SUBMISSION ON THE REVIEW OF THE PLANT VARIETY RIGHTS ACT 1987 FOR THE MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT

INTRODUCTION

Ko Tainui te Waka,

Ko Tainui te Hapu,

Tainui Awhiro ngunguru te pō, ngunguru te ao

1. My name is Angeline Ngahina Greensill. I am a claimant in the Wai 2522 Urgent Inquiry and I was a claimant in the Wai 262 Inquiry for and on behalf of Tainui o Tainui.

2. Thank you for the opportunity to make further input on the Issues Paper regarding the Plant Variety Rights Act 1987. It is unclear how and to what extent, the Crown, in its consultation hui and proposed amendments to the PVR regime, will provide for the exercise of tino rangatiratanga and protection of kaitiakitanga that are at the core of the constitutional relationship guaranteed in Te Tiriti o Waitangi between the Crown and Māori. Significantly it is unclear how Māori will exercise their rights in any legislative regime domestically which will also be applied internationally which purports to recognise Te Tiriti o Waitangi in the way it is developed and then operated.

3. I say at the outset that on this basis I am opposed to any PVR regime which gives exclusive legal rights to the Crown to determine the legislative and constitutional framework that governs the protection, use and development over taonga. We say that commercialisation of any traditional plants and medicines of Māori must be managed by Māori who are the knowledge keepers and kaitiaki of those taonga and have inherited the mātauranga Māori from which to ensure the protection and use of taonga tuku iho for present and future generations. It is unclear in the present proposal where this interface comes to play where Māori enduring obligations are given force and acknowledgement by the Crown or its delegated agencies.

4. I have been active in monitoring the process of development of this proposal since my participation in the Wai 262 Inquiry of the Waitangi Tribunal. Since that Inquiry, I have also participated in the ANZTPA Inquiry and the TPPA Inquiry to ensure that international obligations that are negotiated and then settled by the New Zealand Government gives force to our concerns about the marginalisation of our Treaty rights.

This process has been one that has taken over 10 years to gestate. I feel the issues we identified in the Wai 262 case are no closer to resolution now than when we started.

5. I have been monitoring the various legal implications of UPOV and PVR Act issues since I began participating in the Wai 2522 Inquiry. I **attach** herewith a brief summation of the issues to highlight the complexity of these matters and the efforts I have been taking to keep abreast of matters. All of this has been done on a pro-bono basis. I doubt whether many groups in the Māori world could maintain this kind of oversight given the secrecy of the process, the difficult and complex issues involved and the competing international and domestic obligations at play. It is for these reasons that we need a special properly resourced engagement process for Māori.

6. There has been an apparent bias to minimise the voice of Māori with the current propositions that are being promulgated as a result of the review of the PVR Act. Significantly there is this presumption on the part of the Crown that the Crown, can unilaterally assume the development and implementation of rights over Māori and their taonga in practical terms without providing for Māori governance including the right of veto of proposals inconsistent with Te Tiriti as an essential aspect of the framework outcome. Notably Māori have only been asked to comment at a late stage in this process. I reject the suggestion that because there is 3 years before the final matter can be completed that fact alone condones the present approach.

7. A need for epistemological pluralism is central to enforcing the rights that Māori have under the Treaty and through what has been discussed within the Wai 262 report. To manifest a document that states that there were and are indeed processes put in place that encourage Māori feedback when a clear analysis of the past 10 years reveals a reluctance by the Crown to have any participation by Māori until they have been forced to by dint of Waitangi Tribunal recommendations is part of the intellectual misrepresentation by the Crown upon which the present proposal rests.

8. In addition, there has been a negligible effort on the part of the Crown to provide information either for Māori to keep abreast of developments in the International arena that impact on rights of protection for taonga species. Any information that Māori have gleaned has occurred because of the indigenous peoples' networks that have developed to monitor this area and the dedication of a few Māori activists like Maui Solomon and

Aroha Mead who have devoted their whole lives to keeping Māori abreast of these matters. They have been accompanied by Pākehā allies such as Professor Jane Kelsey and others to educate and inform us all on these developments. There has been little efforts by workers and advisers in the Crown to educate, inform and provide policy initiatives to critique. In part this is because international free trade agreements are conducted in such secrecy, local and indigenous populations are having their rights dealt with in a vacuum and without their knowledge and consent.

9. With little to no succinct depictions of how the regime will cooperate with Māori interests, any comment has been hard (and hence this late submission). Instinctively though because the Crown itself has failed to critique its proposals against Te Tiriti guarantees, one can only assume that is the case because Te Tiriti obligations are inferior to the international trends being implemented in the Free Trade Agreements that are the setting in which this legislative regime is to operate and reflects the institutional bias that has enabled the invisibilisation of Māori concerns.

