



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

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# Consultation Paper

## Review of the Plant Variety Rights Act 1987: Proposed Regulations

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July 2021

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CCC 6965



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

## Ministry of Business, Innovation and Employment (MBIE)

### Hikina Whakatutuki - Lifting to make successful

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

MBIE combines the former Ministries of Economic Development, Science + Innovation, and the Departments of Labour, and Building and Housing.



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## Submissions process

The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the issues raised in this document by **5pm on Wednesday, 25 August 2021**

Your submission may respond to any or all of the questions in this paper. We encourage you to use the submissions template provided.

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](mailto: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](mailto:pvractreview@mbie.govt.nz)

## Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will the development of the regulations required to implement the new Plant Variety Rights Act. We may contact submitters directly if we require clarification of any matters in submissions.

## Release of information

MBIE intends to upload PDF copies of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

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# 1 Introduction

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1. The release of this consultation document forms part of the current review of the Plant Variety Rights Act 1987 (**the PVR Act**) being carried out by the Ministry of Business, Innovation and Employment (**MBIE**). 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.
2. The purpose of the PVR regime is to incentivise the development and importation of new varieties of plants. PVRs are granted after an examination process carried out by the PVR Office under the authority of the Commissioner of Plant Variety Rights (**the Commissioner**). The PVR regime is administered by the Intellectual Property Office of New Zealand (**IPONZ**).
3. In November 2019 Cabinet agreed to policy decisions on proposed amendments to the PVR Act to meet New Zealand’s obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**). Cabinet also agreed to amendments to ensure that New Zealand’s PVR regime is consistent with the Crown’s Obligations under Te Tiriti o Waitangi (**the Treaty**).
4. In March 2021 Cabinet also agreed to further amendments to the PVR Act. These amendments include amendments dealing with Treaty of Waitangi compliance issues and operational issues relating to the administration of the PVR regime.
5. A new Plant Variety Rights Bill (**the PVR Bill**) to replace the PVR Act was introduced to Parliament on 11 May 2021 and completed its first reading on 19 May 2021. The text of the Bill can be found at:  
[https://www.legislation.govt.nz/bill/government/2021/0035/latest/LMS352239.html?search=ts\\_bill\\_plant\\_resel\\_25\\_a&p=1](https://www.legislation.govt.nz/bill/government/2021/0035/latest/LMS352239.html?search=ts_bill_plant_resel_25_a&p=1)

## Purpose of this Discussion Paper

6. This discussion paper considers what regulations will be needed to implement the provisions of the PVR Bill. The regulations mainly deal with procedural and administrative issues relating to the implementation of the PVR Bill (as opposed to, for example, the criteria for granting a PVR). These include:
  - How applications for a PVR must be made
  - The ‘formal’ requirements that a PVR application must meet before it can proceed
  - Time limits for providing information and propagating material that the Commissioner requires in order to examine a PVR application

- Setting the conditions under which growing trials must be conducted where the examination process involves a growing trial which is conducted by or on behalf of the applicant
  - The procedures to be followed where third parties oppose or challenge the grant of a PVR, or apply for a compulsory license
  - The procedures to be followed in hearings before the Commissioner
  - Procedures for administrative issues relating to PVR applications and granted PVRs (for example when applications or PVRs are assigned to another person).
7. The current regulations, the Plant Variety Rights Regulations 1988 (**the PVR Regulations**) are now out of date and are not fit-for-purpose. For example they do not take account of the fact that the Commissioner now carries out many of their functions online.
  8. There are also provisions where the PVR Act refers to something prescribed in the regulations, but where the regulations are silent. For example, the PVR Act requires PVR applicants to provide a proposed denomination for the variety concerned within a prescribed period of making the PVR application. However, no period is actually prescribed in the regulations.
  9. In addition, the PVR Regulations are silent on many procedural aspects relating to the process for making applications for PVRs, examining and granting the applications, and dealing with issues that arise after grant. They effectively leave many of these aspects to the discretion of the Commissioner.
  10. Leaving most procedural aspects to the Commissioner's discretion is undesirable. It can leave applicants and third parties uncertain as to their rights and obligations under the Act. This could lead to unintended loss of rights by applicants and PVR owners. Third parties who may have legitimate grounds to oppose or challenge the grant of a PVR may be deterred from doing so, because they are unsure of what is required of them.
  11. In addition, the fact that the regulations are silent on many procedural aspects can result in unnecessary expense and delay for applicants and third parties if proceedings are initiated under the Act. An example of the problems that this can cause is the case of an application for a compulsory license over a PVR that was filed a few years ago.
  12. The current Act and regulations are very vague about the procedure that should be followed in such cases. After discussions with the parties concerned, a procedure based on the procedure used in opposition proceedings under the Trade Marks Act 2002 was adopted. This approach likely prolonged the proceedings and imposed unnecessary costs on all the parties involved, including the Commissioner.
  13. In light of this, MBIE considers that a complete review of the PVR regulations is required, rather than simply amending the current regulations.

14. In August 2020 a discussion document, “Discussion paper: Review of the Plant Variety Rights Act 1987 - Outstanding policy issues” was released. This paper included discussion on a number of procedural and operational issues related to the granting plant variety rights. MBIE’s proposals regarding the regulations takes account of the submissions received on the discussion document.

## Farm Saved Seed

15. Clause 15 of the PVR Bill provides an exception to the rights of a PVR owner. This exception allows farmers to save and condition seed of varieties protected by PVR for the purpose of sowing the next season’s crop without the permission of the PVR owner. However, clause 15 also provides that the exception does not apply to varieties of a kind specified in the regulations.
16. At this stage MBIE is not proposing any regulations in relation to clause 15. It is intended that MBIE will only consider recommending making regulations under clause 15 if the case for this is made in the future (e.g. if growers and PVR owners approach MBIE with an agreed proposal for such regulations after the Bill has entered into force).

## Non-indigenous plant species of significance

17. Clause 54 of the Bill includes a definition of ‘non-indigenous species of significance’, and provides that the species to which this definition applies will be listed in the regulations. This document also invites comments on a proposed list of ‘non-indigenous species of significance’.

## 2 The Regulations

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18. MBIE considers that the regulations should:
- allow the Commissioner to implement the new PVR Act in an efficient and cost-effective manner
  - be clear and understandable for PVR applicants, PVR owners and third parties
  - appropriately balance the interests of PVR applicants, PVR owners, third parties and the public
  - be consistent to the extent practical with the other regimes for registered intellectual property rights administered by IPONZ.

