



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Discussion Paper

Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues

August 2020



MBIE 4920



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE)

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The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Monday, 21 September 2020**

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at: <https://www.mbie.govt.nz/have-your-say/plant-variety-rights-act-1987-review-outstanding-policy-issues>. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to PVRActReview@mbie.govt.nz.
- mailing your submission to:

Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

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

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on changes to the Plant Variety Rights regime. We may contact submitters directly if we require clarification of any matters in submissions.

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Glossary

Descriptions of key terms here are not intended to be definitions.

Commissioner	The Commissioner of Plant Variety Rights. The Commissioner is part of the Plant Variety Rights Office, within the Intellectual Property Office of New Zealand
The Committee	In this paper, the Committee refers to the Māori PVR Committee. This is the body that was previously referred in other discussion documents as the Māori Advisory Committee for the PVR regime.
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
IPONZ	Intellectual Property Office of New Zealand
kaitiaki	Guardian, protector, caretaker (Wai 262 report)
kaitiaki condition	A new condition for the grant of a Plant Variety Right will be whether kaitiaki relationships will be affected by a PVR grant and, if so, whether the impacts can be mitigated to a reasonable extent so as to allow the grant.
mātauranga Māori	The Waitangi Tribunal referred to mātauranga Māori as “the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional knowledge” (Wai 262 report)
mana	Authority, prestige, reputation, spiritual power (Wai 262 report)
MBIE	Ministry of Business, Innovation and Employment
MAC	The proposed Māori Advisory Committee for the Plant Variety Rights regime
PVR	Plant variety right
PVR Act	<i>Plant Variety Rights Act 1987</i>
PVR Amendment Bill	The Bill, currently being drafted, amending the <i>Plant Variety Rights Act 1987</i>
PVR regime	New Zealand’s plant variety rights regime

PVR Office	Plant Variety Rights Office
taonga	A treasured possession, including property, resources and abstract concepts such as language, cultural knowledge, and relationships (Wai 262 report)
taonga species	Taonga species are native birds, plants and animals of special cultural significance and importance to Māori
Tribunal	Waitangi Tribunal
UPOV	International Union for the Protection of New Varieties of Plants (Union Internationale pour la Protection des Obtentions Végétales)
UPOV 91	The 1991 revision of the International Convention on the Protection of New Varieties of Plants
Wai 262 report	Waitangi Tribunal 2011 report entitled <i>Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity</i>
Wai 2522	Waitangi Tribunal inquiry relating to the Trans Pacific Partnership Agreement and, subsequently the CPTPP

1 Introduction

Purpose of this Discussion Paper

1. The Ministry of Business, Innovation and Employment (**MBIE**) is reviewing the *Plant Variety Rights Act 1987* (**PVR Act**). The PVR Act provides for the grant of intellectual property rights called ‘plant variety rights’ (**PVRs**). Plant breeders and developers may apply for PVRs over new plant varieties that they have developed. The purpose of the PVR regime is to incentivise the development and importation of new varieties of plants.
2. In November 2019, Cabinet agreed to a number of changes reforming the Plant Variety Rights (**PVR**) regime. Broadly speaking, these changes modernise the PVR regime by:
 - a. implementing measures to give effect to the Treaty of Waitangi/te Tiriti o Waitangi (the **Treaty**) in the PVR regime, and
 - b. giving effect to the 1991 version of the International Convention for the Protection of New Varieties of Plants (**UPOV 91**) (as required by our obligations under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**)).
3. Cabinet’s decisions were informed by MBIE’s advice following public consultation on an Issues Paper and Options Paper in 2018 and 2019 respectively. A summary of the submissions received during the public consultations are available on the [PVR review page](#) on the MBIE website.

Outstanding Treaty of Waitangi issues

4. In December 2019, the Waitangi Tribunal (as part of the Wai 2522 “TPP” inquiry) considered the PVR review in a three day hearing. The focus of the hearing was on the Crown’s engagement with Māori during the PVR review, as well as the decisions made by Cabinet in relation to UPOV 91. The Tribunal reported back in May 2020, finding that the Crown had not breached its obligations under the Treaty. The Tribunal did not make any recommendations in relation to the next steps for the review. The report is available on the [Tribunal’s website](#).
5. However, the November Cabinet paper noted some outstanding issues remained in relation to the Treaty of Waitangi provisions. This paper seeks your views on these issues and our preliminary analysis of proposed options. In most instances we have indicated a preferred option.

Operational issues in the PVR regime

6. In parallel to the policy review, MBIE also ran a review of the operational provisions of the PVR Act and associated regulations relating to applying for and maintaining plant variety rights.
7. As part of this review, the Intellectual Property Office of New Zealand (**IPONZ**) surveyed stakeholders in 2019 to gather general information about how the processes run by the PVR Office are working. Building on the findings of the survey, MBIE now has some proposals for operational changes to the Act and this paper also seeks your views on these issues and our preliminary analysis of proposed options. In most instances we have indicated a preferred option.

Next steps

8. Your views on these issues will inform the advice we provide to Ministers once analysis of submissions is complete.
9. Drafting of a PVR Amendment Bill is underway on the basis of the November 2019 policy decisions. It is intended that any further policy decisions Cabinet makes in relation to the proposals in this paper will be incorporated into the Bill before it is introduced.
10. We anticipate that the Bill will be introduced by the end of 2020.

2 Outstanding Treaty of Waitangi issues in the PVR regime

What did Cabinet decide in November 2019?

11. Cabinet agreed to a package of measures to give effect to the Crown's Treaty of Waitangi obligations in relation to the PVR regime. This package included implementing the recommendations of the Waitangi Tribunal's report *Ko Aotearoa Tēnei* (**Wai 262**) in relation to the PVR Act. But it also went further than Wai 262 in some respects.
12. Key principles guiding these changes are that:
 - a. the Wai 262 recommendations are the starting point for considering the Crown's Treaty obligations in the PVR regime
 - b. early, meaningful and ongoing engagement between plant breeders and kaitiaki is key and should be incentivised
 - c. decisions in relation to issues of importance to Māori should be made by Māori.
13. In summary, Cabinet agreed to the following changes to the PVR regime.

Definitions

14. Cabinet agreed that issues such as determining who kaitiaki are and whether a plant species is taonga should be determined by Māori. As a result, these terms will not be defined in the legislation. Instead, the PVR Amendment Bill will refer to 'indigenous plant species' and 'non-indigenous plant species of significance'. If a breeder is working with plant species from either of these categories they will know that they need to seek to engage with kaitiaki so that any impact on kaitiaki relationships can be considered. The definitions of these categories are yet to be determined.

Disclosure requirements

15. If a breeder indicates they are working with either of these species, they are required to disclose (with their PVR application):
 - a. if there are kaitiaki identified, who the kaitiaki are
 - b. a summary of their engagement with kaitiaki and the outcome of that engagement.

Māori Advisory Committee

16. All applications involving plant species from those two categories will be considered by the Māori Advisory Committee (**MAC**).
17. While the Wai 262 report was comfortable with the MAC having an advisory role, in line with the principles stated above Cabinet has agreed that the MAC should be the decision-maker in relation to kaitiaki interests. Specifically, the MAC will determine whether kaitiaki relationships will be affected by a PVR grant and, if so, whether the impacts can be mitigated to a reasonable extent so as to allow the grant (the **kaitiaki condition**). If the kaitiaki condition is met, the application will proceed to testing by the PVR Office. If not, the application ends there and a PVR will not be granted. The legislation will set out a process for the MAC to follow when considering these issues.
18. In addition, the MAC will play a role facilitating the early engagement between breeders and kaitiaki, as well as advising on whether a variety name is likely to be offensive to Māori.
19. Similar to other committees in the intellectual property area, the members of the Committee will be appointed by the Commissioner of PVRs, and members will be required to have relevant expertise.

Appeals

20. In line with the principles stated above, Cabinet agreed that the courts are not well placed to be making substantive determinations on kaitiaki relationships. It was therefore agreed that determinations of the MAC would only be subject to judicial review. This means that a court would be able to review the process the decision-maker followed to arrive at the determination (i.e. the way the decision was made), but it is not for the court to substitute its own decision for that of the decision-maker.
21. It was also noted that consideration would be given to whether the IPONZ hearings process (or some other process) could provide an appropriate first line of review of a MAC determination before going to court.

What are the outstanding policy issues?

22. In relation to the decisions outlined above, the following issues still require consideration:
 - a. How will 'indigenous plant species' and 'non-indigenous species of significance' be defined?
 - b. Are there any confidentiality considerations in relation to the additional information required to be disclosed with a PVR application?
 - c. What process will the MAC be required to follow when making determination in relation to kaitiaki relationships?

