WAKATŪ INCORPORATION

SUBMISSION ON THE PLANT VARIETY RIGHTS ACT 1987 DISCUSSION PAPER – OUTSTANDING POLICY ISSUES

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Ko wai mātou? Who are we?

1. Wakatū Incorporation (**Wakatū**) is a Māori Incorporation pursuant to Te Ture Whenua Māori Act 1993. Based in Nelson, New Zealand, Wakatū has approximately 4,000 shareholders who are those families who descend from the customary Māori land owners of the Nelson, Tasman and Golden Bay Regions – Te Tau Ihu.

2. Whenua is the foundation of our business with 70% of assets held in whenua (land) and waterspace. We manage a diverse portfolio from vineyards, orchards to residential properties, large retail developments, office buildings, marine farms and waterspace.

3. Kono is our food and beverage business focused on high quality beverages, fruit bars, seafood products, pipfruit and hops. We understand that innovation and adaptability is the key to our success.

4. AuOra is that part of our organisation which is focused on innovation, particularly new ingredients, new products and new business and service models.

5. Our whānau and our businesses are located primarily in our traditional rohe, Te Tau Ihu – the top of the South Island.

6. Our purpose is to preserve and enhance our taonga for the benefit of current and future generations. We have included further detail in Appendix One to this submission which sets out who we are in further detail. We have provided this information to the Ministry of Business, Innovation & Employment (MBIE) previously but provide it again for completeness.

Prior involvement in the reform of the Plant Variety Rights Act 1987

7. Wakatū has made the following recent submissions in relation to the Plant Variety Rights Act 1987 (PVR Act):

- Issues Paper in December 2018.
- Options Paper in September 2019.

8. We understand MBIE has these submissions on file. Wakatū notes that it is pleased a number of its previous submissions have been implemented in a number of the options presented in the Discussion Document.

Overarching submissions

9. Māori are kaitiaki of the natural world; we are connected to the natural world through whakapapa. Within our kaitiaki responsibilities, we are also part of industry. This places Māori in a unique position to, among other things, carry over kaitiaki responsibilities into industry best practice. The Government's reform needs to recognise the multi-faceted rights and responsibilities that Māori hold.

10. Wakatū supports the continued focus in the Discussion Document on ensuring the Crown's obligations, both procedural and substantive, under Te Tiriti are met through this review of the PVR Act. We have made some suggestions in this submission to ensure that the Reform's objectives with respect to Te Tiriti are met.

11. Despite a renewed focus on the Crown's Te Tiriti obligations, the Reform is inherently limited. There is a broader constitutional conversation that needs to occur in parallel to reform such as this. The place of Te Tiriti, and the rights and responsibilities of Māori that are guaranteed by Te Tiriti, need to be properly considered and given effect to by the Crown. The current Governmental arrangements do not reflect a true partnership.

12. Related to the required broader constitutional conversation, there is reform required (and we understand parts have started) across New Zealand's intellectual property laws to better recognise the importance of mātauranga Māori. Last year, the Government announced that it intends to take an all-of-Government approach to the Waitangi Tribunal's *Ko Aotearoa Tēnei* report (Wai 262).

13. A substantive Government response to *Ko Aotearoa Tēnei*, including with respect to the PVR Act, is well overdue. It seems the PVR Act reform would be seen as a part of the Government's response to Wai 262 but it is important that such reform, which will require an all-of-Government approach with overarching principles, is undertaken in a cohesive way. The PVR Act reform is already someway advanced.

14. Wakatū is committed to this kaupapa and the broader issue of intellectual property laws and the protection of mātauranga Māori. Wakatū is actively participating in a range of fora in this regard including being actively involved in the Ngā Taonga Tuku Iho conference held in Nelson earlier in 2018, lobbying the Government following that conference and commissioning research on these matters.

15. There needs to be continued engagement moving forward through the Reform. We look forward to being engaged before the Bill is introduced to the House later this year.