### What are the options for the regulations?

19. In developing the regulations there are essentially 2 options:
- i. Draft a new set of regulations, from scratch without reference to regulations developed for other legislation, including other legislation administered by IPONZ
  - ii. Base the regulations, as far as possible, on relevant provisions of regulations developed for other legislation administered by IPONZ, in particular the Patents Regulations 2014<sup>1</sup> (**preferred option**).
20. In considering these options it quickly becomes clear that option (i) is not viable and that option (ii) is the only option worth pursuing. While both options would likely meet the last three objectives set out above, option (i) would not meet the objective of allowing the Commissioner to implement the PVR Act in an efficient and cost-effective manner.
21. Option (i), drafting a new set of regulations from scratch is likely to impose significant costs on IPONZ if procedures under these regulations are significantly different from the procedures currently implemented by IPONZ in relation to other registered IP rights. It would not be possible, under these circumstances for IPONZ to adapt existing processes. As IPONZ operates an all-electronic system there could be significant IT costs. There would also be additional costs in developing and maintaining staff training material.
22. In addition to the Patents Act 2013 and the Patents Regulations 2014, IPONZ also administers the Trade Marks Act 2002 and regulations, and the Designs Act 1953 and regulations.

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<sup>1</sup> The Patents Regulations 2014 can be found at <http://www.legislation.govt.nz/regulation/public/2014/0275/latest/DLM6166201.html?src=qs>

Although there are differences between the regulations reflecting the different registration regimes involved, there are some procedures common to all of these regimes. The common procedures mainly relate to proceedings, such as hearings and revocation procedures, and administrative procedures such as assignments.

23. The PVR Bill provides for proceedings, including hearings and opposition procedures. There are advantages for IPONZ, applicants for PVRs, PVR owners and third parties if the PVR Act adopts the same approach to proceedings as the other registration regimes administered by IPONZ. This avoids the need to establish a separate system for PVRs, and makes more efficient use of IPONZ resources, as they can be shared with the other registration regimes.
24. Under this option, the PVR Act regulations will adopt essentially the same approach as that taken in the Patents Regulations. Procedures for objections before grant, restoration, and revocation of a PVR, and proceedings such as hearings are proposed to be essentially the same as the corresponding procedures in the Patents Regulations.
25. Where regulations are essentially being adapted from corresponding provisions in the Patents Regulations 2014, MBIE has not provided options. Instead, for each regulation or group of regulations, there is a brief description of what the regulations provide for, together with a cross-reference to the corresponding regulation(s) in the Patents Regulations 2014.

## PVR specific provisions

26. Many of the proposed regulations will be adapted from corresponding provisions in the Patents Regulations 2014. However, there will be some provisions, such as those relating to examination of PVR applications, where the process differs significantly from that under the Patents Regulations 2014, or where there is no corresponding process. These will be the subject of separate analysis later in this document.
27. There are also a few provisions where adapting the corresponding patents regulations will result in a significant change from the relevant provisions in the current PVR Act and regulations. These are also separately analysed later in this document.

### Question

2.1

Do you agree with MBIE's proposal that the new PVR regulations be adapted, as far as possible, from corresponding provisions in the Patents Regulations 2014?

# 3 Regulations adapted from the Patents Regulations

28. The table below sets out an outline of the regulations proposed for the new PVR Act. Where it is proposed to adapt provisions of the Patents Regulations 2014<sup>2</sup> the relevant patents regulations are indicated. In some cases the regulations will require specific provisions in the new PVR Act. Where this is the case, the Act provisions will be based upon the corresponding provisions in the Patents Act 2013<sup>3</sup> as indicated in the table.

Regulation provision	Explanation
<b>Preliminary</b>	
Fees	<ul style="list-style-type: none"> <li>• Sets out that fees set out in the regulations<sup>4</sup> are payable, and when and how they must be paid               <ul style="list-style-type: none"> <li>○ <a href="#">See Regulations 5 - 7 Patents Regulations 2014.</a></li> </ul> </li> </ul>
Forms and documents	<ul style="list-style-type: none"> <li>• Mandates use of the IPONZ Case Management Facility for filing documents               <ul style="list-style-type: none"> <li>○ <a href="#">See Section 229 Patents Act 2013; Regulations 12 – 17 Patents Regulations 2014; clause 146 PVR Bill</a></li> </ul> </li> <li>• Minimum requirements that must be met before a document is considered “filed”               <ul style="list-style-type: none"> <li>○ <a href="#">See Regulations 18-20 Patents Regulations 2014</a></li> </ul> </li> <li>• Requirements for documents               <ul style="list-style-type: none"> <li>○ <a href="#">See Regulations 21-22 Patents Regulations 2014</a></li> </ul> </li> <li>• If specific forms are required (for example for the technical description) this can be specified here. The forms themselves could be set out in a schedule to the regulations.</li> </ul>
Addresses	<ul style="list-style-type: none"> <li>• Requires applicants, PVR owners, agents and any party to a proceeding to provide contact details to the Commissioner:               <ul style="list-style-type: none"> <li>○ Address for service of legal documents</li> <li>○ Communication address (this is an address to which the Commissioner can send communications relating to a PVR application or PVR or proceedings under the PVR Act)</li> <li>○ <a href="#">See Regulations 34-37 Patents Regulations 2014.</a></li> </ul> </li> </ul>

<sup>2</sup> The Patents Regulations 2014 can be found at:

<http://www.legislation.govt.nz/regulation/public/2014/0275/latest/DLM6166201.html?src=qs>

<sup>3</sup> The Patents Act 2013 can be found at:

<http://www.legislation.govt.nz/act/public/2013/0068/latest/DLM1419043.html?src=qs>

<sup>4</sup> A separate review of the PVR fees is underway.