- d. What is the MAC's role, if any, in relation to proposing mitigations that may enable a PVR grant to proceed?
- e. What further measures, if any, are necessary in relation to the process for appointing the members of the MAC?
- f. Can the IPONZ hearings process be adapted to be the first point of review for MAC determinations and, if not, what could go in its place?
- g. How will the standard PVR processes under which (i) an objection to a grant can be made, and (ii) grants can be cancelled and nullified, work in relation to decisions on kaitiaki relationships?

3 Options for addressing outstanding Treaty issues

Criteria/objectives

23. Our criteria for options analysis of proposals relating to Treaty compliance remain the same as those set out in the 2019 Options paper (and the Regulatory Impact Statement that accompanied the November Cabinet paper).
24. For Treaty compliance, our criteria for options development and assessment are:
 - a. facilitates meaningful and mana-enhancing consideration of kaitiaki interests in PVR decision-making processes;
 - b. provides clarity for plant breeders for whom kaitiaki interests will be a relevant consideration in the PVR grant process;
 - c. minimises additional compliance costs.
25. In assessing the options, we assign a double weighting to criterion (a) as it directly responds to the guiding principles for giving effect to our Treaty obligations. Criteria (b) and (c) are secondary objectives and require us to consider the workability of changes we may seek in the specific context of the PVR regime.

Definitions

26. As discussed, our approach to definitions so far in the review has been driven by (a) the principle that Māori should determine matters pertaining to that relationship, and (b) the need to give breeders clarity as to when kaitiaki relationships need to be considered.
27. To this end, our use of the terms ‘indigenous plant species’ and ‘non-indigenous species of significance’ is intended to capture all species for which there may be a kaitiaki relationship. That is, they are intended to act as a ‘trigger’ for breeders to seek to engage with kaitiaki to determine the nature of any kaitiaki relationship that may exist with those species.
28. Some pieces of legislation (e.g. the *Conservation Act 1987*, *Resource Management Act 1991*, *Ngai Tahu Claims Settlement Act 1998*) take the approach of not defining ‘indigenous’.
29. The *Climate Change Response Act 2002* uses the following definition of ‘indigenous plant species’: “a plant species that occurs naturally in New Zealand or has arrived in New Zealand without human assistance”. We propose to use this definition in the new PVR legislation.

1

Do you agree with our proposed definition of ‘indigenous plant species’? If not, do you have an alternative to propose?

- 30. The term ‘non-indigenous species of significance’ is intended to cover species that came here on the migrating waka. While not indigenous, these species are also taonga. In his draft PhD Thesis, Karaitiana Taiuru has undertaken research on what he referred to as ‘introduced taonga species’. The following table is derived from this work and lists the introduced plant species that came on the migrating waka.

Common Māori Name	English and Latin
Kuru	Breadfruit, <i>Artocarpus incisa</i>
Hue	Gourd, calabash, <i>Lagenaria siceraria</i>
Aute	Paper-Mulberry, <i>Broussonetia papyrifera</i>
Karaka/Kōpī	<i>Corynocarpus laevigata</i>
Paratawhiti/Paraa	<i>Maritima fraxinea</i>
Perei	<i>Gastrodia Cunninghamii</i> and <i>Orthoceras strictum</i>
Kūmara	<i>Ipomoea batatas</i>
Taro	<i>Colocasia esculenta</i>
Ti pore	Pacific cabbage tree, <i>Cordyline fruticosa</i>
Whikaho	Yam, <i>Dioscorea</i> species

- 31. It is proposed that this list of ‘non-indigenous species of significance’ is placed in regulations under the new legislation.

2

Do you agree that ‘non-indigenous species of significance’ be listed in regulations and that the list reflect the table above? If not, why not? Are there species that should be on that list that are not?

Disclosure obligations and confidentiality

- 32. In the next chapter of this discussion document (covering operational issues in the PVR regime) we discuss whether certain information provided with an application for a PVR should be kept confidential. The current situation is that all information provided with an application is made publically available by the PVR Office.
- 33. This issue is relevant in the context of the Treaty provisions too. These provisions introduce new disclosure obligations that require additional information to be provided with an application when the application involves either indigenous plant species or non-indigenous species of significance (see paragraph 15).
- 34. We seek your views on whether there are any confidentiality considerations in relation to this additional information and, if so, how this information should be treated.

3

Are there any confidentiality considerations in relation to the additional information required under the new disclosure obligations? If so, how should this information be treated?

Māori PVR Committee

35. As the proposed Māori Advisory Committee now has a determinative role, MBIE considers that the committee should be renamed to better reflect the role it will play in the new regime.
36. We propose that the Committee be named the Māori PVR Committee, and will refer to this as the **Committee** for the remainder of this discussion document.
37. We are interested in your views on the appropriate name of the Committee.

4

Do you agree with the proposal to change the name of the Committee to the 'Māori PVR Committee'? If not, do you have any other recommendations?

Appointments process

38. Cabinet agreed that, like the Patents and Trade Marks regimes, the Commissioner of PVRs should appoint members of the Committee. While the appointment process in those regimes is not set out in the legislation, the legislation states a person must not be appointed as a member of the advisory committee unless, in the opinion of the Commissioner, the person is qualified for appointment.
39. In the other intellectual property (**IP**) regimes, the exact process of appointment is set out in the Terms of Reference of the relevant advisory committee. In summary, the appointment process in these regimes involves seeking applications from those interested to be on the committee. These are sought both through a general call for nominations, and through approaching specific organisations (such as the Federation of Māori Authorities, Te Puni Kōkiri, Te Papa Tongarewa Board, The Waitangi Tribunal, New Zealand universities, Te Hunga Roia Māori o Aotearoa). This is followed by an interview carried out by a panel, which includes the chair of the advisory committee, who advises the Commissioner on the most suitable candidates. In addition, the Commissioner also receives advice from Te Puni Kōkiri. These additional steps feed into the Commissioner's decision making process to ensure all members of the committee have the necessary skills to carry out their role.
40. Similar processes are also used in other regimes – most notably the appointment of the Ngā Kaihautū Tikanga Taiao under the *Environmental Protection Authority Act 2011* (the **EPAA**). Under the EPAA, members of Ngā Kaihautū are appointed by the Environmental Protection Authority, which is in turn appointed by the Minister of the Crown responsible for the EPAA. Like the Patents and Trade Marks regime, the appointment process includes a call for applications and interviews of shortlisted candidates.
41. This appointment process has generally worked well so far. Advisory committees across the IP regimes and under the EPAA have attracted suitably qualified candidates through this appointment process. As such we consider it appropriate to retain a similar process (where the Commissioner appoints members following an application and interview process) in the

PVR regime where the details of the appointment process will be set out in the Terms of Reference.

42. Given the pivotal role the Committee will play, we consider it appropriate to explore options to strengthen the appointment process. We agree with the Tribunal's view that a good process around appointments is important to ensure the Committee can carry out its determinative role effectively and autonomously.
43. To strengthen this process, we propose to include a statutory requirement that requires (i) the Terms of Reference to be reviewed regularly, and (ii) the Commissioner to consult with the Committee on this review. While this is what happens in practice, a statutory requirement would ensure that the Committee is an equal partner in determining its Terms of Reference (which will specify the appointment process).
44. Establishing the Committee for the first time could involve appointing members under a draft Terms of Reference based on those for the Māori Advisory Committee's in the other IP regimes. Once appointed the Commissioner would then work with the Committee members to review and finalise these Terms of Reference.

5

Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose?

Criteria for appointment

45. Acknowledging that the new PVR regime will give the Committee a power to determine whether applications meet the kaitiaki condition, and the Committee will play a role in facilitating early engagement, it is important that the members appointed to the Committee have the necessary skills and knowledge to undertake this role.
46. Cabinet agreed that the members should be required to have relevant expertise including in relation to mātauranga Māori, te ao Māori, tikanga Māori and taonga species. This reflects the approach taken by the Patents Act and the Trade Marks Act.
47. Beyond having regard to a person's knowledge of tikanga Māori, te ao Māori and mātauranga Māori, the Patents Act and Trade Marks Act do not set out specific criteria that must be met by any member appointed to the Committee. While it is not possible to set out specific criteria in the legislation – it is necessary to keep the legislative requirements reasonably high-level and flexible – we consider that the new legislation could include additional criterion for consideration when members of the Committee are appointed.
48. For example, section 21 of the *Te Urewera Act 2014* requires the appointer to consider “whether the proposed member has the mana, standing in the community, skills, knowledge, or experience to participate effectively in the Board and contribute to achieving the purposes of the Board.”

