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**Name:** Emma Brown, General Manager Plant Varieties

**Email:** [redacted]

**Organisation**: The New Zealand Institute for Plant and Food Research Limited Rangahau Ahumāra Kai

**Submission on the Exposure Draft of the Plant Variety Rights Regulations 2022**

Plant & Food Research's Core Purpose is to enhance the value and productivity of Aotearoa New Zealand's horticultural, arable, seafood, and food and beverage industries to contribute to economic growth and the environmental and social prosperity of Aotearoa New Zealand. As such, we welcome the opportunity to submit on the Exposure Draft of the Plant Variety Rights Regulations 2022.

As stated in our submission on the Bill, innovation in plant breeding is a key contributor towards success in primary industries, and therefore strong plant variety intellectual property protection that balances the interests of breeders, growers and society is essential to horticulture and arable agriculture supporting Aotearoa New Zealand's future.

Plant & Food Research is making this submission on its own behalf and not on behalf of any particular client or joint venture partner.

Summary of key points of this submission:

- There are numerous drafting errors and cross referencing issues that need to be addressed in this Exposure Draft.
- We appreciate the work to modernise the regulations but note that in some cases the provisions have become much more complicated and require very high levels of statutory interpretation to understand.
- Plant & Food Research submits that in most cases the timelines afforded throughout the regulations are unreasonably short, especially in regards to the compulsory licencing regime.

## 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.*

Note that Plant & Food Research is submitting separately on the "Review of Plant Variety Rights Fees – Discussion Document".

### Regulation 2

We support the timely implementation of this legislation. However, we note that there is a strong consensus among the plant breeders of New Zealand that the fees and hearing process timings of the compulsory licensing framework need major attention before this draft becomes law.

### Regulation 7

Please see our submission in response to the ”Review of Plant Variety Rights Fees - Discussion Document” on this matter.

### Regulation 11

Regulation 11(1) directs the rights holder to consider the renewal fee specified in Schedule 2 in accordance with subclause (2). It appears that Schedule 2 is in fact the list of non-indigenous species of significance, and that this is a mistaken cross reference.

## 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 36

Regulation 36 requires that every variety of plant to which this regulation applies requires a photograph to be submitted with the application. Regulation 36(1) states that this requirement applies to every plant variety that is fruit, an ornamental variety, or a vegetable (including potato). This appears to be an overly simplistic description that is not consistent with other aspects of the PVR regime including within the draft regulations, draft Bill and the draft fees. For instance, if a user was to submit a Hop or Cannabis application for PVR, are they exempt from providing a photograph?

We submit that this regulation requires clarification. There needs to be consistency across crop and species classifications across the PVR regime to enable users to be able to easily interact with the regime.

### Regulation 38

We support the 3 month prescribed timeline with the reasonable opportunity for extension by the Commissioner in reasonable circumstances.

### Regulation 41

There are currently lengthy delays with the New Zealand post entry quarantine system. Because of these delays we strongly support the possibility of unlimited extensions to enable sufficient material to enter through New Zealand’s quarantine process and the subsequent time to bulk up plant material for the Plant Variety Rights Office to enable a growing trial. It would be unreasonable for plant breeders, and subsequently growers and consumers, to be penalised due to the constraints and limitations of the post entry quarantine system.

### Regulation 42

We broadly support clause 47 in the Plant Variety Rights Bill and the regulations empowering the Commissioner to set the conditions of a growing trial. However, as in our previous submission, we request that a requirement for consultation is included between the applicant and the Commissioner before a decision be made as to what type of growing trial is chosen.

In most cases the applicant is familiar with the plant material before they file for PVR. They are likely to have information that will help the Commissioner ensure that growing trials are run in a robust, efficient and high quality manner. This would help ensure that trials run to time, which will save time and cost to both the applicant and the PVR Office, giving confidence that the appropriate comparative material is being used and the appropriate conditions

are applied, especially if the material has already been DUS tested overseas. We see this as vitally important, as it will help better inform the Commissioner and strengthen their decision making.

**Regulation 43**

We submit that where the Commissioner decides to use an overseas test report under section 47(2)(d) of the PVR Bill, and if there is more than one test report is available, the Commissioner should first consult with the applicant before a decision is made as to which report should be relied upon.

While we agree that the Commissioner should have the overall power to make this decision, we submit that a requirement to consult with the applicant means that the applicant would be enabled to share additional information regarding the reports that the Commissioner may otherwise be unaware of. Additional information the applicant may be able to provide would include; relevant growing conditions or methods used, the comparative material available overseas and/or the testing facilities.

**Regulation 48**

We submit that as is, this regulation contains drafting errors. We suggest the clauses be amended as follows:

48 Prescribes times for supply by PVR holder, or further information, or an applicant for a PVR, or a PVR holder for propagating material required by Commissioner

48 (1) The prescribed time for a PVR holder to comply with a request for information under section 69(1) of the Act for **information** is the time set by the Commissioner within the period beginning 1 month after the date of the Commissioner's request and ending on the day that is 2 years after the date of the request, unless that time is extended by the Commissioner under subclause (3).

48 (2) The prescribed time for an applicant for a PVR or a PVR holder to comply with a request by the Commissioner under section 69(2) of the Act for **propagating material** is the time set by the Commissioner within the period beginning 1 month after the date of the Commissioner's request and ending on the day that is 1 year after the date of the request, unless that time is extended by the Commissioner under subclause (3).