Regulation provision	Explanation
Agents	<ul style="list-style-type: none"> <li>• Sets out requirements if applicants use an agent to act on their behalf in dealings with the Commissioner               <ul style="list-style-type: none"> <li>○ <a href="#">See Regulations 38 – 44 of the Patents Regulations 2014.</a></li> </ul> </li> </ul>
<b>Process for obtaining grant of a PVR and other matters</b>	
Application for a PVR	<ul style="list-style-type: none"> <li>• Sets out the “formal” requirements that a PVR application must meet               <ul style="list-style-type: none"> <li>○ <a href="#">See section 32 Patents Act 2013; Section 5 Plant Variety Rights Act 1987; clause 36 PVR Bill; Clause 42 PVR Bill; Regulation 50 Patents Regulations 2014, Regulation 5A Plant Variety Rights Regulations 1988</a></li> <li>○ Where propagating material must accompany the application, what species and propagating material this requirement applies to. It is also proposed that colour photographs be required to accompany all applications.</li> </ul> </li> </ul>
Convention applications	<ul style="list-style-type: none"> <li>• Sets out the “formal” requirements where PVR applications are based on PVR applications made in another UPOV country. This includes time limits for filing documents in support of convention applications, and what documents are required. It is proposed to shift these “formal” requirements from the PVR Act to the regulations. No change to the time limits is proposed.               <ul style="list-style-type: none"> <li>○ <a href="#">See sections 12(c), (d) Plant Variety Rights Act 1987; Clause 42 PVR Bill; Regulations 68 – 70 Patents Regulations 2014.</a></li> </ul> </li> </ul>
Grant and publication of PVR	<ul style="list-style-type: none"> <li>• Sets out the “formal” requirements for grant of a PVR, including that any outstanding fees have been paid.</li> <li>• Documents (if any) that become open to public inspection on grant               <ul style="list-style-type: none"> <li>○ <a href="#">See section 78 Patents Act 2013; clause 28 PVR Bill; Regulations 82 and 85 of the Patent Regulations 2014.</a></li> </ul> </li> </ul>
Nullification/ Cancellation of a PVR	<ul style="list-style-type: none"> <li>• Procedures to be followed where proceedings for nullification or cancellation of a PVR are started by a third party or the Commissioner. These processes are similar to the processes for revoking a patent. It is proposed that the procedure be based on the procedure for revoking a patent.               <ul style="list-style-type: none"> <li>○ <a href="#">See Clauses 79 – 83 PVR Bill; Regulations 102 – 105 of the Patents Act 2014.</a></li> </ul> </li> </ul>
Restoration of lapsed applications and PVRs	<ul style="list-style-type: none"> <li>• Procedure to be followed if an applicant applies to restore a PVR application that has lapsed under section 7 of the PVR Act, or where a PVR has lapsed due to non-payment of the grant fee. Cabinet has agreed that the PVR Act should provide for such restorations, where the lapsing was unintentional.               <ul style="list-style-type: none"> <li>○ <a href="#">See clauses 87 – 100 PVR Bill; Regulations 110 – 115, and 116 – 121 Patents Regulations 2014.</a></li> </ul> </li> </ul>
<b>Registration of Assignments of applications and PVRs</b>	
Substitution of applicant	<ul style="list-style-type: none"> <li>• Procedures to be followed if a PVR application is assigned (substitution of applicant) including when a PVR applicant dies. The PVR Act and regulations do not deal with this issue at all               <ul style="list-style-type: none"> <li>○ <a href="#">See sections 129, 130 Patents Act 2013, clauses 70, 71 PVR Bill, Regulations 122 – 123 Patents Regulations 2014.</a></li> </ul> </li> </ul>

Regulation provision	Explanation
Registration of assignments of PVRs	<ul style="list-style-type: none"> <li>Procedures to be followed to register an assignment of a granted PVR, including when a PVR owner dies. The current PVR Act and regulations do not deal with this issue at all. <ul style="list-style-type: none"> <li><a href="#">See sections 165 – 167 of the Patents Act 2013; clauses 72-73 PVR Bill, Regulations 124, 125 Patents Regulations 2014.</a></li> </ul> </li> </ul>
<b>Administrative and other matters</b>	
PVR Register	<ul style="list-style-type: none"> <li>Sets out what must be recorded in the PVR Register established by the Act</li> <li>Access to, and searches of register</li> <li>Alteration and correction of register <ul style="list-style-type: none"> <li><a href="#">See Sections 194 – 205 Patents Act 2013; clauses 128-139 PVR Bill, Regulations 128 – 142 Patents Regulations 2014.</a></li> </ul> </li> </ul>
PVR Journal	<ul style="list-style-type: none"> <li>Sets out what information about PVR applications must be published <ul style="list-style-type: none"> <li><a href="#">See section 34 Plant Variety Rights Act 1987; clause 145 PVR Bill, Regulation 8 Plant Variety Rights Regulations 1988.</a></li> </ul> </li> </ul>
Miscellaneous provisions	<p>Includes provisions regarding:</p> <ul style="list-style-type: none"> <li>Form of evidence</li> <li>Amendment of documents</li> <li>Power to waive requirements of certain regulations, and requirements about maintenance of records <ul style="list-style-type: none"> <li><a href="#">See Regulations 144, 145, 149 and 151 Patents Regulations 2014.</a></li> </ul> </li> </ul>
<b>Procedural and evidential requirements for proceedings before Commissioner</b>	
<p>Proceedings before the Commissioner include hearings in relation to:</p> <ul style="list-style-type: none"> <li>refusal to grant a PVR</li> <li>pre-grant objections</li> <li>cancellation/nullification of PVRs</li> <li>restoration of lapsed applications/PVRs</li> <li>compulsory licenses</li> </ul>	<p>Sets out procedures that apply to proceedings before the Commissioner. These include:</p> <ul style="list-style-type: none"> <li>Documents that must be filed</li> <li>Case management</li> <li>Halt or consolidation of proceedings</li> <li>Extensions of time limits in proceedings</li> <li>Procedural and evidential requirements</li> <li>Form of hearings <ul style="list-style-type: none"> <li><a href="#">See Regulations 152 -175 Patents Regulations 2014.</a></li> </ul> </li> </ul>

## Question

3.1

Do you agree with the outline of regulations to be adapted from the Patents Regulations set out in the table above? If not, please explain which aspects of the outline you disagree with, and why?

## 4 PVR specific regulations

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29. This section of the consultation document deals with those aspects of the proposed PVR regulations where there are no direct equivalent provisions in the Patents Regulations 2014. These issues are analysed and discussed below. The provisions discussed are those relating to:
- Denominations
  - Examination
  - Compulsory licenses.

### Denominations

30. A denomination is a unique name that is given to the variety and which is used to identify the variety if a PVR is granted. The denomination submitted by the applicant must meet certain requirements. Currently the requirements are not set out in the PVR Act and regulations. However, in the PVR Bill they are set out in clause 35. A PVR cannot be granted on a new variety unless a denomination acceptable to the Commissioner has been submitted by the applicant.
31. The PVR Act requires applicants to supply a denomination within a prescribed period of making the application, but no period is actually prescribed. Clause 36 of the PVR Bill requires that a denomination must be provided with a PVR application. If the Commissioner objects to the denomination, the applicant must submit a replacement denomination within the period prescribed in the regulations. Failure to do so will result in the application lapsing.
32. In addition, the PVR Bill will also allow applicants to apply to the Commissioner to change the denomination supplied with an application at any time before grant of the PVR.
33. What should the prescribed period be? Any prescribed period must be long enough for the PVR applicant to devise a replacement denomination and check to see that no-one else has any rights in that particular denomination. But it should not be so long that it might delay the grant of a PVR.
34. The PVR Bill (like the PVR Act) provides third parties with an opportunity to object to a proposed denomination. If an applicant is required to submit a replacement denomination, third parties must have a reasonable time to find out about the replacement denomination, and decide whether or not they should object.