49. In addition to the criteria already agreed, we propose to include wording similar to section 21(3) of the Te Urewera Act. This would require the Commissioner to take into consideration a wider range of factors, including mana and standing, when appointing members to the committee.
50. We also consider that the Commissioner should take into account the range of expertise the Committee collectively holds and be required to consider any gaps in expertise when appointing new members.
51. Finally, given the decision-making power of the Committee and the possibility of judicial review of Committee's determinations, we also consider it desirable that the Committee has some legal experience among its members.

6

Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose?

Process for reaching determinations on kaitiaki relationships

52. Cabinet agreed that the primary role of the Committee is to make a determination on whether or not the kaitiaki condition is met. This means it determines whether a relevant application can proceed to testing by the PVR Office on the other criteria for a grant. As this gives the Committee a decision-making role, there are a number of outstanding issues relating to the process for making a determination which need to be addressed in legislation.
53. Unlike the Patents regime and Trade Marks regime, where the Māori advisory committees have a purely advisory role and the ultimate decision rests with the Commissioner, the Committee will have a decision-making power which will be subject to judicial review. Therefore, it is important that some fundamental aspects of the decision making process are set out in legislation, specifically:
 - a. the matters the Committee needs to consider when making a determination
 - b. the approach the Committee should take towards decision-making
 - c. how determinations are reached.

List of relevant considerations

54. Cabinet agreed that determinations of the Committee would only be subject to judicial review in the Courts (as opposed to an appeal on the decision). This is consistent with the principle that matters pertaining to kaitiaki relationships should only be considered by Māori. To support this, Cabinet agreed that the legislation should set out a process for considering kaitiaki relationships and noted that this might include listing factors to be taken into account.
55. The Cabinet paper included an indicative list of such factors:
 - a. Have the parties acted in good faith?

- b. Have kaitiaki demonstrated their relationship to the taonga species and associated mātauranga Māori?
 - c. What is the kaitiaki assessment of the affect that the grant of a PVR might have?
 - d. How significant is that affect?
 - e. Is this affect consistent with (i) the nature of the kaitiaki relationship, (ii) the affect from PVRs already granted in relation to that species?
 - f. Have mitigations been considered?
56. We propose to include this list of relevant considerations in the legislation to guide the Committee decision-making processes. We believe such a list is also important to provide both breeders and kaitiaki a clear indication of the factors that the Committee will take into consideration as well as assist the courts in the event that a judicial review of a Committee decision is sought.

7 Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not?

8 Are there any additional factors that should be added to the list of relevant considerations?

Approach to decision making

57. There are a number of different approaches that can be taken by public authorities when making decisions. Where a public authority is making decisions that affect the rights of an individual, in this case intellectual property rights, it is important that the approach taken by the decision-making body is appropriate and consistent with principles of natural justice. Where the decisions relate to te ao Māori, decision-making should also be consistent with tikanga principles.
58. When the Committee is making a determination on whether the kaitiaki condition has been met, MBIE has identified two approaches the Committee can take:
- a. **Option 1** an investigative approach to decision-making in which they work with both parties before making a determination. Where an application does not have sufficient information for the Committee to reach a determination, the Committee may have discussions with the breeders and kaitiaki during the decision-making process to seek further information. The Committee may also wish to convene a hui to facilitate discussion and clarification of issues raised by either party before reaching their decision. As with requests by the Commissioner, if information is not provided to the Committee within the prescribed period, the application would lapse.
 - b. **Option 2** an administrative approach to decision making in which they make determinations solely on the information provided by the applicant.

59. Option 1 is our preferred option. The purpose of the Treaty of Waitangi provisions is to protect kaitiaki interests while facilitating meaningful engagement between breeders and kaitiaki. There are likely to be instances where it is not fully clear whether or not the kaitiaki condition has been met and the Committee will need further engagement with both parties. In our view, Option 1 satisfies our first criterion as it provides the Committee with an opportunity to facilitate dialogue between kaitiaki and breeders after an application is made.
60. Option 1 enables the Committee to work with both parties to ensure they are satisfied kaitiaki interests are protected. Option 1 is consistent with principles of natural justice and enables the Committee to incorporate tikanga principles into the decision making process. While this may increase the compliance cost to breeders and prolong the decision making process in some cases, this will reduce the likelihood of challenges to the Committee's decisions and provide breeders with an opportunity to make changes to their application in the event that it was not clear whether the kaitiaki condition has been met.
61. While Option 2 would be more cost effective, we consider that it does not satisfy the first criterion and risks incorrect determinations being made.

9

Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not?

Unanimous decisions vs majority-vote

62. As the Committee will be a collection of individuals with a decision-making function, there is an outstanding question of what will constitute as a valid decision.
63. On this issue, MBIE has identified three options:
- a. **Option 1** the Committee must reach a unanimous decision which requires everyone to agree on a given course of action.
 - b. **Option 2** a simple majority of the Committee must agree on a decision
 - c. **Option 3** the Committee must strive to reach a unanimous decision, and in the event that this is not possible despite all efforts, the chair of the Committee may allow a decision to be made by consensus or a simple majority vote.
64. Option 3 is our preferred option, as it is a hybrid of Option 1 and Option 2 and caters to situations where a unanimous decision, while desirable, may not be possible. Where a small committee is making decisions about important issues, like rights and interests of kaitiaki, it is important that the committee must try to reach a unanimous decision in the first instance. This facilitates meaningful and mana-enhancing consideration of kaitiaki interests in decision-making processes by ensuring that all members of the will have an equal voice in the decision making process and the implications of a PVR application on a kaitiaki relationship is fully considered before a decision is made.

65. A similar framework is used under the Te Urewera Act (sections 33 - 36) which requires the Board to strive to make certain decisions by unanimous agreement and where after reasonable discussion, the Chair deems this is not practicable, the Chair can require the decision to be made by consensus or a vote to be determined by the majority.
66. Due to the likely size of the committee (around 5 members), and the weight given to the first criterion, we believe Option 2 is not suitable for this regime. Majority decision-making is generally more suitable for larger committees.

10

Do you agree that the Committee should be required to reach a unanimous decision and only in the event that, despite all efforts, a decision cannot be reached can the Chair of the Committee allow a decision to be made by either a consensus or a vote (Option 3)? If not, why not?

Role of the Committee in considering mitigations

67. Cabinet has agreed that the Committee must determine whether the breeder has met the kaitiaki condition. In making this determination, the Committee must consider whether any impacts on a kaitiaki relationship can be mitigated to a reasonable extent so as to allow the grant.
68. While we anticipated that the Committee would not be able to impose mitigations when agreement could not be reached on this issue, there was some discussion on this issue in the Tribunal and we consider that some clarity is important.
69. The legislation could allow the Committee to take one of two approaches to this:
- a. **Option 1** the Committee is able to impose mitigations if breeders and kaitiaki are unable to reach agreement.
 - b. **Option 2** the Committee can only facilitate discussions between kaitiaki and breeders on the issue of mitigations.
70. Option 2 is our preferred option.
71. The overall intent of the Treaty of Waitangi provisions in the PVR regime is to incentivise early engagement between breeders and kaitiaki. It is hoped that these discussions will result in agreement on how to proceed with the PVR, including on the issue of mitigations, before an application is filed. In this instance, the Committee will play a fairly minor role in the process.
72. The issue at hand arises if there has been no agreement between kaitiaki and the breeder before the application comes before the Committee for consideration. In this situation the Committee would play a more proactive role in assessing the impact of a PVR grant on the kaitiaki relationship. The question is, if the Committee considers that the impact is such that it could be reasonably mitigated, should they be able to impose mitigations if kaitiaki and the breeder have been unable to agree?

73. Our initial view is that, in relation to the second two criteria for options analysis, there is little difference between the two. Option 1 may be marginally preferred in relation to these as a Committee determination on mitigation may be preferable to breeders when compared to an ongoing dialogue that may not yield a satisfactory resolution. However, we do not consider that Option 1 measures up well against the first – and most important – criterion. It is for kaitiaki themselves to determine whether there is an appropriate mitigation in relation to the potential grant of a PVR: allowing the Committee to impose a mitigation would not be mana-enhancing for kaitiaki.
74. Option 2 may raise a concern that kaitiaki could simply hold up the process and not agree to a proposed mitigation despite the impact on the kaitiaki relationship being relatively minor. However, we do not consider this concern to be significant as it is in the interests of all parties to reach an agreement. The breeder will wish to see their application progress, but there is nothing preventing them simply walking away and developing/commercialising the variety outside the PVR regime, without an intellectual property right over a plant variety, with no further legal obligation to engage with kaitiaki.

