Submission template

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

Your name and organisation

[redacted]	[redacted]
[redacted]	[redacted]
Organisation/Iwi	The New Zealand Institute for Plant and Food Research Limited (Plant & Food Research)

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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?
	The proposed definition is to be taken from the Climate Change Response Act 2002 and reads that an 'indigenous "a plant species that occurs naturally in New Zealand or has arrived in New Zealand without human assistance". *Plant & Food Research supports the definition as currently worded and thinks that it will be fit for purpose for the Act.*
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?
	[Plant & Food Research is strongly supportive of including some form of list of non-indigenous species of significance. This is in part because it provides necessary clarity and certainty around which species are covered by this definition, which allows interested Parties to more effectively plan their business activities. If the list was either not included, or not exhaustive, it would create a high level of uncertainty that could be easily avoided through the inclusion of a list. *As to the content of the list, Plant & Food Research has no specific suggestions around the species included at this point in time. Plant & Food Research sees it as important that this list can be appropriately amended overtime through appropriately defined mechanisms and with the necessary consultation, and as such believes that the best place for this table to sit is within regulations.*
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?

	The outcome of the engagement with kaitiaki may include commercial arrangements which the parties may not wish to have made public. The applicant and the kaitiaki involved should be able to keep the commercial arrangements confidential. Where it is reasonable and necessary to share information to this effect with the Māori PVR Committee then this information should be made available on a confidential basis. *The Discussion Document is unclear as to whether this information would be published at time of application or whether it is technically publically available in the same way that breeding history and original is today in that it is public but requires and OIA to access.*
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?
	[Plant & Food Research supports the suggested name of the Māori PVR Committee.]
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?
	[Plant & Food Research supports the amendments to the appointment process]
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?
	[Plant & Food Research supports the criteria of appointment as currently worded.]
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?
	Plant & Food Research supports the inclusion of the list of relevant considerations in the legislation. We think that it is important the legislation makes it clear whether or not the considerations will be given equal weighting.
8	**Māori Advisory Committee – decision making processes** Are there any additional factors that should be added to the list of relevant considerations?
	[Plant & Food Research believes that the relevant considerations as outlined are appropriate, but support legislation appropriately enabling the Māori Advisory Committee to exercise a reasonable amount of discretion over relevant considerations.]
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?

	Plant & Food Research agrees with an investigative approach to decision making and supports the MBIE preferred Option 1. Although we support this option we acknowledge this option will require greater input from the Māori Advisory Committee and for this approach to work effectively the Māori Advisory Committee will need to be resourced to carry out this function.
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?
	Plant & Food Research supports MBIE's preferred Option 3]
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?
	[Plant & Food Research supports the principles behind MBIE's Option 2 and note the concerns raised by MBIE related to this option in paragraph 74 of the Discussion Document. *Paragraph 74 reads: "Option 2 may raise a concern that kaitiaki could simply hold up the process and not agree to proposed mitigation despite the impact on the kaitiaki relationship being relatively minor. However, we do not consider this concern to be significant as it is in the interests of all parties to reach an agreement. The breeder will wish to see their application progress, but there is nothing preventing them simply walking away and developing/commercialising the variety outside the PVR regime, without an intellectual property right over a plant variety, with no further legal obligation to engage with kaitiaki."* *As worded, paragraph 74 appears to be legitimising the abandonment of intellectual property protection and kaitiaki engagement as an appropriate solution. We believe the legislation should not be drafted in a way that foresees or enables this type of outcome from the start, and should provide appropriate tools and mechanisms to enable Parties to come to an outcome that isn't simply 'walking away' or not securing PVR protection. Further to that, by legitimising the approach in paragraph 74 MBIE run the risk of undermining the Māori Advisory Committee from the outset.]*
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?
	[Plant & Food Research broadly supports Option 3, however we would like to note that the discussion at the MBIE hui held on 29 September 2020 should inform the drafting of the relevant provisions. There was largely a consensus that some form of mediation process, with further engagement with IPONZ and/or the Maori Advisory Committee if necessary, should be included in the regime. *Plant & Food Research supports resolution processes being included before the need to escalate to judicial review.]*

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?
	The Māori Advisory Committee should have the ability to consider new information. There needs to be time limit on when a party can exercise the right to a first stage review also on when the party needs to supply the new information. Plant & Food Research agrees with the suggested 14 days to exercise the right to a stage review. In addition the Māori Advisory Committee should have a reasonable time limit on reporting their determination in order to give clarity to the Parties involved. *Plant & Food Research supports that the Māori Advisory Committee is empowered to have the right people on the committee to make appropriate decision.]*
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?
	Plant & Food Research supports the requirement for imposing a time limit in relation to a review of a determination.
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?
	[Plant & Food Research would support a 20 working day period similar to Patents and other IP regimes]
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?
	[Plant & Food Research support Option 2.

