



INTELLECTUAL  
PROPERTY  
OFFICE  
PLANT VARIETY RIGHTS

## Plant Variety Rights Office Technical Focus Group Meeting

### Key discussion Points

<b>Date</b>	Tuesday, 12 June 2018
<b>Time</b>	9:30 am – 12:15 pm
<b>Location</b>	IPONZ, MBIE, Wellington.

#### Participants

Louisa van den Burg    Bloomz Ltd  
Andy Warren            Bloomz Ltd  
Cath Snelling            Plant and Food Research  
Humphrey Foote        AJPark  
Ricky Hann              Zespri  
Thomas Chin             Plant Breeding and Research Association  
Malcolm Woolmore    Kiwiflora Ltd  
Bruno Simpson         Waimea Variety Management  
Joy Lin                    Grasslanz New Zealand

IPONZ/PVRO            Chris Hardy, Chris Barnaby, Cecilia R-Jackman, Kylie Miller

MBIE Business Law    Aidan Burch

UPOV                    Peter Button

#### Apologies received

Matt Dolan              NZ Plant Producers Incorporated  
Fiona Pringle            Baldwins  
Kerry Hughes            Alex MacDonald Ltd

## **1. Welcome and MBIE and IPONZ Update -**

- Liz Francis, Patent, Design and PVR Manager recently retired in April. Chris Barnaby is fulfilling the position of PVR Manager in the interim. A permanent structure will be in place late in 2018.
- IPONZ currently has an Acting General Manager, Vanessa Horne, following the secondment of Ingrid Bayliss to another MBIE position.
- IPONZ is undertaking a wider review of staffing; including roles, flexible working conditions, and development and progression
- The participation of Peter Button, Vice Secretary General of the International Union for the Protection of New Varieties of Plants (UPOV) was acknowledged and appreciation given.

## **2 Adoption of the agenda**

The agenda was adopted unchanged.

## **3. Matters arising from last meeting -**

i) Following discussion at the 2017 meeting regarding use of foreign test reports, availability of plant material and compulsory licences, revised and updated information documents are available on the Technical Guidance (TG) page of the website.

<https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/>

A new document, Variety testing in NZ, has been added which provides information and education material regarding options for testing arrangements and use and availability of varieties.

<https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/variety-testing-in-new-zealand/>

ii) Following the 2017 discussion regarding Surrender and Cancellation, a reminder explanation was published in the Oct 2017 Journal as agreed by the last meeting. PVRO continues to talk with users about the difference between these two actions.

**4. Reports on technical activities for agriculture, fruit and ornamentals -** Written summaries for agriculture and for ornamentals were circulated to attendees before the meeting (Annex one and two)

i. PVR applications for fruit varieties show a steady and continuing increase, mainly for blueberry and apple. Agricultural application numbers remain steady and the slow decline in ornamental applications continues.

ii. Due to quarantine delays, PVRO has increased the time periods for importation deadlines and the time to supply plant material for testing. This is a practical response to a situation that PVRO or the applicant has little if any influence over.

iii. The length of time between application and grant for apples has increased from around four or five years in 2013 to 2015, to closer to seven or eight years in 2016 to 2018. The increase is due to a longer period from application date to start of testing, with no change to the period under DUS evaluation. The increasing length of the application period has highlighted practical differences between the protection provided under Provisional Protection and a Grant of rights. Legally there is no specific difference, but in practice they are not the same. Provisional Protection is becoming a larger element in managing protected varieties due to the increasing length of applications, in many cases due to prolonged importation periods. The meeting was advised that MPI has indicated that quarantine space for citrus is full until 2021.

iv. In the course of the discussion, industry representatives indicted some of the main factors affecting declining PVR applications in Ornamentals as:

- a) Biosecurity constraints; quarantine space and exportation and importation process complexity and the additional costs incurred.
- b) New Zealand is a small market and the industry is reliant on domestic sales only which may not pay off the importation effort.
- c) Breeding for food is more commercially attractive.

v. As discussed in previous years, the ongoing quarantine delays impact negatively on the relationship between agents and overseas breeders. Industry suggested that PVRO could develop an importation guide for agents and commercial partners however this is probably not a role well suited for PVRO due to the absence of a direct role in the process.

vi. PVRO has noted a trend with some PVR applications not having any evident prospective commercial activity for the variety. This in itself is not directly relevant to the application but can have consequences for access to plant material and the availability of the variety for testing or other official purposes. PVRO does not hold a list of “approved” agents and maintains a clear position of not recommending any agent.