11

Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose?

Post-determination considerations

75. This section considers those issues that arise after the Committee has made a determination on the kaitiaki condition. It covers options to review a determination made by the Committee, along with how a determination fits with the usual PVR processes of objections after grant and cancellation/nullification of grants.

Review of determinations of the Committee

76. In other IP regimes, such as the Patents regime, any party who may be affected by a decision of the Commissioner has the right to a formal hearings process run by IPONZ. Once a decision is made, it is then appealable to the High Court. In chapter 4 of this discussion paper, we are proposing that this same process be incorporated into the PVR regime. So what processes should be put in place in relation to determinations of the Committee?
77. Cabinet agreed that determinations of the Committee would only be subject to judicial review by the High Court, as opposed to an appeal on merits. However, as determinations of the Committee are not subject to the same process as the decisions by the Commissioner, there are a number of outstanding process issues which relate to how (i) whether there should be a first stage review prior to an issue going to Court and (ii) whether there should be time limit for initiating a judicial review of a determination of the Committee.

First stage review

78. MBE has identified three options for a first stage review:
- Option 1** only have the option of judicial review by the High Court (i.e. no first stage review)
 - Option 2** determinations of the Committee are reviewed through the IPONZ hearings process
 - Option 3** the Committee may be asked to reconsider their determination in light of new information provided by a person objecting to the determination.
79. Option 3 is our preferred option.
80. Option 1 is consistent with the principle of Māori determining issues important to Māori. However, court action is expensive and it takes a long time for matters to be heard. Therefore Committee determinations are unlikely to be challenged making them effectively unreviewable. As the decision relates to the rights of an individual and interests of kaitiaki, we consider it important that the both the breeder and kaitiaki have an opportunity to challenge and be heard in relation to any decision with as few barriers as possible.
81. Option 2 provides a cheaper, more accessible option for reviewing decisions of the Committee. We consider this to be an important requirement for the PVR regime. However, the general IPONZ hearings process may not be well-suited to considering issues relating to kaitiaki relationships as it would be taking decisions on kaitiaki relationships out of the hands of Māori. A hearing could just be on the basis of process (akin to an initial consideration of judicial review principles) but IPONZ does not have the necessary legal experience to assess this.
82. We consider Option 3 strikes a better balance between ensuring the review process is accessible to both parties whilst ensuring important decisions affecting Māori are determined by Māori. Empowering both breeders and kaitiaki with a right of reconsideration enables both parties with avenue for a first stage review of a determination. Provided that the right is exercised within a specified period of time (such as 14 days), this will allow aggrieved parties to challenge a determination of the Committee without seeking a judicial review.
83. As a sub-option within Option 3, consideration could be given to adding a new member to the committee when a review is being carried out to provide a “fresh set of eyes” on the application. Options might include the Chair of the Patents Māori Advisory Committee (as this committee requires similar expertise) or someone with a legal background along with relevant expertise in intellectual property and traditional knowledge issues.

12

Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose?

13

Do you have any thoughts about either the timeframe for initiating this first stage review or the proposal of adding a person to the Committee when they are reviewing a determination, and who might be appropriate?

Timing for initiating a judicial review

84. Regardless of whether there is a first-stage review of the Committee's determination, there is an issue of whether there should be a time limit for initiating a review of a determination.
85. If the applicant wishes to commence judicial review proceedings, we propose that the person is required to notify the Committee and the Commissioner of this within an appropriate timeframe from the date of the Committee's determination (either the initial determination or a final determination if there is a first-stage review). We note that, in both the PVR and Patents regimes, appeals to decisions of the Commissioner must be initiated within four weeks.
86. If the Committee has determined that an application can proceed to testing by the PVR Office, it would not be in the interest of either the breeder or the PVR office for testing to commence, only to have the determination reversed on review. We would also not want a situation in which a review unduly delays an application. (If the determination of the Committee is that the application cannot proceed, then this issue is less pertinent.)
87. However, we are also aware of the fact that an aggrieved party will need reasonable time to seek legal advice and consult iwi/hapū. We understand that there may be specific protocols and tikanga principles that Māori will need to follow before a decision to notify an intention to seek judicial review can be made. We want to ensure that the legislation provides both breeders and kaitiaki sufficient time to have these discussions whilst avoiding any undue delays in the application process.
88. For this reason we are interested in what would be a reasonable timeframe for an aggrieved party to consider the Committee's response and have the necessary discussions to determine whether they will seek a judicial review.

14

Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not?

15

What do you think is an appropriate timeframe for an aggrieved party to notify Commissioner and the Committee of their intention to seek judicial review?

Objections after grant and cancellation/nullification of grants

89. These three issues are closely linked and best addressed together.
90. Under section 15 of the PVR Act, any person who does not think that the criteria for a grant¹ have been met may object (to the Commissioner) to the grant continuing to be in force. There is no process prescribed for how this objection would be considered.

¹ Aside from having a suitable denomination (name), the criteria are that the variety is new, distinct, stable and homogenous.

91. Under section 16, the Commissioner can cancel a grant if (among other reasons) (i) the variety was not new or distinct at the time the application was made, or (ii) the variety is not stable or homogenous.
92. UPOV 91 introduces the provision of nullification of a grant (Article 21) alongside cancellation (Article 22). Nullification means the grant is deemed never to have been made, whereas cancellation only applies from the point of cancellation.
93. To align with UPOV 91 (as agreed by Cabinet):
 - a. If any of the four main criteria were not met at the time the grant was made, the grant will be nullified
 - b. If it is shown (subsequent to a grant) that the variety is no longer stable or uniform², then the grant may be cancelled.
94. In line with the first point above Cabinet also agreed that a grant could be nullified on the basis if the kaitiaki condition is found not to have been met at the time of the grant. It was noted at the time that this may not be consistent with UPOV 91, which does not permit additional grounds for nullification beyond those in Article 21.
95. Sections 15 and 16 of the Act will be amended to be consistent with UPOV 91. This means that objections to a grant may be made by a third party and, depending on the circumstances, this could lead to either cancellation or nullification. As proposed elsewhere, any objection would be subject to a hearing.

Options

96. The key issues here are (i) under what circumstances can an objection after grant in relation to the kaitiaki condition be made, and (ii) what process would such an objection follow?
97. In relation to the first issue, the options appear to be:
 - a. **Option 1** Do not allow objections after grant in relation to the kaitiaki condition, even if the Committee has not considered the application
 - b. **Option 2** Allow objections after grant to be made in relation to the kaitiaki condition only if the Committee has not considered the application
 - c. **Option 3** Allow objections after grant to be made in relation to the kaitiaki condition even if the Committee has already considered the application.
98. Option 2 is our preferred option.

² UPOV 91 uses the term 'uniform' instead of 'homogenous'.

Analysis

99. If the Committee has already considered the kaitiaki condition and parties have had the option to review the determination, we do not consider that an objection after grant is appropriate, and so we do not consider that Option 3 should be progressed.
100. Our view is that objections after grant should only be considered if, for whatever reason, the Committee has not had the opportunity to consider the application. On this basis, Option 1 is clearly not preferred as there would then be no avenue for kaitiaki to challenge the grant of a PVR. Option 2 is therefore our preferred option in relation to this issue.
101. The next issue is, given our preferred option, what process should be followed?
102. Breeders are required to disclose whether their application involves either indigenous plant species or non-indigenous species of significance. If it does, the application is automatically referred to the Committee.
103. Therefore, if an application has not been considered by the Committee it is likely to be because incorrect information was submitted at the time of the application. Under both the current Act and UPOV 91, this is potentially grounds for cancelling an application.
104. This suggests that the appropriate process is first to determine whether correct information was supplied at the time of the application. This could be through the IPONZ hearing process as this is a procedural matter rather than a substantive issue relating to kaitiaki interests. If the applicant was shown not to have provided correct information, then the grant would be cancelled and the application referred to the Committee for a determination. Should the Committee then determine that the kaitiaki condition is met, the grant will be restored.
105. We note that this process is slightly different from Cabinet's agreement that a grant be nullified if the kaitiaki condition is not met.

16

Do you agree with our preferred option and process for objections after grant in relation to the kaitiaki condition (Option 2)? If not, why not? Is there an alternative you wish to propose?