Structure of our submission

16. Our submission at this stage is focused on the way in which the Discussion Document has approached how best to give effect to the Crown's Te Tiriti obligations. Wakatū intend to stay involved in the Review process through further direct engagement and potentially a further submission once a Bill is introduced. We note the Discussion Document anticipates that will be by the end of 2020.

17. Wakatū has not used the template submission to provide its submissions on the Discussion Document. We have structured our submission into three parts; namely, submissions on:

- matters that were decided by Cabinet in November 2019;
- outstanding policy issues; and
- matters that are not specifically addressed in the Discussion Paper.

Submissions on those matters determined by Cabinet in 2019

18. Our position on those matters determined by Cabinet in 2019 (set out in paragraphs 11 – 21):

- *Definitions:* Wakatū agrees that certain terms should not be defined through the legislation and that those terms should be determined by Māori (however we have offered suggestions on some defined terms later in our submission). It will be important that those are determined by the kaitiaki themselves, rather than the Māori Advisory Committee (MAC).
- *Disclosure requirements:* Wakatū agrees that Applicants should have disclosure requirements placed on them with their PVR application. However, whilst Wakatū agrees the engagement that the Applicant has undertaken with kaitiaki should be disclosed, that disclosure should be verified by the appropriate kaitiaki to ensure accuracy at the Application stage. We also note our previous submission which confirmed our position that Applicants (and breeders) should also provide new information about the origin of the plant material, who the kaitiaki are, any engagement the breeder has had with kaitiaki and the breeder's assessment of whether kaitiaki

interests would be affected by the commercialisation of the new variety.

- *Māori Advisory Committee:* Wakatū is supportive of the MAC having a decision-making role. However, appointment of members should not be by the Commissioner of PVRs alone. It is important that there is Māori community involvement in the appointment of the MAC members. An electoral college model may not be the most suited to these types of appointments but something analogous would be acceptable (to ensure that the MAC members have both the skills and support from the Māori Community; this is particularly important if they are going to have decision-making powers).

- *Appeals:* Wakatū agrees with the proposed appeal scope. Another option, if a substantive arbiter is required, is to refer matters of tikanga to the Māori Appellate Court.[1]

Submissions on outstanding policy issues

19. The following matters are set out in the Discussion Document as outstanding policy issues (at paragraph 22):

- How will 'indigenous plant species' and 'non-indigenous species of significance' be defined?

- Are there any confidentiality considerations in relation to the additional information required to be disclosed with a PVR application?

[1] As the High Court is able to do under section 61 of Te Ture Whenua Māori Act 1993 (the Māori Land Act 1993).

- What process will the MAC be required to follow when making determinations in relation to kaitiaki relationships?

- What is the MAC's role, if any, in relation to proposing mitigations that may enable a PVR grant to proceed?

- What further measures, if any, are necessary in relation to the process for appointing the members of the MAC?

- Can the IPONZ hearings process be adapted to be the first point of review for MAC determinations and, if not, what could go in its place?

- How will the standard PVR processes under which (i) an objection to a grant can be made, and (ii) grants can be cancelled and nullified, work in relation to decisions on kaitiaki relationships?

Definition of 'indigenous plant species' and 'non-indigenous species of significance'

20. Whilst Wakatū agrees it is important to have certainty and clarity on definitions, we note the following concerns with the proposed approaches for defining 'indigenous plant species' and 'non-indigenous species of significance':

- *Indigenous plant species* – the proposed definition from the Climate Change Response Act 2002 may not be appropriate in this context. For example, it is unclear what is meant by whether a plant species "occurs naturally" in New Zealand. That definition could also capture non-indigenous species as the next part of the definition ("has arrived in New Zealand without human assistance") is linked with an "or". **Wakatū** recommends either that "indigenous plant species" is not defined in the Bill for this context or that the definition be reframed as "taonga species".