##### **5. Use of foreign test reports and incomplete growing trials -**

A written summary was circulated to attendees before the meeting. (Annex three)

i. PVRO has encountered problems with owners of **granted** varieties that refuse to provide their varieties for comparative testing. PVRO has taken steps to address this under the provisions provided for by the Act.

ii. Industry suggested that PVRO could take up more Foreign Test reports. This action could increase the number of applications. In response, PVRO continues to utilise foreign test reports and currently takes a conservative approach, primarily

due to frequent lack of testing information from overseas authorities regarding varieties used as comparators and whether relevant varieties in NZ commerce have been considered.

iii. In response to the discussion, PVRO will investigate the possibilities regarding increasing the reciprocal sharing of information between PVRO and Foreign authorities.

An exchange of information with the Community Plant Variety Office of the European Union (CPVO) on the varieties of common knowledge (VCK) considered during the examination is under consideration for certain genera. An arrangement with the CPVO could be a model for other bilateral agreements. On behalf of the UPOV Office, Peter Button offered to provide assistance.

iv. PVRO continues to stress that use of a Foreign Test Report does not necessarily lead to a change in the need for access to plant material.

## **6. PVR Act Review update-**

The Business law team provided a summary of activity in 2018 and the next steps

- i. Industry continues to request the adoption of UPOV 91 and expressed concerns regarding the slow pace of the review.
- ii. The Issues paper drafted during 2017/18 with feedback from some industry and Māori experts is expected to be released at the end of July 2018.
- iii. Public consultation on the issues paper is expected in August and will run to October 2018. Public meetings are expected to occur in September or October with at least one meeting to be held in the South Island (likely to be Christchurch), and at least one meeting to be held in the North Island (like to be Bay of Plenty).
- iv. An Options Paper is expected to be published in Q2 2019.
- v. Once CTTTP Agreement enters into force for New Zealand, New Zealand must adopt UPOV 91 or compatible provisions within three years.

## **7. Next Meeting**

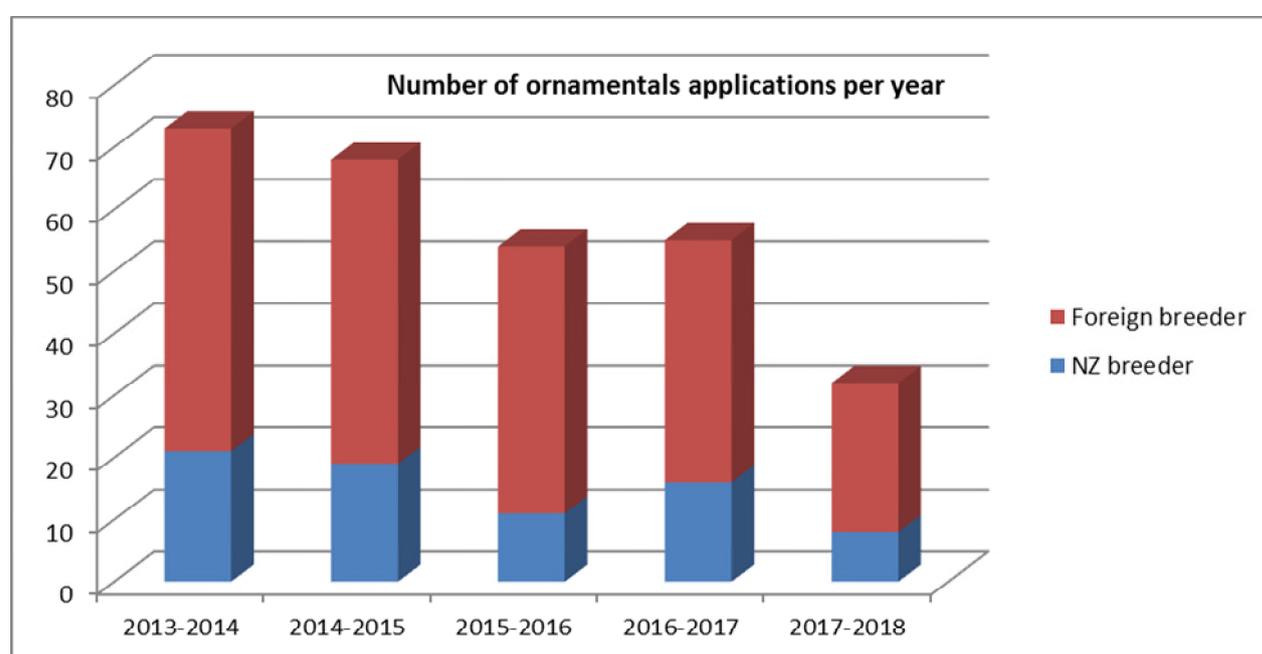
- TFG 2018 report will be available on the website on the Technical Guidance Page of the website
- The next meeting date was suggested for early/mid June 2019 Zespri put forward a proposal to host the meeting in Tauranga. Confirmation will be made in the earlier part of 2019.