4 Proposed operational changes to the current regulatory regime

106. Our overall objective for the proposed operational changes to the current regulatory regime is to increase effectiveness and operational efficiency. The PVR Office aims to progress applications as smoothly and efficiently as possible throughout the different stages of the process.
107. In this regard, we are proposing to concentrate on the following issues/questions:
- a. Information available to the public
 - b. Supply of plant material in relation to a specific application
 - c. Provision of propagating material for comparison and reference purposes
 - d. Should growing trials be optional or compulsory?
 - e. Who should conduct growing trials?
 - f. Trial and examination fees
 - g. Hearings and appeals relating to decisions of the Commissioner of PVRs.

Information available to the public

108. Under section 8 of the PVR Act, all information supplied in relation to an application is available to the public because documents are open to public inspection.
109. MBIE understands that some applicants are reluctant to provide information to the PVR Office regarding the origin and breeding of their varieties because, due to the provision in section 8, their competitors may be able to get access to it. They may fear that parentage information could provide a competitor with knowledge of the applicant's breeding programme and indicate the direction of breeding goals. This way, parent knowledge could be beneficial to another breeder who is targeting a similar market.
110. Due to the unpredictability of nature, even if a competitor finds out an applicant's breeding method, there is no guarantee that the same or a similar variety will be obtained as a result. However, with gene editing or other breeding technologies, this could potentially change.

111. The problem with the status quo is that failure to provide information on origin and breeding may hinder the Commissioner's role of determining if the requirements for grant of a plant variety right are met.
112. On one hand, a basic intellectual property right principle is that the information provided by the applicant should be sufficient to allow the public to propagate the variety (once the right has been surrendered or expired) and to allow third parties to use it as a basis for further new varieties.
113. The provision and publication of information in return for a limited exclusive right to exploit the variety can be considered as part of the social contract³ implicit in the grant of intellectual property rights like plant variety rights. Provision of this information also provides third parties with an opportunity to evaluate this information and, if they consider there are any inaccuracies or other issues with it, they can inform the Commissioner. This potentially makes the PVR grant process more robust.
114. On the other hand, some other jurisdictions protect confidential information. For example, in the United States, applications for plant variety protection and their contents are kept in confidence by the Plant Variety Protection Office, by the Board and by the offices in the Department of Agriculture to which access may be given under regulations. No information concerning these is given without the authority of the owner, unless necessary under special circumstances as may be determined by the Secretary. However, the Secretary may publish the variety names designated in applications, stating the kind to which each applies, the name of the applicant and whether the applicant specified that the variety is to be sold by variety name only as a class of certified seed.
115. MBIE would like to hear your thoughts about whether some of the information supplied to the Commissioner in relation to a plant variety right application should be kept confidential, either temporarily or permanently.
116. MBIE identified three options for dealing with this issue:
 - a. **Option 1:** All information is available to the public (status quo)
 - b. **Option 2:** Origin and breeding information kept confidential
 - c. **Option 3:** Origin and breeding information kept confidential temporarily
117. At this stage, MBIE has not identified a preferred option.

³ The social contract refers to the rationale that IP rights are provided on the basis that the opportunity for the rights holder to get a return on their investment in their innovation is balanced against the public having appropriate access to that innovation so that society as a whole benefits.

Preliminary analysis

Option 1: All information is available to the public (status quo)

118. Under Option 1, all information would continue to be available to the public. This would be in line with the social contract implicit in the grant of intellectual property rights meaning that, in exchange for the provision and publication of information, applicants get a limited exclusive right to exploit their variety.
119. An advantage of this approach is that third parties can evaluate the breeding and origin information. If they consider that the information is inaccurate or wrong, they can provide this information to the Commissioner which may be of value to the examination.

Option 2: Origin and breeding information kept confidential

120. Under Option 2, the Act would provide that all information, except about breeding and origin, would be available to the public. The main disadvantage of Option 2 is that it would prevent third parties from evaluating the breeding and origin information. If third parties consider that the information is inaccurate or wrong, they can provide this information to the Commissioner, potentially improving the robustness of the PVR process.
121. A similar way of dealing with the problem is by restricting the access of information to specific people (eg those with a legitimate interest) like in Australia and the European Union.
122. Under Australian law, information about the parent variety used in the breeding programme can only be inspected by the applicant, the applicant's authorised agent, the Minister, the Registrar, a person who is required to inspect the part of the application in the course of performing his/her duties in accordance with the Australian Plant Breeder's Rights Act or a prescribed person.
123. In the European Union, information is open to public inspection when there is a legitimate interest.
124. Another option could be to only allow access to this information if this is authorised by the owner (similar to the regime in the United States mentioned above).

Option 3: Origin and breeding information kept confidential temporarily

125. Under Option 3, origin and breeding information could be kept confidential before grant or for a particular timeframe.
126. This would be in line with the principle that the information provided by the applicant should allow the public to propagate the variety once the right has been surrendered or expired. This option would also enable breeders to keep breeding and origin information as a trade secret if no plant variety right is granted.

127. One disadvantage if origin and breeding information is only made public after grant is that it would prevent third parties from evaluating the breeding and origin information prior to the grant.

17 What are your views of the problem identified by MBIE?

18 What do you think about the options outlined by MBIE? What would be your preferred option and why? Are there other options that could be adopted?

19 If you support Option 3 what timeframe would you suggest for the information to be made public and why?

Supply of plant material in relation to a specific application

128. In relation to the seed-propagated varieties listed in regulations, seeds must be provided to the PVR Office at the time the application is filed otherwise the application is not deemed to be made.
129. For other seed-propagated varieties and vegetatively-propagated varieties, reproductive material must be supplied after being requested to do so by the Commissioner. The period to do this is 12 months after the request but the Commissioner may allow a longer period. Under section 7(3) failure to provide plant material within the time prescribed results in the application lapsing.

20 Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why?

Provision of propagating material for comparison and reference purposes

130. In carrying out growing trials, it is necessary to grow the variety being examined alongside other similar varieties for comparative purposes. This assists in determining whether the variety to which the application relates meets the legal requirements for grant of a PVR (especially distinctness).
131. Currently, the Act allows the Commissioner to request plant material of a variety that is the subject of an application for use in a growing trial of that variety. Most times applicants are willing to provide additional material for use as comparison varieties in trials of other varieties if asked by the Commissioner but sometimes applicants are unwilling to do so.

132. There is no explicit authority in the Act giving the Commissioner the power to require applicants to provide additional material for a purpose other than use in a growing trial of the variety that is the subject of an application. This means that the variety may not be available for use as a comparison variety in growing trials of other varieties of the same species. As a result the PVR examination process is less robust than it could be.
133. The Act gives the Commissioner the power to request grantees to provide plant material of their protected varieties and if this is not done within a prescribed period, the grant may be cancelled. However the Act does not specify how the Commissioner may use this material. It is unclear whether such material can be used for comparison and reference purposes. Some grantees are willing to provide material voluntarily but, increasingly, many are not.
134. The varieties used for comparison can include plant material of provisionally protected varieties, those in relation to which a right has previously been granted and varieties of common knowledge. These varieties may be sourced from applicants, grantees or third parties.
135. Applicants may not have access to some or all of the comparison varieties required. Even if they do have access, they may be prohibited by contractual or licensing arrangements from providing the material to the Commissioner. This could particularly be the case if the comparison varieties are protected by a plant variety right and the applicant concerned does not own that plant variety right. In such cases, there may be no way to obtain material from the plant variety right owner for comparison purposes.
136. Also, plants are living things and may change overtime. It is important that the plant material held by the PVR Office is true to the variety type and representative of the variety long term for testing purposes. This means plant material is needed even after grant so that it can be replaced as needed.
137. MBIE has identified two options relating to the supply of plant material:
- a. **Option 1:** Plant material can only be required for use in growing trials (status quo)
 - b. **Option 2:** Applicants and grantees be required to provide propagating material for comparison and reference purposes
138. MBIE prefers Option 2.

Preliminary analysis

Option 1: Plant material can only be required for use in growing trials (status quo)

139. Under Option 1, plant material of a variety would continue to only be required for use in growing trials of that variety.
140. This solution used to work well when the Act was created (in the 1980s). However, currently, the increase in the number of varieties has made determining distinctness, uniformity and

stability a more complex process. It also means that a variety collection becomes critical as reference for future testing.

