Submission template

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

Your name and organisation

Name	Wendy Cashmore & Andrew Mackenzie
Email	*wendy@plantippartners.com*; *andrew@plantippartners.com*;
Organisation/Iwi	Plant IP Partners Limited

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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?
	We agree, on the basis that it gives a workable framework and is consistent with other pertinent NZ legislation
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?
	We agree species defined in that way are to be listed in regulations and that the draft list (as set out in the table at point 30 as published in the Discussion Paper dated August 2020) is the appropriate list. *Further, we expect the legislation to be clear on the process by which the definition 'non-indigenous species of significance' is assessed for continued validity over time, and that extension of the scope of that definition is not taken lightly. We also expect legislative provision that the process for that and/or any addition of any other species to the current list is no less rigorous than the level of due diligence completed by Dr Taiuru in his thesis research – and, that there is also an appropriate process for interested parties to be heard on the assessment of any species for addition to the list prior to the decision for it to be added to the list. The information and perspectives brought forward through that process being a contribution to the final decision making for addition or not, not mere "consultation".* *We also advocate that there are appropriate grandfathering provisions in the new law to ensure continuity of any application or grant in place prior to the enactment date of the new law to be exempt from the new provisions.*
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?
	Reasonable disclosure of the species of the candidate and/or the parents of the candidate in the case of any inter-specific hybrids will be required to enable the PVR Office and the Maori PVR Committee to carry out their respective duties; this information should remain confidential to the applicant and those parties until after a grant is issued. *This also has potential to de-risk concerns from applicants that any ill-timed publication might prejudice their eligibility to apply or their capacity to meet non-disclosure deadlines in other jurisdictions for the same candidate variety.]*

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?
	Agree this proposal]
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?
	Agree this proposal]
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?
	Agree this proposal]
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?
	We agree the list of considerations proposed – and note that the Discussion Paper indicates the assessment steps to arrive at the determination of whether the considerations have been met is a "post-application" process [see #52 page 17; "Cabinet agreed that the primary role of the Committee is to make a determination on whether or not the kaitiaki condition is met. This means it determines whether a relevant application can proceed to testing by the PVR Office on the other criteria for a grant." *The sequential timing of these steps is critically important to the integrity of the PVR process. As with other applications, any application that is referred to the Maori PVR Committee must first have an application date issued by the Plant Variety Rights Office to ensure that any novelty or priority considerations in respect of that candidate variety are not adversely impacted*
8	**Māori Advisory Committee – decision making processes** Are there any additional factors that should be added to the list of relevant considerations?
	Where the Committee develops precedents as an outcome of its determination process it would be helpful to have those published. It would raise the level of informed approach among users of the PVR system and support continued development of knowledge and understanding in this fresh and evolving area of the plant variety IP field of practice.]
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?
	Agreed]

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?
	Agreed]
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?
	Agreed – this encourages a mediation-style engagement, rather than arbitrative-style]
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?
	Option 3 standing alone is not supported; as widely and constructively discussed at the hui facilitated on by the MBIE working party 29 September 2020 participants expressed reasonable consensus for stepwise approaches to be provided for including initial mediation style engagement, with a relevant IPONZ process to follow if still required. In this context where continued communication and engagement is perceived more likely to arrive at an outcome satisfactory for all parties the process could incorporate Option 2, Option 3, and the sub-option set out in point 83 of the Discussion Paper dated August 2020 where a new member is added to the Committee for the review period. All of these options should take precedence of moving quickly to any judicial review. A separate course for review for matters that come to light that are genuinely "constitutional" could also be considered – but are likely to be referred away from the scope of the PVR Act per se for consideration, which would mean the Committee is relieved from addressing a matter of such import but can achieve their process for the relevant application while referring-on such additional matters to a relevant authority.]
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?
	See point above]
14	**Post-determination considerations** Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not?
	We agree having a time limit is prudent and 4 weeks is a reasonable period.
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?

	]
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?
	Option 2 is supported]

Operational issues

17	**Information available to the public** What are your views of the problem identified by MBIE?
	The content provided in the Discussion Paper dated August 2020 reasonably covers and expresses the realities of the situation & the effects of the various options (intended and unintended)]
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?
	Each of the options have pros & cons; overall we support Option 1 on the rationale of enabling a robust PVR scheme and for the transparency – and therefore level playing field – it would provide to breeders, proprietary variety developers, and rights holders with respect to early identification and opportunity to communicate on the relationship of applications and candidate varieties to pre-existing titles, varieties, and contractual obligations, and other matters of interest to all parties. For context, Option 1 would best enable early identification of Essentially Derived Varieties (EDV) and for the natural flow of opportunity and obligation in dealing with applications for such dependent varieties to be dealt with in a timely and efficient manner.]
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 this option is adopted an outcome should be publication of a variety description at the time of grant – certainly within a reasonable time period to allow 3rd party objections to such a grant. See point above re EDV's.]
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?