In the afternoon, Peter Button, the Vice Secretary General of UPOV provided a seminar on UPOV activities and the opportunity for a question and answer session.

### Ornamentals Area Report

Year	Total Filed	NZ breeder	Foreign breeder	Granted
2013-2014	73	21	52	102
2014-2015	68	19	49	71
2015-2016	54	11	43	62
2016-2017	55	16	39	46
2017-2018*	32	8	24	46

**Table 1. Number of ornamentals applications per year.**



#### **Year Summary notes:**

- Great diversity in the applications. The applications under test belong to 33 different genera. Achieving economies of scale in the testing and data processing steps is challenging.
- Roses and petunias still have the highest number of applications overall.
- First protected variety of the genus *Pseudopanax* (NZ bred).
- The majority of the applications are tested using a PVR growing trial all around NZ. This is carried out either by using central testing or at applicant's property. In the current year only nine varieties have been granted PVR using a Foreign Test Report.

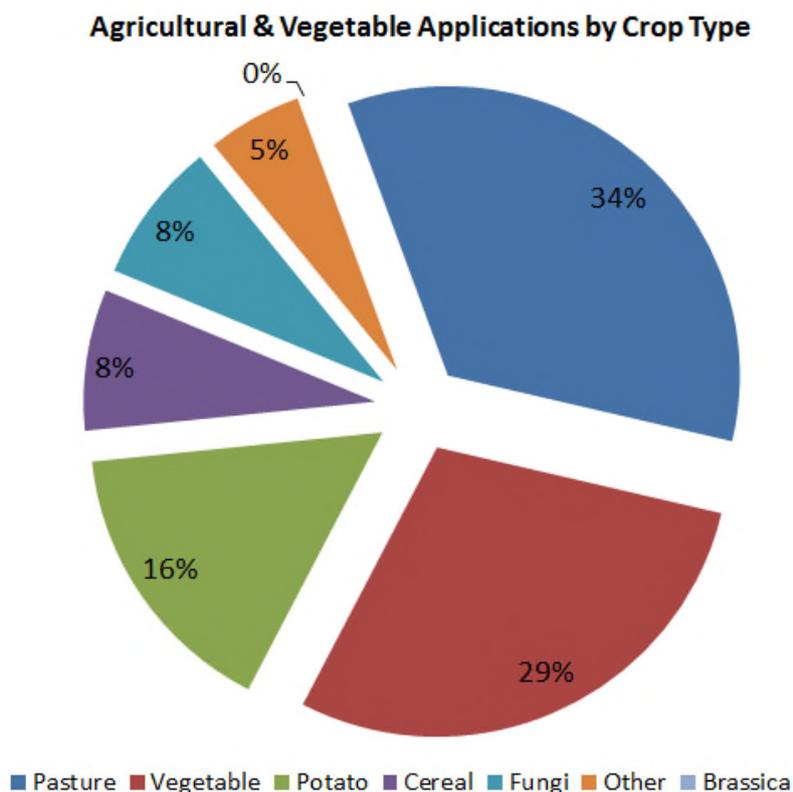
## Report on Agriculture, Vegetable, & Fungi Testing Activities July 2017 to June 2018

Prepared 8 June 2018

### Applications Received

38 applications were received for agricultural, vegetable, & fungi varieties in the period 1 July 2017 to 8 June 2018 (2017: 39 applications), from 15 different owners (2017: 20 different owners). Compared to recent years the number of applications for vegetable varieties was relatively high, while the number of applications for fodder brassicas decreased from five in 2017 to none in the 2018 period.

Applications by crop type fluctuate significantly from year to year and this year's applications are broadly in line with the numbers of applications received over the last few years.



Half of all applications received in 2018 were for varieties bred in New Zealand (2017: 48.7%). The vast majority of foreign bred varieties were from Europe with a single application received from Australia. Over 70% of European varieties were from the Netherlands. While most pasture varieties were bred in New Zealand, all

vegetable applications received in the period to June 2018 were from European based breeders.

The first ever applications in New Zealand for varieties of *Cucumis melo* (melon) were received during the year.

### **UPOV Test Guideline Developments**

Work on the new Quinoa UPOV test guideline, and the review of the Oats UPOV test guideline, recently concluded. These new guidelines are likely to come into effect within the next 12 months.

Work is continuing on the review of the Triticale and Red Clover UPOV test guidelines. Good progress was been made on the Red Clover guideline review at the last meeting of the Technical Working Party for Agriculture held in May 2018 and it is possible that work on this guideline may conclude late next year.

### **Refinements to New Zealand Testing Protocols**

Refinements continue to be made to testing procedures.

