Submission: Review of the Plant Variety Rights Act 1987: Proposed Regulations

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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?
	We support this approach. However, seek assurance from officials developing the regulations that appropriate latitude on related timelines and actions clearly account for the biological seasonality of the materials subject of the application or grant.

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?

On balance, and subject to the point made at 2.1 we support this approach. Specifically, we expect the prescribed filing system will recognise & accommodation the UPOV PRISMA on-line filing system.

We do have reservations on the direct, per se, application of the "revocation" sections of the Patent Act regulations for PVR matters and wish to see clear parameters and framework for the application of those regulations set out and consulted on prior to finalisation of any PVR regulations derived from that section.

The "restoration" provisions are seen as a worthwhile addition for balance and certainty to the NZ PVR regime.

Registration of assignments of PVRs as envisaged in the table provided in the **Consultation Paper** Review of the Plant Variety Rights Act 1987: Proposed Regulations and put into action in Regulations 124,125 Patents Regulations 2014 are supported.

However, we remain concerned at the intent & obligation set out at clause 72-73 of the PVR Bill itself and believe redrafting of that section is required for relevant alignment with the nature of the regulations model proposed here.

We submit those clauses of the PVR Bill should not proceed as currently drafted.

As parties have previously submitted on this matter through the PVR consultation process:

"Register of Rights and Interests

- Section 72 provides a requirement to 'lodge' ownership /interest in PVR's with the commissioner. We submit that this process is onerous to both the commissioner and to the owners of interests in PVR and adds little value to either party.
- We are not aware that any other piece of IP legislation in effect in New Zealand requires public notification of all rights and interests held against or in the right.
- The applicant or holder should be compelled, as they are currently, to ensure that there is a registered representative in New Zealand that can be contacted should any enquiry need to be made."

We submit again that as a PVR is – contrary to the opinion expressed in the Sapere report – a full IP right then any need for registration of assignments can be effectively manged at the discretion of the grant holder (and without obligation) through pre-existing facilities available under NZ law. For example, such as registration of title and interests under the Personal Property Security Register.

More appropriate alignment of these matters in a redrafted PVR Bill and the PVR regulations is sought.

On balance we support adoption of the procedural and evidential requirements for proceedings before the Commissioner to be adopted from Regulations 152-175 of the Patents Regulations 2014.

However, as submitted consistently through the PVR consultation process, the bar for an application and supporting evidence for a compulsory licence must be stringently

	weighted to *solely* a public interest test. The PVR regulations should set out strictly limited criteria that account solely for a public health, animal welfare, or environmental risk. Those are justifiable criteria. Further, fees for such an application should be set at a level where anti-competitive and vexatious actions are effectively discouraged.

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.
	We are comfortable with supporting a *set* timebound period [option (i)] for submission of a denomination. With flexibility on reasonable extensions to the initial period for submission, this approach contributes to the certainty & balance users of the PVR system are seeking.
4.2	**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?
	In our experience, it would be unusual for a denomination submitted for a candidate variety to be used solely in NZ – it is more typical that PVR applications for the same candidate will be made in multiple jurisdictions. On this basis we propose the initial period for submitting a denomination should be six months, with extensions on a month-by-month basis up to a total 12-month period allowed. This enables a thorough and systematic approach to the practicalities of multi-jurisdiction checking. Especially allowing for the lengthy correspondence that is likely to be required with prescribed regulatory office channels, cross-checking with trademark registrations in target production regions and markets, and any additional steps such as translation (for example, key trading partners such as China may require an applicant to ensure alignment among an English, Mandarin, and Pinyin version, before submitting that English version to the NZ system).
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 support the time limits for providing information and propagating material in relation to a PVR application, with flexibility for extensions on the basis of "reasonable in the circumstances" as described in the **Consultation Paper** Review of the Plant Variety Rights Act 1987: Proposed Regulations. This is an important section for stakeholders to review the resulting draft PVR regulations – stakeholder consultation prior to finalisation of any PVR regulations is expected. A key matter for that review is to confirm that any *obligation* on the applicant for supply of information and propagating material is restricted to the candidate variety.
4.4	**Examination** If you disagree with MBIE's proposal, what alternative time limit regime should be adopted?
	[Insert response here]
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, that is reasonable
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?
	We support this provided the regulations facilitate open and clear dialogue on the matters of genuine and exceptional circumstance.
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?
	On balance the approach is perceived as reasonable and workable given the nature of the biological materials subject of the PVR system. It is also perceived as contributing to coherence with norms in other UPOV countries. This is an extensive range of conditions under the power of the Commissioner. We submit that further extending those powers risks the NZ PVR system becoming overly bureaucratic which will cause it to become over-prescribed, unwieldy, and therefore a disincentive to users of the system.
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.

