Submission on the Options Paper: Review of the Plant Variety Rights Act 1987

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This submission focuses on three points:

(i) The current Review should be suspended and integrated into Te Pae Tawhiti for the integrity of both initiatives

(ii) The interpretation of the Crown's Treaty obligations on which the options are based is deeply flawed

(iii) The paper concedes that the Crown does not yet understand what its Treaty obligations require in relation to plant varieties and may seek to change the regime in the future, but that will not be possible under the TPPA/CPTPP.

1. Relationship to Te Pae Tawhiti

1.1 On 28 August 2019 the Minister for Māori Development announced an all-of-government strategy to address the Wai 262 claim as demonstrating 'a commitment to building a new and enduring relationship between Māori and the Crown'. The accompanying narrative on Te Puni Kōkiri's (TPK) website says: 'An all-of-Government approach is needed to progress this kaupapa, which is an important part of strengthening the Māori-Crown relationship and for New Zealand as a nation. … This Government considers that it's time to take a more deliberate and coordinated approach to these issues.'[1]

1.2 I welcome this much overdue proposal for a process to respond to Wai 262. Most of the original claimants have passed on and the failure of successive governments to address the claim and the report *Ko Aotearoa Tēnei* is unconscionable. That includes the Crown's negotiation of international trade agreements that cut across its ability to respond to Wai 262 in breach of the Crown's obligations, despite that breach being pointed out repeatedly.

1.3 The initial discussions in Te Pae Tawhiti are intended to take place from September to October 2019, involving 'a number of Government Ministers and agencies coming together to work alongside each other, Māori and the wider public over a number of years. The exact scope, phasing and timing of the work is still to be worked through.'[2]

1.4 The current proposal is organised around three broad kete of issues, drawn from key terms that feature in *Ko Aotearoa Tēnei*.

a) Taonga Works me te Mātauranga Māori
b) Taonga Species me te Mātauranga Māori
c) Kawenata Aorere / Kaupapa Aorere (with an international focus)

[1] https://www.tpk.govt.nz/en/a-matou-kaupapa/wai-262-te-pae-tawhiti
[2] https://www.tpk.govt.nz/en/a-matou-kaupapa/wai-262-te-pae-tawhiti

1.5 The kete for Taonga Species promises to address kaitiakitanga, protection and partnership. The current Plant Varieties Review (PVR) falls directly within the scope of this conversation.

1.6 The kete for Kawenata Aorere centres on engagement and representation of Māori interests, including in negotiation of international trade agreements.

1.7 Proceeding with the current PVR separately and prior to the all-of-government conversation on the same issues will seriously undermine the integrity of Te Pae Tawhiti, whose three kete are separate but indivisible. **The PVR should be suspended and integrated into Te Pae Tawhiti, reworking elements of the PVR as appropriate.**

1.8 The government has opted to proceed with the PVR on its original timetable and outside the all-of-government approach. The statement confirming this approach downplays the centrality of the PVR to Te Pae Tawhiti: the PVR does not simply '*touch* on issues related to taonga species and Māori rights in international treaty negotiations', as IPONZ suggests.[3] Rangatiratanga over taonga species is central to the Te Pae Tawhiti. A pre-emptive outcome from the PVR will circumscribe what the holistic and integrated process of Te Pae Tawhiti can achieve.

1.9 The government explains that this is 'because of the deadlines imposed on the New Zealand Government by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)'.[4] The deadline for implementing New Zealand's obligations is three years from the entry into force of the agreement, which means 30 December 2021, two years and three months from now. **There is still time for the Crown to step back and review the positions being proposed in the current PVR document as part of the all-of-government approach.**

2. Flawed interpretation of the Crown's Tiriti o Waitangi obligations

2.1 Suspending and integrating the PVR into Te Pae Tawhiti is not only a more credible and coherent way to address the substantive issues - it is also essential in light of deep flaws in the *Options Paper*'s interpretation of the Crown's obligations under te Tiriti o Waitangi.

2.2 The Wai 262 report *Ko Aotearoa Tenei* is treated as a 'useful starting point' for considering the new PV regime.[5] Rather than strengthening the options for protection Maori rights and responsibilities in response to criticisms that the report did not go far enough,[6] the *Options Paper* retreats from the Wai 262 report in significant ways that benefit the Crown.

[3] https://www.iponz.govt.nz/news/whole-of-government-work-programme-announced-for-wai-262/
[4] https://www.iponz.govt.nz/news/whole-of-government-work-programme-announced-for-wai-262/
[5] *Options Paper,* para 54
[6] *Options Paper,* paras 32-33

2.3 The paper cites the Tribunal's key finding that the Treaty '*does not guarantee ownership in taonga species (or mātauranga Māori relating to taonga species), but it does guarantee tino rangatiratanga*'.[7] The Tribunal said '*the principle of tino rangatiratanga requires recognition and protection of kaitiaki relationships with taonga species and mātauranga Māori. This means providing kaitiaki with a level of control over the use of genetic and biological resources of taonga species sufficient for kaitiaki to protect their relationships with those species to a reasonable degree'*.[8]

2.4 The Tribunal recommended establishing a Commissioner with powers to refuse a PVR that would affect the kaitiaki relationship, supported by a Māori advisory committee.

