

**CONSULTATION PAPER**  
**REVIEW OF THE PLANT VARIETY RIGHTS ACT 1987: PROPOSED REGULATIONS**  
**SUBMISSIONS TO MBIE**  
**BY T&G GLOBAL LIMITED**

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**A. INTRODUCTION AND BACKGROUND**

1. T&G Global Limited (**T&G Global**) has already made submissions to the Select Committee in relation to the PVR Bill.
2. These present submissions deal with the Consultation Paper released on 14 July 2021 and entitled "*Review of the Plant Variety Rights Act 1987: Proposed Regulations*".
3. T&G Global is focused on growing healthier futures. Established more than 124 years ago as Turners and Growers, today as T&G Global it is New Zealand's largest grower and exporter of fresh fruit and vegetables and is listed on the New Zealand Stock Exchange. With revenues of \$1.4 billion, it employs over 2,000 people located in 13 countries.

4. T&G Global grows premium apples, tomatoes, citrus, blueberries and grapes, and partners with independent growers to market, sell and distribute fresh produce to customers and consumers in more than 60 countries, who are prepared to pay a premium for high-quality produce which is grown with strong sustainability credentials.
5. T&G Global has been a very heavy investor in new plant varieties. It has very successfully brought to market innovative apple varieties such as those marketed under the trademarks JAZZ™ and ENVY™, and A19 and RS1 kiwifruit varieties marketed as ENZA Gold™ and ENZA Red™. It has more recently partnered with Plant and Food Research as global commercialisation manager to support sustainable investment in a wide range of their berries globally. These arrangements have already underpinned millions of dollars in export returns and royalties for not only the breeders but also, more importantly, the New Zealand growers. This commercialising will continue for many years to come.
6. The New Zealand JAZZ™ and ENVY™ programs span the majority of New Zealand's apple producing areas across Hawke's Bay, Gisborne, Nelson and Otago. The programs are set to double in order to meet global consumer demand. T&G Global is therefore one of the largest exporters of New Zealand apples to the world, with around 95% of its crop picked and packed for international markets.
7. T&G Global also licenses growers of Scifresh (marketed as JAZZ™), Sciros (marketed as Pacific Rose™), HOT84 and Scilate apples (marketed as ENVY™) in other countries. In the 12 years since T&G Global first released Scilate apples (marketed as ENVY™) to New Zealand growers, it is now grown under licence in 13 countries, was voted the number one apple for taste, appearance and texture by consumers in the USA in 2019, and the brand is on track to be a billion-dollar brand by 2025.
8. This business makes up a significant proportion of the New Zealand apple industry. Development of these orchards and investment in markets needs to be underpinned by sensible, certain and internationally compatible PVR legislation. As a grower, T&G Global is supporting orchard investments that exceed \$20 million per annum and a multi-million-dollar annual investment in R&D and future genetics.
9. T&G has recently launched a bespoke global new variety development company focussed on sourcing excellent genetics both here in New Zealand and also offshore for introduction into New Zealand. This subsidiary of T&G Global will support breeders with funding breeding innovation, IP protection (PVR and TM), filing, enforcement, commercial Licensing growing and selling of their products to generate royalty income.
10. T&G Global continually scours the globe to discover new fresh produce varieties which deliver value to customers, consumers, and growers, such as new flavours and attributes, extended seasonal availability and increased yield. It is naturally keen on introducing and acting as the PVR filing agent for the breeders to bring appropriate varieties to New Zealand. However, before being able to do so it must convince the relevant offshore breeders that there is appropriate PVR protection in New Zealand under the PVR legislation and regulations.
11. As noted, T&G Global is also a plant breeder, developer, licensee, and licensor, and it has a strong vested interest in the continued success of growers, supply chain entities, marketers, and other individuals and groups who leverage innovation to generate economic value.

12. New Zealand's horticultural industry has a strong role to play in accelerating New Zealand's recovery from COVID-19 and building its future prosperity, and T&G Global is committed to contributing to this.
13. T&G Global does this by combining New Zealand's strong natural advantages with both New Zealand-developed and global intellectual property in plant genetics and world-class growing systems, to create a compelling offer for large, premium international markets. This competitive advantage can be scaled to contribute strongly to the New Zealand economy, and create a highly skilled, sustainable, and productive workforce.