35. There appear to be two viable options:
- i. a replacement denomination must be provided within a set period;
  - ii. no set time period for submitting the denomination.

#### Option (i): denomination must be submitted within a set period

36. Under this option, the applicant must submit a replacement denomination within a set period of being notified of the Commissioner's objection. If a replacement denomination is not filed within the set period, the application lapses.
37. What should the set period be, and what, if any, extensions of this period should be available? MBIE proposes that a suitable period is three months, extendible by up to 1 month if the applicant requests an extension before the expiry of the three month period.
38. MBIE considers that a three month period (extendible by 1 month if needed) is ample time for the applicant to devise a new denomination and check to ensure that the new denomination will not conflict with any rights a third party might have in that denomination.
39. The main advantage of this approach is that an acceptable denomination will be associated with the variety concerned relatively quickly after the application has been filed. This will give ample time for third parties to object to any replacement denomination submitted by the applicant.
40. It will also mean that a PVR on the application can be granted promptly once the Commissioner is satisfied that the other criteria for granting a PVR have been met. This will limit unnecessary delays in grant. Delays in grant can lead to uncertainty for third parties as to what rights might or might not exist in a particular variety. In addition, the term of a PVR begins at grant, and applicants have provisional protection between filing of a PVR and grant. Unnecessary delays in grant can result in the effective term of protection for a new variety lasting for significantly longer than the terms provided for in the PVR Bill.
41. A disadvantage of this approach is that applicants may be put to the time and expense of devising a replacement denomination even though a PVR may not eventually be granted on their application. However, applicants must still incur the costs of devising a denomination to be submitted with their PVR application even though there is no guarantee at the time the application is filed that a PVR will be granted.

#### Option (ii) No set time period for submitting a replacement denomination

42. Under this option, if the Commissioner objects to a denomination, the applicant would have to submit a replacement denomination before a PVR can be granted on their application, but there would otherwise be no time limit set. A disadvantage of this approach is that applicants could delay grant by not submitting a new denomination even though the Commissioner was satisfied that all the other criteria for grant were met. As noted in the discussion of option (i), unnecessary delays in grant are undesirable.

43. An advantage of this option is that applicants could avoid putting in time and effort in devising a replacement denomination until they knew that a PVR would be granted on their application.

## Questions

4.1

Which of the two options for the time limit for submitting a replacement denomination do you support? Please explain why.

4.2

If you favour option (i) should the prescribed period for submitting a denomination be extendible? If so how long should any extension be, and on what grounds?

## Examination

44. Once a PVR application is made, the application is examined to determine whether or not the variety described in the application meets the criteria for grant of a PVR. The examination process will involve some form of growing trial, as well as consideration of documentary material provided by the applicant.
45. This part of the consultation document looks at what regulations may be required for the examination process. In particular it will look at the following:
- Time limits for:
    - providing information and propagating material for examination
    - paying trial and examination fees
  - Requirements surrounding growing trials where:
    - growing trials are conducted by persons other than the Commissioner, that the trials must be conducted under conditions approved in writing by the Commissioner
    - where two or more overseas test reports are available.

## Time limits for providing information and propagating material for examination

46. In order to complete examination of the application, the Commissioner may require information from the applicant. The Commissioner will also require the applicant to provide

propagating<sup>5</sup> material of the variety where the growing trial is conducted or arranged by the Commissioner. Propagating material may also be requested by the Commissioner to the PVR Reference Variety Collection maintained by the Commissioner<sup>6</sup>.

47. Section 5(2)(a) of the PVR Act requires the applicant to provide the following information to the Commissioner within the prescribed period from making the application:
- Information regarding the origin and breeding of the variety
  - A description of the botanical features of the variety
  - A description of those features of the variety that the applicant believes distinguish it from the other existing varieties.
48. The period for providing this information is prescribed in regulations 6(1)(a) and 6(2)(a) of the PVR regulations. The periods are:
- 18 months from making the application, if the growing trial is conducted by or on behalf of the applicant. The Commissioner may extend this period if satisfied that there are ‘exceptional circumstances’ justifying the extension.
  - 12 months from making the application in all other cases. The Commissioner may extend this period. Grounds on which the Commissioner can extend the period, and limits on the length of the extension are not specified.
49. Section 5(3) of the PVR Act allows the Commissioner to request that the following be provided within a prescribed period of making the request:
- Such quantities of the reproductive material of the variety as the Commissioner specifies
  - Any other information that the Commissioner thinks relevant.
50. The period for providing information or propagating material under section 5(3) is prescribed in regulations 6(1)(b) and 6(2)(b). The period is 12 months from the date of the Commissioner’s request. The Commissioner may extend this period. Grounds on which the Commissioner can extend the period, and limits on the length of the extension are not specified.
51. If the applicant does not provide the information or propagating material required under sections 5(2)(a) or 5(3) within the time prescribed, the application lapses under section 7(3).

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<sup>5</sup> The PVR Act uses the term “reproductive material”. The term “propagating material” is used in this consultation document as this is the term used in the 1991 Revision of the UPOV Convention (UPOV 91). The PVR Bill will align New Zealand’s PVR legislation with UPOV 91.

<sup>6</sup> See <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/availability-and-supply-of-plant-material/> and <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/variety-testing-in-new-zealand/>

### Is there a problem with the current arrangements?

52. The current approach provides for two sets of time periods for providing information and propagating material. One set runs from the date of making an application, the other from the date the Commissioner requests the information or propagating material. In addition, the length of the time periods depends on who carries out the growing trial.
53. The provisions for extending the time periods also differ. Where the growing trial is carried out by or on behalf of the applicant extensions are available under 'exceptional circumstances'. In all other cases, the prescribed times can be extended by the Commissioner, no grounds for giving an extension are specified, or limits on the extensions.
54. There does not seem to be any good reason for providing different prescribed time periods for different types of information. There also does not seem to be a good reason for providing different time periods depending on who is carrying out the growing trials.
55. It also seems undesirable to prescribe time periods which can then be extended potentially indefinitely, and where no grounds for extension are specified. This is a particular issue with the PVR system, where the PVR term does not begin until a PVR is granted, and applicants are provided with provisional protection between the date of application and the date of grant. As a result, delays in grant can extend the effective term of protection of a protected variety to well beyond the terms specified in the Act.
56. One result of this is that applicants will not necessarily be disadvantaged if grant is delayed, for example, because applicants are slow to provide information or propagating material when requested. However, such delays can cause uncertainty to third parties. They can also cause problems for the Commissioner, for example, in organising growing trials.

