



Federated Farmers of New Zealand
**SUBMISSION ON PLANT VARIETY
RIGHTS REGULATIONS**

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SUBMISSION ON PLANT VARIETY RIGHTS REGULATIONS

TO: Ministry of Business, Innovation and Employment

DATE: 27 August 2021

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ABOUT FEDERATED FARMERS

Federated Farmers of New Zealand is a membership organisation, which is mandated by its members to advocate on their behalf and ensure representation of their views. Federated Farmers does not collect a compulsory levy under the Commodity Levies Act and is instead funded from voluntary membership.

Federated Farmers represents rural and farming businesses throughout New Zealand. We have a long and proud history of representing the needs and interests of New Zealand's farmers.

Federated Farmers aims to empower farmers to excel in farming. Our key strategic outcomes include provision for an economic and social environment within which:

- Our members may operate their business in a fair and flexible commercial environment;
- Our members' families and their staff have access to services essential to the needs of a vibrant rural community; and
- Our members adopt responsible management and sustainable food production practices.

SUBMISSION ON PLANT VARIETY RIGHTS REGULATIONS

1. INTRODUCTION

- 1.1. Federated Farmers of New Zealand (Federated Farmers) welcomes the opportunity to submit to the Ministry for Business, Innovation, and Employment (MBIE) on the Consultation Paper Review of the Plant Variety Rights Act 1987: Proposed Regulations (Consultation Paper) relating to the proposed regulations (Regulations) which are to accompany the new Plant Variety Rights Act, once in force.
- 1.2. The Consultation Paper comes after a phase of public consultation on the review of the existing Plant Variety Rights Act 1987 (PVRA), including public submissions on the proposed Plant Variety Rights Bill (Bill), in early July. We understand that the Bill is expected to be implemented by the end of 2021 to comply with New Zealand's obligations to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
- 1.3. To meet our obligations to CPTPP, New Zealand has elected to give effect to the International Convention on the Protection of New Varieties of Plants 1991 (UPOV 91) agreement or give effect to it. The UPOV agreements have strengthened the rights of plant breeders, at what could be considered a reduction in the rights of farmers and other end-users.
- 1.4. Federated Farmers represents the interests of those farmers who are growing the seed on farm bred by plant breeders for multiplication, those who purchase seed for sowing on their own farms or farming enterprises, and those who save their own seed for future use on their own farms. Our interest in the Consultation Paper relates to the regulation of farm-saved seed, compulsory licensing provisions and the public interest that is generally served through the Regulations. Federated Farmers will comment on these issues raised in the Consultation Paper.
- 1.5. Federated Farmers has been a participant in the pre-consultation workshops held by the Ministry in 2017, the public consultation meeting in 2018, and submitted to MBIE on the "Issues Paper: Review of the Plant Variety Rights Act 1987" (the Issues Paper) and appeared before the Economic Development, Science, and Innovation Select Committee (Committee) on 12 August 2021 to speak to our submission on the Bill. The main points we raised with the Committee was to emphasise the need for access and transparency in a new PVR regime; as we have outlined at paragraph 2.5, below, as farmers and growers, our members are price takers who must absorb any business price increases, with no opportunity to pass these costs on. Further, farmers and growers are vital to the production of food and fibre. In our changing climate, accessing new plant species is imperative to help with the increasing challenges our members face in feeding the world.
- 1.6. We ask that MBIE give this submission on the Consultation Paper careful consideration. New Zealand farmers and growers bring individual skills, agronomic expertise and utilisation of inputs which leads to greater outputs and production of plant varieties, in turn contributing to a vital sector of the economy. Put simply, without farmers and growers, there would be no market for plant variety rights holders.

- 1.7 Federated Farmers would also like to offer assistance to MBIE in preparing and drafting any Regulations relating to farm-saved seed and any royalty regime that may be implemented in future. As noted in our submission on the Bill and at paragraph 3.6.4, below, we are supportive of a regime where royalties (if any) are set collectively by representatives of the plant breeding industry, growers and famers, and MBIE, respectively. We therefore request that any regulations are prepared in a similar manner.

