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Submission on the Ministry of Business, Innovation & Employment issues paper for the review of the Plant Variety Rights Act 1987

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EXECUTIVE SUMMARY

1. Summerfruit New Zealand Incorporated is the national body representing the interests of all Growers, marketers and exporters of apricots, cherries, nectarines, peaches and plums as well as any hybrids of those fruits.
2. At the time of the last industry "Crop Survey" in 2014, the industry comprised 279 Growers who produce fruit from just over 1,386 hectares. The main growing areas are the Hawkes Bay and Central Otago, with some production remaining in Marlborough, north of Auckland and Canterbury.
3. The majority of all nectarines, peaches and plums produced in New Zealand are consumed on the domestic market. Only minor volumes of each are exported, largely to the Pacific. Cherries and apricots produced in Central Otago account for the bulk of all export. Asian countries dominate export sales for cherries, Taiwan and China being the main markets, however markets in other countries are expanding rapidly such as Vietnam and Malaysia. Australia remains the primary export market for apricots.
4. The industry is going through a period of growth, strongly lead by cherry exports. There are also industry lead projects in the pipeline to reinvigorate the apricot sector. These are reliant on the successful commercialisation of new varieties bred through an industry breeding programme. This programme run in conjunction with Plant & Food Research over the last 10 years has been funded through the Commodities Levy (Summerfruit) Order.
5. As with other horticulture industry groups innovation is the backbone to continuing success as we strive to achieve the Government's goal of increasing horticultural export

value. One of the key determinations of export growth and remaining globally competitive is the ability to develop new and innovative plant varieties.

6. Summerfruit NZ welcomes the opportunity to provide comment on the Plant Variety Rights (PVR) Act 1987 Review – Issues Paper. Our members have interests across the PVR regime, including breeders and growers who use of new genetics to produce high value fresh fruit that result in higher yields and meet commercial and consumer (New Zealand and overseas) needs. The development and grant of rights for a new variety that is distinct, uniform and stable requires significant investment. Summerfruit NZ believes a future regime should recognise this, as well as providing for the interests of other parties (Māori, farmers and growers and the wider community).

7. Summerfruit NZ supports MBIE's intention to align the future PVR regime with New Zealand's international obligations as required under the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP), through ratification of International Convention for the Protection of New Varieties of Plants (UPOV) 1991, or a similar regime that gives effect to it.

8. In this submission Summerfruit NZ provides an overview of the appropriateness of the proposed PVR regime objectives and highlights how growers may be impacted by updates to different sections of the regime.

COMMENTS ON ISSUES RAISED

Objectives of a future PVR regime

9. The objectives of the PVR regime should enable the development and dissemination of new plant varieties, with the intention to improve the range and traits of plants. The future PVR regime needs to reward domestic innovation and encourage international breeders to bring new varieties to New Zealand. This needs to be done in alignment with our international obligations and update our regime, which hasn't been done since 1987.

10. The development of new plant varieties can be time and resource intensive, therefore there needs to be a careful balance that protects the rights of both breeders and users. The regime should provide incentives for breeders to develop and register new varieties in a manner that isn't overcomplicated and is cost effective. Without such a focus its likely breeders will choose to operate outside the regime, preventing future access to the variety by users and the general public.

11. The regime as currently structured is prohibitive for small and medium sized enterprises (SMEs), which make up a significant proportion of the summerfruit industry. Summerfruit NZ is aware that some New Zealand companies choose not to register their new varieties due to cost and uncertainty of return on their investments, in addition to the regulatory burden. The objectives should inform the scope of the rights in the PVR regime, which are practical, efficient, effective and enforceable regime.

Proposed objectives

12. The proposed objectives of the PVR regime (as below) provide a good basis for meeting the future needs of society as a whole, however there are improvements that could be made to refine their intention and outcomes.

- *To promote innovation and economic growth by incentivising the development and dissemination of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and society as a whole.*

13. The first objective is the most important to the summerfruit industry. Direct benefits have been gained through innovation of new plant varieties. Incentives for the development and dissemination of new varieties should be facilitated by the regime, to ensure return on a breeder's investment and wider societal benefits.