### MBIE's proposals

57. Clause 46 of the PVR Bill sets provides that an applicant must provide information or propagating material within the time period specified by the Commissioner. In dealing with the issues identified above, the following factors will need to be taken into account:
  - The nature of the PVR examination process is such that the time taken to complete the examination process can vary considerably depending on the plant species involved.
  - Prescribed periods need to be long enough to give applicants a reasonable period to respond to a request for information or propagating material, but not so long as to unnecessarily delay the examination process.
  - There can be situations where, due to circumstances beyond their control, applicants may not be able to provide the requested information or material within the time prescribed. This could mean that some applicants need to request multiple extensions of time.

58. Arrangements for prescribing time periods need to be flexible enough to take account of the factors identified above, while still providing applicants, third parties and the Commissioner a degree of certainty as to how the examination process is progressing and when it is likely to end. In light of this, MBIE considers that it is not feasible to propose discrete options. Instead MBIE has set out below a proposed approach, and seeks submitters' views on various aspects of this proposal.
59. The PVR Bill, in clause 46, provides that, where the Commissioner requests information or propagating material from an applicant, the information or material must be provided within a prescribed period of the date of the request, where a period is prescribed. This approach would apply regardless of the nature of the information or material required, or who conducts the growing trials. As is currently the case, if the information is not provided within the prescribed period, the application will lapse.
60. So what should the prescribed periods be, and under what circumstances should extensions be available? MBIE proposes that the prescribed time period be at least one month from the date of request, and no more than 12 months from the date of the request. This period could be extended as discussed in paragraph 62 below.
61. This approach gives the Commissioner the ability to set time periods of less than 12 months (but more than 1 month) if the Commissioner considers that the nature of the information or material requested justifies a shorter period. The minimum time period of one month is considered a reasonable minimum time for complying with a request.
62. Under what circumstances should extensions be permitted, and how long should the extension be? MBIE proposes that extension should be available under the following conditions:
- Extensions of time of up to 12 months can be granted; this allows the Commissioner the flexibility to grant extensions of less than 12 months if the Commissioner considers that a lesser time is justified.
  - Extensions of time must be requested by the applicant, with the request being made before the time period ends.
  - Extensions will only be granted if the Commissioner considers that an extension is reasonable in the circumstances<sup>7</sup>. This will require the applicant to provide reasons for granting an extension.
  - There is no limit on the number of extensions provided the conditions set out above are met.
63. MBIE acknowledges that there will be circumstances where applicants may have to request extensions multiple times. For example, where applicants have to obtain propagating material of their varieties from overseas, there may be considerable delays in getting the

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<sup>7</sup> The term 'reasonable in the circumstances' is taken from Regulation 161 of the Patents Regulations 2014.

material through the Ministry for Primary Industries' quarantine and biosecurity processes. This might result in these applicants having to apply for extensions of time every 12 months.

64. We appreciate that some applicants might see this as onerous. However, this approach ensures that the Commissioner is kept informed of the progress of the application at regular intervals. Extensions of time requests will appear in the application information appearing on the Commissioner's website, so third parties will also be aware of the progress of the application.

## Questions

4.3

Do you agree with MBIE's proposals for the time limits for providing information and propagating material in relation to a PVR application? If not please explain why.

4.4

If you disagree with MBIE's proposal, what alternative time limit regime should be adopted?

## Time limits for paying trial and examination fees

65. Section 5(2)(c) of the PVR Act requires the applicant to pay the prescribed trial or examination fee within the prescribed period after making an application. However, no period is actually prescribed. Failure to pay the fee within the prescribed period results in the application lapsing under section 7(3).
66. Trial fees cover the cost of growing trials where these are conducted by or arranged by the Commissioner. Examination fees cover the cost of examining the results of growing trials where these are not conducted or arranged by the Commissioner.
67. In the case of growing trials conducted or arranged by the Commissioner, they may be conducted over two or more growing seasons depending on the species involved and results of the trials. A fee is required for each growing season, as specified in the regulations.
68. The PVR Bill requires prescribed fees to be paid within a prescribed period after the Commissioner requests payment (clause 48). The Bill also empowers the Commissioner to defer taking any action in respect of an application if a fee has not been paid. For example the Commissioner could refuse to assess the results of a growing trial carried out by a person other than the Commissioner if the examination fee has not been paid.
69. Submitters to the 'outstanding issues' discussion document (in 2020) on this issue supported this approach, and, where submitters mentioned a time period, 2 months was the most common suggestion. On this basis, MBIE proposes that the prescribed period for paying the trial and examination fee be two months from the date the Commissioner requests payment.
70. Should extensions of this time be available? Applicants will be aware when they file an application that they will have to pay trial or examination fees at some stage in the

examination process, so will have ample opportunity to ensure that funds are available when payment is requested.

71. On this basis, MBIE proposes that extensions of the two month period should only be available if the Commissioner is satisfied that there are genuine and exceptional circumstances<sup>8</sup> justifying the extension.
72. In this context, ‘exceptional circumstances’ means circumstances that are unusual and ‘out of the common run’. They do not have to be rare, but they do have to be an exception rather than the rule. This requirement provides a high threshold, and few extensions on this ground are likely to be granted.