## **B. SECTION 2: THE REGULATIONS**

14. The Consultation Paper poses the question:

“2.1 Do you agree with MBIE's proposal that the new PVR Regulations be adapted, as far as possible, from corresponding provisions in the Patent Regulations 2014?”

15. T&G Global supports the proposal and agrees that it is common sense to use the Patent Regulations as a guide. Further comment on this is made in relation to Compulsory Licences later in this submission

## **C. SECTION 3: REGULATIONS ADAPTED FROM THE PATENTS REGULATIONS**

16. Section 3 sets out a Table of Topics and in each case the corresponding provision (where relevant) in the Patents Act, Patents Regulations, PVR Bill and Plant Variety Rights Regulations 1988.
17. Question 3.1 asks:

*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?”*

18. T&G Global agrees with the outline of regulations to be adapted from the Patents Regulations.

## **D. REQUIREMENTS SURROUNDING GROWING TRIALS**

19. As the Consultation Paper notes, the Act and Regulations do not require growing trials, nor the formal conditions under which they must be conducted.<sup>1</sup> But the current approach from the Commissioner is that compliance with the DUS criteria cannot be ascertained without a growing trial. So, a growing trial is required for all species.
20. In its submissions to the Select Committee, T&G Global has contended that there should not be a requirement that in every case a growing trial is required. It has argued for more flexibility where the growing trials are being conducted in another UPOV country by or under the authority of a UPOV member state. This is contemplated by clause 47 of the Bill.
21. Further, in circumstances where the availability of provisional protection from the date of filing is being removed by the Bill, there is a need to shorten the time between application and grant. Importation of material (where applicable) coupled with growing trials for every application can contribute significantly to overall delays (up to 6 years have been experienced) impacting the period of grant.

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<sup>1</sup> Consultation Paper at [74].

22. The issue which T&G Global wishes to address concerns regulation where the Commissioner decides to rely on the report of a growing trial carried out by or under the supervision of a UPOV member state. Paragraph [80] of the Consultation Paper states that the decision on whether or not to rely on an overseas growing trial will be made by the Commissioner – with any disagreement by the applicant to be resolved at a hearing.
23. Paragraph [81] also refers to the position where there are two or more reports available from overseas authorities. Current practice is that the Commissioner decides which report is used.<sup>2</sup>

#### *Growing Trials in New Zealand or Reliance on Overseas Growing Trials*

24. The Consultation Paper at para [77] asks what Regulations are needed regarding growing trials. The focus of that paragraph is on Regulations determining *where* the growing trials are carried out and *the conditions* under which the trial proceeds and is overseen.
25. This does not deal with the situation where a decision is needed as to whether it is appropriate to rely on an overseas growing trial or whether a New Zealand growing trial is required.<sup>3</sup>
26. T&G Global accepts that the Commissioner is the person to make the decision, with a provision for a hearing where the applicant disagrees. The sorts of criteria needed will be those listed in [83] (in relation to a determination between two or more reports from overseas authorities) ie:
  - The basis of the overseas report.
  - The supervision of the growing trial conducted.
  - The results obtained.
  - Whether the physical conditions under which the overseas trial was conducted was similar to those in New Zealand *for the plant variety in issue*. ***The italicised criterion needs to be a consideration.***
  - Whether the reference varieties used in the trial were representative of the varieties of common knowledge available in New Zealand.

#### *Commissioner's Determination Between Two Growing Trials*

27. T&G Global accepts that the determination as to which of two overseas reports should be used will be a matter for the Commissioner – with the power for an applicant to seek a hearing if it disagrees.
28. T&G Global accepts the criteria in para [83] of the Consultation Paper but says that an additional required factor is whether the physical conditions under which each trial was conducted were similar to those in New Zealand *for the plant variety in issue*.

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<sup>2</sup> Consultation Paper at [82].

<sup>3</sup> Paragraph [83] of the Consultation Paper deals with criteria but only where the choice is between two or more overseas growing trials.