For potatoes, in order to eliminate differences in tubers resulting from different storage conditions, light sprout characteristics are now being assessed on tubers harvested from PVR growing trials rather than on the tubers submitted by applicants. Investment has been made in a new lightbox for growing potato lightsprouts to match the specifications in the UPOV test guideline.

New lighting has also been acquired for assessing Wheat coleoptile growth. This lighting now meets the specifications in the UPOV test guideline for Wheat.

AsureQuality, who are contracted to grow a number of agricultural trials for the New Zealand PVR Office, have recently allocated additional staffing resources to carry out growing trials and to collect trial data.

### **Variety Collection Developments**

A protocol for storage of grass endophyte varieties has been agreed with applicants. This protocol formalises the practice that has been undertaken in recent years.

Work continues on developing appropriate protocols for combining the PVR seed collection with the OECD seed collection. Both of these collections are curated by AsureQuality. It is likely that the quantity of seed requested for some crops will be significantly increased. This will have a number of benefits including: -

- Seed maintainers will be approached less frequently for replacement seed
- Comparator variety seed used in trials in successive years will more frequently be sourced from the same seed lot

### **Issues Around Varieties of Common Knowledge**

Once a year the PVR Office circulates a list of known varieties of common knowledge of agricultural (and some vegetable) varieties to major seed agents and seed maintainers for their comments and updates. This list is used for the design of PVR growing trials. Often when seed agents are requested to provide fresh seed of the varieties on this list we receive comment that particular varieties have not been sold or maintained for several years. In order to have robust growing trials it is important that the PVR Office is provided with up to date information on seed varieties present in commerce in New Zealand. This can be done effectively by providing comments and additions to the list that is circulated annually.

One of the requirements for a grant of rights is that a variety is distinct from all other known varieties at the date that it became a variety of common knowledge. The date a variety becomes of common knowledge is most frequently set by either the date it was first offered for sale, or the date of its entry into an official register of varieties (whichever comes first). When applications are received from foreign breeders the application may be for a variety that has already been sold, or had an application for rights made, several years ago in an overseas jurisdiction. Applications for such varieties may impact on applications for varieties which have earlier application dates for plant breeders rights in New Zealand, but which became varieties of common knowledge at a later date.

In some situations testing of the variety with an earlier New Zealand application date may have concluded, but for the arrival in New Zealand of the foreign bred variety. It may be possible to distinguish the two varieties by supplementary evidence such as photographs or overseas descriptions. However on some occasions a side by side growing trial is required to ensure there is sufficient difference between the two varieties in New Zealand growing conditions. This may result in extra trial costs and a delayed decision on whether to make a grant of rights. In recent years this has become a more common occurrence for cereal crops and potatoes.

Annex 3

### **Use of foreign test reports and missing varieties from a growing trial; Information to encourage questions and discussion.**

*PVRO has been requested to include this matter on the agenda for the 2018 Technical Focus Group meeting.*

#### **1. USE OF FOREIGN TEST REPORTS**

Website information: <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/use-of-foreign-test-reports-for-dus-testing-in-new-zealand/>

A critical question is often:

Has the foreign testing included potential similar varieties of common knowledge, bred or available in New Zealand?

Common knowledge is a global view and when a variety becomes of common knowledge is determined by a number of actions, the two most common is the variety entering the market or an application for plant variety protection. When one of these actions first occurs, this sets the date of common knowledge and any potential similar varieties can be identified prior to that date.

An example: Application in New Zealand for a United States bred blueberry variety is made on 1 February 2018. The applicant has queried whether the test result from the European Union could be used. The variety became of common knowledge, on the date of the European Union application, 1 March 2013. For this variety, any potential similar varieties can only be considered if of common knowledge prior to 1 March 2013.

In practice, the identification of similar varieties is often restricted or limited by the availability of information or plant material for all varieties of common knowledge. As a result, potential similar varieties in New Zealand may be missed or overlooked by foreign testing authorities. Experience has shown that this situation is not uncommon and is often the primary reason for a requirement to DUS test in New Zealand.

### **What is happening here and internationally?**

Access to and availability of variety information, in particular variety descriptions, has been identified as important. In many cases, identifying varieties of common knowledge can be an authority's or breeder's greatest challenge. There is ongoing discussion between authorities to share and exchange information and ways to make variety information more easily available, such as on line databases.

## **2. REQUESTED VARIETIES MISSING FROM A GROWING TRIAL**

Varieties requested for inclusion by PVRO are not always present in growing trials for a range of reasons. When this occurs, the first and most important action is to notify PVRO and provide an explanation. Whether or not the growing trial can proceed without that variety is dependent on details of the candidate variety and other varieties which are present.

The basis of DUS testing is the growing trial, but evaluation and examination can be supplemented by use of variety descriptions, photographs and other variety information. This additional information may be used to exclude similar varieties and remove the need for that variety in a growing trial.