## Questions

- |     |                                                                                                                                                                                                                |
|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4.5 | Do you consider that the two month period for paying trial or examination fees is reasonable? If not, please explain why.                                                                                      |
| 4.6 | MBIE proposes that the prescribed period be extendible only under genuine and exceptional circumstances. Do you agree with this? If not, what extension (if any) should be available, and under what criteria? |

## Requirements surrounding growing trials

73. This part of the consultation document considers what regulations should be provided in relation to growing trials.
74. The PVR Act and regulations do not require growing trials, and do not regulate the form of growing trials, or the conditions under which they must be conducted. Despite this, the current approach is that compliance with the criteria for grant (**the DUS criteria**<sup>9</sup>) cannot be assessed without a growing trial. That is, a growing trial is required for all applications. The growing trial arrangement is determined by the Commissioner according to the species involved – the applicant is usually not able to choose the form of growing trial.
75. In determining the most appropriate growing trial arrangement, the Commissioner will choose the arrangement that will ensure that any PVR granted would be robust and that would not result in the grant of PVR over varieties that were common knowledge in New Zealand.
76. The PVR Bill, in clause 47, requires that a PVR cannot be granted unless there has been a growing trial. The growing trial could be conducted in New Zealand, or could be a growing trial carried out by, or under the supervision of, an authority of a UPOV member state

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<sup>8</sup> The term ‘genuine and exceptional circumstances’ is taken from Regulation 161 of the Patents Regulations 2014.

<sup>9</sup> The DUS criteria are Distinctness, Uniformity and Stability.

responsible for granting PVRs. The Bill also gives the Commissioner the power to decide the form of growing trial in respect of an application.

77. What (if any) regulations are needed regarding growing trials? MBIE considers that regulations may be needed:
- Where growing trials are carried out by or on behalf of the applicant, prescribing the conditions under which the trial must be carried out.
  - Where the Commissioner decides to rely on the report of a growing trial carried out by, or under the supervision of an authority of a UPOV member state responsible for granting PVR, which report the Commissioner must rely on if there is more than one report available.

### Prescribed conditions for growing trials

78. Some growing trials will be conducted by or on behalf of the applicant. That is, the trial will be conducted by the applicant, or the applicant will engage a third party to carry out the trial. For such trials, the Commissioner will specify the conditions under which the trial must be conducted.
79. It is proposed that the regulations will empower the Commissioner to direct the following details of a growing trial in these circumstances:
- The location and timing of the trial
  - Trial design and varieties to be included
  - Conditions under which the trial must take place
  - How the trial will be overseen and by whom.

### Growing trials conducted overseas

80. For some varieties the Commissioner may decide to rely on the report of a growing trial conducted by, or under the supervision of, an authority of a UPOV member state (**overseas authority**) responsible for granting PVR. The decision on whether or not to rely on an overseas growing trial would be made by the Commissioner – the applicant would not get a choice. Any disagreement between the applicant and Commissioner on this issue could be resolved with a hearing.
81. There may be applications where there may be two or more reports available to the Commissioner, from different overseas authorities. These arise because the applicant has applied for PVR in two or more UPOV member states.
82. In such cases, which report should be used by the Commissioner? Current practice is that the Commissioner decides which report should be used. However, some applicants have taken issue with this. There are two approaches that could be taken in the regulations:

- i. Codify the current approach – that the Commissioner decides which report to rely on (**preferred option**);
- ii. the applicant nominates the report that they would like the Commissioner to use

#### Option (i): the Commissioner determines which report to use (preferred option)

83. Under this option, if there are two or more reports from overseas authorities relating to a particular variety, the Commissioner would decide which one to use. Factors the Commissioner would take into account would include:
- The basis of the report: is the report based on a growing trial carried out or supervised by the overseas authority from which the report is obtained, or is the report based on a report of a growing trial carried out by a second overseas authority? If the latter, the Commissioner would rely on the report carried out in the second overseas authority, if available. This avoids the situation where the Commissioner relies on a report from an overseas authority that is just a report on a report from another overseas authority.
  - Whether the physical conditions (such as climate or soil type) under which the overseas trial was conducted were similar to those in New Zealand.
  - Whether the reference varieties used in the trial were representative of the varieties of common knowledge available in New Zealand.
84. The main advantage of this approach is that the Commissioner could choose the report which could give the greatest assurance that the variety concerned would meet the criteria for grant of a PVR if it was the subject of a growing trial in New Zealand. This would ensure that the PVR granted is robust and would not result in the grant of PVR over a variety that is a variety of common knowledge in New Zealand. For this reason, this option is preferred.
85. Some overseas authorities charge a fee for use of their test reports. The Commissioner would have to pass this on to the applicant. Other authorities do not charge a fee. In some cases the report relied on by the Commissioner may be the most expensive of the reports available. The costs of overseas reports varies, but is usually of the order of several hundred dollars. Some applicants may see this as a disadvantage as they may be looking to minimise their costs.

#### Option (ii): Report nominated by applicant

86. Adoption of this option would mean that if there were two or more reports from overseas authorities, the Commissioner would rely on the one nominated by the applicant. However, the applicant's choice may be influenced by factors other than robustness of grant. For example, they may be tempted to choose the cheapest report in order to keep their costs down. Or they may choose the report that is most favourable to the applicant. For this reason, this option is not preferred.

## Questions

4.7

MBIE has proposed that the regulations empower the Commissioner to set the conditions of a growing trial. Do you agree with the conditions proposed by MBIE? Are there any other conditions that you think the Commissioner should have the power to set?

4.8

MBIE proposes that where the Commissioner chooses to rely on a growing trial conducted by an overseas authority, and two more such reports are available, the Commissioner should determine which report to rely on. Do you agree with this proposal? If not please explain why.

## Compulsory licenses

87. Section 21 of the PVR Act provides for the grant of compulsory licenses. The PVR Bill will continue to make provision for compulsory licenses (see Part 7). The PVR Act provision requires the Commissioner to give the PVR owner (but not the applicant for the compulsory license) a reasonable opportunity to be heard before making a decision, but otherwise there is nothing in the PVR Act or regulations to indicate the procedure to be followed by the Commissioner.
88. A problem with this approach is that it is unfair to the applicant for a compulsory license. There is no requirement to give the applicant an opportunity to be heard, or for the Commissioner to consider any submissions made by the applicant. In addition the lack of a prescribed procedure can mean that proceedings may be unnecessarily protracted, for example, because there are no time limits for either party to the application to provide evidence or other information to support their case.
89. As mentioned in paragraph 12, in a recent compulsory license application, a procedure based on the trade mark opposition procedure in the Trade Marks Act 2002 was agreed upon by the parties concerned in the absence of any prescribed procedure. MBIE proposes that the same approach be adopted in the PVR regulations. This would mean that, when a compulsory license application is filed, a copy of the application is sent to the PVR owner, and the applicant and PVR owner would need to do the following:
- The PVR owner may send a counter-statement to the application for a compulsory license to the Commissioner, within two months of the application being sent to the PVR owner.
  - If a counter-statement is received, the Commissioner must send a copy of the counter-statement to the applicant for a compulsory license. If no counter-statement is received, the Commissioner must invite the applicant to file evidence.
  - The applicant must file evidence in support of its application, within 2 months of receiving the counter-statement, or within 2 months of the Commissioner inviting

the applicant to file evidence. If no evidence is filed by the applicant within the two month period, the application for a compulsory license will be deemed to be withdrawn.

