Submission template

Review of the Plant Variety Rights Act 1987: Exposure Draft of the Plant Variety Rights Regulations 2022

Instructions

This is the template for those wanting to submit by Word document a response to the release of the exposure draft of the PVR Regulations 2002 for consultation.

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised by 5pm on Friday, 20 May 2022. Please make your submission as follows:

1. Fill out your name and organisation in the table, "Your name and organisation".
2. Fill out your comments on each section of the regulations in the comment box. You may comment on any or all of these sections. Where possible, please include evidence to support your views, for example relevant examples.
3. If you would like to make any other comments that are not covered by any of the questions, please provide these in the "Other comments" section.
4. When sending your submission, please:
    a. Delete this first page of instructions.
    b. Include your e-mail address and telephone number in the e-mail accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
    c. If your submission contains any confidential information:
        i. Please state this in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.
        ii. Indicate this on the front of your submission (eg the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).

    Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 1993 also applies.
5. Send your submission as a Microsoft Word document to ***PVRActReview@mbie.govt.nz***

Please direct any questions that you have in relation to the submissions process to ***PVRActReview@mbie.govt.nz***.

Submission template

Review of the Plant Variety Rights Act 1987: Exposure Draft of the Plant Variety Rights Regulations 2022

Your name and organisation

Name	Dr Ana Penteado
Email	
Organisation/Iwi	Independent Researcher/ Associate Professor at the Notre Dame University, School of Law

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

☐ The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at ***www.mbie.govt.nz***. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

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.
	In the Plant Variety Rights Regulations 2022, we have focused on the sections of interest for the quantity of seeds provided for the conduction of tests. "*16. Number of plant variety right application or plant variety right must be given when all information or documents filed under Act or regulations All information or documents given to the Commissioner under the Act or these regulations must contain, or be filed with, the number of the plant variety right application or plant variety right (if any) that is the subject of the application, request, assertion, opposition, or other matter in respect of which the information or document is given*." I think it is missing to express for the reader the seed quantities necessary for each species submitted in each PVR application, so there is no gap in understanding and no misunderstanding that quantities are of extreme importance to the PVR application.
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.

[Insert response here] "36. Colour photographs to be supplied with certain applications (1) This regulation applies to every plant variety that is fruit, an ornamental variety, or a vegetable (including a potato). (2) A PVR application for a variety of plant to which this regulation applies must be accompanied by— (a) a satisfactory photograph of ***all or part of a typical plant*** *of the variety showing the variety's* ***distinguishing features****; or Plant Variety Rights Regulations 2022 Part 2 r 36 Consultation draft 17 (b) 2 or more satisfactory photographs (each being a photograph of all or part of a typical plant of the variety) that together show the variety's dis- distinguishing features. (3) A photograph is satisfactory if— (a) it is* ***a photograph based on plants propagated*** *from the original plant or plant part; and (b) it is clear enough and large enough to enable the subject matter to be easily identified*."

This could be further clarified as it presents legal gaps to controversial interpretation and would delay the process for a PVR application, causing PVR examiners to waste time explaining basic details to applicants. Let us use the benchmark document from UPOV to clarify these points:

a) The conduct of tests depends on clear, professionally quality taken pictures identifying the material required. Therefore, pictures should identify two independent growing cycles under normal growth conditions in which the size of plots should be uniform.
b) Each photograph provided should have 60 (sixty) plants for each test conducted if the grouping varieties required a different number of varieties, that should be stated.
c) If methods and observations are considered, all such events should measure and count the number of plants for each PVFR species. In this benchmark, the document is stated that 20 plants or "parts of 20 plants" for this specific variety. The number of plants to be observed is of utmost importance for a PVR application test aiming for uniformity, distinctiveness, and stability.
d) I see an absence of disease resistance characteristics for assessing distinctiveness, uniformity and stability on pictures. I refer to *36 Colour photographs to be supplied with certain applications, 1, 2, but specifically on 3*. Back in 2002, as the benchmark document states, there was a discussion in the UPOV Technical Committee to add disease resistance characteristics for establishing distinctiveness, which the expert group accepted. While this might be a detail that a photograph may not be able to clarify by a still image, this may be a record for controlled infection. According to the benchmark UPOV document, "each race should be tested separately, and the results should also be indicated separately." This is one aspect of the disease resistance characteristics, but other assessments may be clarified for the PVR applicant.

