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Submission on the Ministry of Business, Innovation and Employment's proposed options for the Plant Variety Rights Act 1987 Review

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INTRODUCTION

1. Horticulture New Zealand (HortNZ) advocates for and represents the interests of New Zealand's 5,000 commercial fruit and vegetable growers. The horticulture industry is valued at over \$5.5b with over \$3.6b in exports annually (FreshFacts, 2018).
2. The industry employs over 60,000 people, occupies some 130,000 ha of land and provides critical regional development opportunities in Northland, Auckland, Bay of Plenty, Hawke's Bay, Gisborne, Manawatu, Marlborough, Nelson, Canterbury and Central Otago.
3. New Zealand growers supply fresh and processed fruit and vegetables to domestic consumers, as well as exporting fresh products to discerning consumers in over 120 countries.
4. The horticulture industry in New Zealand is undergoing a period of significant growth through increased production of premium varieties for export and through exploration of opportunities to grow new fresh fruit and vegetables in the future. The protection of growers and breeders' rights will help facilitate this continued growth.
5. As HortNZ is an industry good organisation working in the interests of its members (commercial fruit and vegetable growers), we provide general comments and responses to some of the Ministry of Business, Innovation and Employment's questions, where relevant to the horticulture industry.

MEETING CPTPP OBLIGATIONS

Question 2: Do you agree with our analysis and conclusion of the CPTPP options?

6. The options put forward by MBIE to either accede or 'give effect' to the International Convention for the Protection of New Varieties of Plants (UPOV) 1991, clearly demonstrates that the latter option is more suitable to ensure the new PVR regime meets Treaty of Waitangi obligations as set out in the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). If the Crown chose to accede to UPOV 1991 then it would need to meet the criteria outlined in the agreement and nothing additional, which would not be Treaty compliant. By 'giving effect' to UPOV 1991 the new PVR regime would align with its provisions and be consistent with trading partners implementation of the international agreement, but would also have the ability to consider kaitiaki interests.

7. HortNZ supports MBIE's preferred option to give effect to UPOV 1991 which will allow the Crown to include any additional criteria in the new PVR regime to consider kaitiaki interests in a meaningful and mana-enhancing way.

TREATY COMPLIANCE – KEY TERMS

Question 4: Do you have any comments on the principles listed above and how they might apply in practice? For example, would it be useful to specifically list non-indigenous species of significance?

8. The principles MBIE have proposed to provide guidance for how breeders and kaitiaki could interact in a future regime will provide more certainty of what should be considered during the PVR application process. Specifically, the relationship kaitiaki have with certain plant species needs to be clear, which could be achieved through development of a list of species of significance.

9. HortNZ considers developing a list of species of significance, in addition to the use of principles, will provide more certainty for breeders so they understand what kaitiaki engagement is necessary during the application process.

TREATY COMPLIANCE – OPTIONS ANALYSIS

Question 5: Do you agree with the proposed options? Are there alternatives we have missed? Do you agree with our analysis and conclusions?

10. HortNZ would like to see the revised PVR regime recognising kaitiaki interests in a meaningful and mana-enhancing way that is Treaty compliant. The future regime should provide opportunity for early engagement between plant breeders and kaitiaki, when breeders are considering working with plants that are of kaitiaki interest.

DEFINITIONS - BREED

Question 7: Our preferred option is to incorporate the definition of "breed" that was considered in the previous review to address concerns around discovery of varieties in the wild. Do you agree?

11. HortNZ considers the proposed definition of 'breed' from the draft 2005 Bill, as outlined below, to be appropriate for inclusion in the new PVR regime. This definition provides an equivalent meaning to the definition used in UPOV 1991. Endorsement by the Waitangi

Tribunal as a recommendation from their Wai 262 report provides further weight for this preference.

Breed: in relation to a variety, includes the process of selection within the natural variation of a plant or plant population, together with the process of propagation and evaluation so as to enable the development of the variety.

TERM OF THE RIGHT

Question 11: Do you agree with the proposed options? Are there alternatives we have missed?