	The status quo is operating reasonably well (and could be assumed to continue reasonably well where the requirements for plant material supply remain unchanged) solely due to the discretion allowed to the PVRO - and which in our experience it does exercise – for the extension of deadlines for supply. *This has been especially and increasingly critical in recent years, where for example, a sector was subject of a disease incursion that required strict lockdowns on movement of plant material (kiwifruit), and in crop by crop cases where MPI has allowed import health standards (IHS) to lapse and/or has not addressed implementation of new or refreshed IHS for some crops creating long delays in the opportunity for import and post-entry quarantine (PEQ) processes to operate. Exacerbated further by MPI's failure to accredit offshore facilities and/or provide adequate capacity to meet demand; relying on a user-pays basis for what should be a matter of national investment to support the NZ innovation ecosystem and economy.]* *We support on-going discretion for the PVRO to exercise reasonable discretion to extend the deadline for supply of plant material – and equally support that it is reasonable the PVRO should request applicants to demonstrate reasonable intentions to procure, produce, and supply the plant material*
21	**Provision of propagating material for comparison and reference purposes** What are your views of the problem identified by MBIE?
	The information provided in the Discussion Paper dated August 2020 reasonably covers a portion of the realities of the current & evolving situation, however fails to acknowledge or communicate two further critical components. *Firstly, the PVRO itself does not "host" all of the growing trials to which the plant material would potentially be supplied and grown – nor subcontracts all of those it does not conduct directly; that gap is filled by growing trials "hosted" by 3rd parties, typically with no contractual relationship to the PVRO.* *As an outcome of that approach, the PVRO side steps accountability for providing any comfort, support, assurance, or guarantee that when plant material of a proprietary variety (post-application, or post-grant) is supplied it would not be at risk of misuse, misappropriation, or loss in being grown in any of those circumstances – and the applicant or rights holder has no recourse for action via the PVRO.* *Secondly, there is no acknowledgement of the very real time delays and opportunity cost for all participants in the NZ PVR scheme brought about by MPI's failure to provide or maintain a timely, effective, and fit for purpose plant import and PEQ process (see paper provided by industry representatives to the MBIE PVR Working Party ahead of the PVR Technical Focus Group and PVRA consultation held 20 August 2020.]*
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?

	The principle of Option 2 is supported, however, as noted above the NZ PVRO must acknowledge accountability and be proactive and transparent in how it arranges and organises for "safe and legally appropriate" hosting and use of the materials provided in good faith by breeders and title holders. An appropriate contracting process should be designed and implemented where the PVRO is bound into every hosting situation (rather than relying on a vague and implied role), and itself should be proactive in facilitating the "safe harbour" for growing trials and/or comparisons of variety constituents to take place that will provide the integrity of the PVR system users are seeking. This is important for NZ-based users of the system and even more critical for those introducing their varieties from outside NZ.]
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?
	No we do not support that proposal, it is unreasonable given the constraints and decrease of confidence in the growing trial system as outlined in previous points. We would also debate that side by side growing trials of the whole plant are required in all cases. It may be that timely provision of samples of variety constituents may satisfy the points of comparison required under the PVRA.
24	**Should growing trials be optional or compulsory?** What are your views of the problem identified by MBIE?
	On the basis of experience and views already provided here we support optional post-application trials only]
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?

	We support that growing trials post-application should be optional. *To enable that we propose that there is a focus on educating applicants about the opportunity and value of providing substantive data and supporting descriptive information at the time of application, or soon after the acceptance of an application.* *And, willingness for more adoption of test reports from other jurisdictions by the NZ PVR system.* *Many users of the NZ PVR system are also making applications in other jurisdictions for the same candidates – both through PVR offices and through the US Patent Office. In many instances these applications result in post-application growing trials being carried out by credible agencies.* *We do not advocate that the NZ PVR system moves to a more onerous application process, but do advocate strongly that on acceptance of the application in NZ the PVRO gives the applicant an opportunity to provide such substantive data as would be reasonable to meet the outcomes of a NZ based growing trial either in the form of a test report from another credible jurisdiction, or a substantive data set and variety description for examination by the NZ PVRO (to meet the reasonable guidelines provided by the NZ PVRA for such an option). And, that a NZ growing trial is only considered if the submissions do not meet the standards set in the guidelines, or the applicant preferentially opts for that per se.* *In any case, we would prefer to see the NZ PVR scheme look to more proactively adopt offshore test reports than it does currently.]*
26	**Who should conduct growing trials?** What are your views of the problem identified by MBIE?
	We support that it is reasonable that there are a range of options for "operators" to conduct growing trials – that's sensible in a small, resource restricted PVR scheme. However, as submitted above we believe that a more clearly facilitative and contractual role should be implemented by the PVRO – including itself taking on accountability for prudence and integrity of use of materials supplied]
27	**Who should conduct growing trials?** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
	[We support Option 4 although reiterate that support is in the context of the viewpoints and options advocated as submitted in preceding points]
28	**Trial and examination fees** What are your views of the problem identified by MBIE?
	[The information provided in the Discussion Paper dated August 2020 reasonably covers the realities of the current & evolving situation. Although we also note it would be an unfortunate outcome if applicants or potential applicants were effectively "priced out" of the opportunity to access the NZ PVR system.]
29	**Trial and examination fees** Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

	We support 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?
	[]
31	**Hearings and appeals relating to decisions of the Commissioner of PVRs** Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the *Patents Act 2013*. If not, why?
	Yes we support that alignment
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?
	Our view is that the full hierarchy of the courts should be available, but that appeals should commence in the District Court.]

Other comments