10. Further information will be needed to give a more comprehensive inquiry but firstly a proper process of Māori engagement must be established that is resourced to enable independent critique if there is to be real commitment to meeting Treaty of Waitangi obligations. These concerns are at the core of the ongoing litigation that is occurring parallel to this submissions process on these matters.

WAI 262 REPORT

11. Rights to flora and fauna, mātauranga Māori and the protection of taonga, including taonga species, were central to the Wai 262 claim. The Tribunal stressed the importance of protecting the cultural relationship between kaitiaki interests and taonga species, including with reference to bioprospecting and intellectual property rights, and concluded that existing plant varieties legislation did not protect kaitiaki interests. The Tribunal recommended that a draft Plant Varieties Bill prepared by the Crown in 2005 include a power to deny plant variety rights protection on the ground that it would affect kaitiaki relationships with taonga species. That decision should be made by a Commissioner of Plant Variety Rights who would be supported by a Māori Advisory

Committee.[1]

12. The Waitangi Tribunal in the Wai 262 Report recognised that intellectual property obligations, including the Plant Variety Rights Act 1987 were not designed to protect the kaitiaki interests in taonga species and mātauranga Māori and should be amended to do so. The Wai 262's Tribunal's key recommendations in relation to plant varieties were:

    a) that the Commissioner of Plant Variety Rights 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) that the level of human input into the development of a plant variety required for PVR protection be clarified (to address concerns that varieties may be discovered in the wild); and

    d) that the Commissioner be empowered 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.

13. That report also made recommendations on the process for the making of international instruments, observing that:[2]

> It is for Māori to say what their interests are, and to articulate how they might best be protected – in this case, in the making, amendment, or execution of international agreements. That is what the guarantee of tino rangatiratanga requires. It is for the Crown to inform Māori as to upcoming developments in the international arena, and how it might affect their interests. Māori must then inform the Crown as to whether and how they see their interests being affected and protected. This is necessarily a dialogue: Māori and the Crown must always be talking to one another, whether it is occasional consultation as needed or something more regular, fixed, and permanent.

14. Taonga species can be identified as species over which whānau, hapū, or iwi claim kaitiaki obligations. These obligations are set out within the matrix of mātauranga

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1 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wai 262, 2011) at 206 to 208.

2 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wai 262, 2011) at 681.

Māori, whakapapa and the interconnectedness of concepts like Mauri and Mana. The law must recognise the importance of kaitiakitanga and taonga species relationships. This is evident where vulnerable taonga are under threat. The compliance with kaitiakitanga is necessary for the survival of a species and the survivability of the culture that has obligations to that survival. To sever the obligations of the children of Tanemahuta from the children of Papatūānuku is to sever the whakapapa of one to the other. It is this relationship between kaitiaki and taonga species that needs to be protected.

15. Throughout the Wai 262 hearings process, concerns were placed by witness after witness that kaitiaki have no ability to affect commercial exploitation (with particular regards to Harakeke Mānuka) and furthermore, that it would affect their kaitiakitanga.[3]

16. Measuring the recommendations of the Wai 262 report is not a sufficient method alone either of ensuring that the interests of Māori are taken into consideration in any finalised proposal. When discussing the concerns of the claimants of Wai 262, the proposal presently before us is unclear as to whether even those observations have been taken account of. Reliance on such a report to achieve an international standard addressing indigenous rights would be seen as complacent when a more thorough approach could have aided in implementing a more sufficient and Treaty compliant regime that also satisfies some of the concerns of indigenous populations throughout the world.

17. The premise of a plural mechanism that ensures that the voices of tangata whenua are heard and acted on needs to be a significant aspect of any regime. It must be noted that due to the differences in iwi and hapū, their relationship alters with their connection to the land as is reflected in their kawa and tikanga. Therefore, there would need to be some consideration in identifying how to address the varying mātauranga in any protection regime and in any application of that regime. To provide an alternative, the interests of kaitiaki, mātauranga Māori and/or taonga species must be fully understood and provided for in decision making processes. The current process of consultation has not enabled these nuanced differences to be identified and we say the present model is silent on how they are to be included in any legislative regime or its application accordingly.

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[3] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuatahi (Wai 262, 2011) at 67.

TINO RANGATIRATANGA AND KAITIAKITANGA

18. I have consistently raised issues with respect to Māori rights and the exercise of tino rangatiratanga and kaitiakitanga responsibilities in relation to taonga species with MFAT and MBIE now for several years. Those whom I have been consulted by have included parties from a variety of government agencies. Despite the change of face the basis of engagement is the same. Tino rangatiratanga is thought to be subordinate to kāwanatanga.