2. GENERAL COMMENTS

- 2.1. This submission has been developed based on feedback we have received from our membership. We acknowledge any submissions which the MBIE has received from individual members on the Consultation Paper.
- 2.2. Federated Farmers acknowledges the complexity of PVR, and the balance to be struck between fostering innovation and the public interest in making varieties available, both within New Zealand and worldwide. In New Zealand, it encompasses a wide spectrum of industries, each with their own challenges.
- 2.3. We acknowledge that updating legislation and regulations to this area is fraught with the natural tension caused by balancing a simplistic approach (one-size fits all) with the need to cater for the wide variety of industries impacted by the Bill; fostering innovation with the wider public interest of plant variety availability.
- 2.4. Federated Farmers supports the approach of giving effect to UPOV in updating the PVRA; however, in making regulations, our members would commend an approach which looks to consider the impact on farmers and growers as food and fibre producers and upstream effects of this impact on the wider public.
- 2.5. Federated Farmers requests that MBIE note many farmers and growers across New Zealand, particularly in the arable sector, are price takers. Consequentially, there are very few instances where farmers and growers can pass costs onto end users. Any increase in the cost of inputs are therefore absorbed by farmers and their businesses.
- 2.6. There is an inequity between what farmers and growers are paid for their vital skills compared with what companies receive by benefitting from these skills. Federated Farmers therefore wishes MBIE to bear this imbalance in mind when considering this and other submissions on the proposed regulations. Furthermore, we ask that the Regulations are drafted in a manner which provides greater transparency for farmers and growers in terms of pricing regimes and accessing PVR through compulsory licencing regimes.
- 2.7. Federated Farmers agrees with the Regulations' objectives, as outlined at paragraph 18 of the Consultation Paper, especially where the Regulations are to balance the interests of PVR applicants, PVR holders, third parties and the public.
- 2.8. For interpretation purposes, where we have referred to PVR holder in our submission, this has the meaning as per clause 14 of the Bill, we take this to have the same meaning has PVR owner, as used in the Consultation Paper and questions and would request this wording be changed for consistency in any summary produced.

3. FARM SAVED SEED

- 3.1. Federated Farmers notes at paragraphs 15 and 16 of the Consultation Paper that MBIE is not proposing regulations regarding farm saved seed, as provided by clause 15 of the Bill. We also note that MBIE will only consider recommending making regulations relating to clause 15 if:
 - 3.1.1. MBIE is approached by growers and PVR holders with an agreed proposal for such regulations; and
 - 3.1.2. The Bill has been passed into an Act of Parliament.
- 3.2. Federated Farmers has recently met with other grower and plant breeding industry representatives to discuss the future of regulations around farm saved seed. We therefore advise MBIE that the following points have been agreed by Federated Farmers, United Wheatgrowers (UWG), as grower representatives and the New Zealand Plant Breeding and Research Association (NZPBRA), being representative of PVR holders:
 - 3.2.1. Federated Farmers, UWG and NZBPRA agree to farmers and growers' right to retain seed for their own use ("farm-saved seed");
 - 3.2.2. Where farm-saved seed is subject to a plant variety right, that the PVR Regulations are the appropriate instrument for introducing a royalty regime, if royalties are payable;
 - 3.2.3. Federated Farmers members have generally indicated that they see the value in the intellectual property provided by breeders and wish to ensure the future of plant breeding in New Zealand through a royalty regime;
 - 3.2.4. Federated Farmers members and NZPBRA are in discussion as to the mechanisms around royalties on farm-saved seed; and
 - 3.2.5. A Memorandum of Understanding is being prepared by Federated Farmers and NZPBRA regarding farm-saved seed. Federated Farmers and NZPBRA will be consulting with their respective members prior to entering into this agreement.
- 3.3. Federated Farmers is entering into discussions with PVR holders in good faith because its members have indicated a royalty regime would support the future and innovation of plant breeding in New Zealand. We note that there is nothing compelling our members to agree to royalties under UPOV in relation to the use of farm-saved seed because this is deemed an exclusion to PVR under UPOV, compared with a restriction to PVR and submit that these are distinct concepts under UPOV and the Bill.
- 3.4. Federated Farmers would also note that any reference under UPOV as to "equitable remuneration" per Article 17(2) is in reference only to where there has been a restriction on a PVR, as provided in Part 7 of the Bill, relating to the grant of compulsory licences.
- 3.5. Federated Farmers also notes the provision for royalty payment, as equitable remuneration, under Clause 104 where a PVR holder's rights have been restricted by the Commissioner through the grant of a compulsory licence.