Operational issues

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

	In general, Plant & Food Research do not perceive there to be a problem with origin and breeding history being publically available information. This is consistent with other jurisdictions' plant variety intellectual property regimes, including the United States Plant Patent. It is likely that the role of both the Commissioner and the Maori Advisory Committee would be hindered by the lack of origin and breeding information.
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?
	In principle Plant & Food Research supports option 1, contingent to further information from MBIE about how, and what, information is planned to be made available. Alternatively Plant & Food Research would be supportive of Option 3, where information was kept confidential until grant, contingent to further information from MBIE about how information is planned to be made available. Support of either of these options is also dependent on the level of information that is planned to be made available. *In Plant & Food Research's experience, the status quo is that while this information is available to the public, it is not published, and we are advised it is only available through the Official Information Act 1982. This practice negates the potential advantage highlighted by MBIE in paragraph 119 of the Discussion Document.* *There is a misconception that Australia operates a confidential system. In practice, Australia does not operate as outlined in paragraph 122* *One potential issue is that 'Breeding history' can be interpreted to mean the parents and timing of breeding of the new candidate variety or it can be interpreted as the entire process, potentially including multiple generations, the latter often being considered trade secret. This trade secret information is of higher significance for some species than others, e.g. seed propagated species, and is part of the valuable intellectual property of those companies. Therefore, as MBIE have noted, could provide competitors with advantages that would otherwise not exist if the information was not made public.* *Plant & Food Research approves of how the Office currently implements this the relevant provisions.*
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?
	[If implemented, noting Plant & Food Research's reservations relating to the depth and method of information to be made public, we would support the origin and breeding history being made public at the time of grant. This is in line with to several other countries e.g. in the Canada and Australia where the origin and breeding history information is included in the published description of the variety.

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?
	[At present, Plant & Food Research do not consider that the provisions regarding the supply of plant material are causing any problems. This is in large part due to the implementation and operation of the Act by the Office, which has been very pragmatic and reasonable. This pragmatic approach will continue to be both extremely important and necessary moving forward, especially in relation to material being imported.]
21	**Provision of propagating material for comparison and reference purposes** What are your views of the problem identified by MBIE?
	[Refer to response to Question 22.]
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?
	[In principle Plant & Food Research is supportive of MBIE's preferred option (Option 2: Applicants and grantees required to provide propagating material for comparison and reference purposes) This support is contingent on key questions that require resolution before implementation of Option 2 or an analogous scheme: *Question 1: If applicants are required to supply plants at the Offices' compulsion, which will then be passed on to third parties (including potential business competitors) under this provision, what guarantees will the Office provide that the material will be secure?; and* *Question 2: What will be the obligation of the grant holder when it comes to any fees incurred propagating and supplying plant material required to meet the higher thresholds of Option 2; and* *Question 3: Will grant holders be allowed to enter agreements to secure the plant material with third parties?]*
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?
	[Given the high variability of plant material and many other factors outside the grant holders control, appropriate timeframes will need to be equally flexible to enable this approach to succeed. *Plant & Food Research believes that parties who are compelled by the Office to provide plant material should be afforded the right to enter into an agreement with the party (including potential business competitors) receiving the plant material on behalf of the Office. Importantly, if an agreement is reasonably required by the variety owner to supply plant material to a third party under the provision, failure to agree to terms on the agreement should not be grounds to lapse or cancel the grant/application.]*
24	**Should growing trials be optional or compulsory?** What are your views of the problem identified by MBIE?

	[Effectively, Option 2 is implemented by the Office at present, as the status quo. Plant & Food Research is in support of Option 2.
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?
	[As noted above, Plant & Food Research is supportive of an approach that retains the status quo in this situation. This is because the status quo as currently implemented aligns with the current UPOV principles. We support, as MBIE have noted and highlighted, that growing trials can be conducted in countries other than New Zealand. Additionally, we would support the NZ PVRO taking a more proactive approach to adopting overseas test reports.]
26	**Who should conduct growing trials?** What are your views of the problem identified by MBIE?
	[An ideal option would be the CPVO model, with Entrusted Offices and the central testing of all varieties. This allows impartial subject matter experts to collect the data of all candidate varieties centrally for distinctness, uniformity and stability in a professional and consistent manner. This system negates the concerns identified in our response to question 22. However, we recognise that this is an expensive system for the size of New Zealand and the number of applications.]
27	**Who should conduct growing trials?** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	[Plant & Food Research is supportive of Option 4 and we recognise that this in effect how the Act is operated at present.
28	**Trial and examination fees** What are your views of the problem identified by MBIE?
	[See response below.]
29	**Trial and examination fees** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	[Plant & Food Research supports 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?

	Plant & Food Research would support trial fees being paid before the start of the years' trial. If the trial is conducted over several years, Plant & Food Research would support trial fees being paid each year before the trial for that season. Plant & Food Research would support the examination fee being paid before the examination is carried out. Effectively Plant & Food Research would support the model under which the PVR Office currently operates *Plant & Food Research supports the flexibility afforded to the Commissioner under Option 3 to take into account seasonal and biological factors which may influence timings of trial and examination.*
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?
	Plant & Food Research would agree that adverse decisions in relation to the exercise of the Commissioner of PVR's discretionary or other powers under the Act should be subject to a right to be heard consistent with that as provided for Section 208 of the Patents Act 2013 and Section 176 of the Trade Marks Act 2002.
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?
	Plant & Food Research's view is that first appeals from rulings of the Commissioner of PVRs should be to the High Court, as provided for in Section 214 of the Patents Act 2013 and Section 170 of the Trade Marks Act 2002, that being the body of judges most experienced in the hearing of such matters in relation intellectual property rights and hence best placed to make such determinations.

Other comments