19. It is my firm view that the ability of Māori to exercise authority over whakapapa, traditional knowledge, culture, and other taonga, is prejudiced by the plant varieties regime. This has been a consistent concern that myself and other claimants have raised in the Wai 262 Inquiry and recently in the Wai 2522 Inquiry, in the context of New Zealand's international trade obligations under CPTPP and UPOV 91. This must change for there to be any credible proposal that pays more than lip service to the cultural and intellectual property rights at the heart of these concerns.

Disenfranchisement of mātauranga Māori

20. The reviewed document shows the disenfranchisement of mātauranga Māori and mana Māori motuhake. The WAI 262 report illustrates the interest Māori have for their taonga and kaitiakitanga, clearly identifying the significance and struggle that Māori have with legislation that seeks to overrule their inherent roles with Papatūānuku and Ranginui. Kaitiakitanga stems from the notion of whakapapa where every person is connected to each other and the whenua. It is embedded into Māori, the duty of kaitiaki. With or without legal ownership, kaitiakitanga remains. The Crown has ignored this important value of Māori and in doing so have demonstrated a lack of respect for tapu and whakapapa.

21. Whakapapa stretches beyond the current state both past and future generations. The mauri of the plant and its species are always taken into consideration when used for traditional means; something that is being overlooked in the current PVR Act. Flora and fauna are not seen just as resources as past, present and future generations are intertwined with the whenua. It must be noted that each iwi and hapū have different connections with the local flora and fauna and their relationship differs.

22. Furthermore, the subjectification of flora to be used with bioprospecting and genetic modification is the act of manipulating the world which was bestowed upon Māori to be custodians of for what could be commercial capabilities.

23. With the act of copyrighting taonga works and taonga species, the owners give no ability for kaitiaki to perform their duties. The interest then turns to one of business rather than of Te Ao Māori. The significance of this is that you lose sight of the value associated to the land for Māori.

24. The regime shows the dominance that the Crown wishes to impart on Māori. The ability for it to take away cultural values and norms and place it into a Pākeha sphere inhibits Māori and is a clear breach of the Treaty, in particular Article II. Deliberately or unconsciously, it doesn't matter which Māori values are diminished to a process of colonisation that diminishes and denies the application of these values in the future governance and use of our taonga.

Accommodation of economic gain over domestic responsibility to protect taonga species

25. The entire plant varieties regime has been crafted to further the interests of commercial breeders rather than helping local and indigenous communities to produce their own varieties to protect. It is my view that the PVR Act will give privileges and rights to investors that will affect Māori culture, and customary knowledge, for commercial gain and there will be no benefit sharing with Māori who have inherited such knowledge in a particular taonga species. The PVR Act will give investors and plant breeders a greater say in government decision making than are currently guaranteed to Māori.

PATHWAY FORWARD

26. These issues like the Wai 262 and Wai 2522 matters are so complex and significant that they cannot be addressed in a piecemeal fashion nor in a manner which simply sees the "tinkering" with existing Crown legislation and policy. Finding a way forward must involve good faith and measured negotiation between the Treaty partners, starting from first principles, and according the perspective of tangata whenua an equitable voice, as required by the Treaty relationship.

27. Since MBIE began its review process and held regional hui to amend the Plant Variety

Rights Act 1987, we have consistently expressed unhappiness with the process, which has undermined our ability to engage effectively to promote and protect the interests recognised in the Wai 262 Report. Notification of hui have been at the last minute and are not advertised. Very few resources and little expert information has been made available to them to assist in developing an effective Tiriti-based resolution. Māori need to be involved from the initiation of discussions on policies that affect them, and at all subsequent stages, so as to protect their interests, to ensure there is proper knowledge of the Treaty and tikanga implications of the policy or regulation, and to ensure the process, substance, and Crown's understanding of the issues are Tiriti compliant.

28. I therefore recommend that Māori and academics, separate from MBIE, form the nucleus of a group responsible for the consultation and communication strategy with some immediacy, with general responsibility for:

    a) the raising of awareness among Māori of the key issues;

    b) the canvassing of kaitiaki Māori drawn from iwi and hapū to determine foundational principles;

    c) the appointment of a "taumata" representative of kaitiaki Māori drawn from iwi and hapū who can engage with MBIE and the Crown.

29. I believe that such a strategy would encourage greater participation of Māori and will provide for the exercise of tino rangatiratanga and the exercise of kaitiakitanga.

