

Regulatory Impact Statement: Regulations to accompany new Plant Variety Rights Act

Coversheet

Purpose of Document	
Decision sought:	<i>Analysis produced to inform final policy decisions on regulations to accompany the new Plant Variety Rights Act</i>
Advising agencies:	<i>Ministry of Business, Innovation and Employment</i>
Proposing Ministers:	<i>Minister of Commerce and Consumer Affairs</i>
Date finalised:	<i>16 November 2021</i>

Problem Definition

A Plant Variety Rights Bill intended to replace the Plant Variety Rights Act 1987 has been introduced to Parliament. Regulations will be required to implement the new Bill and deal with inadequacies in the current regulations, the Plant Variety Rights Regulations 1988. The current regulations do not reflect the fact that the Intellectual Property Office of New Zealand now conducts most of its operations online. They do not mention many procedural aspects of the process for obtaining a plant variety right, leaving these issues to the discretion of the Commissioner of Plant Variety Rights. This can lead to uncertainty and unnecessary costs for plant breeders and third parties.

Executive Summary

This Regulatory Impact Statement has been produced as part of the review of the Plant Variety Rights Act 1987 (**the PVR Act**).

The PVR Act provides for the grant of intellectual property rights called ‘plant variety rights’ (**PVRs**). These provide PVR owners with the exclusive right, for a limited term, to produce for sale and sell propagating material¹ of their new plant varieties. The PVR Act is administered by the Intellectual Property Office of New Zealand (**IPONZ**). PVRs are granted after an examination process carried out by the Commissioner of Plant Variety Rights (**the Commissioner**).

A bill, the Plant Variety Rights Bill (**the Bill**), to replace the PVR Act was introduced to Parliament in May 2021.

The existing regulations associated with the PVR Act are the Plant Variety Rights Regulations 1988 (**the PVR Regulations**). There are, for example, provisions in the PVR Act which refer to something prescribed in the regulations, but where the PVR Regulations are silent. The PVR Regulations do not mention many procedural aspects relating to the process for obtaining Plant Variety Rights, examining applications, and dealing with issues that arise after grant of a PVR. These issues are largely left to the discretion of the Commissioner. In addition, the PVR Regulations do not take account of the fact that

¹ Propagating material includes seed of sexually reproduced varieties, and cuttings of asexually reproduced varieties.

IPONZ now conducts most of its operations online. This can leave PVR applicants uncertain of their rights and obligations under the Act. In addition, the Bill provides for some procedures that are not in the PVR Act.

Consequently, new regulations to replace the 1988 regulations are required, rather than amending the 1988 Regulations.

MBIE considers that the regulations should:

- i. be clear and understandable and provide certainty for PVR applicants, PVR owners, and third parties without imposing unnecessary costs or complexity on these groups
- ii. appropriately balance the interests of PVR applicants, PVR owners, third parties and the public
- iii. allow the Commissioner to implement the provisions of the PVR Bill efficiently and transparently
- iv. be consistent, to the extent practical, with the regulations for the other intellectual property legislation administered by IPONZ.

Many of the procedural aspects of the PVR regime are very similar to the corresponding procedures provided for under the Patents Regulations 2014. For these procedures it is proposed that the new PVR regulations be adapted from the corresponding provisions in the Patents Regulations 2014. New regulations will be required where processes in the PVR Bill differ significantly from the corresponding processes in the Patents Act and regulations.

Adopting this approach will help to minimise the costs involved in implementing the new regulations. The Plant Variety Rights system operates on a cost-recovery basis from fees charged to applicants for PVRs. Currently there are only around 100 PVR applications made each year. This means any additional costs in developing and maintaining systems to implement the regulations could have a significant impact on the fees paid by individual applicants.

The new regulations primarily impact plant breeders, both local and overseas, wishing to obtain PVRs over their new plant varieties in New Zealand. They may also impact the interests of third parties such as growers of new plant varieties and users of harvested material of such varieties, and the public as the consumers of harvested material and products made from them.

