

Submission template

Review of the Plant Variety Rights Act 1987: Exposure Draft of the Plant Variety Rights Regulations 2022

Your name and organisation

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1 General provisions [Regulations 3 and 7-34 and Schedule 3]

Regulation 11 refers to the renewal fee specified in Schedule 2. This should be corrected to Schedule 3.

Regulation 32 - the wording "If the Commissioner becomes aware that a person is not entitled to act as an agent" reflects the requirement of Regulation 31(1), but does not seem to capture the circumstances of Regulation 31 (2), which is at the Commissioner's discretion.

Instead, we suggest wording similar to Regulation 24 of the Trade Marks Regulations 2003 be adopted for Regulation 32:

If the Commissioner refuses to recognise a person as an agent, the Commissioner must, as soon as practicable, notify that person and that person's principal in writing.

Schedule 3 gives the current fees which are being consulted on. Our comments regarding the quantum of fees will be provided as part of that consultation.

2 Provisions relating to PVR applications [Regulations 35-48 (excl. 45-47)]

Regulation 35 requires information on the nationality or principal place of business of "each breeder who is an applicant". The phrase "breeder who is an applicant" is unclear in the context where applicant is used elsewhere in the regulations and Bill. Is this information not required for applicants that are not breeders? Or breeders that are not applicants? We note that the regulation 50 of the Patent Regulations only requires this information for applicants, not inventors. In the PVR context, inventors are similar to breeders. We suggest more closely following the wording from regulation 50(1)(b), for example r35(1)(b) could recite

an application must contain, or be accompanied by, the following information:

- (i) the name and address of each applicant; and
- (ii) the nationality or principal place of business of each applicant; and
- (iii) the name and address of each breeder.

This change would also ensure consistency with r35(2) which refers to applicants.

We understand that information on the nationality of breeders is not part of the PRISMA application form, and requiring this information for filing will

mean all applications that designate NZ will be incomplete.

Regulation 37(1) requires that an application be accompanied by propagating material. This is not feasible when applications are required to be made via the IPONZ case management facility. We submit this regulation should be amended so that it is clear that seed may be provided after the application has been filed and given a filing date.

Regulation 38(1) refers to the “prescribed time” in section 36(2A). However, this clause in the PVR Bill refers to the “prescribed date”.

Regulation 41(2) – “request for information under section 46(1A) of the Act for information” contains an error of repetition.

Regulation 42 relates to prescribed requirements under section 47(5) of the Act. Section 47(5) states “A growing trial must be conducted in accordance with any prescribed requirements”. This suggests prescription by the Commissioner is optional, which is appropriate as “growing trial” in section 47(5) encompasses trials already undertaken by overseas testing bodies or UPOV states (ss 47(2)(c),(d)).

However, regulation 42 states the prescribed requirements are that “the Commissioner must impose conditions” (a),(b),(c), (d), suggesting the Commissioner is obligated to impose these conditions even if the growing trial has already taken place. Perhaps regulation 42 should recite “The prescribed requirements under section 47(5) of the Act for a growing trial are ~~that the Commissioner must impose conditions~~ requirements to be complied with by those conducting the growing trial relating to-- (a)...(e) any other ~~conditions~~ requirements necessary to ensure that the growing trial is undertaken in a manner that is satisfactory to the Commissioner”.

Regulation 48 – text in Regulation 48(2) has been copied from regulation 41 and contains the same error of repetition.

Regulation 48(1) should refer to section 69(2), as section 69(1) does not relate to requests for propagating material. Regulation 48(2) should refer to section 69(1), as section 69(2) does not relate to requests for information.

The periods for providing information and propagating material under regulations 41 and 48 are not consistent:

	Time period for providing propagating material	Time period for providing information
Regulation 41	2 years, extendible by further periods of up to two years	1 year, extendible by up to 1 year
Regulation 48	1 year, extendible by	2 years, extendible by

up to 1 year

further periods of up to two years

These issues appear to arise because clause 46(1) and (2) and clause 69(1) and (2) of the Bill are backwards with respect to each other, and text for regulation 48 has been copied from regulation 41.

3 No comment

4 **Opposition to grant of a PVR [Regulations 45-47]**

Regulation 45 should recite the payment of the required fee and refer to Schedule 3. We understand from the Review of Plant Variety Rights Fees Discussion Document, Appendix 3 that Schedule 3 will include a Notice of Opposition fee.

Regulation 47 We understand that the evidence timeframes from the Patent Regulations have been adopted for this clause. These deadlines are suitable for oppositions relating to a proposed denomination or novelty. However, for oppositions that relate to the criteria in s30(1)(a), the PVR applicant may need to conduct a growing trial to provide evidence that their variety is distinct, uniform and stable. For example, if an opponent alleged that an applicant's variety is not distinct when compared to variety X, the applicant should be able to grow both varieties under the same conditions and then provide expert evidence showing the results. It will not be possible to do this in four months.

This is especially important as an opposition can be filed at any time before grant, i.e. an opposition could be filed before the PVR Office had conducted its own DUS examination.

