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Submission template

Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues

Your name and organisation

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Responses to questions in the discussion document

Treaty of Waitangi issues

1	**Definitions** Do you agree with our proposed definition of 'indigenous plant species'? If not, do you have an alternative to propose?
	*No - As per our original submission, the definition of terms is central to the success of the review. We submit that the words **Taonga** and **Kaitiaki** be defined as opposed to the suggested "indigenous and non-indigenous species of significance"* *There should be a register of **Taonga*** *The difficulty for breeders is that in the case of **Kaitiaki** there is no definition whether it be hapu, iwi, regional or national so it invites multiple engagements which are unwieldy, costly and further entitlements may only arise after the application is filed and others become aware of it* *Furthermore – identifying who the **Kaitiaki** is will be of major contention and difficult for the average breeder to ascertain, particularly where species have been obtained from multiple sources, bred, cross bred and widely commercialised*

2	**Definitions** Do you agree that 'non-indigenous species of significance' be listed in regulations and that the list reflect the table above? If not, why not? Are there species that should be on that list that are not?
	No – see 1 above *If this is going to be passed as law then there needs to be a well-defined register that goes beyond the opinions of one paper/author* *The other issue of consideration is the **Taonga** type species that already have been hybridised both here in New Zealand and offshore. How will these be assessed by the PVR office and in the case of offshore species that have proprietary rights offshore how will that be handled* *Good examples of prior hybridisation like Manuka (leptospermum scoparium), harakeke (flax) and cordylines need to be considered. If we can get these right, as these are the significant commercial species, then there may be a much clearer pathway*
3	**Disclosure obligations and confidentiality** Are there any confidentiality considerations in relation to the additional information required under the new disclosure obligations? If so, how should this information be treated?
	Yes – this needs to be very carefully considered to ensure that any disclosure that is made during the engagement process is 1) confidential and 2) doesn't trigger disclosure provisions in particular in regards to United States Plant Patent applications *In order to protect the breeder's interest it would be preferable (in fact mandatory) that the NZPVR application is filed prior to any Maori engagement taking place, if necessary. This will establish a priority date and will also ensure that provisional protections are in place prior to any disclosure.* *Once the application is filed the PVR office can indicate to the breeders that the Treaty provisions have been (potentially) triggered, which will be particularly helpful for overseas breeders*
4	**Māori Advisory Committee - appointments** Do you agree with the proposal to change the name of the Committee to the 'Māori PVR Committee'? If not, do you have any other recommendations?

	*We submit that there should be a **Maori Trustee** or **Maori Commissioner** with power to co-opt, as opposed to a Committee as the latter will be difficult to appoint, be costly, not appropriate in experience and may not achieve its intended outcome.* *The **Maori Trustee** should be appointed by the Minister in consultation with Maori and have a very clear Terms of Reference. Management of conflicts of interest and confidentially are two essential components.* *The cost of the **Maori Trustee** (or any Committee) should be publically funded and not the responsibility of the breeder as it is effectively a Treaty Issue. It is inappropriate to suggest that a blanket increase in PVR fees should to fund such activity* *A five person Maori Committee is out of balance given the whole PVR office only has five staff, and only +/- 7% of applications will potentially be affected by the Treaty provisions*
5	**Māori Advisory Committee - appointments** Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose?
	Point 39 states that the chair of the advisory Committee will advise the Commissioner on the most suitable candidates for the Committee, however there is no defined process for selecting and appointing the chair, especially when first establishing the Committee
6	**Māori Advisory Committee - appointments** Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose?
	The range of expertise must include some knowledge of plants, breeding and intellectual property legislation
7	**Māori Advisory Committee – decision making processes** Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not?
	The Committee needs to show evidence that they have considered all of the relevant considerations, and the types of mitigations that should be considered (55f) need to be defined *55e - Will the Committee be provided with a list of PVRs already granted in relation to the species that is being assessed– who will provide it and if there are a number of PVRs already granted for a particularly species how will they be taken into consideration to provide a fair outcome?*
8	**Māori Advisory Committee – decision making processes** Are there any additional factors that should be added to the list of relevant considerations?

