

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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The PVR Regulations have been divided up into a number of subsections as set out in the accompanying A3 poster and Guide. You are asked to comment below on each of these subsections. The final comment box is for you to provide comment on the proposed new seed quantities required with an application.

PVR Regulations 2022

Key matters that apply to all applications or grants	
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. Please provide any comments you have on these regulations in the box below.
	<i>No comments]</i>
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. Please provide any comments you have on these regulations in the box below.

SUMMARY

Mountain Blue Orchards Pty Ltd proposes that there should be the inclusion of Regulations to:

- (1) ensure the Commissioner is provided with adequate information to exercise his or her discretion in relation to the use of overseas growing trials pursuant to Clause 47(2) of the PVR Bill; and
- (2) to provide matters that the Commissioner must take into account when exercising his or her discretion in relation to the use of overseas growing trials pursuant to Clause 47(2) of the PVR Bill.

Regulations in these two areas will ensure that the Commissioner is able to systematically consider pre-existing overseas growing trials on a case by case basis, if the applicant seeks to rely on them. The Regulations will still allow the Commissioner to exercise his or her discretion, but this exercise will be based on information and guided by prescribed considerations. These Regulations will also help to ensure the principles of natural justice are observed, in accordance with Clause 118 of the PVR Bill.

Mountain Blue submits that these Regulations will further New Zealand's policy objectives underlying the PVR reform by:

- (1) reducing redundancy in growing trials; and
- (2) increasing efficiency in processing foreign applications; thereby
- (3) removing a barrier to the introduction of new plant varieties in New Zealand.

Mountain Blue acknowledges that the issue of the use of overseas growing trials was raised in submissions on the PVR Bill and has partially been considered but submits that current practice in respect of the exercise of the Commissioner's discretion was not taken into account.

REASONS AND EVIDENCE FOR CLAIMS

Redundancy of duplicate testing

It is observed that there is, generally, no clear reason for duplicating a reliably conducted trial that takes into account all varieties of common knowledge. A reliably conducted growing trial produces objective universal evidence as to whether a variety is distinct, uniform and stable (the DUS requirements).

Evidence

The IPONZ plant varieties database shows that whilst thousands of foreign and New Zealand originating applications have been granted, or have expired or been surrendered after granting, only twenty (20) foreign applications across all plant species have been rejected due to not meeting DUS requirements. Of these twenty, 3 were not tested elsewhere, and 14 have either been rejected elsewhere or have an unclear history of withdrawn and terminated applications in other countries. Only 3 varieties have a clear history of passing DUS tests elsewhere but failing testing in New Zealand. This shows that, in the vast majority of cases, overseas test results that establish the DUS requirements are replicated in New Zealand with the same outcome, rendering the duplicate test redundant.

Summary

The New Zealand PVR reform provides an opportunity to clarify the law to remove the practice of redundant testing.

Increasing efficiency/removing a barrier to introducing new plant varieties

As the various policy papers in relation to the PVR Act review establish, New Zealand is seeking to establish an intellectual property regime for plant variety rights that will 'encourage the development and dissemination of new plant varieties' (MBIE, 'Issues Paper Review of the Plant Variety Rights Act 1987' (September 2018) Foreword, ix. See also [30], p 6.) in part through creating an environment that will encourage foreign plant breeders to introduce varieties to New Zealand.

It is submitted that unnecessarily duplicating growing tests in New Zealand adds uncertainty to the PVR application process and creates a barrier to the introduction of new plant varieties into New Zealand. This is contrary to the policy intentions underlying the reform of the PVR Act.

It is further submitted that duplicate testing is inefficient for growers, and, it is assumed, inefficient for IPONZ staff and leads to considerable delays in processing foreign applications, which again creates a barrier to the introduction of new plant varieties. This delay is of considerable concern, particularly as the PVR Bill is proposing to reduce the extent of provisional protection of varieties between the date of acceptance and the date of grant.