- 3.6. Federated Farmers therefore repeats its comments made in its submission to the Committee, in the event a royalty payment is required on farm-saved seed under future regulations that:
- 3.6.1. the payment on farm saved seed is applied per kilogram of named cultivars sown by farmers and growers;
 - 3.6.2. there is no end point royalty on farm-saved seed;
 - 3.6.3. that any farm-saved seed should only be paid on the first two generations of that seed; and
 - 3.6.4. that these royalty rates are set annually by a representative group of farmers, growers, industry and MBIE.
- 3.7. Federated Farmers will update MBIE in due course to a proposal for a royalty's scheme, as agreed between industry members.
- 3.8. Federated Farmers would also add that our members do not wish to see regulations added to restrict their ability to use farm saved seed by requiring them to seek permission from a PVR holder, before commencing their farming activities.
- 3.9. We repeat comments made in our submission to MBIE on the PVRA Issues Paper at the end of 2018, and our more recent submission to the Committee that we do not see how it will be practical for farmers to seek permission from PVR owners to use farm-saved seed. What opportunity for recourse would there be if a PVR owner or licensee refuses to allow to use that variety? Federated Farmers is concerned about possible delays that the need to gain permission would add to the sowing process, how the information would then be used and whether then the PVR holder or licensee would then seek a royalty payment from the farmer to use that seed. Our members indicate that they are concerned that PVR holders or licensees would use illegitimate reasons for declining the application to use farm saved seed of a protected variety.

4. RESPONSES TO QUESTIONS IN THE DISCUSSION DOCUMENT

We adopt the Consultation Paper's numbering in response our responses below.

5.1 The Regulations

2.1 PVR regulations – general: Do you agree with MBIE's proposal that the new PVR regulations be adapted, as far as possible, from corresponding provisions in the Patents Regulations 2014?

Federated Farmers agrees with the adoption of new Regulations, rather than the adoption or alteration of the Plant Variety Right Regulations 1988 (1988 Regulations). Given PVR are primarily concerned with the protection of intellectual property, Federated Farmers agrees that the Regulations be adapted from existing intellectual property frameworks, so far as they are amended to be appropriate with the particular requirements of the plant breeding industry.

5.2 Regulations adapted from the Patents Regulations

3.1 Regulations adapted from the Patents Regulations: Do you agree with the outline of regulations to be adapted from the Patents Regulations set out in the table above? If not, please explain which aspects of the outline you disagree with, and why?

Federated Farmers agrees with the outline of regulations to be adapted from the Patent Regulations and makes no further comment.

5.3 PVR specific regulations

4.1 Denominations: Which of the two options for the time limit for submitting a replacement denomination do you support? Please explain why.

Federated Farmers supports a set period for submitting a replacement denomination and agrees with MBIE's suggestion of three (3) months, extendable by one (1) month as this is in line with the time limits around imposed for the compulsory licence regime under Part 7 of the Bill.

4.2 Denominations: If you favour option (i) should the prescribed period for submitting a denomination be extendible? If so how long should any extension be, and on what grounds?

As above, Federated Farmers supports an extension of one (1) month, as this is consistent with other provisions with the Bill, such as Part 7 relating to compulsory licences.

4.3 Examination: Do you agree with MBIE's proposals for the time limits for providing information and propagating material in relation to a PVR application? If not please explain why.

Federated Farmers has no specific comment to make on the proposed time limits for providing information and propagating material in relation to a PVR application. However, Federated Farmers would generally recommend the shortest time period as practical for delivering information and propagating material so to ensure a more expedient delivery of new and innovative plant species for use by grower, for the public's benefit.

4.4 Examination: If you disagree with MBIE's proposal, what alternative time limit regime should be adopted?

Federated Farmers has no comment to make regarding an alternative time limit regime.

4.5 Examination: Do you consider that the two-month period for paying trial or examination fees is reasonable? If not, please explain why.

Federated Farmers has no comment regarding the time period for paying trial or examination fees.

4.6 Examination: MBIE proposes that the prescribed period be extendible only under genuine and exceptional circumstances. Do you agree with this? If not, what extension (if any) should be available, and under what criteria?

Federated Farmers agrees with the prescribed period being extendible under genuine and exceptional circumstances.

- 4.7 Examination: MBIE has proposed that the regulations empower the Commissioner to set the conditions of a growing trial. Do you agree with the conditions proposed by MBIE? Are there any other conditions that you think the Commissioner should have the power to set?**

Federated Farmers has no comment regarding the Commissioner's powers in setting conditions of a growing trial.

- 4.8 Examination: MBIE proposes that where the Commissioner chooses to rely on a growing trial conducted by an overseas authority, and two more such reports are available, the Commissioner should determine which report to rely on. Do you agree with this proposal? If not please explain why.**

Federated Farmers supports codifying the current approach, being that the Commissioner can determine what report they choose to rely on. Federated Farmers also agrees with the suggested factors that the Commissioner must consider when deciding what report to use.