	58a – it is unreasonable that the application may lapse due to information not being provided, if that information has been requested from a party other than the breeder *Requesting information, and potentially convening a hui may extend the engagement process considerably, which not only incurs a cost for the breeder in terms of delayed commercialisation etc but also exacerbates the issues in regards to disclosure and provisional protection*
9	**Māori Advisory Committee – decision making processes** Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not?
	Yes, taking into consideration the comment in 8 above
10	**Māori Advisory Committee – decision making processes** Do you agree that the Committee should be required to reach a unanimous decision and only in the event that, despite all efforts, a decision cannot be reached can the Chair of the Committee allow a decision to be made by either a consensus or a vote (Option 3)? If not, why not?
	*As per 4 the decision of the **Maori Trustee** (or Chair if not a Trustee) should be final in terms of any recommendation to the Commissioner*
11	**Māori Advisory Committee – decision making processes** Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose?
	*We support option 2 - The Committee should NOT be able to **impose** mitigations* *We submit that in the event of an unresolved dispute there be in the first instance a **mediation** process between the **Maori Trustee** and the Breeder or his/her advocate.* *There are good grounds on the issue of fairness as it's a two sided discussion such that a **Breeders Trustee** may be appointed by the Minister for such matters and paid for by public funds (as it also directly relates to the Treaty provisions)l*
12	**Post-determination considerations** Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose?
	There needs to be a <u>defined disputes process</u>. *We submit that in the event of an unresolved dispute there be in the first instance a **mediation** process between the **Maori Trustee** and the Breeder or his/her advocate. There are good grounds on the issue of fairness as it's a two sided discussion such that a **Breeders Trustee** may be appointed by the Minister for such matters and paid for by the public fund (as it directly relates to the Treaty provisions)* *Any recommendation by the **Maori Trustee** should be appealable as per any normal disputes process. We suggest that there should be a defined mediation process well before any legal challenge /judicial review. Such a judicial review will be very costly, un affordable to breeders and threatening to all those concerned*

13	**Post-determination considerations** Do you have any thoughts about either the timeframe for initiating this first stage review or the proposal of adding a person to the Committee when they are reviewing a determination, and who might be appropriate?
	*Maximum of a month or twenty working days. Addition of a **Breeders Trustee** as per 12 above will help balance the conversation*
14	**Post-determination considerations** Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not?
	We submit that three months be the maximum time limit but only after the disputes process as per 12 above and the opportunity for mediation has been exhausted
15	**Post-determination considerations** What do you think is an appropriate timeframe for an aggrieved party to notify Commissioner and the Committee of their intention to seek judicial review?
	See 12 There should be a Disputes process well before any judicial review
16	**Post-determination considerations** Do you agree with our preferred option and process for objections after grant in relation to the kaitiaki condition (Option 2)? If not, why not? Is there an alternative you wish to propose?
	*We submit that all objections after a PVR grant should be treated in the same way no matter what the ground of objection is. The **kaitiaki** condition determination should be appealable in the same way as any decision on novelty, distinctness, uniformity or stability*.

Operational issues

17	**Information available to the public** What are your views of the problem identified by MBIE?

