**Guidance notes on Choice of Comparators**

1. Purpose to:
   1. Clarify that it is the sole responsibility of the Approved Person (aka accredited Qualified Person, “QP”) to choose the comparators for inclusion in the comparative growing trial (or when an overseas test report is used to prepare the detailed description, to choose and include relevant comparator varieties in that description), in accordance with their responsibilities in subsections 26, 34 and 37 of the PBR Act.
      1. Subject to an examination of the detailed description for consistency (see 4.2.1) the validity of the QP’s choice of comparators is dealt with through the objection (s35) and revocation process (s50).
   2. Provide guidance as to the selection of suitable comparator varieties.
2. **Choice of comparator varieties**
   1. What are comparator varieties
      1. Comparator varieties are those against which the candidate variety needs to be compared and found clearly distinguishable. Comparator varieties are drawn from the pool of varieties whose existence is a matter of common knowledge at the time of the application. These varieties are referred to as varieties of common knowledge (VCK).
   2. Who is responsible for their choice
      1. The QP nominated for the application has sole responsibility to identify and include the most similar varieties of common knowledge in the comparative growing trial.
         * + This practice and procedure is made clear in TGP/6 Arrangements for DUS Testing, which relevantly states:

“DUS Testing in Australia

[..] 1.9 The comparative trial must conform to the usual scientific standards and use UPOV Test Guidelines where they are available. The applicant or their adviser designs the trial, including the selection of comparator varieties, collects and analyses the data, documents in words and photographs the distinguishing features of the variety and rebuts any comments or objections.”

* + - 1. QPs are alerted to this responsibility, including by way of:
         * instructions relating to applying for accreditation as a QP.

QPs apply for accreditation based on their claims of qualifications and experience in relation to one or more species. This includes knowledge of relevant varieties of common knowledge.

* + - * + the letter accrediting them as a QP;
        + the letter notifying that the application for PBR has been accepted;
        + the list of functions that the QP has agreed to in relation to the application (QP1 Form, PBR00005);
        + training at QP Workshop(s).

1. **Guidance on selection of comparator varieties**
   1. **Varieties of Common Knowledge**

[The General Introduction (TG 1/3)](http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf) provides guidance on *Varieties of Common Knowledge*:

“5.2. Varieties of Common knowledge

Key aspects for determining whether a potential variety is, in fact, a variety and moreover whether its existence is a matter of common knowledge are set out below. These considerations apply equally to all types of variety, whether protected or not, and include plant material, such as ecotypes and landraces. Further developments and a more detailed explanation of the issues related to varieties of common knowledge are to be found in document TGP/3, “Varieties of Common Knowledge.”

5.2.1 Criteria for a Variety

A variety whose existence is a matter of common knowledge must satisfy the definition of a variety set out in Article 1(vi) of the 1991 Act of the UPOV Convention, but this does not necessarily require fulfilment of the DUS criteria required for grant of a breeder’s right under the UPOV Convention.

5.2.2 Common Knowledge

5.2.2.1 Specific aspects which should be considered to establish common knowledge include, among others:

(a) commercialisation of propagating or harvested material of the variety, or publishing a detailed description;

(b) the filing of an application for the grant of a breeder’s right or for the entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;

(c) existence of living plant material in publicly accessible plant collections.

5.2.2.2 Common knowledge is not restricted to national or geographical borders.

**5.3 Clearly Distinguishing a New Variety**

5.3.1 Comparing Varieties

5.3.1.1 It is necessary to examine distinctness in relation to all varieties of common knowledge. However, a systematic individual comparison may not be required with all varieties of common knowledge. For example, where a candidate variety is sufficiently different, in the expression of its characteristics, to ensure that it is distinct from a particular group (or groups) of varieties of common knowledge, it would not be necessary for a systematic individual comparison with the varieties in that group (or those groups).

5.3.1.2 In addition, certain supplementary procedures may be developed to avoid the need for a systematic individual comparison. For example, the publication of variety descriptions, inviting comment from interested parties, or cooperation between members of the Union, in the form of an exchange of technical information, could be considered as supplementary procedures. However, such an approach would only be possible where the supplementary procedures, in conjunction with the other procedures, provide an effective examination of distinctness overall. Such procedures may also be appropriate for consideration of varieties of common knowledge, for which living plant material is known to exist (see section 5.2.2) but where, for practical reasons, material is not readily accessible for examination. Any such procedures are set out in document [TGP/9](http://www.upov.int/edocs/tgpdocs/en/tgp_9.pdf), “Examining Distinctness.”