- *Non-indigenous species of significance* – As above, **Wakatū** recommends that this definition be reframed as "introduced taonga species". It is important that any definition acknowledges the kaitiaki relationship and is determined by the kaitiaki. Therefore, the list of species at paragraph 30 of the Discussion Document may not be appropriate. Further research and consultation with a wide range of Māori experts should be undertaken prior to any definition being defined in legislation.

Disclosure obligations and confidentiality

21. There are confidentiality considerations that will apply to the new information required under the disclosure obligations.

22. **Wakatū** recommends that the Applicant be required to confirm with the kaitiaki what information is confidential, which should be also considered by the MAC (in the event that they may determine there is further information that should remain confidential) and this information should not be publicly released. It also should have restricted internal access at MBIE and only be accessible by the MAC.

Māori PVR Committee

23. Wakatū agrees that the name should be changed from the "Māori Advisory Committee" given they will now have decision-making powers.

24. **Wakatū** recommends that a Māori name is considered for the Committee (now that it has decision making powers). If this isn't accepted, then Wakatū agrees the "Māori PVR Committee" is appropriate.

25. Wakatū has made some comments about the proposed appointment process in paragraph 18. **Wakatū** recommends that the appointment process involve the Māori community (for example, through organisations

such as the Federation of Māori Authorities and other pan-Māori groups that often assist with appointment processes for Māori Committees).

26. **Wakatū** agrees with the proposed amendments to the criteria for appointment set out in paragraphs 45 – 51.

27. In relation to the relevant considerations listed at paragraph 55, it will be important that the kaitiaki can have the opportunity to address the MAC if they wish to do so. This will assist in the MAC's determination. "Significance" in paragraph 55(d) is a high threshold (particularly if Resource Management Act 1991 jurisprudence is considered relevant for determining significance). **Wakatū** recommends the following amendments / additions:

- Kaitiaki should have the opportunity to address the MAC (in that regard, Wakatū agrees with option 1 set out at paragraphs 58(a) and 59 in terms of the approach to decision-making).

- "Significance", with respect to effects, is amended to provide "What is the level of the effect, as assessed by the kaitiaki"?

- Following mitigation, adding "Can the effects be avoided?"

28. **Wakatū** agrees with the recommendation about how voting should occur in the MAC, namely that the Committee must strive to reach a unanimous decision, and in the event that this is not possible despite all efforts, the Chair of the Committee may allow a decision to be made by consensus or a simple majority vote (set out at paragraphs 62-66).

29. **Wakatū** agrees with the recommendation on mitigation, namely that the MAC can only facilitate discussions between kaitiaki and breeders on the issue of mitigations. Wakatū is of the view that this approach will mean

that the kaitiaki retain the mana over that process rather than the MAC imposing conditions (set out at paragraphs 67-74).

Post-determination considerations

30. **Wakatū** agrees with the proposed options for review and that a first stage review could be undertaken by the Committee rather than proceeding straight to a judicial review, so long as the judicial review option is retained, and the Committee is free to maintain its original decision in light of any new information (set out in paragraphs 78-83).

31. **Wakatū** recommends 30 working days for the proposed time limit to judicially review a determination of the MAC. This is longer than many other timeframes for appeals but provides people, including kaitiaki, longer to consult with whānau, hapū and iwi if required (set out in paragraphs 84-88).

Objections after grant and cancellation/nullification of grants

32. **Wakatū** does not agree with the proposed option 2 at paragraph 98 to allow objections to be made in relation to the kaitiaki condition if the MAC has not considered the application. **Wakatū** recommends option 1 is implemented, namely that the MAC does not allow objections after grant in relation to the kaitiaki conditions, even if the Committee has not considered the application.

Proposed operational changes to the current regulatory regime

33. We have not submitted on all of the matters in this section. However, we note that we have already provided submissions on confidentiality and confidential information, and how that should be managed.