Option 2: Applicants and grantees required to provide propagating material for comparison and reference purposes

- 141. Under Option 2, the Act would enable the PVR Office to require applicants and grantees to provide additional plant material for comparison trials and to build a collection for the future. Section 16(2)(e) already requires grantees to provide plant material. However it is unclear whether such material can be used for comparison and reference purposes. Option 2 would clarify this.
- 142. The rationale behind this proposal is that would help with the robustness of the examination process, especially in relation to distinctness. And there is a quid pro quo that breeders who may be concerned about provision of material for comparison in relation to other applications, will benefit from third party provision of material to support their applications.
- 143. As part of this proposal, if the plant material needed for specified purposes is not provided without good reason, within the timeframe prescribed in regulations, the application could lapse or the grant could be cancelled. The appropriate timeframe has yet to be considered.
- 144. As an alternative, the Commissioner could provide an extension on the condition that lapse or cancellation would occur if the material for specified purposes is not provided, without good reason, before the extension expires. This would be MBIE's preferred option.

21	What are your views of the problem identified by MBIE?
22	Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?
23	Do you agree that if material is not provided lapse or cancellation could occur? Can you think of other ways to enforce this requirement? What is the appropriate timeframe?

Should growing trials be optional or compulsory?

- 145. Regulation 16 of the Plant Variety Rights Regulations 1988 says that "if" the Commissioner has insufficient information to be satisfied that a variety in respect of which an application has been made is distinct, homogeneous or stable they may undertake or commission growing trials of the variety. Regulation 16 also provides that, in certain circumstances, the Commissioner may disregard any results of any growing trials undertaken or commissioned by an applicant.
- 146. The steps in the Act and Regulations imply the following process: applicants provide information (whether after a preliminary growing trial or not), the Commissioner assesses if

the information was sufficient and, based on that, decides if they should undertake or commission further trials.

147. Currently, the number of varieties has grown dramatically and it is more common for the information that applicants provide to be insufficient. This is why growing trials are crucial in the plant variety rights regime.
148. The use of the word “if” in regulation 16 implies that growing trials are not required in all applications. The reality is that the determination of whether a variety is distinct, homogeneous or stable cannot take place without a growing trial (whether it is in New Zealand or overseas).
149. MBIE is aware that some applicants have disputed current practice and have argued that the Commissioner should be prepared to consider information that has not been derived from growing trials. They question whether the Commissioner has the power to only consider information derived from growing trials. This raises the question of whether the Commissioner should be empowered to require growing trials in all cases.
150. MBIE has identified two options in relation to growing trials:
 - a. **Option 1:** Growing trials not compulsory (status quo)
 - b. **Option 2:** Compulsory growing trials
151. MBIE prefers Option 2.

Preliminary analysis

Option 1: Growing trials not compulsory (status quo)

152. Under Option 1, applicants would provide information (whether following a growing trial or not). This is the status quo. The Commissioner decides whether or not the information provided by the applicant is sufficient to determine whether the DUS requirements are met.
153. Option 1 may be an advantage if future improvements in technology mean that information sufficient to determine whether the statutory criteria are met can be derived without a growing trial. If this occurs, the current provisions would allow the Commissioner to consider that information. However MBIE understands that it is likely to be many years (if at all) before growing trials may not be necessary.
154. The Commissioner would continue to be tasked with determining if the statutory tests are met so, if the information produced is insufficient due to the lack of growing trials, the Commissioner would continue to direct what further work should take place.
155. Under the current Act the Commissioner’s decision that a growing trial is required is appealable to the District Court. However appeals are costly and there is the risk that applicants may decide to comply with the Commissioner’s decision regarding a growing trial because it is cheaper than appealing the Commissioner’s decision.

156. Note that, as part of the current review of the Act, it is intended that parties adversely affected by a decision of the Commissioner would also have the right to a hearing before an IPONZ Hearing Officer before a final decision is made.

Option 2: Compulsory growing trials

157. Under this option, the Act would provide that a growing trial must be conducted for all applications for the grant of a PVR. The growing trial could be one conducted in New Zealand, or in another country.

158. As mentioned above, MBIE understands that it is likely to be many years (if at all) before growing trials may not be necessary to determine if the legal tests for the protection of plant variety rights are met.

159. The advantage of this option is that the information that the Commissioner would have available for the assessment would be more likely to be sufficient after a growing trial.

160. Another advantage is that there would be certainty about the requirement that growing trials should always take place. This does not mean that growing trials would only be conducted in New Zealand. The location of the trial is not always a primary factor. Foreign reports would continue to be admissible in certain cases. However, depending on the circumstances of a particular case, a growing trial in New Zealand may sometimes be necessary to complement the information in the foreign report.

161. The main disadvantage of this option is that it requires applicants to incur the cost and effort involved in conducting growing trials.

24 What are your views of the problem identified by MBIE?

25 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

Who should conduct growing trials?

162. As mentioned above, regulation 16 says that "if" the Commissioner has insufficient information to be satisfied that a variety in respect of which an application has been made is distinct, homogeneous or stable they may undertake or commission growing trials of the variety.

163. In practice, the following five arrangements for growing trials are used by the PVR Office:

- a. Central testing conducted by, or on behalf of the Commissioner The Commissioner meets the costs of the trial, and charges the applicant the relevant trial fee.

- b. Testing by a specified research or industry organisation These trials are arranged by the applicant who pays the organisation concerned to carry out the trial. The organisation carries out the evaluation of the variety and supplies the results to the Commissioner. The applicant is charged the prescribed examination fee.
 - c. Testing on a property organised by the applicant The trial is conducted on a site organised by the applicant. Variety evaluation is conducted by the Commissioner, and the applicant is charged the relevant trial fee.
 - d. Breeder testing This is similar to (c) above, but where the applicant arranges for the evaluation of the variety. The applicant is charged the examination fee.
 - e. Foreign test report The Commissioner will accept the results of a DUS test carried out by or on behalf of a foreign PVR granting authority. The applicant is charged the examination fee.
164. The nature of the trial depends on the species involved. However, there is nothing in the PVR Act or regulations that sets out what form of trial applies to particular species.
165. At present, the growth in the number of varieties has made the growing trial process very complex. Data collection expertise and knowledge of, and access to, varieties are crucial to be able to conduct a trial. This is probably the reason that applicants increasingly rely on the Commissioner's expertise about the information necessary to meet the tests in the Act and what type of trial would produce that information.
166. Where the Commissioner requires growing trials to be conducted in New Zealand, there is a question as to whether, and to what extent, the Commissioner should be involved in growing trials.
167. MBIE has identified four options regarding who should conduct growing trials:
- a. **Option 1:** Applicants organise their own growing trials
 - b. **Option 2:** Applicants have the option to conduct their own growing trials
 - c. **Option 3:** The Commissioner directs the types of trial for certain species
 - d. **Option 4:** The Commissioner directs the types of growing trials in all applications
168. Under all of these options, the Commissioner would continue to have the power to accept (or not) information derived from growing trials conducted by, or on behalf of, a plant variety right granting authority in another country.
169. When the PVR Office conducts a growing trial the costs incurred by the Commissioner in arranging the trials would be recovered by fees charged to applicants which would be set in regulations, as is currently the case. It is important to note that current trial fees have not been reviewed since 2002 and no longer reflect the costs incurred by the Commissioner in conducting a growing trial. It is possible that trial fees could increase substantially if they were to reflect the full cost of conducting growing trials.

170. This could mean that some applicants may consider that they could arrange a trial at a lower cost than the trial fee charged by the PVR Office. However they will still be charged the examination fee. Also, there may be times when the cost of a growing trial conducted or arranged by the Commissioner may be less onerous than that of a trial undertaken by the applicant.
171. MBIE prefers Option 4.

Preliminary analysis

Option 1: Applicants organise their own growing trials

172. Under Option 1, the blanket rule would be that applicants would be responsible for organising their trials. The Commissioner would not be involved in undertaking or commissioning growing trials. Applicants would conduct the trials themselves or commission someone else to undertake them on his/her behalf. However, to ensure the person undertaking the trial is on the right path, the conditions for the trial would be set by the Commissioner (this power already exists in regulation 16(2)(a)).
173. Option 1 may be an advantage to those who prefer to conduct their own trials or those who are reticent to provide plant material to a potential competitor (such as in testing by a research or industry organisation).
174. This option places the onus of identifying the correct method and conducting the growing trial on the applicant. It can be argued that, if the applicant wants the grant of a plant variety right, it should be their responsibility to do what is required.
175. Doing their own work may mean that applicants save the cost of the growing trial fee (although they would still be charged the examination fee). However there may be times when the cost of a growing trial conducted or arranged by the Commissioner may be less onerous than that of a trial undertaken by the applicant.
176. However the Commissioner is tasked with determining if the statutory tests are met so, whatever trial has been conducted previously, if the information produced is insufficient, the Commissioner would continue to direct what further work should take place. This may mean that the applicant would have to incur the cost of a separate trial anyway.