Grouping Varieties
If photographs are used as evidence for any present or future oppositions in the process of PVR approval and registration, then grouping varieties by growth type and harvest maturity should be of interest to the PVR applicant. The information may be really useful to avoid misunderstood or misleading interpretations by applicants and their agents. According to the benchmark document, some recommendations that are crucial for the conduction of tests for distinctiveness, uniformity and stability are seeds (e.g. colour), leaf (e.g. shape), time of the beginning of bolting under long conditions as some of the most common characteristics in group varieties including a Table of Characteristics.

"37. Quantities of propagating material to be provided with applications (1) A PVR application for a variety of a kind of plant described in column 1 of Schedule 3 must be accompanied by the quantity of propagating material specified (opposite the description) in column 2 of Schedule 4, together with the quantity, if any, of seed ears specified

(opposite the description) in column 3 of Schedule 4. (2) ***The standard of purity and germination of the propagating material must be acceptable to the Commissioner****."*

Regarding *37 Quantities of propagating material to be provided with* applications, this is one of the sections lacking more clarity, and I will address below my concerns. Then the standard of purity and germination of propagating has considerable discretion from the Commissioner. While this is a positive assessment for the administrative office and the PVR examiners, as technology and biotechnology can affect the purity and germination of propagating material, it must have at least a basis for the PVR applicant to consider as guidance. Perhaps an update will be necessary each time innovative methods and techniques are available, which could be cumbersome for administration, however, it is necessary to keep the process transparent and clear for applicants. That affects directly the quantity of sees necessary to conduct tests for uniformity, distinctiveness and stability.

"42 Prescribed requirements under section 47(5) of Act, The prescribed requirements under section 47(5) of the Act for a growing trial, are that the Commissioner must impose conditions to be complied with by those conducting the growing trial relating to— (a) the location and timing of the growing trial; and (b) the trial design; and (c) the varieties to be included in the growing trial; and (d) how the growing trial will be overseen and by whom: Plant Variety Rights Regulations 2022 Part 2 r 42 Consultation draft 19 (e) any other conditions necessary to ensure that the growing trial is undertaken in a manner that is satisfactory to the Commissioner."
Reviewing section 47(5) on the Bill, there is not clear to me what is growing trials, and that makes sense because you need a Table of Characteristics for this or to use the UPOV benchmark document to have guidelines for PVR breeders, applicants, assignees and agents. I would suggest that the best place to explain such denominations should also be here in the Regulations. This definition appears to be missing, and its importance must be stressed for conducting tests for distinctiveness, stability and uniformity.
The reviewed section 47 (5) is below:

"47 Growing trials (1) A PVR must not be granted for a plant variety unless a growing trial has been 20 undertaken for that variety. (2) The Commissioner must decide whether a growing trial is to be undertaken— (a) by or on behalf of the Commissioner; or (b) by or on behalf of the applicant; or (c) by an overseas testing body approved by the Commissioner; or 25 (d) by or on behalf of an authority of a State that is a member of UPOV and grants plant variety rights."

There is an absence of a proper definition of growing trials. If we consider the benchmark UPOV document, growing trials are a fundamental part of the conduct of tests. However, a definition of what they are is not available in the Plant Variety Rights Act 1987.
To conduct a satisfactory test for distinctiveness, stability and uniformity, a plant's breeder must follow two independent cycles for the variety according to the benchmark UPOV document. Perhaps independent plant growth cycles will vary according to the variety to be tested, but at least two independent growth cycles will be necessary. Nevertheless, technical information is an aspect that should be a guideline for PVR applicants.

"48 ***Prescribed times for supply by PVR holder of propagating material or further information required by Commissioner*** *(1) The prescribed time for a PVR holder to comply with a request by the Commissioner under section 69(1) 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 sub- clause (3). (2) The prescribed time for an applicant for a PVR or a PVR holder to comply with a request for information under section 69(2) 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 subsection (3). (3) The applicant or a PVR holder may before the expiry of the period referred to in subclause (1) or subclause (2), as the case requires, request the Commissioner to extend that period, and if the Commissioner considers it reasonable in the circumstances to do so the Commissioner may— Plant Variety Rights Regulations 2022 Part 2 r 48 Consultation draft 21 (a) in the case of a request relating to the period in subclause (1), extend the time on 1 occasion for a period not exceeding 1 year: (b) in the case of a request relating to the period in subclause (2) extend the time on 1 or more occasions for a further period not exceeding 2 years on each request for an extension*."