Evidence

Mountain Blue's history of filing in New Zealand is evidence of the barrier created by the requirement to duplicating growing tests in New Zealand. Before introducing varieties to New Zealand Mountain Blue has good data on each variety's likely commercial viability in New Zealand. PVR applications in foreign jurisdictions have been filed and growing trials either commenced or completed so Mountain Blue has evidence that each variety is distinct, uniform and stable.

Of the 18 applications Mountain Blue has filed three (16.6%) have been withdrawn in part due to administrative difficulties, delays and expenses arising from the requirement to duplicate growing trials in New Zealand.

In gathering further evidence for a barrier to foreign applications we examined the number of blueberry applications that were subsequently withdrawn. In New Zealand 19 of the 90 foreign applications, or 21%, were withdrawn before registration was completed. Only 1 of the 30 New Zealand applications (3%) was withdrawn. In contrast, in Australia where foreign DUS tests are accepted, only 5.3% of foreign blueberry applications were withdrawn, as compared to 7.9% of Australian applications being withdrawn.

The time for processing an application has been used as an indicator of efficiency, and again blueberry applications have been examined. For New Zealand applications the average time between acceptance of an application and registration is 979 days, with a median time of 974 days. For foreign applications the average time between acceptance and registration is 1,683 days, with a median time of 1,513 days. Foreign applications, take on average, just under 2 years longer to process than New Zealand applications.

Summary

Whilst it is an overstatement to say that the sole the cause of the high number of foreign applications for PVR being withdrawn in New Zealand is the requirement to duplicate growing trials in New Zealand, it is Mountain Blue's experience that administrative difficulties in establishing growing trials and delays arising from this are contributing factors in deciding not to proceed with seeking PVR and introducing new varieties into New Zealand.

Requiring growing trials to be repeated in New Zealand only where there is uncertainty about the reliability of the test results will remove a barrier to the introduction of plant varieties from overseas and should also reduce the time between application for and acceptance of a PVR, thereby reducing the number of overseas applications that are withdrawn before a plant variety is introduced to New Zealand.

Reform history: previous submissions

It is acknowledged that the use of overseas growing trials was raised in submissions on the PVR Bill. T&G Global submitted that reforms should remove the automatic requirement for NZ based DUS testing and allow for the use of foreign DUS test results on the basis that this will reduce the examination period and compensate for the loss of provisional protection. This submission was rejected on the basis that 'the Bill effectively does what the applicant is suggesting'. (MBIE, Plant Variety Rights Bill Departmental Report to the Economic Development, Science and Innovation Committee 30 September 2021, p 39 item 76)

Plant IP Partners Ltd submitted that takeover of overseas test results should be the first option to fulfil the DUS requirements. This submission was rejected on the basis that '[t]akeover of foreign test results is at the Commissioner's discretion. There will be occasions where a foreign test report may not usable for the New Zealand application.' (MBIE, Plant Variety Rights Bill Departmental Report to the Economic Development, Science and Innovation Committee 30 September 2021, p 39 item 75)

It is submitted that the MBIE did not take into account existing law and practice in relation to exercise of the Commissioner's discretion.

Evidence – existing law

The current law provides the Commissioner with discretion to accept foreign DUS tests. Section 10(2)(d) of the Plant Variety Rights Act 1987 provides:

- (2) An application shall be eligible for the making of a grant if, and only if, the applicant has given the Commissioner all reproductive material of the variety concerned requested by the Commissioner, and the Commissioner...
 - (d) is satisfied that that variety is new, distinct, homogeneous, and stable.

The PVR Act 1987 does not provide any further guidance on the evidence that can be used by the Commissioner to determine that a variety is new, distinct, homogeneous, and stable (the DUS requirements). The Plant Variety Rights Regulations 1988 do, however, indicate that foreign growing trials could be used as evidence to satisfy the

DUS requirements. Regulation 16(1) indicates that growing trials may be required if “insufficient information” to establish that plant variety is distinct, homogenous and stable exists. Foreign growing trials are the most obvious example of existing external evidence of DUS requirements that could be sufficient.

