SUBMISSION ON THE OPTIONS PAPER ON THE PLANT VARIETY RIGHTS ACT 1987

Angeline Greensill

INTRODUCTION

Ko Tainui te Waka,

Ko Tainui te Hapū,

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. I have read the Options Paper on the Review of the Plant Variety Rights Act 1987. I have previously made submissions on the Review of the Plant Variety Rights Act. They are attached as **Appendix A** and the concerns I raised in them remain.

3. I have also read and support the submissions on the Options Paper that were prepared by Professor Jane Kelsey and Te Kāhui Rongoā Trust.

4. The concerns I raised in the Wai 262 Inquiry are not allayed by the contents of the Options Paper, for example, there is a general sense throughout the Options Paper that plant breeders' interests are prioritised over iwi, hapū and whānau. There is also a lack of detail around exactly how the interests of Māori in respect of use, ownership and protection of either the existing species or any cultivars will be considered.

Relationship to Te Pae Tawhiti

5. The Minister for Māori Development announced on 28 August 2019 that after many years, an all-of-government strategy was being developed to address findings and recommendations in *Ko Aotearoa Tēnei*.

6. The current proposal is organised around three kete of issues, which are based on key terms from *Ko Aotearoa Tēnei*:

    a) Taonga Works me te Mātauranga Māori;

    b) Taonga Species me te Mātauranga Māori; and

c) Kawenata Aorere / Kaupapa Aorere.

7. The Review of the Plant Variety Rights Act is currently listed in the work programme for Kete 2 – Taonga Species me te Mātauranga Māori.

8. I am concerned that the fundamental elements of Kete 2 which mirror the fundamental elements of the Plant Varieties Review are not being given adequate consideration and weight as the Plant Varieties Review continues. Given Kete 3's international focus and the impetus for the Plant Varieties Review, consideration must also be given to the Plant Varieties Review in this Kete.

9. In light of the position I have consistently maintained, I recommend that the Plant Varieties Review is suspended and then properly integrated into Te Pae Tawhiti to allow the elements of the Plant Varieties Review to be reworked appropriately. Te Pae Tawhiti needs to be amended to integrate the Plant Varieties Act so that it is not pre-empted by any international free trade obligations in Kete 3 or undermined by other matters that emerge from that free trade process. In Wai 262 we clearly identified a range of international obligations that would impact on the Plant Varieties Act framework, this still remains the case.

10. There is sufficient time available for the Crown to suspend things at this point to allow for a review of the positions in the current Plant Varieties Review document to be worked into the new all-of-government approach.

Inadequate Processes of Engagement

11. Despite pressure to meet international obligations and competing interests locally, the government maintains it will consult genuinely with Māori over plant rights.

12. The approach is one that we as claimants in Wai 2522 have consistently challenged both as an approach that satisfies Treaty obligations and significantly as an approach that will be developed genuinely with Māori.

13. Dr Moana Jackson who is a co-claimant with me said in Nelson to MBIE and other Crown advisers that the Treaty relationship doesn't talk about consultation. Treaty parties don't consult - they negotiate, they reach agreement and as long as the Crown is wedded to the idea 'oh, we're fulfilling our Treaty obligations if we consult with

Māori' then they're beginning again from the wrong place.

14. He said: "One doesn't go to the other and say, 'this is what we're going to do, what do you think?' and then, as often happens in the consultation process, then ignores what our people say anyways".

15. Dr Jackson believed the approach needs to be completely reset. I agree.

16. I have participated in a number of various consultation processes and sadly I do not see evidence of the genuine step change that is required. What has become more and more apparent is the efforts for the Crown to set up a focus group as the one stop shop for Māori consultation tick off.

17. I and a number of others who have been engaged in the process of information sharing have objected to the approach and have sought dialogue not with officials but with Ministers of the Crown so that our issues can be dealt with. After a year engaged intimately we are still awaiting a meeting with Minister Faafoi. This delay is indicative of the de-prioritisation Māori suffer in this policy space.

18. I was reminded of my early involvement in Wai 262 where I challenged:

> For several centuries in Western law, people have been able to claim ownership of ideas, and able to 'sell' these ideas and 'protect' these ideas from being 'stolen'. These are Intellectual property rights. Indigenous people who historically operated from a collective cultural base have had western systems of law imposed upon them which has often ruled that Indigenous knowledge is for the 'common good' and therefore able to be taken.

19. The notion of public good is important here and that decisions aren't located as the "New Right" and the "Free Market" would have us believe, at the level of individual freedoms and so on. For Māori it is not simply an issue of individual autonomy over your own decision making. Individualism inevitably develops the potential divide and rule scenario and subsequently commodification and exploitation. There ought to be some form of Māori authority which is at the centre which can make collective decisions on behalf of Māori with respect to what counts as intellectual and cultural property rights. We need an authority, a stamp an authorisation or whatever. There are creative ways around this but I think the tension between sustainable development and controlled exploitation needs to be dealt with. I don't think we necessarily need to

freeze in the headlights because it is a hard issue to deal with. My view would be that we have to find ways to also develop our people economically. Some of those ways are going to involve the controlled use of our own resources that we have to hand. There are ways to do this with a conscience and with care. Our hapū who ultimately protect those rights need to be integral in the development and advancement of such processes. The present consultation document does not in any way address these matters appropriately.

Appendix A

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.