## 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.*

As noted in our 2020 submission on the "Outstanding Policy Issues paper" and the 2021 submission on the "Consultation Paper on the Proposed Regulations", Plant & Food Research is strongly supportive of including a list of non-indigenous species of significance in the legislation. This is in part because it provides clarity and certainty around which species are covered by this definition. This allows interested Parties to effectively plan their business activities and start the consultation process before breeding occurs. If the list was either not included, or not exhaustive, it would create a high level of uncertainty that could be easily avoided through the inclusion of a list.

As to the content of the list, Plant & Food Research has no specific suggestions or comments around the species included. Plant & Food Research sees it as important that this list can be appropriately amended in the future through clearly defined mechanisms in the proposed Bill and with meaningful consultation.

## 4. 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 55**

We submit that the reference in clause 55(2) to clause 54 should likely be amended to clause 56 as it appears to be a mistaken cross reference.

### Regulation 57

We submit that should this situation arise and the PVR holder's offer to surrender the PVR is abandoned through failure to file a counter-statement within the 2-month period, then they ought not have renewal fees charged against them as it was their deliberate desire to surrender a PVR and it is being retained against their intention.

### Regulation 58

Plant & Food Research again submits that the proposed 2 month timeframes to file evidence with the Commissioner are not enough time to adequately file sufficient evidence for the matter at hand.

Gathering evidence from independent expert witnesses such as plant breeders & scientists is time consuming and extensive. Depending on the situation, economic and IP licensing experts might also be needed.

While the Commissioner can grant a 3-month extension under regulation 104, Plant and Food Research submits that at least 4 months should be given from the outset to file evidence in light of the extensive work that needs to be done to review, gather and file evidence with the Commissioner. This will also free up the Commissioner's workload from expected requests for extensions.

## 5. 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*

We are supportive of a clear process for the restoration of lapsed applications and PVR provisions. However, the draft regulations appear to be overly complex and in parts unclear of the requirements of the relevant Parties e.g clause 64 (3). We are willing to work with MBIE to improve these through further consultation.

## 6. Compulsory licences [Regulations 71-75]

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

### Regulation 71

We submit that the applicant for a compulsory licence should have to provide all of their supporting documents with their application for a Compulsory Licence as they have no time limit to prepare such an application.

Plant & Food Research is also concerned with regulation 71(2) as there is no time requirement on the applicant and/or the Commissioner to send a copy of the application to the PVR holder to which the compulsory licence application relates too. We submit that a reasonable time limit be put in place and consideration given for breeders who may reside outside of New Zealand as we do not want to unreasonably penalise breeders offshore from bring premium genetics into New Zealand for the benefit of New Zealand.

Clause 106 of the Plant Varieties Bill reads:

> *'The Commissioner must publicly notify an application for a compulsory licence, and make it publicly available, as soon as practicable after they receive it."*

We submit that the equivalent level of urgency to notify be extended to not only public notification, but also to directly notify the PVR holder.

### Regulation 72

This draft regulation sets out that the PVR holder may, within 2 months after receiving a copy of the application, file a counter-statement with the Commissioner.

We refer to our submission on the 2021 "Consultation Paper on the Proposed Regulations" and submit again that the proposed 2 months is not sufficient time to respond to the Commissioner with a counter-statement.

A protected variety could be licensed to multiple parties in New Zealand and/or overseas. This means that extensive consultation by the PVR owner with each of these licensees (and possibly their sub-licensees) will be required to understand the full impact of a compulsory licence application on both the PVR owner and the licensees for a sufficient counter-statement to be prepared and filed with the Commissioner.

The general consensus from submitters on 2021 "Consultation Paper on the Proposed Regulations" was that the 2 month time limit was too short. The majority of the submissions advocate for a longer response time in the region of 4-6 months.

There should also be provision for exclusive licensees of the PVR to make submissions given that Commissioner has to consider their views under the requirements of the draft Plant Varieties Rights Bill.

Plant & Food Research again submits that the timeframes be extended to 4-6 months.

**Regulation 74**

Plant & Food Research submits the requirement for the PVR holder to file evidence in support of their case within 2 months of receiving the applicant's evidence is not sufficient.

The evidence required both in support of, and in opposition to, a compulsory licence application is extensive. It is foreseen that such exercises would require the gathering of evidence from witnesses of fact, plant breeding experts directly involved in the variety at issue, independent scientific experts, independent economic experts and independent legal experts (giving evidence about usual terms of IP licensing). The work required to gather this type evidence will be highly involved and time-consuming.

Plant & Food Research submits again that the timeframes similar to those in the Patent opposition procedure are more appropriate than the timeframes taken from the Trade Mark opposition procedure. The PVR holder should be given a minimum of 4-months to file their evidence with the Commissioner after receiving the applicant's evidence.

## 7. 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 104**

We submit that this important clause is not clear and creates ambiguity around what circumstances the Commissioner can extend a time limit prescribed for filing information or a document, or taking a step in a proceeding under these regulations.

For example, regulation 104(2)(b) states that subclause 1 does not apply in respect of the time limit prescribed for filing a notice of opposition of a kind referred to in regulation 95(a).

However regulation 95(a) refers to a set of regulations that reach far wider than the filing of a notice of opposition. So is the intent that the Commissioner cannot extend the time limits for any of those proceedings listed under regulation 95(a) or just those that deal with notice of opposition procedure?

Plant & Food Research submits that further clarity is needed.

## 8. PVR Register [Regulations 76-88]

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

**Regulation 85**

Plant & Food Research supports the 4-month time limit given to the opponent to file evidence in support of the opponent's case. This time frame should be the minimum acceptable time frame, as discussed above.

**Regulation 86**

Plant and Food Research supports the 4-month time limit afforded by this clause and again submit that this time frame should be the minimum acceptable time frame for comparable clauses, as discussed above.