The use of the language “the Commissioner may disregard any results of any growing trials undertaken or commissioned by an applicant” in Regulation 16(2) and “the Commissioner may disregard [reports in a language other than English] until the applicant has paid the cost of obtaining an independent translation of it” in Regulation 16(3) clearly envisages that pre-existing or foreign growing trials may either be accepted or disregarded by the Commissioner, at his or her discretion.

This reading is supported by the IPONZ technical guidance in relation [Use of Foreign Test Reports for DUS Testing in New Zealand | Intellectual Property Office of New Zealand \(iponz.govt.nz\)](https://www.iponz.govt.nz).

Despite the existing law, in practice, the Commissioner applies his or her discretion to require growing trials for fruit to be conducted in New Zealand even where foreign DUS tests results are available.

As Mountain Blue primarily breeds blueberries, New Zealand blueberry PVR applications were examined to provide evidence for this assertion. Although UPOV test guidelines exist for blueberries and many of the applicants had test results from UPOV member countries conducting in accordance with UPOV test guidelines, IPONZ required New Zealand growing trials for all foreign blueberry applications.

Further, the technical questionnaire that must be completed to make a PVR application for blueberries requires a site for New Zealand growing trials to be specified. It does not require the applicant to present information relating to existing DUS tests. Nor does the technical questionnaire give the applicant the opportunity to request that foreign DUS tests be used instead of a New Zealand based growing trial.

Summary

Whilst Clause 47 of the PVR Bill is clearer about different possible sources of growing trials, this does not substantively alter the existing law. The acceptance of overseas growing trials is left to the Commissioner’s discretion both under the current law and the proposed reforms. There is nothing in the PVR Bill to prevent the Commissioner from exercising his or her discretion to automatically require duplicate growing trials in New Zealand, as is the current practice in relation to the exercise of the Commissioner’s existing discretion on this matter.

PROPOSAL IN DETAIL

Mountain Blue Orchards Pty Ltd proposes that there should be the inclusion of Regulations to:

- (1) ensure the Commissioner is provided with adequate information to exercise his or her discretion in relation to the use of overseas growing trials pursuant to Clause 47(2) of the PVR Bill; and

- (2) provide matters that the Commissioner must take into account when exercising his or her discretion in relation to the use of overseas growing trials pursuant to Clause 47(2) of the PVR Bill.

The Regulations will still allow the Commissioner to exercise his or her discretion, but this exercise will be based on information and guided by prescribed considerations.

Proposal 1: Ensure the Commissioner is provided with adequate information

Clause 36(2)(b)(iv) of the PVR Bill allows for regulations to prescribe matters that must be included in applications. It is submitted that a Regulation be added, either within Regulation 35 or as a separate Regulation, requiring applications to include details of overseas testing results that the applicant seeks to rely on to establish that the variety is distinct, uniform and stable. A draft is suggested below.

- (1) This regulation applies to every PVR application when the applicant wants the Commissioner to consider using a growing trial in accordance with section 47(2)(c) or section 47(2)(d) of the Act.
- (2) Where (1) applies the applicant must provide the following information in relation to the growing trial:
 - (a) The name of the testing country or countries;
 - (b) The test date;
 - (c) The estimated date of availability; and
 - (d) Any other information in relation to the design or conduct of the test or tests that the Commissioner requests.

Proposal 2: Matters the Commissioner must take into account

In order to guide the exercise of the Commissioner's discretion it is suggested that Regulation of matters to be considered is included prior to the existing Regulation 43. A draft is suggested:

- (1) Where the applicant seeks to rely on a test report in accordance with section 47(2)(c) or section 47(2)(d) of the Act the Commissioner must take the following considerations into account before making his or her decision:
 - (a) Whether the overseas testing authority has:
 - (i) been approved by the Commissioner; or
 - (ii) is from a State that is a member of UPOV; or
 - (iii) or is from State that has an agreement with New Zealand in respect of the recognition of PVR test results; and
 - (b) Whether the variety was test grown using official UPOV test guidelines and test procedures; and
 - (c) Whether all the most similar varieties of common knowledge were taken into account in the test; and
 - (d) whether sufficient data and descriptive information is available to satisfy the requirements of the Act; and

- (e) Any plant character which may change expression due to New Zealand's climate and environment, resulting in the overseas test report variety description having significant difference when compared to the variety as grown in New Zealand.

