants.
 5. The costs of this option over 30 years, as estimated in the economic study, was relatively low, and the likely (intangible) benefits of disclosure of origin discussed in the consultation document were likely to outweigh them.
 6. New Zealand currently does not have an access and benefit sharing regime applying to genetic resources and traditional knowledge. If, in the future, New Zealand were to introduce such a regime, this may mean that a disclosure regime like option (iii) would be more appropriate for New Zealand.

The Economic Evaluation

7. The economic evaluation carried out as part of the consultation exercise provides a cost-benefit analysis (CBA) of the three disclosure of origin scenarios presented in the consultation document.
8. The CBA considered the likely costs of implementing each of the three scenarios set out in the consultation document. In particular, the evaluation considered the costs of the three scenarios to:
 - the Intellectual Property Office of New Zealand (which has responsibility for examining applications for patents);
 - New Zealand applicants for patents;
 - Foreign applicants for patents in New Zealand.
9. For all of the options, the costs (estimated over 30 years) were relatively low and should not impose a significant burden on patent applicants or on the Intellectual Property Office. The estimated costs of options (i) and (ii) were about the same, while option (iii) was about five times higher (but still low when taken over a 30 year period).

Consultation meetings

10. In addition to releasing the consultation document, the Ministry also conducted a number of face-to-face meetings around New Zealand with representatives of Māori

(New Zealand's indigenous people). Meetings were also held with other interested persons including researchers and patent attorneys.

What did submitters say?

11. Most submitters, including submissions from Māori, agreed with the Ministry's assessment of the issues, and agreed with the Ministry's preferred option³. Some submitters, including some Māori submitters considered that the costs of the various options was overstated.
12. Submissions from Māori considered that option (ii) was the minimum acceptable standard to protect traditional knowledge. They considered that New Zealand should aspire to option (iii).
13. Many non-Māori submitters also saw option (ii) as an interim step to a full domestic access and benefit sharing regime. New Zealand does not currently have an access and benefit sharing regime for genetic resources and traditional knowledge. There was a strong preference that a disclosure of origin regime be progressed in the context of work to develop a comprehensive bioprospecting policy for New Zealand.

WHAT IS HAPPENING NOW?

14. In June 2019, the New Zealand government agreed that New Zealand support an international disclosure of origin requirement that:
 - i. Facilitates better-informed decision making in states' patent regimes, and the increased availability of quality information about the uses and users of genetic resources and traditional knowledge;
 - ii. Minimises additional compliance and administrative costs for patent applicants
 - iii. Aligns with the objectives of the Convention on Biological Diversity and the United Nations Declaration on the Rights of Indigenous Peoples;
 - iv. Effectively balances the need to create clear obligations for states with the need to ensure sufficient flexibility, acknowledging the varying domestic contexts and drivers for implementing disclosure regimes among WIPO member states.
15. The Ministry considers that the IGC Chair's text on genetic resources meets the objectives identified above.

Treaty of Waitangi Flora and Fauna and cultural and intellectual property claim

16. The development and implementation of a disclosure of origin regime for New Zealand is being pursued as part of the government's response to recommendations made following a claim made under the Treaty of Waitangi. The

³ A summary of the submissions, together with the submissions can be found at:
<https://www.mbie.govt.nz/have-your-say/disclosure-of-origin-discussion-document/>

1840 Treaty of Waitangi is a treaty between the British Crown and representatives Māori.

17. In 1975, the Waitangi Tribunal was established to allow Māori to make a claim that they have been disadvantaged by any legislation, policy or practice of the Crown since 1840.
18. In 1991, a claim known as the flora and fauna and cultural and intellectual property claim was filed with the Tribunal. The Waitangi Tribunal's report into this claim, *Ko Aotearoa Tēnei*, was published in July 2011⁴. Among the Tribunal's recommendations is that the New Zealand government implement a disclosure of origin requirement in New Zealand's patent legislation.
19. The New Zealand government subsequently agreed to the development of a whole-of-government approach⁵ to deal with the issues raised in *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. This approach will deal with all of the issues raised in the report, including consideration of an access and benefit sharing regime. The implementation of a disclosure of origin regime for New Zealand's patent legislation is included in this approach. Work on this approach is ongoing.

[End of document]

⁴ The report can be found at https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356054/KoAotearoaTeneiTT1W.pdf

⁵ A summary of this approach can be found at: Te Pae Tawhiti: WAI 262 <https://www.tpk.govt.nz/en/a-matou-kaupapa/wai-262-te-pae-tawhiti>