## **E. PROVISION OF COMPARABLE PROPAGATING MATERIAL TO THE COMMISSIONER FOR GROWING TRIALS**

29. An area relating to growing trials that does not appear to be addressed in the Consultation Paper is where an applicant is required to provide comparable propagating material (for example, a comparable variety of apple) for comparison with the applicant's variety in growing trials.
30. In such circumstances the comparable propagating material may be subject to stringent licence conditions between its owner/exclusive licensee (T&G Global) and growers.
31. Yet if budwood is provided to the Commissioner for a growing trial, none of these stringent contractual conditions over security and the preventing of unauthorised planting or propagation are in place.
32. T&G Global submits that this is an area which needs to be strongly corrected in Regulations so that the Commissioner and those who undertake growing trials must be bound by conditions imposed by the PVR owner of the comparable material as to confidentiality, security and prevention of any unauthorised use and propagation. Such conditions include no propagation, no authorised sales of fruit and limitations on access to the site.
33. Also provisions are needed as to the destruction of comparable plant material at the end of a growing trial to prevent it falling into the hands of unauthorised parties. The experience of Zespri in the unfortunate case of Mr Gao and his company Smiling Face Limited in making unauthorised use of propagating material from Zespri's G3 and G9 kiwifruit varieties is a clear indication of the need for such conditions in the case of growing trials (whether conducted by the Commissioner or under supervision.) The PVR owner should not be placed at any disadvantage or the security of the PVR material imperilled simply because the Commissioner has called upon provision of that comparable plant material for the purposes of a growing trial. The Commissioner should also consider IPONZ-managed DUS blocks to ensure security.

## **F. COMPULSORY LICENCES**

34. Paragraphs [87] – [92] of the Consultation Paper set out a proposed procedure for dealing with compulsory licences. Questions 4.9 and 4.10 are as follows:
  - 4.9 *Do you agree with the proposed procedure for dealing with compulsory licence applications? If not please explain why.*
  - 4.10 *If you disagree with the proposed procedure, what other procedure could be used?"*
35. T&G Global submits that a compulsory licence application differs very substantially from a trade mark opposition for reasons which are explained below. Accordingly, the trade mark opposition procedure which has been put forward in the paper is not well suited for compulsory licences.
36. T&G Global submits that that the procedure (and time frames) used for patent oppositions should be adopted.
  - (a) ***The Compulsory Licence Application***
37. Under the Bill an applicant for a compulsory licence needs to provide the following information:

- (a) That the applicant has been unable, after making reasonable efforts, to obtain authorisation from PVR holder to undertake the restricted acts in respect of which the compulsory licence is sought (clause 103(1)(b)).
38. T&G Global has requested that the Bill include in clause 103 a new sub-paragraph (d) to match equivalent provisions in the UK, Singapore, Japan and EU. The provision would read:
- “(d) The applicant is financially and otherwise in a position to exploit in a competent and business-like manner the rights to be conferred and intends to exploit those rights.”
39. In the event that the Select Committee agrees with this submission, both of the above matters will need to be provided for in the application.
40. In addition, T&G Global submits that the application should be required to set out the proposed terms of the licence. A PVR holder cannot realistically be expected to deal with an application when none of these details are provided.
41. The need for all of this detail means that (as with many patent proceedings before the Commissioner) the applicant should be required to file with the Commissioner both an **application** and a **statement of case** dealing with standing, qualification to apply and the proposed terms and conditions of the licence.

**(b) The evidence in support and in opposition**

42. The evidence, both in support of or in opposition to a compulsory licence application, is likely to be extensive. Experience with an application filed several years ago clearly demonstrated this. The evidence will likely include expert evidence from economists, lawyers (concerning the usual terms in IP licensing) and others. T&G Global submits that the period for filing evidence of two months (under the Trade Mark Regulations model) is inadequate. The time for filing evidence should be comparable to patent opposition or revocation proceedings before the Commissioner under Regulation 94 or 103 Patents Regulations 2014.
43. The Regulations should provide for evidence as follows:
- By the applicant **four months** after the filing of the counterstatement.
  - By the PVR owner **four months** after receiving the applicant’s evidence.