Option 2: Applicants have the option to conduct their own growing trials

177. This is slightly different to Option 1. Under 2, the blanket rule is that it is the applicant's choice to decide whether they would like to undertake their own trials or ask the Commissioner to undertake or commission the growing trial. This would allow applicants to choose a growing trial arrangement that best suits them.
178. However, to ensure the person conducting the trial is on the right path, the conditions for the trial would be set by the Commissioner (as provided currently in regulation 16(2)(a)).

179. The same advantages and disadvantages identified for Option 1 apply.
180. Those who prefer to conduct their own trials or those who are reticent to provide plant material to a potential competitor (such as in testing by research or industry organisation) may choose this option.
181. Doing their own work may mean that applicants save the cost of the growing trial fee (although they will still be charged the examination fee) but sometimes the cost of a growing trial conducted or arranged by the Commissioner may be less onerous than that of a trial undertaken by the applicant.
182. The Commissioner would still be tasked with determining if the statutory tests are met. So, whatever trial has been conducted previously, if the information produced is insufficient, the Commissioner would continue to direct what further work should take place. This may mean that the applicant would have to incur the cost of a separate trial anyway.

Option 3: The Commissioner directs the type of trial for certain species

183. Under Option 3, the Commissioner would have the power to require a particular type of growing trial for certain species. For example, currently the PVR Office uses central testing for barley, oats, wheat, forage brassicas, ryegrass, clover, peas, garden roses, Zantedeschia, Phormium and some other ornamentals.
184. The advantage of this option is that applicants would have certainty about what species will require which type of growing trial. However the categories matching the types of trials are not set in stone. Circumstances change constantly. A trial may be advisable to be run overseas because trials of that species have never been conducted in New Zealand and, shortly after, a New Zealand breeder may start undertaking trials making a domestic trial preferable.
185. If the species matching the types of trials were set in regulations, the disadvantages would be that the list of species would never be exhaustive and would be harder to change if circumstances changed.

Option 4: The Commissioner directs the type of growing trial in all applications (preferred option)

186. Under Option 4, the Commissioner would have the power to direct, as appropriate to the particular application, the type of trial that is likely to produce the required information that needs to be assessed to determine whether the criteria for grant of a PVR are met or not. The types of trials would be those currently used by the PVR Office (listed earlier in this document), including trials undertaken by the applicant.
187. This option places the onus of identifying the correct type of trial on the Commissioner. It can be argued that this is the appropriate option as the Commissioner has the expertise about the type of information necessary to assess whether the tests in the Act are met and what type of trial would produce the required type of information.

188. In one sense, the current regulations already anticipate this kind of oversight from the Commissioner, as the Commissioner may disregard the results of any growing trials arranged by the applicant unless they were approved by the Commissioner.
189. The growing trials would be conducted by different entities depending on the type of trial selected by the Commissioner as appropriate to the particular application. For example, research/industry organisations, breeders, third parties or the PVR Office in the case of central testing. The types of growing trials that the Commissioner would choose from and the species matching those would continue to be listed on the IPONZ website. The current categories and species that match those are expected to continue to apply.
190. Despite the overall categories of species that usually match the type of growing trial, the Commissioner would take into account the special circumstances of each case (eg time of the year, availability of varieties, whether the specific variety applied for is already being tested in New Zealand or overseas).
191. This option would be consistent with the majority of foreign authorities/UPOV members, with significant authority direction or role in the testing for all species.
192. The official variety description, which is prepared based on growing trial results, is important and forms part of the identity of the intellectual property right. For some crops, it may be desirable that all descriptions are based upon growing trials at the same location so that descriptions of varieties of the same species can be compared. The Commissioner would be aware of other applications for the same species and would be the right person to decide how the trials should be managed so that the trials take place at the same location.
193. A disadvantage could be that those who prefer to conduct their own trials or who are reticent to provide plant material to a potential competitor may disagree with the Commissioner's decision that the trial should be testing by research or industry organisation. However the IPONZ website currently explains that plant material should only be made available to any party, other than the variety owner, in such a way that the legitimate interests of the variety owner would be safeguarded. It also says that the PVR Office is the custodian of plant material and its usage is for testing and other official purposes only and any plant material usage outside this scope requires the consent of the variety owner.⁴
194. It may be that in a particular case it would be useful for the applicant to conduct the trial. For example, when there is only one breeder of a particular species and this breeder is the applicant. They may have a comprehensive variety collection that could allow them to conduct a complete growing trial. Other examples may be when the number of similar varieties is small and there is not a lot of competition. As with Option 1, to ensure applicants are on the right path, the conditions for the trial would also be set by the Commissioner.
195. Where the Commissioner arranges growing trials (eg central testing), the costs incurred by the Commissioner in arranging the trials would be recovered by fees charged to applicants. As

⁴ <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/policy-on-plant-material-ownership/>

noted above, the current trial fees have not been reviewed since 2002 and no longer reflect the costs incurred by the Commissioner in conducting a growing trial.

196. This could mean that some applicants may consider that they could arrange a trial at a lower cost than the trial fee charged by the PVR Office. However they will still be charged the examination fee and, if the Commissioner has required that the trial be conducted by someone else, it will be because in the specific case the applicant is not considered to have the required expertise, knowledge or access to varieties to be able to conduct their own trial.
197. Also, there may be times when the cost of a growing trial conducted or arranged by the Commissioner may be less onerous than that of a trial undertaken by the applicant.
198. Under Option 4, the Commissioner could give applicants the option of either arranging their own growing trials or opting to have the trial arranged by the Commissioner. If, in a particular case, the applicant is considered to have the required expertise to conduct their own trial, the choice could be left to them. This would allow applicants to choose a growing trial arrangement that best suits them, under conditions set by the Commissioner.
199. In every case, if an applicant disputes the Commissioner's decision in relation to the type of growing trial the applicant could request a hearing.

26 What are your views of the problem identified by MBIE?

27 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

Trial and examination fees

200. This part of the consultation document looks at issues surrounding the payment of trial and examination fees, and what happens if fees are not paid on time. It does not consider the level of fees. The trial fees vary according to the species involved in the trial and are specified in the Plant Variety Rights (Fees) Order 1999.
201. The trial and examination fees are intended to cover the cost of examining a plant variety right application, including the costs of a growing trial. More than one trial and examination fee may be required, where trials extend over more than one growing season.
202. The trial or examination fee must be paid within the prescribed period after making the application. However no period is actually prescribed in the regulations.
203. Growing trials are dependent on the seasons and, if the trial is not conducted during the appropriate season, there can be a delay of months or a year before it can take place again. Where a growing trial is arranged by the Commissioner, this could mean commencing the trial before the fee has been paid and without having certainty that the fee will ever be received.

204. In addition, if the growing trial cannot be started promptly, for example if there are delays in obtaining propagating material for the trial, the Commissioner may be holding on to the trial fee for a long period of time before the trial actually begins. It might be considered unfair for the applicant not to have the use of the money for that time.
205. For example, if the growing trial suggests that the variety being trialled does not meet the legal requirements for granting a plant variety right, the applicant may choose not to pay the fee at all and abandon the application. There would be a debt to the PVR Office but no certainty that it would be collected.
206. Applications are eligible for a grant when (among other requirements) the fee has been paid. If fees are paid months or even years after the costs were incurred, there would be budgeting and forecasting problems for the PVR Office.
207. Also, given that the Act provides provisional protection to varieties from the application date, if applicants delay paying the fee, they effectively extend the term of plant variety right protection.
208. MBIE has identified three options for dealing with this problem:
- a. **Option 1:** Trial and examination fees paid at the time of the application
 - b. **Option 2:** Require trial and examination fees to be paid within a prescribed time of filing of the application, otherwise the application lapses
 - c. **Option 3:** Trial and examination fees paid within a prescribed period after the Commissioner's request, otherwise applications could lapse
209. MBIE prefers Option 3.

Preliminary analysis

Option 1: Trial and examination fees paid at the time of the application

210. Under Option 1, trial and examination fees would be paid together with the application fee and if they are not, the application would be deemed not to be made. This means that the application would not be accepted or processed.
211. The advantage of this approach would be to ensure that the trial or examination fee was paid in advance of any growing trial taking place.
212. This would not always work. There may be some cases where the growing trial cannot commence for good reason, due to delays out of anyone's control, eg extreme weather events. In these cases, the PVR Office could be holding on to the fee for what might be a substantial period of time (maybe years) before the growing trial commences which could be unfair.

