WAKATŪ INCORPORATION SUBMISSION ON THE PLANT VARIETY RIGHTS ACT 1987 REVIEW

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Submitter details:

Wakatū Incorporation, Nelson

Contact details:

Kerensa Johnston, Chief Executive, .

Wakatū House,
Montgomery Square,
PO Box 440, Nelson.

03 546 8648

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 descend from the original 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. Our purpose is to preserve and enhance our taonga for the benefit of current and future generations. We have included an **Appendix** to this submission which sets out who we are in further detail.

Overarching submissions

5. 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.

6. Wakatū supports the focus in the Issues Paper on ensuring the Crown's obligations, both procedural and substantive, under Te Tiriti o Waitangi 1840 (**Te Tiriti**) are met through this review of the Plant Variety Rights Act 1987 (**PVR Act**).

7. However, 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.

8. 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. A topical and current issue, that affects the ability of Māori to be kaitiaki as well as development rights, is the use of Māori names to label, describe and / or characterise products or services when no permission has been sought for the use of the term. In some cases, the product does not link with the Māori term used at all. This is unacceptable and needs to be addressed.

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

10. There needs to be continued engagement moving forward through the Reform. It is pleasing that the material to date places emphasis on this. In that regard, our expectation is that Wakatū will continue to be directly engaged. Miriana Stephens attended some of the first round of workshops and found those useful to both better understand the Crown's intended process for the PVR Act review but also to discuss issues, and potential solutions, with others. We look forward to continuing to be involved in this way.

11. Our submission at this stage is focused on the way in which the PVR Act Review is approaching 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 to Parliament.

Specific submissions

12. Wakatū has not used the template submission to provide its submissions on the PVR Act Review. There are a number of matters that are addressed in the template submission, such as UPOV 91, that Wakatū would like to have further discussions with Crown officials about including its likely affects on kaitiaki interests. In that regard, as noted above, Wakatū will remain directly engaged in this Reform and looks forward to that further discussion.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

13. It is important that Article 29.6 of the CPTPP is upheld through this Review. Article 29.6 provides:

> 1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures **it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.**
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> 2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

14. Although the Waitangi Tribunal found that this clause would afford adequate protection from the concerns that were raised by the claimants in the TPPA inquiry, it is important that the Government ensures the threshold in this clause is high and that it is used to ensure that the PVR Act reform better protects kaitiaki rights and responsibilities.

Nagoya Protocol

15. Wakatū notes that the Issues Paper records there are a number of issues requiring consideration before New Zealand could become a party to Nagoya Protocol. These include how New Zealand regulates the discovery and subsequent use of genetic resources and protects mātauranga Māori in this context. The Issues Paper then records that these issues are outside of the scope of this review.

16. Wakatū would like to discuss the benefits of the Nagoya protocol and records its disappointment that it is outside the scope of this Review. 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.

Objectives and scope (including Ko Aotearoa Tēnei recommendations)

17. The objectives of the PVR regime, as provided for in the Issues Paper, generally meet our expectations for a modern, fit-for-purpose PVR regime. However, our preference is for a strengthened Treaty of Waitangi objective as follows:

> *Compliance with the Crown's Treaty of Waitangi obligations.*

18. The Wai 262 Report, *Ko Aotearoa Tēnei*, provides a useful starting point as a lens for the analysis about the Crown's obligations.

19. However, Wakatū supports the claimants' view that tino rangatiratanga in this context entitled Māori to:

    a. Decision-making authority over the conservation, control of, and proprietorial interests in natural resources including indigenous flora and fauna me o ratou taonga katoa;

b. The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o ratou taonga katoa;
c. The right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;
d. The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;
e. The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna;
f. A right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna;
g. The right to participate in, benefit from and make decisions about the application, development, uses and sale of me o ratou taonga katoa;
h. The right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in me o ratou taonga katoa.

20. Although Wakatū supports the Wai 262 claimants' view above, as a first step to enable the Government to better recognise kaitiaki rights and responsibilities, Wakatū supports the relevant recommendations of the Wai 262 Tribunal namely:

a. that the Commissioner of PVRs be empowered to refuse a PVR that would affect the kaitiaki relationship;
b. that the Commissioner be supported by a Māori advisory committee in his/her consideration of the kaitiaki interest.
c. to clarify the level of human input into the development of a plant variety for the purposes of PVR protection; and
d. to enable the Commissioner to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori (offensive names).

21. The Wai 262 Tribunal's recommendations seem to be relatively low hanging fruit that the Government could implement relatively easily. Wakatū would expect that such recommendations would be incorporated as part of a broader suite of reforms that engage with and protect the kaitiaki relationship.

22. In addition, Maori should have input into the appointment of the PVR Commissioner (if this regime is to remain) and there should be an overarching Treaty clause in the revised PVR Act. Our preference is for the legal weighting in that clause to be the same as section 4 of the Conservation Act 1987 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.

Conclusion

23. 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 and the Reform more generally (including intended next steps).

24. We look forward to hearing from you about such a discussion.

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

Ngā mihi nui,

Kerensa Johnston,
Wakatū CEO.

APPENDIX

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.'[1]

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.

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.

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

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 Maori 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.wakatu.org.nz for further information.