FURTHER CONSIDERATIONS

Clause 47(3) of the PVR Bill requires the Commissioner to notify the applicant of his or her decision under Clause 47(2). Clause 118 of the PVR Bill requires any person who will be affected by the exercise of a Commissioner's discretion to be given a reasonable opportunity to be heard. Schedule 1A and Schedule 2 provide appealable matters. Neither a decision under Clause 47(2) or an alleged failure to be heard under Clause 118 are appealable. This may be a gap in the drafting of the PVR Bill.

Key matters that only apply to applications or grants in certain circumstances

Non-indigenous species of significance [Regulation 6 and Schedule 2]

- 3 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. Please provide any comments you have on these regulations in the box below.

No comments]

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

- 4 These regulations set out the provisions for filing a notice of opposition to the grant of a PVR and prescribed timeframes. Please provide any comments you have on these regulations in the box below.

[No comments]

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

- 5 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. Please provide any comments you have on these regulations in the box below.

It is not conceptually clear why Clause 85(3) of the PVR Bill gives persons the power to oppose the surrender of a PVR. Regulations 55 through to 58 make the process of surrender potentially very onerous.

A number of previous submissions raised concerns about the compulsory licencing provisions in the PVR Bill.

In light of the compulsory licencing changes it is not difficult to envisage a situation in which a person applies for a PVR, is unable to make the variety available to the satisfaction of the Commissioner within 3 years and so seeks to surrender the PVR, in order to avoid the risk of compulsory licencing. If the process for surrender is unduly complex and subject to objection then the safeguard of being able to surrender a PVR in order to avoid compulsory licencing is removed, and the risk to a grower of being unable to protect its property in New Zealand increases. This creates a disincentive to introducing varieties in New Zealand. In light of the Regulations it is submitted that Clause 85(3) of the PVR Bill be revisited.]

6	<p>Restoration of lapsed applications and cancelled PVRs [Regulations 59-70]</p> <p>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. Please provide any comments you have on these regulations in the box below.</p> <p><i>No comments</i></p>
7	<p>Compulsory licences [Regulations 71-75]</p> <p>These regulation set out the provisions relating to application for, opposition to, and amendment/revocation of, a compulsory licence. Please provide any comments you have on these regulations in the box below.</p> <p><i>[No comments]</i></p>
8	<p>Proceedings before the Commissioner (hearings) [Regulations 95-118]</p> <p>These regulations set out the processes to which these proceedings apply and all other matters relating to the conduct of hearings. Please provide any comments you have on these regulations in the box below.</p> <p><i>No comments]</i></p>
<p>Other matters</p>	
9	<p>Substitution and assignments [Regulations 49-51]</p> <p>These regulations deal with substitution of applicants, registration of assignments and other interests, and vesting of PVRs or PVR applications. Please provide any comments you have on these regulations in the box below.</p> <p><i>[No comments]</i></p>
10	<p>PVR Register [Regulations 76-88]</p> <p>These regulations deal with matters relating to the PVR register (content, search and changes). Please provide any comments you have on these regulations in the box below.</p> <p><i>No comments]</i></p>
11	<p>Other matters [Regulations 89-94]</p> <p>These regulations cover a handful of other, mainly administrative matters. Please provide any comments you have on these regulations in the box below.</p>

PVR Regulations: proposal to amend quantities of seed required with an application

12	<p>Quantities of seed required</p> <p>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. Please provide any comments you have on this proposal in the box below.</p> <hr/> <p><i>No comments]</i></p>
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If you have any other comments you wish to make on matters relevant to this consultation, please make them in the box below