Section 47 is missing that the quality of the seed must be not below the marketing standard seed that will be commercialised in New Zealand. The way this section is drafted permits seeds to be presented in the growing trials to possibly be of inferior quality as the ones to be commercialised, which is problematic. Another aspect overlooked in this section 48 is that the seeds delivered must have been free of any treatment exception made for the Commissioner or Examiners to have pre-approved such treatment.

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

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. Please provide any comments you have on these regulations in the box below.
	[Insert response here]
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. Please provide any comments you have on these regulations in the box below.

	[Insert response here] Reviewing section 47(5) on the Bill, there is not clear to me what is growing trials, and that makes sense because you need a Table of Characteristics for this or to use the UPOV benchmark document to have guidelines for PVR breeders, applicants, assignees and agents. I would suggest that the best place to explain such denominations should also be here in the Regulations. This definition appears to be missing, and its importance must be stressed for conducting tests for distinctiveness, stability and uniformity. The reviewed section 47 (5) is below: *"47 Growing trials (1) A PVR must not be granted for a plant variety unless a growing trial has been 20 undertaken for that variety. (2) The Commissioner must decide whether a growing trial is to be undertaken— (a) by or on behalf of the Commissioner; or (b) by or on behalf of the applicant; or (c) by an overseas testing body approved by the Commissioner; or 25 (d) by or on behalf of an authority of a State that is a member of UPOV and grants plant variety rights."* There is an absence of a proper definition of growing trials. If we consider the benchmark UPOV document, growing trials are a fundamental part of the conduct of tests. However, a definition of what they are is not available in the Plant Breeder's Rights Act 1994 or the Plant Variety Rights Act 1987. In the Plant Breeder's Rights Act 1994, there is an interpretation that "test growing includes a comparative test growing" is not satisfactory for this purpose. To conduct a satisfactory test for distinctiveness, stability and uniformity, a plant's breeder must follow two independent cycles for the variety according to the benchmark UPOV document. Perhaps independent plant growth cycles will vary according to the variety to be tested, but at least two independent growth cycles will be necessary. Nevertheless, technical information is an aspect that should be a guideline for PVR applicants.
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. Please provide any comments you have on these regulations in the box below.
	[Insert response here]
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. Please provide any comments you have on these regulations in the box below.
	[Insert response here]
7	**Compulsory licences [Regulations 71-75]** 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.
	[Insert response here]

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. Please provide any comments you have on these regulations in the box below.
	[Insert response here]
	Other matters
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. Please provide any comments you have on these regulations in the box below.
	[Insert response here] *"96 Extra information that must be contained in documents filed in proceedings (1) A document, including written evidence, or bundle of documents filed in a proceeding must contain the following information: (a) the name and address for service of the person filing the document; and (b) if that person has an agent, the agent's name; and (c) the number of the PVR application or PVR that is the subject of the proceeding. (2) Every document referred to in regulation 95(a), and every statement of case and counter-statement, that is filed in a proceeding must be signed by the per son giving the information or document or on whose behalf the information or document is given (for example, the applicant or the opponent)".* It seems that this section would be clearer if it stated that visual evidence might qualify for evidence as extra information in the proceedings. I may understand that visual evidence such as pictures is not allowed from section 96 and the prior section 63. However, having in mind section 105 that restricts the field of evidence to particulars filed, it would be extremely helpful to have visual evidence for cases in which this kind of evidence can support any parties involved.
10	**PVR Register [Regulations 76-88]** 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.
	[Insert response here]
11	**Other matters [Regulations 89-94]** These regulations cover a handful of other, mainly administrative matters. Please provide any comments you have on these regulations in the box below.

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

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. Please provide any comments you have on this proposal in the box below.

