

Section 230: Commissioner may extend time limits for delays by Commissioner

- (1) *The Commissioner may extend the time within which anything must be done under this Act or the regulations if that thing is not or will not be done in time because of a delay by the Commissioner.*
- (2) *The Commissioner may grant the extension even if the time has expired for doing the thing.*

Compare: [1953 No 64 s 93\(1\), \(5\)](#)

Scope of Section 230

- ~~1. A response to an examination report may be filed out of time i.e. beyond the period set in an examination report and the extension period (regulation 78(2)) in exceptional circumstances (regulation 78(3)). The phrase 'exceptional circumstances' includes those situations where the applicant has taken all reasonable and prudent steps to ensure that a response was filed in a timely manner, yet for reasons beyond the applicant's control, was unable to do so. A request for an extension of time under regulation 78(3) should be made at the same time as filing of the response. The request should provide a detailed account of the circumstances and reasons leading to failure to file a response in time.~~
1. The scope of section 230 is relatively wide and applies to any matter under the Act or Regulations where a time period is not met due to delay by the Commissioner. Generally, delay by the Commissioner arises where IPONZ has failed to take action on a matter in a timely manner and which affects the position of the applicant, patentee or third party.

Delays during examination of an application

2. ~~For applications under examination, During examination~~ the time to place the application in order for acceptance, and the time to respond to an examination report ~~will~~ may be extended by the Commissioner under section 230 ~~if necessary, and toward or beyond the expiry of the period allowed under section 71,~~ if the application has not been put in order for acceptance because of a delay by the Commissioner and there were more than 20 working days remaining in the section 71 period at the time of filing the response. ~~Generally, where a subsequent examination report is issued within the last month of the period remaining under section 71(1), the section 71(1) period (and section 67(1) deadline) will be extended to take account of any delay by the Commissioner.~~
3. Delay by the Commissioner is considered to be ~~any a~~ a delay in issuing a subsequent examination report ~~beyond the period of more than~~ 20 working days following receipt of a ~~an applicant~~ response to the preceding an earlier examination report. For example, if a subsequent examination report is issued 22 working days after the date of receipt of a response, then the delay by the Commissioner will be 2 days. The section 71(2) period will be extended by 2 days, as will the period for responding to an examination report within the last month of the 71(1) period.

4. Delays by the Commissioner is identified and reported within each examination report as it arises are cumulative and the section 71(1) period may be extended accordingly. Calculating of the delay by the Commissioner is subject to the rules governing working days (see regulation 3(1)). It is possible for a single application to have more than one extension of time under section 230 through delay by the Commissioner. See also **Notification of delay** below.

Delays in raising late objections

5. Delay by the Commissioner may include raising late objections that could reasonably have been raised in an earlier examination report.
6. Raising of a new objection after examination has commenced is undesirable, more particularly where the objection could reasonably have been raised in an earlier examination report. However, there may be occasions such as where a new citation is raised by another IP office on a corresponding patent application that a new objection should be raised. It is assumed that the applicant will be aware of citations raised by other IP offices, and will consider the relevance of the citation to the claims of each of the corresponding patent applications, including the New Zealand application under examination. As part of the examination process, an examiner will consider what if any new citations are raised by other IP offices on corresponding applications. If the examiner considers that any new citations identified by a foreign IP office are relevant to the claimed subject matter under examination, then a new objection will be raised.
7. If a new objection is raised at a late stage in the examination process i.e. within last 20 working days of the section 71 deadline, and the objection could reasonably have been raised at an earlier date in the examination process, then the delay in raising the new objection will be construed as delay by the Commissioner in accordance with section 230(1). The Commissioner may extend the time to place the application in order under section 230 to respond to the new objection. The same consideration applies where a new objection is raised based upon a new citation or information becoming available at late stage in the examination process (see paragraphs 9 & 10 below).
8. The maximum period of time that will be provided for responding to a late objection is 20 working days from the date of issuance of a report including a late objection where there are less than 20 working days left in the section 71 period. 20 working days is the time for patent examiners to address and complete all matters relating to an applicant response to an examination report. This period of time is considered to be a reasonable period, and is used as a metric against which delay under section 230 is determined.
9. An extension under section 230 is discretionary, and will not be granted to accommodate a response to:
 - a. an objection that was previously raised and is being maintained; or
 - b. to provide further time to respond to an objection arising from amendments proposed by the applicant in responding to an objection raised in an earlier examination report; or
 - c. to address a new objection on a matter that the applicant should reasonably have been aware of previously, such as a new citation relating to novelty from an

overseas IP office on a corresponding or equivalent application for substantially the same claimed subject matter.

4-10. Where a new citation(s) has been raised under inventive step in a foreign examination report of a corresponding application, then the examiner should consider whether or not it would have been reasonable in the circumstances for the same citation to be applicable under New Zealand patent law. Inventive step is generally considered to be more subjective than novelty, and is open to national legal interpretation, and to the consideration of individual examiners. With the foregoing in mind, the examiner should consider whether or not a new objection against inventive step would merit an extension of time if raised late in the examination process (see also paragraph 7 above).

Delays during hearing proceedings

11. Hearings before the Commissioner follow various time periods set out in the Act and regulations. However, due to the administrative complexity of hearing proceedings there may some delays which may be attributable to the Commissioner. These delays may also be addressed under section 230 and are subject to the discretion of the Commissioner (or hearings Assistant Commissioner).

Maori advisory committee – delay by the commissioner

12. Where the Commissioner, under section 15(3), is seeking advice from the Maori advisory committee or any other person and the time taken to receive this advice extends beyond 20 working days, then any delay will be construed as delay by the Commissioner.

13. In practice, it is anticipated that the Commissioner would seek advice from the Maori Advisory Committee before issuance of a first examination report. Where this is the case, then there will not be any delay in the examination process.

5-14. Where a first (or subsequent) examination report has already been issued and the Commissioner subsequently seeks advice from the Committee, then the section 71 period will be extended by the corresponding number of days beyond the 20 working days where the delay is attributable to the Commissioner.

Notification of delay

15. Where there has been a delay due to the Commissioner under section 230 and a time period has been extended, then a notification of the delay and the corresponding time period is published in the Journal.