213. Also, if the application is later withdrawn before the growing trial takes place, the PVR Office may have to give a refund which would cause further administrative processing and delays.
214. Another disadvantage may be that smaller applicants may have difficulty paying both the application and the trial or examination fee at the same time.
215. Finally, the PVR Office does not always know at the time when the application is submitted if either the trial or the examination fee will be required so this cannot be a blanket rule.

Option 2: Require trial and examination fees to be paid within a prescribed time of filing of the application, otherwise the application lapses

216. The status quo is that trial and examination fees should be paid within a prescribed time of filing the application but there is currently no prescribed time to do this, and the lapse provisions do not extend to the payment of fees.
217. Under this option, applicants would have to pay the trial or examination fee within a prescribed period after filing the application – and this period would be stated in the regulations – or the application lapses. This approach avoids the risk of the applicant abandoning the application after a trial or examination has commenced, but before paying the appropriate fee.
218. However, other disadvantages would remain. The Commissioner might still have to refund the fee if the applicant abandons the application before a trial or examination commences. Delays in beginning the growing trial would still mean that the Commissioner would be holding on to the money for a long period of time. For these reasons, this option is not preferred.

Option 3: Trial and examination fees paid within a prescribed period after the Commissioner's request, otherwise applications could lapse (preferred option)

219. Under Option 3, the Commissioner would request the fee when the conditions are right for the growing trial or examination to begin. The time would start counting from when the request is made (as opposed to the time the application is made). The timeframe would be prescribed in regulations to provide applicants with certainty and the ability to schedule payments in advance. The current office process of sending reminders in advance would continue and the Commissioner would be able to give an extension.
220. As with Option 2 the application would lapse if the trial and examination fee was not paid within the prescribed period (including any extensions) and no good reason is given. The lapsed application could be restored if the criteria for restoration are met⁵.
221. The advantage of Option 3 is that it would promote operational efficiency and avoid delays in progressing applications. It would also avoid the uncertainty about whether costs would be reimbursed.

⁵ The current Act does not provide for restoration of lapsed applications, but the November Cabinet paper proposed that the Act provide for restoration.

28

What are your views of the problem identified by MBIE?

29

Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

30

What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3?

Hearings and appeals relating to decisions of the Commissioner of PVRs

222. The Act requires the Commissioner to make decisions involving the Commissioner's discretion on various aspects of the PVR application process, and after grant of a PVR. However, apart from decisions under section 6 (objections before grant) and section 21 (compulsory licenses and sales) there is no right to be heard before the Commissioner before a final decision is made. Instead, persons affected by a decision of the Commissioner can appeal that decision to the District Court.
223. It can be argued that it is contrary to natural justice for the Commissioner to make decisions without providing for some right to be heard before the decision is made. Another issue is that, for those issues where the Act does provide for hearings, there are no provisions in the Act or regulations regarding the conduct of those hearings
224. The PVR Office is now part of the IPONZ, which also administers other intellectual property laws, including the Patents Act 2013, and the Trade Marks Act 2002. Both of these laws provide that the relevant Commissioner must not exercise any of the Commissioner's discretionary powers adversely to an applicant or any other party to a proceeding before the Commissioner without giving the person a reasonable opportunity to be heard. IPONZ maintains a hearings office to manage hearings processes, including providing hearings officers to conduct hearings.
225. In light of this, MBIE proposes to amend the PVR Act to include a general provision like that mentioned above in the other IP regimes. (In the Patents Act 2013 the relevant provision is section 208.) We also propose to amend the PVR regulations to include procedures for hearings, along the lines of those in the Patents Regulations 2014.
226. MBIE is interested in hearing the views of stakeholders on this issue.
227. Introducing a hearings process into the PVR regime then raises the question of where appeals to a Commissioner's decision should be heard. This is currently the District Court in the PVR Act, but in other IP regimes appeals are heard at the High Court. While appeals to the District Court may cost less than appeals to the High Court, the High Court may be better suited to considering the technical issues involved.

228. At this stage, MBIE does not have a preference. We are interested in hearing the views of stakeholders on where appeals should be heard.

31

Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the *Patents Act 2013*. If not, why?

32

What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why?

5 Next steps and development of regulations

229. Drafting of a PVR Amendment Bill is already underway on the basis of the decisions taken by Cabinet in November 2019. This discussion document focuses on further changes that would need to be included in this Bill (as opposed to regulations). We anticipate that Cabinet will make decisions on these issues shortly after Parliament resumes after the general election. Drafting of these decisions can then be included in the Bill. We are targeting introduction of a PVR Amendment Bill before the end of the year.
230. In addition to the Bill, a number of changes to regulations will be required to support the new PVR regime. We will be undertaking the necessary preparatory work for these in the coming months with the aim of consulting on these later in the year (or early next year). These changes are likely to include:
- a. providing regulations regarding the conduct of growing trials
 - b. availability of information
 - c. timeframes for paying fees, providing information, and providing plant material for comparison and reference purposes
 - d. changes to the amounts of seed that must be provided for some species
 - e. regulations setting out procedures for hearings and other proceedings including cancellation, nullification and compulsory licenses
 - f. regulations to support the Treaty of Waitangi provisions in the new legislation, such as the list of non-indigenous species of significance.
231. It is likely that the procedures referred to in 'e' would be modelled on relevant provisions in the Patents Regulations 2014

6 Recap of questions

Treaty of Waitangi issues

Definitions

1 Do you agree with our proposed definition of ‘indigenous plant species’? If not, do you have an alternative to propose?

2 Do you agree that ‘non-indigenous species of significance’ be listed in regulations and that the list reflect the table above? If not, why not? Are there species that should be on that list that are not?

Disclosure obligations and confidentiality

3 Are there any confidentiality considerations in relation to the additional information required under the new disclosure obligations? If so, how should this information be treated?

Māori Advisory Committee - appointments

4 Do you agree with the proposal to change the name of the Committee to the ‘Māori PVR Committee’? If not, do you have any other recommendations?

5 Do you agree with our proposed amendments to the appointment process? If not, why not? Do you have any alternative amendments to propose?

6 Do you agree with our proposed amendments to the criteria for appointment? If not, why not? Do you have any alternative amendments to propose?

Māori Advisory Committee – decision making processes

7 Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not?

8 Are there any additional factors that should be added to the list of relevant considerations?

9 Do you agree that the Committee should take an investigative approach to decision-making (Option 1)? If not, why not?

10 Do you agree that the Committee should be required to reach a unanimous decision and only in the event that, despite all efforts, a decision cannot be reached can the Chair of the Committee allow a decision to be made by either a consensus or a vote (Option 3)? If not, why not?

11

Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose?

Post-determination considerations

12

Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose?

13

Do you have any thoughts about either the timeframe for initiating this first stage review or the proposal of adding a person to the Committee when they are reviewing a determination, and who might be appropriate?

14

Do you agree with our proposal for imposing a time limit in relation to a review of a determination of the Committee? If not, why not?

15

What do you think is an appropriate timeframe for an aggrieved party to notify Commissioner and the Committee of their intention to seek judicial review?

16

Do you agree with our preferred option and process for objections after grant in relation to the kaitiaki condition (Option 2)? If not, why not? Is there an alternative you wish to propose?

Operational issues

Information available to the public

17

What are your views of the problem identified by MBIE?

18

What do you think about the options outlined by MBIE? What would be your preferred option and why? Are there other options that could be adopted?

19

If you support Option 3 what timeframe would you suggest for the information to be made public and why?

Supply of plant material in relation to a specific application

20

Do you consider that these provisions regarding the supply of plant material for a specific application are causing any problems? If so, why?

Provision of propagating material for comparison and reference purposes

21 What are your views of the problem identified by MBIE?

22 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

23 Do you agree that if material is not provided lapse or cancellation could occur? Can you think of other ways to enforce this requirement? What is the appropriate timeframe?

Should growing trials be optional or compulsory?

24 What are your views of the problem identified by MBIE?

25 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

Who should conduct growing trials?

26 What are your views of the problem identified by MBIE?

27 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

Trial and examination fees

28 What are your views of the problem identified by MBIE?

29 Do you support MBIE's preferred option? If not, what other option(s) should be adopted, and why?

30 What would be the appropriate timeframe for payment of trial and examination fees in options 2 and 3?

Hearings and appeals relating to decisions of the Commissioner of PVRs

31 Do you agree that the Act should include provision for a right to be heard along the lines of that in section 208 of the *Patents Act 2013*. If not, why?

32 What is your view on where appeals to decisions of the Commissioner should be considered (i.e. District Court or High Court)? Why?