30. Given the Wai 2522 Urgency is scheduled to commence this year, issues relating to TPPA obligations and Free Trade agreements are likely to become live well before the MBIE consultation is over, and certainly before legislation has been passed. There is therefore considerable urgency to generate informed debate among Māori and academics to object to the current process, and to influence the outcome of the current legislation.

LEGAL ISSUES ON TPPA, UPOV1991 AND WAI 2522

The relevant provisions in the TPPA text

Article 18.7: International Agreements

2. Each Party shall ratify or accede to each of the following agreements, if it is not already a party to that agreement, by the date of entry into force of this Agreement for that Party: …
(d) UPOV 1991;[1]

Annex 18-A

Annex to Article 18.7.2

1. Notwithstanding the obligations in Article 18.7.2 (International Agreements), and subject to paragraphs 2, 3 and 4 of this Annex, New Zealand shall:

(a) accede to UPOV 1991 within three years of the date of entry into force of this Agreement for New Zealand; or

(b) adopt a sui generis plant variety rights system that gives effect to UPOV 1991 within three years of the date of entry into force of this Agreement for New Zealand.

2. Nothing in paragraph 1 shall preclude the adoption by New Zealand of measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party.

3. The consistency of any measures referred to in paragraph 2 with the obligations in paragraph 1 shall not be subject to the dispute settlement provisions of this Agreement.

4. 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 Annex. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 2 is inconsistent with a Party's rights under this Agreement.

The Tribunal's question to experts:

What is the effect of Article 18.7.2 and Annex A which requires NZ to accede to Upov or implement a plant variety rights system to give effect to Upov 91. What (if any) space does NZ have to develop a regime in tension with Upov 91?

Joint response of advisers: We agree that there is a risk of a state-to-state dispute from the implementation of Paragraph 1(b) of Annex 18-A. We are of different views as to whether there is no or a limited risk of investor state dispute settlement. This is a complex and difficult area that will require extensive consultation in determining an outcome consistent with the Annex. We agreed that paragraph 4 was not necessary.

[1] Annex 18-A applies to this subparagraph.

Interpretation of Annex 18-A

The Tribunal's interpretation of the obligation is that New Zealand must either sign up to the UPOV 91 treaty or implement a plant variety rights system which gives effect to it. However, action is not required until three years after the TPPA comes into force.

Paragraph 1 of Annex 18-A seems clear about the obligation. In paragraph 2 it does not use the word 'notwithstanding' in paragraph 1. Instead it says 'nothing shall preclude measures' that comply with Te Tiriti provided they are not arbitrary or unjustified discrimination. While the consistency of paragraph 2 measures with the paragraph 1 obligation cannot be challenged in a dispute, the good faith legal obligation still applies. And a measure taken to comply with Te Tiriti can still be challenged by another state or an investor as involving arbitrary or unjustified discrimination.

The Crown has tried to give the broadest possible interpretation of Annex 18-A to allow deviation from UPOV 91. There is no access to the negotiating notes (they will be kept secret for 4 years after the agreement enters into force), so it is impossible to know if these meanings were discussed with the other parties, or MFAT is just being creative.

David Walker (TPPA chief negotiator) said 'the obligation is to implement an otherwise UPOV consistent system however, to the extent that UPOV 91 is found to conflict with obligations New Zealand has under the Treaty of Waitangi to protect indigenous species, New Zealand can deviate from UPOV 91.'

Charteris (MBIE official in charge of PVA review) said (25 August 2016) "When implementing the TPP obligations, New Zealand can adopt any measure that it deems necessary to protect indigenous plant species in fulfilment of any obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary discrimination against a person of another Party" [para 9]. He appears to be saying that the only restriction on NZ's new law is that it is not arbitrary or unjustified discrimination, and that it does not need to be UPOV 1991 compliant.

The Crown also claims that Annex 18-A was merely included in the final text for avoidance of doubt that the Treaty exception applies to plant varieties; the claimants and Tribunal's expert Amokura Kawharu say it does not.

Extracts referring to UPOV91 from the Wai 2522 Tribunal Report

Because we do not have sufficient information about the proposed engagement process in respect of changes to the plant variety rights regime and UPOV 91, we adjourn that aspect of our inquiry until further information is available.