Submissions on matters not addressed in the Discussion Document

34. This section of the submission addresses those matters that are not provided for in the Discussion Document. Our submissions in this section focus on matters that will go towards achieving one of the Crown's objectives with this Reform: to give effect to the Crown's Te Tiriti obligations through the PVR Act. These submissions are consistent with general submissions we have made previously.

35. The Bill must have an over-arching Treaty of Waitangi clause. This is becoming more and more common in legislation that clearly affects Māori interests or triggers the Māori/Crown relationship directly (noting our view that all legislation would be relevant for the Māori/Crown relationship).

36. Our preference is for the legal weighting in such a Treaty of Waitangi clause to be the same as section 4 of the Conservation Act which provides:

> This Act [the Conservation Act 1987] shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

37. The Crown's commitment to Te Tiriti should also be explicitly referred to in any preamble and / or any principles that are included in the PVR Act.

38. Wakatū would like to see discussion of the benefits of the Nagoya Protocol and records its disappointment again that it appears to continue to be outside of the scope of this work. The Nagoya Protocol is directly related to the issues that are being considered as a part of this Reform and further consideration needs to be given to its importance alongside this Reform.

Conclusion

39. As noted above, Wakatū intends to remain actively involved in this Reform. In that regard, Wakatū requests a meeting with officials to discuss its submission before the Bill is introduced (as we would like the opportunity

to discuss our submission to inform the drafting instructions). We look forward to hearing from you about such a discussion.

40. Thank you for the opportunity to participate in this process.

Ngā mihi nui,

Kerensa Johnston,
Wakatū CEO.

APPENDIX ONE

A brief customary history of the Nelson and Tasman District

1. In the 1820s and 1830s, mana whenua then living in Te Tau Ihu were conquered by tribes from the North Island, including Ngāti Rārua, Ngāti Awa (now known as Te Ātiawa), Ngāti Tama and Ngāti Kōata. This tribal grouping is known as Ngā Tāngata Heke – the people of the Heke. The Heke were the series of migrations back and forth from the north to the south, including to Te Tau Ihu, in the early 19th century from the Kāwhia and Taranaki coasts. These migrations are remembered in the collective memory of the people as a series of named Heke.

2. By 1830, it was established that the hapū who held Māori customary title or mana whenua in Nelson, Tasman Bay and Golden Bay were the descendants of the four Tainui-Taranaki iwi of Ngāti Koata, Ngāti Rārua, Ngāti Tama and Te Ātiawa.

3. The four Tainui-Taranaki iwi in western Te Tau Ihu are recognised as the mana whenua on the basis of acquiring Māori customary title through a combination of take (raupatu (conquest) and tuku (gift)) and ahi kā roa (keeping the fires alight, by occupation or in other recognised ways). Over time, the whakapapa of the migrant iwi from the north became, as the Waitangi Tribunal has put it, 'embedded in the whenua through intermarriage with the defeated peoples, the burial of placenta (whenua) and the dead, residence, and the development of spiritual links.'[2]

4. From the time of the heke onwards, Māori customary title manifested itself in western Te Tau Ihu (Nelson, Tasman Bay and Golden Bay) as an exclusive right to land, with the power to exclude others if necessary, with the ability to dictate how land and resources was used and accessed.

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2 Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol III, 1366.

5. Ngāti Rārua, Te Ātiawa, Ngāti Tama and Ngāti Koata did not move to Te Tau Ihu en masse, but particular whānau and hapū, or sections of particular whānau and hapū, from those iwi settled in a staged series of migrations, with land allocated in various locations as different groups arrived.

6. The pattern of mana whenua in Te Tau Ihu was dictated by the pattern of settlement, in which each kāinga (village) was established around a chief or chiefs and each kāinga was home to extended whānau, with most residents at each kāinga related by blood or marriage. The whānau or hapū (an extended whānau or cluster of whānau could equally be described as a hapū) tended to establish themselves at locations where their neighbouring communities were relatives and/or close allies.

7. By 1840, whānau or hapū belonging to the four Tainui Taranaki iwi were established in Nelson, Tasman Bay and Golden Bay as the mana whenua.