- 4.9 Compulsory licenses: Do you agree with the proposed procedure for dealing with compulsory license applications? If not please explain why.**

Federated Farmers is generally supportive of the proposed procedure for compulsory licences. Adopting the procedure from the Trade Marks Act 2002 gives the opportunity for any applicants to be heard and to respond by reply to evidence submitted by the PVR holder. Allowing the applicant to submit evidence in support of their application will allow the Commissioner to consider the public interest; as required by UPOV Article 17(1) the grant of a compulsory licence, as a restriction on PVR, hangs on whether it is in the public interest to do so.

Federated Farmers opposes the proposed three-month extension to the time limits, we calculate that this could drag proceedings out to beyond a year should an extension in time be granted at each step. Federated Farmers would have MBIE note that the criteria under clause 103(1) of the Bill, which must be satisfied before a compulsory licence. As per clause 103(1)(a) and (b) applicants must wait three years from the date that PVR is granted and have already made reasonable efforts to obtain authorisation from the PVR holder. Further, that although there may be genuine and exceptional circumstances for granting the extension, at some point this must be balanced against the public interest; as stated in our submission to the Committee, a public interest exists irrespective of whether an application for a compulsory licence is made. It therefore stands that the procedure for compulsory licences must also be designed in a manner that is in the public interest.

- 4.10 Compulsory licenses: If you disagree with the proposed procedure, what other procedure could be used?**

Federated Farmers acknowledges that genuine and exceptional circumstances may arise which may prevent the timely filing of counterstatements or evidence. However, as mentioned, above these circumstances should be weighted against the public interest which may be eroded by proceedings dragging out.

Federated Farmers therefore proposes that extensions in time be limited to one month, meaning a total of three months, with the total time to not go beyond 12 months from the applicant initially filing the compulsory licence application.

5.4 Other Issues

5.1 Objections before grant: Do you agree with the procedure proposed for objections before grant? If not please explain why.

Federated Farmers agrees with the proposed procedure for objections before grant for the reasons outlined by MBIE; that while it is not in the public interest for PVR to be granted where the criteria are not met, it is also not the public interest for these proceedings to be unduly dragged out. For this reason, Federated Farmers agrees with MBIEs procedure and timeframe.

5.2 Objections before grant: If you disagree with the proposed procedure, what alternative procedure do you suggest be adopted?

As above, Federated Farmers agrees with the proposed procedure and does not wish to suggest an alternative procedure at this stage.

5.3 Requests for propagating material or information from PVR owners: Do you agree with the proposed time periods for providing information or propagating material relating to a granted PVR? If not please explain why.

Federated Farmers supports option (ii) whereby a minimum time and maximum time for complying with the request by the Commissioner is made. We also recommend that this maximum time is not beyond 12 months, with the ability to allow for shorter maximum time as deemed appropriate. Given this relates to the maintenance of PVR, it is vital that this process be expedient, so that decisions around what is or is not capable of being subject to PVR, are also made expediently. This also extends to earlier comments in that it is not in the public interest that PVR is attached to plant species where criteria are not met. We view this as a continuing public interest and therefore support a procedure that allows for requirements of the Commission to be met, with this not allowed to drag out unnecessarily.

5.4 Requests for propagating material or information from PVR owners: MBIE proposes that the proposed time periods not be extendible. Do you agree with this proposal? If not, what extensions should be available and under what grounds should extensions be provided?

Federated Farmers agrees with the proposal that time periods are not extended.

5.5 Non-indigenous species of significance: When should the regulations listing non-indigenous species of significance enter into force? Should they enter into force with the Bill's non-Treaty provisions, or be left until the Treaty provisions come into force? Please give reasons for your response.

Federated Farmers agrees with the list as provided in the Consultation Paper but does not have a view on when this listing should enter into force at this stage.

5.6 Non-indigenous species of significance: Do you have any other comments on the list and the entries in it?

As above, Federated Farmers agrees with the list as provided in the Consultation Paper.

5. OTHER ISSUES

- 5.1. Federated Farmers requests that MBIE consider regulation in relation to the PVR register, whereby the Commissioner must keep a register of plant variety rights in New Zealand so to ensure the public interest is served in preventing practices of claims of PVR protection where it has not been granted or has lapsed.
- 5.2. We would support MBIE including measures in the Regulations to prevent practices or claims to PVR status relating to non-protected varieties (i.e. where there is not PVR attached). As per clause 150(l) “prescribing...other matters, not inconsistent with this Act, for the register...” and suggest the Commissioner is given powers pursuant to clause 115(1)(b) to issues notices to parties making PVR claims in relation to non-protected varieties this may include stances where PVR has lapsed, or the variety was never subject to PVR.