	Relying that that the basis and supporting rationale as set out in the **Consultation Paper** Review of the Plant Variety Rights Act 1987: Proposed Regulations is drafted into the PVR regulations largely unchanged then this approach is perceived as reasonable & contributes to the certainty & balance users of the PVR system are seeking.
	Compulsory licenses Do you agree with the proposed procedure for dealing with compulsory license applications? If not please explain why.
4.9	From direct experience of responding on the case cited here we can confirm that the *process* offered in the absence of any useful guidance in the current Act was workable. However, should the model be adopted in the new PVR regulations, users of the PVR system, particularly title holders against whom a compulsory licence application may be made, should be under no illusion that it is entirely at their own volition the quality & depth of investment they respond with. It is also an inevitable fact that it will be costly in terms of their own time & effort, risks and hold-ups to their on-going business, and in bringing on board any professional advice or practitioners. In our experience making a response was onerous, expensive, and burdensome. That was inescapable in the *process* applied. The *process* was also no guarantee or assurance of the "merit" of the compulsory licence application per se, the "quality or factual basis" of its supporting rationale, or the "worthiness" of the applicant. Again, we submit that there must be a high bar for even allowing a compulsory licence application to be filed. The PVR Bill & supporting regulations should facilitate only worthy or relevant applications and disbar frivolous or unwarranted applications. The process adopted should provide for that judgement to be made by the Commissioner at receipt of the application, and before it is accepted to proceed. As submitted at 3.1 the bar for an application and supporting evidence for a compulsory licence must be stringently weighted to *solely* a public interest test. The PVR regulations should set out strictly limited criteria that account solely for a public health, animal welfare, or environmental risk. Those are justifiable criteria. Further, fees for such an application should be set at a level where anti-competitive and vexatious actions are effectively discouraged.
4.10	**Compulsory licenses** If you disagree with the proposed procedure, what other procedure could be used?
	[Insert response here]

Other Issues

5.1	**Objections before grant** Do you agree with the procedure proposed for objections before grant? If not please explain why.
	On balance the approach is perceived as reasonable and workable, contributes to the balance and certainty users of the PVR system are seeking.
5.2	**Objections before grant** If you disagree with the proposed procedure, what alternative procedure do you suggest be adopted?
	[Insert response here]
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.
	On balance the approach is perceived as reasonable and workable, & contributes to the balance and certainty users of the PVR system are seeking. However, we are concerned to be assured that these provisions - both in the PVR Bill and the regulations - pertain only to an obligation on the applicant/rights holder to provide information and material of the *candidate* variety.
5.4	**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?

We do not agree that the proposed time periods not be extendible. The Commissioner should have discretion to assess the PVR owner's "reasonable" excuse for an extension of time.

In our experience both biological factors e.g. seasonal timeliness, and legal/commercial factors, can both affect the ability of an applicant/PVR owner to comply with these requests. The regulations should facilitate flexibility to ensure these matters are appropriately able to be dealt with.

As submitted previously in the PVR consultation process:

"The NZ PVRO must acknowledge accountability and be proactive and transparent in how it arranges and organises for "safe and legally appropriate" hosting and use of the materials provided in good faith by breeders and title holders. An appropriate contracting process should be designed and implemented where the PVRO is bound into every hosting situation (rather than relying on a vague and implied role), and itself should be proactive in facilitating the "safe harbour" for growing trials and/or comparisons of variety constituents to take place that will provide the integrity of the PVR system users are seeking. This is important for NZ-based users of the system and even more critical for those introducing their varieties from outside NZ."

And…

"… the PVRO side steps accountability for providing any comfort, support, assurance, or guarantee that when plant material of a proprietary variety (post-application, or post-grant) is supplied it would not be at risk of misuse, misappropriation, or loss in being grown in any of those circumstances – and the applicant or rights holder has no recourse for action via the PVRO.

Secondly, there is no acknowledgement of the very real time delays and opportunity cost for all participants in the NZ PVR scheme brought about by MPI's failure to provide or maintain a timely, effective, and fit for purpose plant import and PEQ process (see paper provided by industry representatives to the MBIE PVR Working Party ahead of the PVR Technical Focus Group and PVRA consultation held 20 August 2020.

And…

This has been especially and increasingly critical in recent years, where for example, a sector was subject of a disease incursion that required strict lockdowns on movement of plant material (kiwifruit), and in crop by crop cases where MPI has allowed import health standards (IHS) to lapse and/or has not addressed implementation of new or refreshed IHS for some crops creating long delays in the opportunity for import and post-entry quarantine (PEQ) processes to operate. Exacerbated further by MPI's failure to accredit offshore facilities and/or provide adequate capacity to meet demand; relying on a user-pays basis for what should be a matter of national investment to support the NZ innovation ecosystem and economy.]

We support on-going discretion for the PVRO to exercise reasonable discretion to extend the deadline for supply of plant material – and equally support that it is reasonable the PVRO should request applicants to demonstrate reasonable intentions to procure, produce, and supply the plant material."

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.
	The regulations listing non-indigenous species of significance entering into force at the same time as the Treaty provisions come into force seems the best alignment. This means any drafting amendment or finessing to any of the criteria or provisions in either the Bill or supporting regulations can be dealt with consistently and contemporaneously. Users of the PVR system have line of sight to the proposed list prior to that time, so matters of certainty and balance are not unreasonably affected.
	Non-indigenous species of significance Do you have any other comments on the list and the entries in it?
5.6	The list as set out in the **Consultation Paper** Review of the Plant Variety Rights Act 1987: Proposed Regulations derived from the list of species based on research carried out by Karaitiana Taiuru included in the discussion paper should be the finite, definitive list. This list results from extensive, detailed research – and on that basis there is no rationale for the list to "be amended or adapted as time goes by".

Other comments

[Insert response here]