- The PVR owner may file its evidence opposing the grant of a compulsory license within 2 months of receiving a copy of the applicant's evidence.
- The applicant may, if the PVR owner has filed evidence, file evidence strictly in reply within one month of receiving the applicant's evidence.

90. The time limits mentioned above can be extended by up to three months if the Commissioner is satisfied that the extension is justified in the circumstances. The times could also be extended if the Commissioner is satisfied that there are genuine and exceptional circumstances that justify the extension<sup>10</sup>.
91. Once the steps set out above are completed, the Commissioner will then offer the applicant and PVR owner an opportunity to be heard before making a decision on the compulsory license application.
92. This approach ensures that both parties have an opportunity to make their case to the Commissioner. In addition it will ensure that a final decision as to whether or not to grant a compulsory license is made without unnecessary delay.

## Questions

4.9

Do you agree with the proposed procedure for dealing with compulsory license applications? If not please explain why.

4.10

If you disagree with the proposed procedure, what other procedure could be used?

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<sup>10</sup> See regulation 32 Trade Mark Regulations 2003.

## 5 Other Issues

93. This section of the consultation document deals with issues where adapting the Patents Regulations would result in a significant change from the approach taken in the current PVR Act and Regulations. The provisions involved relate to:
- Objections before grant
  - Requests for propagating material or information from PVR owners.
94. This section also seeks feedback on the proposed list of non-indigenous species of significance.

### Objections before grant

95. Section 6 of the PVR Act provides that any person can make objections in relation to a PVR application. The principle behind section 6 is similar to that behind the pre-grant opposition process in the Patents Act 2013. That is, it is intended assist in ensuring that PVRs are only granted when the criteria for grant are met. Clause 49 of the PVR Bill provides for opposition to grant of a PVR, on the same grounds as section 6 of the PVR Act.
96. Under section 6, a person can object that:
- the denomination proposed by an applicant should not be approved by the Commissioner
  - the owner is not the “owner” (i.e. the breeder or a successor in title) of the variety concerned
  - the variety concerned is not new, distinct, stable and homogeneous (**the DUS criteria**).
97. Objections to the denomination must be made within three months of public notification of the denomination. Objections on the other grounds can be made at any time before grant.
98. The Act provides that, if an objection is made under section 6, the Commissioner must not grant a PVR unless the applicant and objector are given a reasonable opportunity to be heard. However, neither the Act or regulations set out any procedure to be followed if an objection is made. The only time frame specified is for objections to the denomination.
99. This is unsatisfactory. In the absence of any procedure or timeframe, an objector could unreasonably delay grant by being slow to provide evidence or other documentation to support their objection. The Act and regulations do not give the Commissioner the power to dismiss an objection in these circumstances.

100. It is not in the public interest, or the interests of the applicant, for grant of a PVR to be delayed unreasonably. However it is also not in the public interest for a PVR to be granted for varieties that do not meet the criteria for grant. Any procedure for objections before grant will need to provide an appropriate balance between these competing interests.
101. On this basis, MBIE proposes that the Act and regulations provide for a procedure that clearly sets out what is required from objectors and applicants, and the time frames involved before the Commissioner offers the applicant and objector the opportunity to be heard.

## Proposed procedure for objections before grant

102. The objection process in section 6 has similarities with the pre-grant opposition procedure in the Patents Act 2013. The procedures associated with pre-grant opposition are intended to provide a balance between avoiding undue delay in granting a patent, while helping to ensure that patents are not granted for inventions that do not meet the criteria for grant.
103. Taking these factors into account, MBIE proposes that the procedure for objections to grant be based on the patents opposition procedure. This procedure, which would be set out in the regulations, would operate as follows:
- The objector would file a notice of opposition with the Commissioner setting out the ground(s) of objection. The notice of opposition would have to be accompanied by a statement of case setting out the facts which the objector is relying on, and the outcome sought by the objector. The Commissioner sends the notice of opposition to the applicant.
  - If the applicant wishes to contest the objection, the applicant must then file a counter-statement setting out why the applicant is contesting the objection(s) raised by the objector. This must be filed within 2 months of receiving the notice of objection. If a counter-statement is not filed within the time allowed, the PVR application is deemed to be withdrawn.
  - The objector may then file evidence in support of the objection. This must be filed within four months of receiving the applicant's counterstatement.
  - The applicant may then file evidence in support of its case within four months of receiving the objector's evidence. If the objector has not filed any evidence, the applicant's evidence must be filed within four months of the date by which the objector's evidence might have been filed.
  - The objector may, within three months of receiving the applicant's evidence, file evidence strictly in reply to the applicant's evidence (that is, the objector cannot introduce any new evidence at this stage).
104. The time limits set out above would be extendible by up to three months if the Commissioner is satisfied that an extension is reasonable in the circumstances. Extensions of

longer than three months could be provided if the Commissioner was satisfied that there were exceptional circumstances justifying the grant of an extension<sup>11</sup>.

105. Once the steps set out above have been completed, the objection would be ready for a hearing. It would be up to the Commissioner to decide, after consulting the parties, when it was appropriate to hold a hearing, if this is what one or both parties want. For example, the Commissioner may not want to hold a hearing until the results of growing trials for the variety involved are available.
106. If, after considering the result of the growing trial, the Commissioner decides to refuse the application, it may be that there would be no need for a hearing on the objection. Any decision by the Commissioner on the timing of a hearing could be the subject of a hearing under clause 118 of the PVR Bill<sup>12</sup>.

## Questions

5.1

Do you agree with the procedure proposed for objections before grant? If not please explain why.

5.2

If you disagree with the proposed procedure, what alternative procedure do you suggest be adopted?

## Requests for propagating material or information from PVR owners

107. Clause 69 of the PVR Bill gives the Commissioner the power to request the following in relation to a granted PVR:
  - Information reasonably needed by the Commissioner to verify the maintenance of the variety to which the PVR relates, or for any other purpose related to that variety (clause 69(1)).
  - Propagating material if the Commissioner considers that this is necessary or desirable for the purposes of exercising or performing the Commissioner's functions, duties, or powers under the Act (clause 69(2)).
108. The information or propagating material must be provided to the Commissioner within the time prescribed in the regulations. If the PVR owner fails to provide the information or

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<sup>11</sup> This approach to time extension of time limits is taken from Regulation 161 of the Patents Regulations 2014.

