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Sent by email to PVRActReview@mbie.govt.nz

Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
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NEW ZEALAND

**REVIEW OF THE PLANT VARIETY RIGHTS ACT 1987
SUBMISSIONS IN RESPONSE TO EXPOSURE DRAFT OF THE PLANT
VARIETY RIGHTS REGULATIONS 2022**

These submissions have been prepared by the New Zealand Intellectual Property Attorneys Inc. (NZIPA).

The submissions are made in response to the April 2022 exposure draft of the Plant Variety Rights Regulations 2022.

BACKGROUND

The NZIPA was established in 1912. It is an incorporated body representing most Patent Attorneys registered under the New Zealand Patents Act, and who are resident and practising in New Zealand. A significant majority of our members are registered as Trans-Tasman Patent Attorneys and/or Australian Trade Marks Attorneys.

The current membership of NZIPA comprises 166 Fellows, 3 Honorary, 8 Students, 11 Non-resident, 25 Associates and 2 Retired.

Patent attorneys operate in the global arena across all sectors of industry to assist businesses in their key markets and to use intellectual property (IP) systems for strategic advantage. Patent Attorneys are qualified to, and regularly advise on, all intellectual property rights including, but not limited to, patents, trade marks, designs, copyrights and, pertinent to the ongoing Plant Variety Rights Act 1987 review, plant variety rights.

Members of NZIPA provide real support to New Zealand's innovators through identification and enhancement of ideas, protection and commercialisation.

**RESPONSE TO THE RELEASE OF THE EXPOSURE DRAFT OF THE PVR
REGULATIONS 2002**

We have appended our response, using the template provided.

CONCLUDING REMARKS

We would welcome the opportunity to discuss any aspect of our submissions with the review team.

Yours faithfully



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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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Organisation/Iwi	New Zealand Intellectual Property Attorneys Inc. (NZIPA)

[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.

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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.

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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	<p>General provisions [Regulations 3 and 7-34 and Schedule 3]</p> <p>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.</p>
	<p>No comments</p>
2	<p>Provisions relating to PVR applications [Regulations 35-48 (excl. 45-47)]</p> <p>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.</p>
	<p>We are concerned that the requirements set out in draft regulation 35 are inconsistent with the UPOV PRISMA on-line tool, which assists in making plant variety protection (PVP) applications to PVP Offices of participating UPOV members.</p> <p>Specifically, regulation 35 requires that a PVR application include ‘the name and address of each breeder who is an applicant’ and ‘the nationality or principal place of business of each breeder who is an applicant’.</p>
	<p>We understand that information on the nationality of breeders or applicants is not part of the PRISMA application form, and requiring this information for filing will mean all applications that designate NZ will be incomplete.</p> <p>PVR applications are required to be made through the IPONZ case management facility. We are concerned that this requirement is inconsistent with the requirement in regulation 37(1) that an application be accompanied by propagating material. We suggest amending this regulation to specify that seed may be provided after the application has been filed and given a filing date.</p>

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.
- No comments
- 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.
- We are concerned that the deadline for the applicant to file evidence under regulation 47(5) does not make adequate provision for oppositions on the grounds that the plant variety is not distinct, uniform or stable (DUS; see clause 30(1)(a)).
- The deadline in regulation 47(5) is adequate for oppositions relating to a proposed denomination or novelty.
- However, for oppositions that relate to the criteria in clause 30(1)(a), the PVR applicant may need to conduct a growing trial to provide evidence that their variety is distinct, uniform and stable. For example, if an opponent alleged that an applicant's variety is not distinct when compared to variety X, the applicant should be able to grow both varieties under the same conditions and then provide expert evidence showing the results. Clearly, it would not be possible to do this in the four months prescribed.
- Notably, an opposition can be filed at any time before grant, i.e. an opposition could be filed before the PVR Office had conducted its own DUS examination.
- The Commissioner may halt proceedings for six months at a time. However, applicants have up to two years to supply plant material for DUS testing. This timeframe recognises how difficult it can be to import plant material into New Zealand. Without the ability to halt proceedings until plant material is imported into New Zealand and a DUS trial is completed, applicants will be significantly disadvantaged. .
- We suggest the regulations be amended to set a more appropriate deadline to file evidence, or to specifically provide for extensions of time and/or a halt in proceedings, where an opposition is based on any of the criteria in clause 30(1)(a)(ii)-(iv). It would also be appropriate for there to be an automatic halt if the PVR office has not yet completed the growing trial required by clause 47(1).
- 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.

Please see our comments above regarding the deadline in regulation 47(5), which are also applicable to the deadline for the PVR holder to file evidence in regulation 53(5). If nullification is sought on the basis that the variety does not meet any of the criteria in clause 30(1)(a)(ii)-(iv), the PVR holder must be given adequate time to conduct a DUS trial before submitting their evidence in answer.

Restoration of lapsed applications and cancelled PVRs [Regulations 59-70]

6 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.

No comments

Compulsory licences [Regulations 71-75]

7 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.

We are concerned that the deadlines for filing evidence under regulation 74 are inadequate, particularly in view of the requirement in clause 103(1)(c) to consider the public interest.

The deadlines for filing the applicant's evidence, PVR holder's evidence and applicant's evidence in reply are 2 months, 2 months and 1 month, respectively. At the very least, we suggest these should be consistent with the currently proposed deadlines for providing evidence in an opposition, cancellation or nullification proceeding (4 months, 4 months and 3 months, respectively).

We are also concerned that regulation 75 does not make provision for submitting evidence regarding an application under clause 111. The grounds for amending/revoking a compulsory licence relate to the public interest, and breach of a condition of the licence (clause 110). Evidence may be required to establish either of these grounds. We suggest that procedures similar to those in regulation 74, which apply to clause 102(1), should apply to procedures under clause 111.

Proceedings before the Commissioner (hearings) [Regulations 95-118]

8 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.

No comments

Other matters	
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>
	No comments
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>
	No comments
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>
	<p>We are concerned that the Commissioner’s discretionary powers in regulations 92 and 93 are unduly limited. By enabling a waiver of requirements, these regulations enable the Commissioner to extend time limits temporarily and also in exceptional circumstances.</p> <p>Regulations 92 and 93 only refer to Part 1 and regulation 35. We suggest they be amended to also refer to other regulations governing procedural requirements during the application stage, particularly regulations 36 and 37 which have requirements at the Commissioner’s discretion for ‘satisfactory’ photographs and standard of purity and germination ‘acceptable to the Commissioner’. We also suggest it would be appropriate to extend the important discretionary powers of regulations 92 and 93 to regulations 38, 39, 40, 41, 42, and 44, which also govern procedural requirements during the application stage.</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>
	No comments

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

No comments