2.5 The *Options Paper* dilutes the Crown's Treaty obligations from **a guarantee of tino rangatiratanga that recognises and protects kaitiaki relationships with taonga species through a level of control over the use of those species sufficient to protect those relationships to a reasonable degree** to this:

> *"The PVR Act allows the Government to provide exclusive rights to plant breeders over the propagating material of new plant varieties they develop.* ***In our view, the Treaty of Waitangi requires the Crown to consider kaitiaki interests – in a meaningful and mana-enhancing way that facilitates protection of those interests – in the PVR regime. This requires a genuine and balanced consideration of the interests of kaitiaki at all stages of the PVR process, from the start of the breeding programme to the decision on whether or not to grant a PVR."***[9]

2.6 Elsewhere the review refers to a regime that is 'inclusive' of kaitiaki interest.[10]

2.7 No source is provided for this 'view' of the Crown's Treaty responsibilities, so I have sought the advice on which this view was based under the Official Information Act.

2.8 Further, the *Options Paper* says the notion of balance between protection of kaitiaki interests and certainty for plant breeders reflects the main recommendation in *Ko Aotearoa Tēnei*,[11] but frustratingly provides no page reference in the Wai 262 report. I presume it is referring to page 704, which says: '*The Commissioner of Plant Variety Rights would need to be adequately informed as to the Māori interest, and to balance it against those of the applicant and any other interests*.' That balance needs to be framed by the rights and obligations of kaitiaki within the authority of rangatiratanga as recognised in the Report. Instead, the *Options Paper* makes up its own notion of 'balance'. This point is revisited in para 2.14 below.

[7] *Options Paper,* para 56, my emphasis
[8] *Options Paper,* para 57, my emphasis
[9] *Options Paper,* paras 32 and 79, bold is original emphasis, underlining is my emphasis
[10] *Options Paper,* para 82
[11] *Options Paper,* para 35

2.9 The paper claims this view is consistent with other intellectual property regimes, such as the Patents Act 2013, which allows a patent to be refused on the grounds that the commercial exploitation of the invention is likely to be contrary to Māori values. That is not the same test.

2.10 The paper's preferred option is to '*allow the refusal of a PVR if kaitiaki interests would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant*'.[12] The positive obligation on the Crown to protect kaitiaki relationships by conferring a degree of control on them has become an implied presumption that permission will be granted, except where there is a negative assessment that the impacts cannot be adequately mitigated. That is not rangatiratanga.

2.11 Concerns that this approach will marginalise kaitiaki is borne out by the paper's estimate that a mere 10% of applications would involve kaitiaki interests.[13] That low figure is not supported by any evidence, and reflects the Crown's minimalist interpretation of a kaitiaki interest of sufficient significance to be recognised.

2.12 I note that the Conclusion of *Ko Aotearoa Tēnei* said that PVR legislation should 'include a power to refuse a PVR on the ground that it would affect kaitiaki relationships with taonga species'.[14] Again, that is quite different in both tenor and consequences from the Paper's preferred option.

2.13 A further concern in the *Options Paper* is the restriction of Treaty obligations to the decision-making processes. Proposals to exclude new varieties from the PVR are rejected on the grounds that those species would then be subject to no regulation. That reasoning is specious. A prohibition on granting rights over such species is equally tenable. The real reason appears to be that partial exclusions would be a significant non-compliance with UPOV 1991.

2.14 Finally, the *Options Paper* invokes the term 'mana' to apply to all participants in the regime, breeders and Māori. Specifically, it promotes a '*mana-enhancing decision-making process*' to '*reflect the principle that the interests of all parties are valid and important, and worthy of consideration in a genuine and meaningful way. Engagement in the PVR regime should enhance the mana of all involved: kaitiaki, breeders, growers, other parties and the Crown'.*[15] This is an abuse of the concept of *mana*, which the Glossary of the Wai 262 report defines as 'authority, prestige, reputation, spiritual power',[16] and is yet another rhetorical device for downgrading the Crown's Tiriti obligations and the guarantee of rangatiratanga.

[12] *Options Paper,* para 34
[13] *Options Paper,* para 37
[14] Waitangi Tribunal, *Ko Aotearoa Tēnei*, page 704
[15] *Options Paper,* para 123
[16] Waitangi Tribunal, *Ko Aotearoa Tēnei*, page 474

3. The TPPA obligation

3.1 The Minister's Foreword to the *Options Paper* concedes that '*many of the options in this paper are informed by New Zealand's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific partnership (CPTPP) to align our regime with the most recent version of the International Union for the Protection of New Varieties of Plants (UPOV 1991)*' (my emphasis).