<sup>12</sup> Clause 118 provides that the Commissioner must not exercise a discretionary power under the Act or regulations adverse to an applicant or other party to a proceeding before the Commissioner without giving the person a reasonable opportunity to be heard.

material within the prescribed period, without reasonable excuse, the Commissioner may cancel the PVR.

109. These requirements are not new; both appear in section 16 of the PVR Act. The information or propagating material must be provided within a time period specified by the Commissioner. There is nothing in the PVR Act or regulations that gives any guidance on setting the time period. If the PVR owner does not provide the material or information within the time specified, the Commissioner may cancel the PVR.
110. What time period for providing the information or propagating material should be prescribed? Should the time period be extendible, and if so on what grounds?

### Time period for providing information or propagating material

111. There appear to be two viable options:
- i. Set a minimum time period that must be specified by the Commissioner, but no upper limit
  - ii. Set a minimum and a maximum time period for complying with the Commissioner
112. At this time, MBIE has not decided upon a preferred option.

#### Option (i): Set a minimum time period (but no maximum)

113. Under this option, the time limit set by the Commissioner must be at least a minimum time set in the regulations, but with no upper time limit set. Setting a minimum time limit ensures that PVR owners are given a reasonable minimum time to respond to requests.
114. The Commissioner would set the time period (subject to the minimum time limit) based on the Commissioner's assessment of what would be a reasonable time for complying with the request. In making such an assessment, the Commissioner would take account of such things as the nature of the information or material requested, and how easy it would be for the PVR owner to provide it. MBIE considers that a reasonable minimum would be one month from the date of the request.
115. An advantage of this approach is that it is flexible. PVR owners' ability to provide information or propagating material may vary depending on the varieties or species involved. Allowing the Commissioner to set the time period allows the time period to be tailored to the PVR owner's ability to meet the request.
116. A disadvantage of an open-ended time limit is that it relies on the Commissioner having sufficient information to determine what might be reasonable in the circumstances. This could lead to disputes if the PVR owner and Commissioner disagree on what is a reasonable time

## Option (ii): Set maximum and minimum time periods

117. This option involves setting minimum and maximum times for providing the information or material requested by the Commissioner. The minimum could be the one month time period suggested in option (i). The maximum could be 12 months. The Commissioner could set a time limit of less than 12 months (but no less than the one month minimum) if they considered a shorter period to be more justified.
118. This would be consistent with the approach taken to setting time limits for the provision of information and propagating material during examination of a PVR application, as described earlier in this discussion document. There seems to be no good reason for different time limits to be prescribed for the purposes of clause 69.
119. An advantage of this approach is that the Commissioner does not have to guess what might be a reasonable time to comply with a request. Setting the upper limit of the time period also reduces the potential for disagreements between the Commissioner and PVR owner over what is a reasonable time to respond.

## Extensions of the prescribed time period

120. Should the time period prescribed for complying with a request under clause 69 be extendible? Clause 69(4) of the PVR Bill provides that, if a PVR owner fails, without reasonable excuse, to comply with such a request within the time prescribed, the PVR may be cancelled. The use of the term ‘without reasonable excuse’ suggests that if the PVR owner is able to provide a reasonable excuse for not complying with a request within the prescribed time, they do not have to comply with it<sup>13</sup>. This is because the penalty for not complying, cancellation of the PVR, will no longer be available to the Commissioner.
121. On this basis, there does not appear to be a need for the time period for complying with a request to be extendible. If it was extendible, the PVR owner would have to provide reasons why they could not comply with the request within the time limit in order to get the extension. If these reasons were sufficient to justify an extension of time, they would likely constitute a ‘reasonable excuse’ for not supplying the information or material.

## Questions

5.3

Do you agree with the proposed time periods for providing information or propagating material relating to a granted PVR? If not please explain why.

5.4

MBIE proposes that the proposed time periods not be extendible. Do you agree with this proposal? If not what extensions should be available and under what grounds should extensions be provided?

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<sup>13</sup> Even though the PVR owner may have reasonable excuse for not providing information or material within the prescribed period, the PVR owner may still be willing to provide the information or material at a later date.

## Non-indigenous species of significance

122. In August 2020, MBIE published a discussion paper ‘*Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues*’. This included a discussion on ‘non-indigenous species of significance’. These were defined as species that arrived in New Zealand on the migrating waka. Although these species are not indigenous to New Zealand, they are taonga.
123. The discussion concerned proposals that the plant variety rights regime include provisions setting out procedures when a PVR application is received relating to indigenous species and non-indigenous species of significance (**the Treaty provisions**). A list of species based on research carried out by Karaitiana Taiuru was included in the discussion paper. This list is repeated below:

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>Marrita fraxinea</i>
Perei	<i>Gastrodia Cunninghami</i> and <i>Orthoceras strictum</i>
Kūmara	<i>Ipomoea batatas</i>
Taro	<i>Colocasia esulenta</i>
Tī pore	Pacific cabbage tree, <i>Cordyline fruticose</i>
Whikaho	Yam, <i>Dioscorea</i> species

124. The discussion document proposed that the list along the lines of that set out above would be included in regulations. Overall, submitters were in favour of this. There appeared to be a general consensus that the list should be a suitable starting point. Although the list will be set out in the regulations, this does not mean that the list cannot be amended or adapted as time goes by.
125. The Treaty provisions in the PVR Bill will not come into effect until at least 12 months after the entry into force of the remainder of the Bill. This is to give time to form the Māori Plant Varieties Committee to be established by the Bill and prepare guidelines for breeders and kaitiaki. It will also give time for plant breeders working with these species time to adapt their processes to the new requirements in the Bill.
126. This raises the question of when the regulations listing non-indigenous species of significance should be made. They will not be needed until the Bill’s Treaty provisions enter into force, so the making and gazetting of the regulations could be left until then. This would allow for the Māori Plant Varieties Committee to undertake further consultations on the list if the Committee considered this necessary.
127. On the other hand, if the regulation listing non-indigenous species of significance enter into force along with the non-Treaty provisions of the Bill, this could give plant breeders certainty as to which non-indigenous species will be subject to the Treaty provisions.

## Questions

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|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>5.5</b> | When should the regulations listing non-indigenous species of significance enter into force? Should they enter into force with the Bill's non-Treaty provisions, or be left until the Treaty provisions come into force? Please give reasons for your response. |
| <b>5.6</b> | Do you have any other comments on the list and the entries in it?                                                                                                                                                                                               |

