



**Fruit Tree Importers Group Submission on *Exposure draft of the Plant Variety Rights Regulations 2022***

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**SUBMISSION on EXPOSURE DRAFT OF THE PLANT VARIETY RIGHTS REGULATIONS 2022**

I am writing on behalf of the New Zealand Fruit Tree Importers Group which represents key stakeholders in the development and commercialization of new and improved proprietary fruit tree genetics.

Our members are active users of the Intellectual Property Office of New Zealand (IPONZ) system and hold numerous New Zealand Plant Variety Rights (PVR) grants.

We welcome the opportunity to comment on the Exposure draft of the Plant Variety Rights Regulations 2022.

Andy Warren

On behalf of the Fruit Tree Importers Group

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

These regulations cover definitions, fees (listed in Schedule 3), forms and documents, addresses and agents.

**Regulation 2.** *The Commencement date is 01 September 2022. Given stakeholder dissatisfaction with the proposed fees, and the '28-day rule' for regulations, will commencement be deferred if the proposed changes to fees have not had Cabinet approval?*

**Regulation 3.** *The interpretation of case management facility is 'the case management facility that may be accessed through the Commissioners website or web services'.*

*This definition and the subsequent use of this term in Regulation 13, 14 and 15 does not provide for the provision of information, specifically applications, technical questionnaires, photographs, and appointment of agents via the International Union for the Protection of New Varieties of Plants (UPOV) PRIMSA online Plant Variety Protection application tool*

*PRIMSA is not listed as alternative delivery method in clause 17.*

**Regulation 9.** *There are issues with the payment of application fees for applications filed using PRIMSA.*

*The current method of MBIE issuing one off invoices outside the case management facility may have a serious consequence if applicants miss novelty bar dates due to administrative delays. This delay issue needs to be addressed.*

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

These regulations provide what must be supplied with, and in relation to, a PVR application (information, photos, denomination, propagating material), including prescribed times for provision of those things. They also cover provisions relating to growing trials and payment of trial and examination fees.

**Regulation 37(1)** *requires that an application 'for a variety of a kind of plant described in column 1 of Schedule 3' must be accompanied by propagating material.*

*This is not possible when applications are required to be made via the case management facility. We also understand that this requirement should only apply to seed of arable crops and vegetables as per Schedule 4.*

*This regulation should be amended so that it only applies to crops that are propagated by seed, and that seed may be provided after the application has been filed and given a filing date.*

*There are currently no formal criteria for the type and quantity of propagating material that must be provided for crops other than those propagated by seed. For clarity this should also be included in Schedule 4.*

**Regulation 38.** *The UPOV convention states that the denomination shall be registered by the authority at the same time as the breeder's right is granted. Therefore, a denomination must be filed prior to grant but it is not necessary for a denomination to be filed within 3 months of application or at any other time prior to grant.*

**Regulation 41(1).** *We support the time for providing propagating material being up to 2 years, however given ongoing difficulties and delays with securing post entry quarantine space, multiple extensions are likely to be required. Extensions should not be withheld provided suitable evidence of genuine attempts to import propagating material can be provided to the Commissioner if requested.*

**Regulation 43(2).** *As discussed during consultation on the Review of The Plant Variety Rights Act 1987: Proposed Regulations (clause 83), as a general principle the Commissioner should rely on reports that are the direct result of a growing trial undertaken by a competent authority, not a report that has been generated from a report of a previous trial undertaken by another authority.*

*However, if more than 1 growing trial report is available from an authority of another state, we request that there is an opportunity for the applicant to file a submission about which report should be utilised by the Plant Variety Rights Office (PVRO). For example, there may be different agronomic or environmental conditions in one or more state that adversely affect the plant material or are more comparable to New Zealand conditions and the expression of the phenotypic characteristics of the candidate variety - such manifestations may be very specific to the candidate variety and known to the breeder only.*

*The respective cost should not be a relevant factor when deciding which report to use.*

*44. Trial fees must be requested by the Commissioner prior to commencement of the growing trial (or prior to commencement of each year of the trial). If the PVRO commences work prior to the collection of fees, and the application is subsequently withdrawn, they have no grounds to then collect fees for costs incurred on a retrospective basis.*

### **3. Non-indigenous species of significance [Regulation 6 and Schedule 2]**

**This regulation provides that the non-indigenous plant species of significance defined in clause 54 of the Bill are listed in Schedule 2 of the regulations.**

*The process for additions to, or subtractions from, the list of non-indigenous plant species of significance should be included in the Regulations*

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

**These regulations set out the provisions for filing a notice of opposition to the grant of a PVR and prescribed timeframes.**

*n/a*

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

**These regulations set out the procedures relating to application for cancellation or nullification of a PVR and the procedures relating to notification of surrender of a PVR.**