We note that ratification is not just the passage of necessary Acts. Domestic compliance may include subsidiary legislation, Ministerial directions, and policy changes. We prioritised for hearing the effectiveness of the Treaty of Waitangi exception clause in the TPPA because we saw it as an issue of fundamental importance given the constitutional significance of the Treaty of Waitangi. We recognise that in so doing we have not been able to engage with or inquire into a range of other issues identified by claimants. They stated that several other parts of the TPPA were of importance to them, namely the obligation to accede to UPOV 91, aspects of the intellectual property chapter relating to medications, and the transparency annex, which

will affect the operation of Pharmac. While these matters were raised during hearings, they were not the focus of this inquiry, and we accordingly make no findings on these aspects of the TPPA. The focus of our inquiry was the Treaty exception and the consultation which the Crown should now undertake. We do, however, anticipate that the Crown will consult with Māori over UPOV and other matters, and so our discussion of consultation is relevant in that respect

UPOV 91 is the most recent (1991) version of the International Convention for the Protection of New Varieties of Plants, which aims to encourage the creation of new plant varieties by protecting the intellectual property rights of plant breeders over the new varieties they create. The Wai 262 report explored the concept of intellectual property rights over living things in detail. Claimants in that inquiry were opposed to systems of intellectual property which give exclusive legal rights over taonga species to anyone other than the kaitiaki of that species.

Among other things, the Wai 262 Tribunal recommended that New Zealand's Plant Variety Rights Act be amended to allow plant variety rights to be refused on the grounds that it would affect kaitiaki relationships with taonga species. There is a question about whether or not this would be allowed under UPOV 91.

The Crown states that it assessed the level of Māori engagement required against the scale of Māori interests impacted by the TPPA according to the first three categories of the 'sliding scale' set out in the Wai 262 report. It determined that most aspects of the TPPA fit within the first category of the sliding scale, where Māori interest is limited. Māori interests in the environment and natural resources were identified as fitting into the second category, which required a mix of information and general engagement. Only the matters of intellectual property provisions and UPOV 91 were identified as interests requiring more targeted processes of engagement.

We now ask, in light of the evidence before us, whether there has been a breach of the principles of the Treaty of Waitangi. We do so only in relation to the first of our two issues: the adequacy of the Treaty exception to protect Māori interests. We then go on to address our second issue: what action the Crown should take in relation to ratification and ongoing implementation of the TPPA. We reiterate that these are relatively narrow questions when compared with the wide range of issues that have been raised before us in relation to the TPPA. Our inquiry did not examine in any depth issues such as UPOV 91, intellectual property, or the future of Pharmac. These are important matters, but are outside the scope of this inquiry and consequently we make no findings in relation to them.

The Government will then introduce any legislation required to give effect to the TPPA. Biological medicines can be granted additional market protection without changes to New Zealand law or regulations. New Zealand must also either sign up to the UPOV 91 treaty or implement a plant variety rights system which gives effect to it. However, action is not required until three years after the TPPA comes into force.

We have seen that the Crown considered Māori interest in intellectual property and UPOV 91 to be significant, yet we know this only from their assessment of post-negotiation interests. When Ngāti Kahungunu responded to the first invitation for open submissions in 2008, they raised, as one of the six iwi claimants in Wai 262, a substantive concern about intellectual property matters, amongst other things. Yet other than a general stakeholder meeting in 2010 to discuss intellectual property in international trade agreements, Ngāti Kahungunu were consulted no further on the matter. This is not simply an issue of poor process. It harms the

relationship and increases the probability of a low-trust and adversarial relationship going forward.

We understand that MFAT officials have an outward focus and relatively limited capacity for extensive domestic engagement with Māori. While our role is to assess Crown conduct, not that of any one Ministry or agency alone, in this instance we only have evidence of Crown conduct by and through one Ministry, and so that is all that we can assess.

Finally, we note that the Government is still developing its process with respect to those aspects of ratification over which it retains a degree of policy flexibility. This includes the response to the TPPA obligations with respect to New Zealand's plant variety rights regime. We are informed that MBIE intends to undertake targeted engagement on issues relating to changes to the plant variety rights regime including discussion on how Māori wish to engage with the Crown on those issues and whether or not New Zealand should accede to UPOV 91, or establish alternative compliance. We are not closing off consideration of Māori interests in relation to UPOV 91. Any such consideration, however, would require more evidence on the topic than has been submitted thus far.

As this issue is ongoing and the process of engagement is still under development, we will adjourn our inquiry in respect of this issue only. The purpose of the adjournment is to allow time for the MBIE process to be finalised and communicated to claimants and others. At that point we may convene a judicial conference to hear from the parties on what, if any, issues remain that may need to be the subject of further inquiry.

The Crown is directed to file an update and timeline as to its plan of engagement with Māori over the plant variety rights regime, and whether or not New Zealand should accede to UPOV 91. This is to be filed no later than 4 pm on Friday 17 June 2016.