12. The term options for grants of PVRs under the current regime currently fall short of the minimum periods of UPOV 1991, 23 compared to 25 years for woody plants or rootstock respectively and 20 years for all other plants. For New Zealand to meet its commitment under the CPTPP requires alignment with at least the minimum UPOV 1991 period and preferably with the European Union terms.

13.

ESSENTIALLY DERIVED VARIETIES

Question 12: Do you agree with the proposed options? Are there alternatives we have missed?

14. Essentially derived varieties (EDV) are varieties that are distinct in their own right (so would be eligible for a PVR), but retain the “essential characteristics” of the variety they are derived from. HortNZ's view is that the wording in UPOV 91 is too ambiguous. How to define an EDV needs to take into account the interests of breeders (of the initial and derived varieties), growers and the public.

15. HortNZ agrees there needs to be more emphasis on the value of the type of distinctiveness, i.e. it is commercially meaningful. Whatever definition and approach are selected there needs to be recognition of the original breeder if the variance between the original and derived variety isn't great.

16. To recognise how breeding may occur in the future participants at the PVR hui in August also commented on the need to include provision for how single parent EDVs could be protected.

RIGHTS OVER HARVESTED MATERIAL

Question 13: Do you agree with the proposed options? Are there alternatives we have missed?

17. Rights over harvested material concerns the extent to which rights are extended to the harvested material (e.g. fruit) grown from the protected propagating material.

18. As per our CPTPP obligations New Zealand required to give effect to UPOV 1991, thereby at a minimum aligning with their provision for rights over harvested material. This provides PVR owners with the right to control the exploitation of harvested material of the protected varieties when material is obtained in an unauthorised manner and the PVR owner didn't have reasonable opportunity to assert their rights over the propagating material. This option provides the PVR owner with rights for unauthorised use of propagating material and harvested material thereof.

19. HortNZ encourages MBIE to refer to the positions put forward by commercial organisations from the horticulture industry that have direct experience with these rights and any complications that arise from them.

COMPULSORY LICENCES – GENERAL ISSUES

Question 15: Do you agree with the discussion and the proposals in relation to the five issues discussed above? If not, why not?

20. The intention of compulsory licences is to ensure the public has access to new varieties protected under the PVR regime. Currently, licence applications can be made to the Commissioner after three years of the PVR being granted, to allow the public access to a reasonable amount of a protected variety at a reasonable price (the social bargain).

21. HortNZ agrees there needs to be more clarity about the process for applying for a compulsory licence and supports the opportunity for parties to be heard before a licencing decision is made.

22. HortNZ supports the proposal for applicant engagement with a PVR owner and that all reasonable steps should be taken to engage with the PVR owner before licence processes are commenced.

23. HortNZ supports the proposal that a licence is limited to the use of the propagating material to propagate the variety in New Zealand.

24. HortNZ disagrees with MBIE's position that there doesn't need to be a public interest test. As discussed at the PVR hui in August, a test would inform if there is a public good benefit and provide clarity to both the PVR owner, potential licensees and the public. This approach is consistent with that used by the European Union and Singapore.

25.

COMPULSORY LICENCES – GRACE PERIOD

Question 16: Do you agree with the proposed options? Are there alternatives we have missed?

26. Currently, the grace period after the PVR has been granted and during which time a compulsory licence application cannot be filed provides the PVR owner with a short period to get a return on their investment and build up sufficient supply of propagative material.

27. HortNZ considers the three-year grace period to be quite short in the reality of preparing a new variety for commercial production. In three years a PVR owner has a lot of work to undertake and having to consider a compulsory licence application as well would not benefit the PVR owner or a potential licensee.

CONCLUSION

28. HortNZ supports the intention of the Ministry of Business, Innovation and Employment to align the future PVR regime with New Zealand's Treaty of Waitangi obligations and New Zealand's international obligations, as required under the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP), through giving effect to the International Convention for the Protection of New Varieties of Plants (UPOV) 1991.

29. HortNZ supports MBIE finding a balance in the future regime between encouraging innovation by plant breeders and ensuring this innovation is available to growers, other breeders and the general public.

28. HortNZ welcomes the opportunity to discuss the content of this submission with the Ministry of Business, Innovation and Employment and requests to be kept up to date on the review of the Act.

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