**Regulation 52.** *Section 20 of the Bill states that grants under the 1987 Act do not obtain the additional rights of the new Act. It should therefore be made clear in the Regulation 52 that applications for cancellations and nullifications under section 67 are not permitted for rights conferred by the 1987 Act*

### **6. Restoration of lapsed applications and cancelled PVRs [Regulations 59-70]**

**These regulations set out the procedures relating to restoration of lapsed PVR applications and restoration of a PVR cancelled because of non-payment of the renewal fee.**

*It is unclear what **Regulation 64(3)(b) and (c)** mean. What are 'definitive steps' as per (b)? The meaning of (c) is baffling - we truly do not understand what this may refer to.*

*The same comments apply for **Regulation 70(3) (b) and (c)** which are similarly worded*

## **7. Compulsory licences [Regulations 71-75]**

**These regulations set out the provisions relating to application for, opposition to, and amendment/revocation of, a compulsory licence.**

*n/a*

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

**These regulations set out the processes to which these proceedings apply and all other matters relating to the conduct of hearings.**

***Regulation 97.** Assuming this clause doesn't apply to decisions made by the Māori Plant Variety Committee (MPVC), does this clause apply to recommendations to the Commissioner by the MPVC?*

## **9. Substitution and assignments [Regulations 49-51]**

**These regulations deal with substitution of applicants, registration of assignments and other interests, and vesting of PVRs or PVR applications.**

*n/a*

## **10. PVR Register [Regulations 76-88]**

**These regulations deal with matters relating to the PVR register (content, search and changes).**

***Regulation 76.** It is also a requirement that the authorities of all the other UPOV Contracting Parties are informed of matters concerning variety denominations, in particular the submission, registration, and cancellation of denominations*

***Regulation 80.** Unsure of the meaning of this clause or why it is even necessary given that much of the information listed must be published in the PVR register and/or PVR Journal. What information is referred to in 80(e) and (f) is totally unclear.*

## **11. Other matters [Regulations 89-94]**

**These regulations cover a handful of other, mainly administrative matters.**

*n/a*

## **12. Quantities of seed required**

**The accompanying document PVR Regulations: proposal to amend quantities of seed required with an application sets out a proposal for increasing the quantities of seed required to be provided with a PVR application.**

*See comments on Regulation 37(1) in matter 2. above*

### **General comments about the drafting of the regulations**

*Members of the PVR Technical Focus group had been assured they would receive an ‘exposure draft’ of the Plant Variety Rights regulations, however we appear to have been delivered a fait accompli.*

*We seriously question how the PVR system can be viewed as ‘modernised’ and for the public good when:*

- *the regulations have gone from 20 clauses to 118!*
- *the language used is typical legalese when modern legislation uses plain language*
- *there is, to our minds, too much detail in some areas and none at all in others*

### **Māori Plant Variety Committee (MPVC)**

*The MPVC is one of the most discussed aspects of the new PVR Bill and has typically produced of most questions. Therefore, the lack of any further detail about the formation and operation of the MPVC, or the appeals process for the appealable decisions made by the MPVC in the Regulations simply adds to this uncertainty.*

*There must be transparency on timeframes and the process the applicant is going through.*

*Clause 68A of the Bill states that an appeal must be made in accordance with the rules of the Māori Appellate Court, however given its purpose is hearing appeals against decisions made by the Māori Land Court, it is difficult to see how this forum will work effectively and fairly in the context of a niche and specialist area of Intellectual Property Protection.*

*As opposed to the Māori Appellate Court which has the purpose in dealing with land matters, we submit that any appeal (not just those in relation to Part 5 of the Act) should be referred to a Specialist Intellectual Property Tribunal.*

*This would be an independent body similar to the Immigration and Protection Tribunal and Independent Police Conduct Authority and provide specialist technical knowledge via a panel of experts. In the process to convene the Tribunal, the specific subject matter experts appointed to each specific hearing would depend on the key issues that arise.*

### **New Zealand’s relationship with UPOV**

*The UPOV convention is clear about the obligations of Contracting Parties, and in particular that the grant of rights shall not be subject to any further or different conditions.*

*Given the Plant Variety Rights Act 2022 deviates from and does not accede to the UPOV Convention, it is uncertain whether New Zealand will be eligible for representation on the UPOV Council. It is unlikely that they will have voting rights.*

*Plant variety innovation and development have a pivotal role in New Zealand’s food and fibre sector, potential omission from the decision-making table at this international forum is a retrograde step and will exclude New Zealand from input into international policy and the benefits of engaging with key decision makers and influencers in the plant breeding and protection arenas.*

*This would be SEVERELY detrimental to New Zealand’s status as a world leading plant variety innovator, apart from the dire economic impacts.*