5.3.1.3 Further, where a candidate variety can be distinguished in a reliable way from varieties of common knowledge, by comparing documented descriptions, it is not necessary to include those varieties of common knowledge in a growing trial with the respective candidate variety. However, where there is no possibility of clearly distinguishing them from the candidate variety, the varieties should be compared with the candidate variety in a growing trial or other appropriate test. This emphasises the importance of harmonization of variety descriptions in minimising the workload of the DUS examiner.

5.3.1.4 To help in the process of examining varieties, certain information is requested from the breeder, usually through a Technical Questionnaire to be submitted with the application. The model Technical Questionnaire, included in the Test Guidelines, seeks information on specific characteristics of importance for distinguishing varieties, information on the breeding scheme of the variety and any other information which may help to distinguish the variety. It also requests the breeder to identify similar varieties and characteristics by which the candidate may be distinguished from these similar varieties.

5.3.1.5 Guidance for the management of variety collections is given in detail in document TGP/4, “[Constitution and Maintenance of Variety Collections](http://www.upov.int/edocs/tgpdocs/en/tgp_4.pdf).”

# It is noted that the Australian Breeder Testing system does not have a separate Technical Questionnaire (as mentioned above) but includes relevant generic elements in the Part 1 Application Form and the specific grouping characteristics used to identify the most similar VCK, in the variety’s Detailed Description.

Once a new variety is clearly distinguished from the most similar VCK, logic dictates that it is also clearly distinct from all other VCK.

1. The QP uses a process of elimination to identify the most similar VCK for the comparative trial using a range of factors including, but not limited to:

* UPOV grouping characteristics;
* Parental/source material;
* List of PBR varieties;
* List of other existing varieties;
* Variety information from the PBR office (eg extracted from the IVDS of Plant Varieties Journal;
* Personal experience with the species;
* From other published information.
  + 1. QPs are able to exclude VCK from trials if they are able to confidently distinguish differences and therefore do not require a comparative growing trial as evidence.
    2. If there are no other varieties in cultivation, QPs should compare their new varieties with the parental/source material and/or similar ecotypes.
  1. The QP is required to justify their rationale for their selection of VCK by publishing the relevant information in the *Grouping Characteristics* and/or the *Varieties Subsequently Excluded* section(s) of the Detailed Description.
     1. The PBR examiner ensures that the detailed description (of the candidate and VCK) is consistent with the states of expression cited in the *Choice of Comparators* section. Any inconsistencies/deficiencies are identified, marked and returned to the QP for consideration and rectification before publication.
     2. Where necessary, the PBR examiner can require that a trial or further test growing be conducted that includes specified comparators.
     3. The situations where specified comparators might be required include where differences between the candidate and proposed VCK are significant and there is evidence that a more similar VCK exists that cannot be clearly excluded based on qualitative characteristics. Usually these characteristics would be those included for grouping in the relevant Test Guideline or National Descriptor.
     4. Where necessary it is appropriate to reasonably extend provisional protection to allow specified comparators to be sourced and established in a comparative trial.
     5. Other situations where specified comparators may be required includes where it is necessary to resolve a comment or objection even though the circumstances may not be the same as in 4.2.3.
     6. Further guidance on variety comparisons can be found in [TGP/9/1](http://www.upov.int/edocs/tgpdocs/en/tgp_9.pdf), in particular Section 6: Supplementary Procedures.

**REVISION HISTORY**

| Date | Version | Changes | initials |
| --- | --- | --- | --- |
| 27/7/2016 | 1.0 | Added version control. Amended 4.2.2 and added 4.2.3 to 4.2.6 | NH |
| 22/12/2017 | 1.1 | Title changed to Guidance notes on Choice of Comparators. Formatting changes. Minor editing to correct spelling. Hyperlinks to external documents added. Location of document moved to PBR EDMS | TH |
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