Submission template

Review of the Plant Variety Rights Act 1987: Proposed Regulations

Your name and organisation

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Responses to questions in the discussion document

The Regulations

2.1	**PVR regulations - general** Do you agree with MBIE's proposal that the new PVR regulations be adapted, as far as possible, from corresponding provisions in the Patents Regulations 2014?
	Yes

Regulations adapted from the Patents Regulations

3.1	**Regulations adapted from the Patents Regulations** 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?
	Yes

PVR specific regulations

4.1	**Denominations** Which of the two options for the time limit for submitting a replacement denomination do you support? Please explain why.
4.2	As stated in our submission on the PVR Bill, we do not believe a variety denomination should be required to file an application (clause 36 PVR Bill). The Bill is intended to give effect to UPOV 91 and should therefore align as much as possible. Under UPOV 91 an application does not require a variety denomination to receive a filing date. Requiring a variety denomination at the time of filing is adding an additional requirement for an application, which should be avoided other than for the purpose of fulfilling Treaty obligations. Where an applicant is required to provide an alternative variety denomination to that originally proposed, the proposed timeframe in option 'i' should be sufficient.
	Denominations If you favour option (i) should the prescribed period for submitting a denomination be extendible? If so how long should any extension be, and on what grounds?

	Yes, the period should be extendible. UPOV rules require applications filed in different countries to use the same denomination. If a change is required in New Zealand then the applicant may need to make changes in other jurisdictions. There could be a number of reasons why the applicant could not clear a name for use globally within three months. However, we do not think an extension needs to be limited to only one month. Nor do we think that extensions should only be available in exceptional circumstances. We think that the approach taken in regulation 161(a) of the Patent Regs should be followed, i.e. a one month extension should be available if the Commissioner is satisfied it is reasonable in the circumstances, and longer extensions are available in exceptional circumstances.
4.3	**Examination** Do you agree with MBIE's proposals for the time limits for providing information and propagating material in relation to a PVR application? If not please explain why.
	We agree with the proposal to standardise timeframes etc. While we broadly agree with the approach to extensions, we submit that the Commissioner should have the power to set deadlines and allow extensions of up to 24 months. This would still be subject to the requirement that the Commissioner is satisfied such an extension is reasonable but would reduce the compliance burden on applicants when it is clear that that there is no quarantine space for several years. We understand the PVR office is in contact with MPI and is aware of which types of plants are subject to significant delays and current office practice is to be pragmatic with those varieties. If the intention is to provide the office with regular updates about an application this should be done via other means, not via examination provisions where an application can lapse if the requested information/material is not provided in time.
4.4	**Examination** If you disagree with MBIE's proposal, what alternative time limit regime should be adopted?
	See above
4.5	**Examination** Do you consider that the two month period for paying trial or examination fees is reasonable? If not, please explain why.
	Yes, we believe 2 months following a request for examination fee payment will be sufficient time to pay the fee.
4.6	**Examination** MBIE proposes that the prescribed period be extendible only under genuine and exceptional circumstances. Do you agree with this? If not, what extension (if any) should be available, and under what criteria?
	Yes, but we believe some consideration has to be given to how this may impact the ability to restore a lapsed application. The grounds for an extension should not be more onerous than the restoration grounds.

4.7	**Examination** MBIE has proposed that the regulations empower the Commissioner to set the conditions of a growing trial. Do you agree with the conditions proposed by MBIE? Are there any other conditions that you think the Commissioner should have the power to set?
	We agree that the regulations should allow the Commissioner to set the conditions of the growing trial.
4.8	**Examination** MBIE proposes that where the Commissioner chooses to rely on a growing trial conducted by an overseas authority, and two more such reports are available, the Commissioner should determine which report to rely on. Do you agree with this proposal? If not please explain why.
	Yes, provided there are clear guidelines available about what the Commissioner will consider when determining which report to use. The applicant could indicate their preferred report at the time of application and reasons for its preference, however the ultimate decision would lie with the Commissioner.
4.9	**Compulsory licenses** Do you agree with the proposed procedure for dealing with compulsory license applications? If not please explain why.
	No, we disagree with the proposed procedure for compulsory licenses. We understand that when this process was proposed by the Commissioner on a previous compulsory licence case it placed a considerable financial burden on the PVR holder, and the short response deadline was unreasonable. While the applicant for a licence has time to prepare documents in advance of their application, the PVR holder has no such ability to prepare. The multistep process also seems to be rather onerous.
4.10	**Compulsory licenses** If you disagree with the proposed procedure, what other procedure could be used?