My comments are related to the quantity of seeds necessary for an effective test to occur. Having this in mind, I investigated historic documents from UPOV to see whether this aspect has been covered efficiently. These are my conclusions below.
My benchmark document to suggest some observations that I have proposed below is the draft from 2002- 08-23, *UPOV Guidelines for the Conduct of Tests for Distinctiveness, Uniformity and Stability*, available at
https://www.upov.int/edocs/mdocs/upov/en/twv_36/tg_13_8_proj_2.pdf
Upon reviewing the benchmark document, I could attest that it is very useful to establish some gaps I might have found in the *proposal to amend quantities of seed with a PVR application*, hereinafter, the proposal. One problem I can identify upfront is that this proposal does not address choices for seed proposed seeds quantity from the aspects of test consistency. I am looking into the benchmark *UPOV draft Test Guidelines*, which clarifies to the public policymaker why disease resistance is an important characteristic for establishing distinctiveness.
Having the historical value of this benchmark document stated upfront, the TC / Council of 1994, clears out the path to consider that the PVR applicant needs to have information about Resistance or "the ability of a variety or a mono-specific population to limit activities of a given pest or pathogen throughout the whole or part of a growing cycle" which is decided by disease and by species not on a general understanding, for all plants. It is not clear if this approach has been looked at for those plant species above mentioned from their individual aspects, related diseases and taxonomic identity instead of a general approach. This information might not be available to the public for good reasons, like the integrity of the Examination process, but it is not clear to me in reading this proposal.
Another aspect is Susceptibility or "zero-resistance level of a variety of a variety of populations with respect to a given pest or pathogen". It is not clear whether this item is considered here, and it must be of utmost importance for guidelines tests so that stability is clear evidence for the plant variety to be considered a variety with stability.
Another element of analysis is Tolerance, or the "Ability of a variety or population to tolerate the development of a pest or pathogen whilst displaying disorders that are without serious consequences for their growth, appearance or yield."
Therefore, it comes to me a logical step to consider that *the standard of purity and germination* must be acceptable by the Commissioner, so the law must give space for the technical staff at the IPONZ to perform technical tests and protocols. I think it might be that the legal document will not be able to address these tests from the step-by-step protocol due to the expertise necessary in the area of Guideline Tests for new plant varieties. In short, the quantity of the propagating material for a PVR to be provided for the applications must be verified by the Commissioner. Obviously, quality and quantity can be stated on the minimum quantity that can be established as in the benchmark draft is outdated as 20 g in 2002. However, the seeds' quality to be found as eligible for distinctiveness, uniformity and stability in a new plant variety are still necessary, and the seeds' quantity and quality need to be ratified by the Commissioner to conduct the tests efficiently. The fact that users have been contacted as stakeholders in the process is always a positive initiative, but the technical examination is pursued and carried on by the PVR Examiners, not the users or PVR applicants.

Again, I would expect all these matters to have been addressed in the Plant Variety Rights Regulations 2022 mentioned in *Guidance to the Proposed New Plant Variety Rights Regulations* 2022 below:

"*Provisions relating to PVR application (Regulations 35-44 and 48) Regulations 35-41 prescribe what (in addition to the requirements of clauses 36, 38 and 46 of the Bill) must be provided in relation to a PVR application, and associated timeframes. This includes provisions relating to information, denominations, colour photographs and propagating material. Regulations 42-44 prescribe matters relating to growing trials and should be read alongside clauses 47 and 48 of the Bill. They set out the conditions the Commissioner can set for growing trials and prescribed that trial and examination fees must be paid within two months of a request, with extensions only being granted in exceptional circumstances. Regulation 48 sets out the prescribed times for supply*

of propagating material or information by third parties (either other PVR applicants or PVR holders) under clause 69 in the Bill."

If you have any other comments you wish to make on matters relevant to this consultation, please make them in the box below

Thank you for this template however, it could be improved if it does not count lines as restrictive or a number of lines allowed. For instance, at the box numbered **Provisions relating to PVR applications [Regulations 35-48 (excl. 45-47**, seems to have not accepted my full reply. *I guess my comment is of interest because my own submission became without a flow on the topics of interest, as the sections intertwined with other sections, so I would not recommend this break on section. It works from the administrative point of view, but for submissions which are invited from the public you may have practitioners which will offer a universal background of content then a stratified reply. I hope my comment is helpful for future submissions.*