14. Dissemination of new plant varieties needs to be qualified as its subjective and open for interpretation. 'Dissemination' could be defined to clarify scope and criteria for access, or it could be changed to 'use' instead. Summerfruit NZ is also concerned with the word 'appropriate', which should also be defined. This leaves the regime open to challenge.

15. Summerfruit NZ acknowledges the intention of the regime to protect the rights of breeders, while also considering the interests of others, i.e. users (growers), Maori and the general public. This is generally reflected in the objective, balancing interest between these parties. We recommend the scope of rights of the beneficiaries are carefully considered to ensure regime balances the competing interests.

- *Compliance with New Zealand's international obligations.*

16. UPOV was last amended in 1991 and provides provisions to harmonise the rights of plant breeders for member countries. Given New Zealand's current PVR regime is only aligned with UPOV 1978, improvements are required to align with UPOV 91, and this provides an opportunity to future proof the regime, given the international agreement is now 28 years old. By adhering to international obligations under UPOV 91 (or equivalent) we are levelling the playing field for plant breeders globally, whilst maintaining New Zealand's integrity and reputation as innovators of high value fresh fruit and vegetable varieties.

17. Summerfruit NZ acknowledges the government's commitment to update our PVR regime has been made under CPTPP within a three-year timeframe. We urge MBIE to make changes to improve the regime, as necessary, that are fit for purpose to meet the future needs of interested parties in New Zealand.

- *Consistency with the Treaty of Waitangi.*

18. Summerfruit NZ recognises the New Zealand government needs to carefully consider its obligations under of the Treaty of Waitangi in the update of the PVR regime. The findings of the Ko Aotearoa Ténei: Report on the Wai 262 Claim (Wai 262) provide sound recommendations for how the regime could be improved in a way that's consistent with the Treaty obligations. These include recognising the value of mātauranga Māori and taonga species under the kaitiaki relationship.

Rights over harvested material

19. The existing PVR regime offers limited rights to harvested material, which includes fruit harvested from a protected variety. Currently growers are free to sell harvested material without the permission of the PVR owner, unless the material also has propagative ability. Under UPOV 91 there are exceptions to this when material has been grown without

authorisation of the breeder and they haven't had the opportunity to seek enforcement. There is also a provision that allows a member country to provide more extensive rights over harvested materials, but to date they haven't been exercised.

20. To overcome this limitation in the regime there are often controls for sale incorporated into grower contracts, which seems to be the most appropriate mechanism for breeders to protect their investment. An example of this is the licencing used by New Zealand companies to protect the production of high value cultivars in the kiwifruit and apple industries. This is another example of using contractual arrangements to circumvent the limitations in the current regime.

Rights over similar varieties

21. Rights over similar varieties is perhaps the most contentious section in the PRV regime, with parties often divided. When a breeder seeks rights over an essentially derived variety (EDV) bred from parent varieties they don't have the rights for, there needs to be appropriate rules balancing the rights of parties. The current regime already has the requirement for distinctness, where the EDV must have one or more characteristic that is different from its parents, in addition to requirements for uniformity and stability. However, the distinct characteristic (physical or physiological) that differentiates it doesn't give regard to the benefit of the EDV (commercial or otherwise).

22. The issues with the distinctness requirement are that characteristics that are of low commercial value can be used to distinguish a variety that is otherwise very similar to its parent, which has other shared commercially valuable characteristics (e.g. harvested material). Although the current PVR regime doesn't include an EDV provision, we recommend it be included in a future regime with tighter requirements around character distinctiveness and the value thereof (i.e. the commercial importance of the change). Currently, many breeders in New Zealand protect their rights to varieties and EDVs through contractual arrangements. An example of this is when a 'sport' is found. Unless there is a contractual arrangement, there is no obligation for a grower to notify the original breeder that a similar variety has been found.

23. A future regime that aligns with UPOV 91 would provide recognition of the investment made by the initial breeder of a variety through a requirement for a grower to seek permission to commercialise an EDV. The specifics of gaining permission will need to be developed to ensure they are fair and reasonable, to minimise piggy-backing, while still encouraging innovation. While it could be considered fairer to put some further parameters around measurement of characteristic differences (i.e. commercial or other), this would be a higher level of requirement used by other UPOV countries. Therefore, the most appropriate mechanism to manage this situation in New Zealand would still be through contractual arrangements.