We propose that the applicant for a compulsory licence should have to provide all of the supporting documents with their application, the PVR holder should then have six months to respond with their combined evidence and counterstatement. At this point the parties could then be heard on the matter. Provided there are some provisions to deal with late filed evidence/information (e.g. at the Commissioner's discretion) the overall time frame would remain approximately the same, but be simpler for all parties.

The Commissioner should also have ability to split the hearing, i.e. have an initial hearing on whether there are grounds for granting a compulsory licence and, if granted, a further hearing on costs. Requiring PVR holders to include evidence regarding financial information when a licence may not even be granted is unfair and open to abuse.

There should also be provision for licensees of the PVR to make submissions. Often, they will be the ones most negatively affected by the grant of a compulsory licence.

We also request that the fee for requesting a compulsory license be set at a level commensurate with the work required by the Office and the PVR holder. Consideration should also be given to whether the Commissioner should have the discretion to award costs or dismiss vexatious applications.

Other Issues

5.1	**Objections before grant** Do you agree with the procedure proposed for objections before grant? If not please explain why.

	The objection procedure raises issues of cost for the Applicant, especially if all objections are treated equally: - If the objection can be made at any time and the procedure is the same regardless of the objection, then after both parties have been through the opposition procedure (both have filed evidence etc) and the matter is ready for a hearing, the Commissioner can still decide to refuse the application on the basis of growing trial results. In these circumstances, the applicant has incurred significant costs potentially in defending the opposition for no benefit. In such circumstances, a post-acceptance opposition procedure makes more sense. - But if objections cannot be raised until after acceptance, then relevant issues that could have been dealt with as part of the examination of the application may not have been considered because the Commissioner was not aware of them. And so further growing trials etc may be required incurring further costs. Therefore, we suggest different approaches depending on the nature of the objection raised under clause 49. That is: If an objection is raised prior to grant and it concerns denomination or ownership, and a hearing is required prior to a decision from the Commissioner, then this should occur as soon as possible and not require the applicant to financially commit further to the PVR application when uncertainty exists about whether it will be allowed. But if an objection is raised prior to grant and it concerns DUS criteria, then growing trials will likely form part of the response and will, most likely, be relevant to the examination process as a whole, and so it makes sense that growing trials must be completed before a hearing can take place. Allowing for case management conferences as part of the objection process may help alleviate issues with respect to cost and the procedure to be adopted in the circumstances.
5.2	**Objections before grant** If you disagree with the proposed procedure, what alternative procedure do you suggest be adopted?
	See comments above.
5.3	**Requests for propagating material or information from PVR owners** Do you agree with the proposed time periods for providing information or propagating material relating to a granted PVR? If not please explain why.
	We refer to our comments above on setting time limits for providing information or plant material during examination. We think a similar approach should apply here, namely the Commissioner should be allowed a wide discretion when setting deadlines and not be constrained by a narrow time limit. We note that growing trials are often discussed with the applicant well in advance (i.e. more than 12 months), so there is no reason to limit the office to only giving 12 months' notice to other PVR holders when they have been discussing the trial design with the applicant before then. It is in everyone's interests that notice is given well before the trial is due to be carried out.

	Requests for propagating material or information from PVR owners MBIE proposes that the proposed time periods not be extendible. Do you agree with this proposal? If not what extensions should be available and under what grounds should extensions be provided?
5.4	No, the time limits should be extendable under certain circumstances, particularly those related to the supply of propagating material. Because of the nature of plants, their availability may be outside the control of the PVR owner. For example, bad weather or other natural phenomena could destroy stocks of plants. There can also be large delays getting plant material into NZ due to ongoing space issues in quarantine, often requiring PVR applicants / owners to request multiple extensions. Additionally, if a plant is requested by the commissioner as a comparator or reference for a DUS trial and is no longer available in NZ, longer than 12 months would be required to import the variety and have it clear quarantine. Contrary to MBIE's proposal, we think there could be good reasons why an applicant cannot meet the deadline set by the Commissioner, but where plant material should still be provided. For example, if a variety is closely related to the variety being tested it makes sense for the trial to be somewhat delayed rather than proceed without the most useful comparator. Therefore, the Commissioner should be able to accept a reasonable excuse from the PVR holder or issue an extension, depending on the circumstances. We also think that the penalty for failure to comply (losing the right) is too high for a non-extendible deadline.
5.5	**Non-indigenous species of significance** When should the regulations listing non-indigenous species of significance enter into force? Should they enter into force with the Bill's non-Treaty provisions, or be left until the Treaty provisions come into force? Please give reasons for your response.
5.6	**Non-indigenous species of significance** Do you have any other comments on the list and the entries in it?

Other comments

[Insert response here]