The arrival of the New Zealand Company

8. When the New Zealand Company ("NZ Company") arrived in the South Island in 1841, rangatira [tribal leaders] representing the families of those whānau or hapū who held mana whenua and who were resident in western Te Tau Ihu negotiated with Captain Arthur Wakefield of the NZ Company and agreed to welcome European settlement in parts of the Nelson, Motueka and Golden Bay area.

9. One of the main reasons for this agreement, from the Māori perspective, was to promote trade relationships between European settlers and Māori for mutual benefit, bearing in mind that tribes of Te Tau Ihu had already had several decades of contact with European traders prior to 1841.

10. According to the arrangements a major benefit promised by the NZ Company when it entered into what it called 'Deeds of Purchase', was that

the resident Māori and their families who held mana whenua in the relevant parts of western Te Tau Ihu (Nelson, Motueka and Golden Bay), would be entitled to retain all existing Māori settlements, including urupa, wāhi tapu and cultivated land, and in addition reserves would be set aside comprising one-tenth of the land purchased. These additional land reserves became known as the Nelson Tenths Reserves ("Tenths Reserves").

11. As a result of the negotiations between the NZ Company and tāngata whenua, the Crown issued a grant in 1845 which extinguished Māori aboriginal (or customary) title over 151,000 acres in Nelson and Tasman (the Nelson settlement). The 1845 Crown Grant excluded all existing Māori settlements, including urupa, wāhi tapu and cultivated land, along with one-tenth of the total area of land acquired for European settlement (15,000 acres).

12. The Crown intended to hold the Tenths Reserves on trust on behalf of and for the benefit of the tāngata whenua who were those families who held Māori customary title to the 151,000 acres in the 1840s.

13. Despite the guarantees and the provisions stipulated in the 1845 Crown Grant, the Crown failed to reserve a full one-tenth of land or exclude settlements, urupa, wāhi tapu and cultivated land from European settlement.

14. On completion, the NZ Company's Nelson Settlement comprised approximately 172,000 acres, although it is likely a much larger area of approximately 460,000 acres was eventually acquired by the Crown.

15. As at 1850, the Nelson Tenths Reserves comprised only 3,953 acres (this figure does not include the designated Occupation Reserves).

16. Between 1841 and 1881, Crown officials administered the Tenths Reserves and the occupation reserves on behalf of the original owners. From 1882, the Public Trustee administered the estate.

Identifying the original land owners

17. In 1892 – 1893, the Native Land Court undertook an inquiry to ascertain who owned the land in Nelson, Tasman Bay and Golden Bay prior to the transaction with the New Zealand Company. The reason for this inquiry was to determine the correct beneficiaries of the Tenths Reserves trust.

18. The Native Land Court Judge (Judge Alexander MacKay) considered that the "New Zealand Company Tenths" (as he called them) had been set aside in accordance with the NZ Company's stipulation in the Kapiti Deed that it would hold a portion of the land on trust, and accordingly he decided that to ascertain those persons with a beneficial interest "it was necessary to carry back the inquiry to the date the land comprised in the original Nelson Settlement was acquired by the Company".

19. The Court's ruling determined the ownership of the 151,000 acres "at the time of the Sale to the New Zealand Company", with the ownership of the four hapū – Ngāti Koata, Ngāti Tama, Ngāti Rārua and Ngāti Awa - broken down according to each of the areas awarded by Commissioner Spain in 1845 (Nelson district, 11,000 acres; Waimea district, 38,000 acres; Moutere and Motueka district, 57,000 acres, and Massacre Bay, 45,000 acres).

20. The Judge's ruling included a determination:

> That although the Reserves made by the Company were situated in certain localities the fund accruing thereon was a general one in which all the hapus who owned the territory comprised within the Nelson Settlement had an

interest proportionate to the extent of land to which they were entitled, at the time of the Sale to the Company.