**(c) Discretion of the Commissioner**

44. There are two parts to a compulsory licence application. The first is whether the criteria for standing and ability to obtain and work a licence are met. The second concern is the terms of the licence. While it may be efficient in most cases to deal with both issues together, provision should be made for the Commissioner to have a discretion to order *sequential hearings* in appropriate cases.

**G. CASE MANAGEMENT CONFERENCE PROVISIONS**

45. Provision needs to be made in the Regulations for the holding of a case management conference in relation to the range of hearings including compulsory licence applications provided for in the proposed regulations. The model provided by Regulation 156 Patents Regulations 2014 or Regulation 26 Trade Marks Regulations 2003 should be adopted. Case Management conferences are reasonably common in both trade mark and patent proceedings before the Commissioner. They help to overcome procedural objections or

arguments and to deal with issues of timing of evidence or timetabling through the hearing itself – where there is urgency.

#### **H. OBJECTIONS BEFORE GRANT**

46. T&G Global strongly agrees with the comments made in paragraphs 95-99 of the Consultation Paper concerning the current procedure in the PVR Act for dealing with objections before grant.
47. The open-ended requirement in s 6 of the current PVR Act that the Commissioner must not grant a PVR unless the applicant and objector have been given “a reasonable opportunity to be heard” has led to ‘gaming of the system’ by objectors. Successive points of objection can be raised by an objector and in such circumstances, the Commissioner is constantly in a state of uncertainty as to whether he/she has given the relevant party “a reasonable opportunity to be heard.” The lack of any prescribed deadline dates for filing evidence or submissions has led to considerable delays in the grant of PVRs where there is an objection before grant.
48. T&G Global supports the adoption of the proposed procedure in para 103 of the Consultation Paper namely adoption of the same procedure under the Patents Regulations for dealing with a patent opposition. Under that procedure there will be prescribed time deadlines giving both the Commissioner and the parties certainty as to the procedure.
49. The fact that the patent opposition procedure is being used for objections/oppositions before grant, is a further reason why the compulsory licence provisions in the Regulations should be adopted from the Patents Regulations rather than the Trade Mark Regulations.

#### **I. REQUEST FOR PROPOGATING MATERIAL OR INFORMATION FROM PVR OWNERS**

50. As the Consultation Paper notes at para [107], clause 69 of the PVR Bill gives the Commissioner the power to request the following in relation to a granted PVR.
  - Information reasonably needed by the Commissioner to verify the maintenance of the variety to which the PVR relates, or for any other purpose related to that variety.
  - Propagating material if the Commissioner considers is necessary or desirable for the purposes of exercising or performing the Commissioner’s functions, duties or powers under the Act.
51. The information or propagating material must be provided to the Commissioner within the time prescribed in the Regulations. If the owner fails to provide the information or material within the prescribed period, without reasonable excuse, the Commissioner may cancel the PVR.<sup>4</sup>
52. The Consultation Paper asks what time period for providing the information or propagating material should be prescribed? Should the time period be extendable and if so on what grounds?

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<sup>4</sup> Consultation Paper [108].

53. There may be many reasons why a PVR owner has difficulty in complying with a request by the Commissioner. In relation to propagating material, there may be issues in being able to provide this.
54. For example, if disease such as PSA or a pest were to wipe out T&G Global's SummerKiwi variety, the company would require several years' extension to reintroduce the material to New Zealand if called upon.
55. T&G Global strongly supports the availability of extension of time where such factors as pest, disease, lack of available plant material or availability of PEQ space cause delays.

## **J. NON-INDIGENOUS SPECIES OF SIGNIFICANCE**

56. The following questions are posed in the Consultation Paper:
  - 5.5 *When should the regulations listing non-indigenous species of significance enter into force? Should they enter into force with the Bill's non-Treat provisions or be left until the Treaty provisions come into force?*
  - 5.6 *Do you have any other comments on the list and the entries in it?*
57. T&G strongly endorses the need for certainty as is canvassed in paragraph 127 of the Consultation Paper. Breeders need to know with certainty what are the non-indigenous species of significance so that they can plan their commercial operations.