We note that the Commissioner may halt proceedings for six months at a time. However, applicants have up to two years to supply plant material for DUS testing. This timeframe recognises how difficult it can be to import plant material into New Zealand. Without the ability to halt proceedings until plant material is imported into New Zealand and DUS trial is complete, applicants will be significantly disadvantaged. .

We submit that the regulations should specifically provide for extensions of time and/or a halt in proceedings where an opposition is based on the criteria in s30(1)(a)(ii)-(iv). Furthermore, we submit that a halt should be automatic if the PVR office has not yet completed the growing trial required in s47(1).

5 **Cancellation, nullification and surrender of PVRs [Regulations 52-58]**

Our comments regarding regulation 47 also apply to the timeframes for

evidence in answer set out in **regulation 53**. If nullification is sought on the basis that the variety does not meet the criteria in s30(1)(a)(ii)-(iv), we submit that the PVR holder should be given enough time to be able to conduct a DUS trial before submitting their evidence in answer.

Clause 81 of the Bill requires the application to cancel or nullify PVR “be accompanied by any fee specified in the regulations”. Perhaps **regulation 52** should mention the fee and refer to Schedule 3. We understand from the Review of Plant Variety Rights Fees Discussion Document, Appendix 3 that Schedule 3 will recite an Application for Revocation fee which will apply.

6

Restoration of lapsed applications and cancelled PVRs [Regulations 59-70]

Regulation 60(4) relates to a request for restoration of a lapsed PVR application. It refers to a circumstance “if the Commissioner requires the applicant to file further evidence under section 92(2A) of the Act.” There is no clause 92(2A) in the Bill and there does not seem to be mention of such a requirement in Clauses 87-93 of the Bill.

Regulation 65(3) refers to section 99(2A) of the Act. This should perhaps be corrected to section 96(3) which relates to provision of further evidence required by the Commissioner.

Regulation 65(3) uses the phrase “date that the request for restoration is given” and could cause confusion as to whether the Commissioner will give the request some date other than the date it was filed. Perhaps this should read “date that the request for restoration is made” consistent with regulation 59(4).

Regulation 67(1) refers to section 145 of the Act, which is the general provision for publishing information in the Journal. Regulation 67(1) is based on Patents Regulation 112 which instead refers to Patents Act s 122, reciting “The Commissioner must publish a request made in accordance with sections 117 to 120 [restoration of lapsed patents] in the journal if the Commissioner is satisfied that a prima facie case has been made out for an order under section 117.” We suggest amendment to Regulation 67(1) to recite “2 months after the date on which the request made in accordance with sections 94 of the Act is published in the journal under section 97(2) and 145 of the Act.”

Regulation 67(3) - For consistency with regulations 68 and 69, regulation 67(3) should refer to the former PVR holder.

Regulation 70(2) should refer to the use of a plant variety that is the subject of the PVR (not the application).

Regulation 70(3)(a) - For consistency with regulation 70(1), which refers to use of a plant variety, regulation 70(3)(a) should recite “used the plant variety” not “used the PVR”.

7 Compulsory licences [Regulations 71-75]

Regulations 71 and 75 both refer to “names and address”, while elsewhere the term “name and address” is used.

Clause 105 of Bill refers to fee for compulsory licence. Perhaps **regulation 71** should mention this fee and Schedule 3.

Regulation 74 – the time frames for filing of applicant’s evidence, PVR holder’s evidence and applicant’s evidence in reply are 2 months, 2 months, 1 month respectively. Given the evidence will address the ground of public interest, these time frames are too short and should be consistent with those for providing evidence in an opposition, cancellation or nullification proceeding (4 months, 4 months, 3 months respectively).

Regulation 75 – There does not seem to be a provision for submitting evidence regarding an application under clause 111 of the Bill (application to amend/revoke compulsory licence).

The grounds for amending/revoking a compulsory licence are the public interest, and breach of a condition of the licence (clause 110 of the Bill). Either of these grounds may need to be established on the basis of evidence. Regulation 74 should apply to procedures under clause 111 of the Bill as well as clause 102(1).

8 Proceedings before the Commissioner (hearings) [Regulations 95-118]

Regulations 95-118 appear suitable and consistent with current IPONZ practice for patents proceedings before the Commissioner.

Regulation 95(a)(iv) should be corrected to refer to section 85(3).

Regulation 95(a)(viii) should be corrected to refer to section 98 (consistent with regulation 95(a)(vi) which refers specifically to the opposition clause 91 of the Bill).

Regulation 95(a)(x) should be corrected to refer to section 111.

11 Other matters [Regulations 89-94]

Regulation 89 – the title could be corrected to “Matters ~~requested~~required to be published in Journal”.

Regulations 92 and 93 are important discretionary powers of the Commissioner to extend time limits temporarily and in exceptional circumstances. The corresponding Patents Regulations refer to a number of other regulations governing procedural requirements during the application stage.

Regulations 92 and 93 only refer to Part 1 and Regulation 35. They should

also refer to other regulations governing procedural requirements during the application stage, particularly regulations 36 and 37 which have requirements at the Commissioner's discretion for "satisfactory" photographs and standard of purity and germination "acceptable to the Commissioner". Extending the important discretionary powers of Regulations 92 and 93 to regulations 38, 39, 40, 41, 42, and 44, which also govern procedural requirements during the application stage, should also be considered.