21. The Court requested each of the hapū so entitled to provide lists of the persons who were the original owners of the land at the time of the New Zealand Company's arrival and their successors.

22. Importantly, therefore, the 1893 lists were not drawn up by the Native Land Court, but by the people. The evidence of how this was done is consistent with a tikanga Māori style process where the lists were debated and revised until consensus is reached.

The Crown's management of the land

23. From 1842 until 1977, when the original owners regained control of their lands, the Crown held the Tenths Reserves and occupation reserves in trust and managed it on behalf of its owners.

24. From 1882 onwards, the Public Trustee, Native Trustee and Māori Trustee administered the Tenths Reserves and occupation reserves on behalf of the original owners and their descendants. During this period, a great deal of land was either sold or taken under public works legislation - in many cases without the owners' consent and without compensation for the loss.

25. A clear example of the Crown's mismanagement during this period is illustrated by the imposition of perpetual leases on the Tenths Reserves and occupation reserves. By way of legislation, the Crown imposed perpetual leases on the land, which for example, allowed for 21-year rent review periods, rents below market value, and perpetual rights of renewal for lessees. In practice this meant the Māori owners could not access or use their land, nor did they receive adequate rent for leasing the land. The problems associated with the perpetual lease regime continue to impact

adversely on the submitters' land, despite some legislative changes in 1997.

26. In the period to 1977, as a result of the Crown's mismanagement, the Tenths Reserves estate was reduced to 1,626 acres.

Proprietors of Wakatū (Wakatū Incorporation)

27. By the 1970s, the descendants of the original owners were lobbying for the return of their land to their control and management. This led to a Commission of Inquiry (the Sheehan Commission) into Māori Reserved Lands.

28. Our establishment was the result of recommendations made by the Sheehan Commission of Inquiry that the Tenths Reserves should be returned to the direct ownership and control of Māori. This recommendation was implemented by the Wakatū Incorporation Order 1977, which according to its explanatory note constituted "the proprietors of the land commonly known as the Nelson-Motueka and South Island Tenths".

29. The land vested in Wakatū Incorporation comprised the remnants of the Tenths Reserves and occupation reserves and the beneficial owners of the land were allocated shares in the same proportion as the value of their beneficial interests in the land transferred.

30. With a few exceptions, those beneficial owners were the descendants of the 254 tūpuna identified as beneficial owners by the Native Land Court in 1893. Wakatū can therefore trace the genesis of a large portion of the land in its estate back to the initial selection of the Tenths Reserves in 1842.

Wakatū Incorporation today

31. Wakatū is the kaitiaki and legal trustee of the remnants of the Tenths Reserves and occupation reserves. Wakatū Incorporation is responsible for the care and development of the owners' lands.

32. The Incorporation represents approximately 4000 Māori land owners in Nelson, Tasman Bay and Golden Bay. Apart from the Crown and local authorities, Wakatū is one of the largest private landowners in the Nelson/Tasman regions.

33. Since 1977, the owners of Wakatū have built a successful organisation that has contributed to the economic growth of the Tasman District and the economic, social and cultural well-being of the descendants of the original owners.

34. Wakatū Incorporation's primary focus is based around its management and use of the ancestral lands of the owners for their cultural and economic sustenance. Today, this comprises a mixture of leasehold land, commercial land and development land.

35. Wakatū has interests in horticulture, viticulture and aquaculture (Kono NZ LP) throughout the Tasman and Nelson District as well as in other parts of New Zealand.

36. The principles and values of Wakatū Incorporation are reflected in its guiding strategic document – Te Pae Tāwhiti.

Further information

37. A full history of the lands administered by Wakatū Incorporation, along with Ngāti Rārua Ātiawa Iwi Trust, Rore Lands, and other whānau and iwi trusts, who own land in the Nelson and Tasman region is set out and

discussed more fully in the Waitangi Tribunal, Te Tau Ihu o te Waka a Maui report. Also see www.Wakatū.org.nz for further information.