3.2 The *Options Paper* found no evidence that New Zealand is missing out from not adopting UPOV 1991[17]. In other words, agreeing to this requirement in the Trans-Pacific Partnership Agreement (TPPA) and retaining it in the CPTPP was not an evidence-based decision. The Crown agreed to accept this obligation for reasons unrelated to the interests of New Zealand's plant breeders.

3.3 UPOV 1991 does not permit states to implement new criteria for grant of a PVR. Refusing to grant a PVR to protect kaitiaki interests would therefore be inconsistent with adopting UPOV 1991.

3.4 The *Opinion Paper* proposes that New Zealand does not accede to UPOV 1991 but 'gives effect' to it.[18] 'Giving effect' means New Zealand remains a member of the previous iteration, UPOV 1978, and 'close to UPOV 1991 for varieties where there is a kaitiaki interest'.[19]

3.5 This wording is sourced in Annex 18-A of the TPPA, which requires New Zealand to adopt UPOV 1991 or a *sui generis* plant variety rights system that gives effect to UPOV 1991. Nothing in that obligation precludes the adoption of *any measures New Zealand 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.*

3.6 There are four elements of the obligation that are relevant to the PVR:

(i) a *sui generis* regime that meets the UPOV requirements as far as possible;
(ii) the Crown's interpretation of its Tiriti obligations;
(iii) the meaning of 'necessary' to meet those obligations; and
(iv) the potential for challenge on the basis of arbitrary or unjustified discrimination.

3.7 There are legal uncertainties relating to all those elements, which I will not canvass here. I just note that the meaning agreed to by the parties during the negotiations has not been disclosed and the negotiating history will remain secret for another three years. It is unclear, therefore, whether an outcome adopted as a result from this review will be automatically accepted by the other parties.

[17] *Options Paper,* paras 40-41
[18] *Options Paper,* para 52
[19] *Options Paper,* para 42

3.8 The Crown interprets this option in Annex 18-A of the TPPA/CPTPP as requiring the future PVR regime to be consistent with UPOV 1991 as far as is possible, subject to the flexibility to meet the Crown's Treaty obligations. The *Options Paper* says that requires the adoption of UPOV 1991 definitions, having to provide new exclusive rights in relation to propagating material and in some circumstances harvested material and implement the compulsory exceptions to exclusive rights.[20] The paper also lists a number of provisions within UPOV 1991 that leave room for domestic policy flexibility, without relying on Annex 18-A.[21]

3.9 The additional reference to the Treaty of Waitangi Exception in the TPPA[22] is unconvincing. That exception only applies to measures that give more favourable treatment to Māori. The Crown would not have sought to include Annex 18-A if it felt confident that its non-compliance with UPOV 1991 on Treaty grounds would be protected by the Treaty Exception.

4. Permanently locking in the outcome of this review

4.1 The *Options Paper* concedes that the decision it ultimately reaches from this review will be based on an imperfect understanding.

4.2 On one hand, the paper suggests the outcome of the Crown's '*Treaty compliance analysis at this time does not mean that acceding to UPOV 1991 could **never** be Treaty of Waitangi-compliant. The difficulty in crafting effective Treaty-compliant options that are consistent with UPOV 1991 stems in part from the lack of policy development relating to Māori rights and interests in taonga species generally in New Zealand*.'[23]

4.3 Elsewhere, the notion of 'legislative context' refers to the lack of faith that Māori have expressed in the current legislation to protect their interests. The *Options Paper* says the new proposals, options and criteria reflect that context.[24] Presumably that means a Treaty-compliant approach aims to correct that failure. Paragraph 83 says "*our conception of what is necessary to comply with the Treaty in the PVR regime is heavily influenced by the current legislative context, …'*

4.4 However, the remainder of that sentence reads: '*and subject to change as underlying issues relating to protection of taonga species comes up for consideration*.' The following paragraph refers to changes being made 'as part of a broader continuous improvement process'.[25]

4.5 Does this mean the Crown is taking an incremental approach towards being Tiriti-compliant?

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[20] *Options Paper,* para 45
[21] *Options Paper,* para 46
[22] *Options Paper,* para 28
[23] *Options Paper,* para 43, bold emphasis original, underlining my emphasis
[24] *Options Paper,* para 81
[25] *Options Paper,* paras 83-84

4.6 Or does it mean that the Crown's interpretation of its Tiriti obligations might change over time as it develops a better understanding of what they are in a new context (such as Te Pae Tawhiti)?

4.7 Whichever meaning, the TPPA/CPTPP will foreclose any such change. Once the Crown, on behalf of New Zealand, informs the other parties to the agreement that the legislation it adopts has fulfilled its obligations in Annex 18-A in relation to UPOV 1991 and te Tiriti, it will not be able to go back and seek to change it – especially if it wishes to adopt a stronger regime of protections for Māori on the grounds that it understands the context or its Treaty obligations better.

4.8 Whatever law the Crown initially adopts and notifies to the other parties under the TPPA/CPTPP will be as good as the PVR regime can get for Māori in relation to matters affected by UPOV 1991.