Compulsory licences

24. The intention of compulsory licences is to balance interests of breeders and others for access to new varieties protected under the PVR regime. Licences granted by the Commissioner, after three years of the PVR being granted, allow the general public access to a reasonable amount of a protected variety at a reasonable price (the social bargain). However, what is considered 'reasonable' needs to be defined. In return it's reasonable to expect a licensee to pay a royalty to the PVR owner. This approach is intended to give the PVR owner protection to use the variety they have innovatively developed while sharing some of the benefits of the new variety with society.

25. Access to a protected variety may also be sought by another breeder, with their intention to use the variety within their breeding programme. Some see the use of compulsory licencing as an alternative to commercial negotiation, where a request made by a breeder for access to the protected variety may have already been declined by the PVR owner. The rights of the PVR owner need to be considered to ensure their investment in the protected variety is protected, otherwise these breeders may choose to operate outside the regime and the societal benefit will be completely lost.

26. To address these issues with the compulsory licencing provision, Summerfruit NZ recommends the new regime clearly outline a process to be followed by the Commissioner when considering requests. Given only two compulsory licence approvals have been granted, it indicates the provision either isn't working effectively or isn't necessary due to alternative arrangements that can be made for access. A future process should balance interests as specified above.

27. Summerfruit NZ is aware of some breeders in the industry who have expressed concern that the period of 3 years is too low given the time required to produce a commercial crop from new varieties (particularly relevant to fruit trees).

Enforcement

28. Having access to a robust enforcement mechanism under the PVR regime is essential to protect the rights of a PVR owner. The regime should give the PVR owner the ability to control and manage the variety. Enforcement should provide the PVR owner protection of their investment and also seek to control how a variety is used, such as production quality provisions to safeguard the brand of a new variety.

29. When a PVR owner's rights are infringed they should have the opportunity to request enforcement activity and/or compensation. However, to date there has only been one PVR infringement case. Often breaches in PVR rights are negotiated privately out of court, to avoid significant costs and if a relationship between the PVR owner and infringer exists, to attempt to maintain it. The latter aspect may involve contractual arrangements, that often have more stringent breach and penalty clauses.

30. Currently, when a breach occurs (to the PVR owner or the PVR Office) the maximum penalty that can be applied is a fine of \$1000. Under UPOV (78 and 91) the only provision for enforcement of PVRs is for 'appropriate legal remedies' to be available. The current fine doesn't provide much of a deterrent to individuals intending to breach the regime and can put significant costs back on the PVR owner to defend their rights in the New Zealand court system. Summerfruit NZ recommends the process of infringement is clarified and/or alternative resolution options are provided for under the regime to address the cost issue associated with defence of a PVR owner's rights.

Participation in the PVR regime

31. Future use of the PVR regime is likely to depend on its usability, cost and protection of rights. Making improvements in the regime to align with UPOV 91 not only levels the playing field with our international partners, but should also make the regime clearer. However, Summerfruit NZ notes that the proposed objectives of the future regime don't include the intention to enhance efficiency or effectiveness.

32. As previously stated, there are currently some companies within the horticulture industry who operate outside of the regime due to the time and resources required to go through the

registration, assessment and approval process to have a new PVR granted. Breeding programmes require significant investment and a lengthy and costly process to go through once when a desirable variety is developed is a deterrent for some breeders. This is especially so if they have multiple varieties in development that a breeder may want to protect. The decision to operate outside the regime and be 'off the radar' may have financial benefits to a breeder, however there will be no societal benefit to others, who are unaware of the variety's existence and won't have the opportunity to access it. If a breeder makes the decision to allow others to propagate the variety this is then done under contractual arrangements, which can provide a higher level of protection of the breeder's rights.

33. Summerfruit NZ encourages MBIE to keep this in mind during the next stage of consultation looking at options for improving the PVR regime to align with UPOV 91.

Conclusion

34. Summerfruit NZ thanks MBIE for their efforts in seeking to understand issues with the current PVR regime through conducting regional meetings, in addition to the formal consultation process.

35. Summerfruit NZ requests to be kept informed of further developments associated with the review of the PVR regime and we remain available to engage with MBIE during the next stage.

36. Summerfruit NZ looks forward to seeing the future PVR regime being updated to be more user friendly and affordable, while aligning with UPOV 91.

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