	<u>No disclosure should occur prior to acceptance of the PVR application</u> and a priority date being established, therefore under the current proposal for Treaty related engagement there must be an assurance that no disclosure is made that breaches confidentiality and/or jeopardises the Breeders rights particularly pertaining to applications in other jurisdictions or other disclosure of information that would allow another party to file an application for what is in fact the same variety. *In reality this may be impossible to achieve, particularly where engagement is comprehensive, so therefore as per 3 above in order to protect breeders interests engagement should not commence until after applications are filed.* *A period of confidentiality should also apply post the grant of the Right in order to protect the longevity of the Breeders exclusive rights*
18	**Information available to the public** What do you think about the options outlined by MBIE? What would be your preferred option and why? Are there other options that could be adopted?
	Option three , noting the stipulations in 17
19	**Information available to the public** If you support Option 3 what timeframe would you suggest for the information to be made public and why?
	Information should be kept confidential for at least three years post Grant]
20	**Supply of plant material in relation to a specific application** Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why?
	Yes there are significant issues with the supply of plant material, largely caused by importation delays due to either outdated or non-existent Import Health Standards (IHS) or the lack of Post Entry Quarantine (PEQ) facilities. *In these circumstances supplying plant material within 12 months of request is difficult, however under the current Act the PVRO are unable to extend requests for longer than 12 months at a time.* *We have requested that MBIE makes a formal approach to MPI to advise them of the impact that import related issues are having on the PVR process*
21	**Provision of propagating material for comparison and reference purposes** What are your views of the problem identified by MBIE?

	A number of the reference varieties required by the PVRO are outdated and difficult to source, and accessing comparator varieties is extremely problematic both due to the importation delays discussed in 20 above, and also the reluctance by variety Owners or their New Zealand agents to provide material for growing trials. *The onus to source propagating material is currently on the applicant and is a time consuming and sometimes futile process, and the PVRO has little authority to enforce any request* *There is also an issue where breeders are 'blanket' filing applications, regardless of any intention to import or commercialise a particular variety in New Zealand. This should be actively discouraged/banned as overloads the system with purposeless applications*
22	**Provision of propagating material for comparison and reference purposes** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	[Option 2 is the preferred option; however serious thought needs to be given to both the process for requesting plant material (currently this is negotiated between breeders and/or their agent) and the trailing process. *At present there is a predominant requirement for growing trials rather than other methods of assessment, however given the lack of central testing for many species, the issues with import delays, and also the inability of the PVRO to enforce any request for comparison and reference varieties under the current Act the process is unwieldy and unfair on breeders that have a well-planned and timely process.*
23	**Provision of propagating material for comparison and reference purposes** Do you agree that if material is not provided lapse or cancellation could occur? Can you think of other ways to enforce this requirement? What is the appropriate timeframe?
	[The provision of propagating material is required under article 12 of UPOV 91. The new Act is supposed to be compliant with UPOV 91 in all respects except for Treaty compliance, so Option 2 must be required *Noting that establishing permanent variety collections will be very expensive (is this to be public funded?) and probably well beyond the capacity of the current PVRO*
24	**Should growing trials be optional or compulsory?** What are your views of the problem identified by MBIE?
	Growing trials should only be required where there are no other options for deriving the information necessary in granting a Right
25	**Should growing trials be optional or compulsory?** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	See 24

26	**Who should conduct growing trials?** What are your views of the problem identified by MBIE?
	[There a range of options from Central testing to private growing trials as happens now – for some smaller species the only option is probably a private trial administered/measured by the likes of AQ on behalf of the PVRO
27	**Who should conduct growing trials?** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	[Option 2, unless there is a assurance under Option 4 that the trial directed by the Commission is conducted by an independent body (i.e. with no breeding or related activities)
28	**Trial and examination fees** What are your views of the problem identified by MBIE?
	[Insert response here]
29	**Trial and examination fees** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	Option 3
30	**Trial and examination fees** What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3?
	Standard business terms- i.e. 20th of the month following invoice/notification
31	**Hearings and appeals relating to decisions of the Commissioner of PVRs** Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the *Patents Act 2013*. If not, why?
	Yes. *It should include a right to be heard about **kaitiaki** issues as welll*
32	**Hearings and appeals relating to decisions of the Commissioner of PVRs** What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why?
	[The High Court as although filing fees are higher, all other costs will be the same – should be the same forum as for other IP rights or infringement proceedings

Other comments

[Insert response here]