Submissions on the proposed approach to the regulations largely came from plant breeders and growers. These submitters generally supported MBIE's preferred option to model the new PVR regulations on corresponding provisions in the Patents Regulations 2014. For those procedures where new regulations are required, breeders generally agreed with MBIE's preferred option. In some cases though, breeders suggested some modifications to the preferred option, which MBIE has accepted.

Submitters representing Māori largely confined their comments on the proposed regulations to the list of non-indigenous species of significance defined in clause 54 of the Bill. This RIS does not deal with this list.

Limitations and Constraints on Analysis

The content of the proposed regulations is determined by the provisions of the new PVR Bill. No formal cost-benefit analysis has been carried out for any of the options. This is an area where it would be difficult, if not impossible to obtain quantitative data on costs and

benefits. Instead, qualitative judgements of the impacts (positive and negative) of the options considered have been used to determine the preferred options.

Responsible Manager (completed by relevant manager)



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Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The PVR Act was passed in 1987 to bring New Zealand's PVR regime into line with the 1978 version of the International Convention on the Protection of New Varieties of Plants (**UPOV Convention**). The UPOV Convention is the principal international agreement relating to intellectual property protection over new plant varieties.
2. The Trans-Pacific Partnership Agreement² (**TPP**), concluded in 2015, included a requirement for New Zealand to either ratify the 1991 revision of the UPOV Convention, or to align with it within three years of the TPP entering into force for New Zealand. In the latter case, the alignment was subject to conditions that might be necessary for the Crown to comply with its obligations under Te Tiriti o Waitangi.
3. In addition, the plant breeding industry has changed significantly since 1987 as research and development is increasingly carried out by private organisations or Crown Research Institutes. Certain industry groups (mainly plant breeders) had been calling for a review for some time, in particular because the majority of our main trading partners (including Australia, the United States of America, Japan, the European Union (**EU**) and Canada) have ratified the most recent (1991) version of the UPOV Convention (**UPOV 91**). They argued that bringing our legislation more into line with UPOV 91 members would encourage greater investment by local plant breeders in breeding new plant varieties, as well as the importation of new varieties into New Zealand.
4. As a result, Cabinet decided, in August 2016 to begin a review of the PVR Act. This review has resulted in the drafting of a new PVR Bill, intended to replace the PVR Act. This Bill was introduced to Parliament in May 2021.

What is the policy problem or opportunity?

5. Regulations will be required to implement the provisions of the PVR Bill. The regulations mainly deal with procedural and administrative issues relating to implementation of the Bill (as opposed to, for example, the criteria for granting a PVR).
6. The existing regulations associated with the PVR Act are the PVR Regulations 1988. There are a number of inadequacies with these regulations.
7. For example, there are provisions in the PVR Act that refer to something prescribed in the regulations, but where the regulations are silent. In addition, the PVR Regulations are silent on many procedural aspects of the process for applying for PVRs, examining the applications, and dealing with issues that may arise after grant of a PVR.
8. The PVR Regulations effectively leave many of the administrative and procedural issues to the discretion of the Commissioner. 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.
9. This may lead to unnecessary expense and delay for applicants and third parties if proceedings are initiated under the Act. Applicants may dispute the Commissioner's powers to set such things as time limits or impose particular requirements. Dealing with these issues can lead to unnecessary costs for applicants and for the Commissioner. Since the costs of the PVR regime are met from fees charged to applicants and PVR owners, any additional costs to the Commissioner must be recovered from these fees.

² Now the CPTPP.

10. There may also be unnecessary delays in granting a PVR. Delays in grant can advantage applicants at the expense of third parties and the public. This is because the term of a PVR begins when the PVR is granted. Unnecessary delays in grant can mean that the term of a PVR is effectively extended well beyond the maximum terms prescribed in the Bill. In some cases applicants may be disadvantaged by delays in grant (for example, because they wish to take action against an infringement of their PVRs).
11. Consequently, new regulations to replace the PVR Regulations are required, rather than just amending the PVR Regulations.

What objectives are sought in relation to the policy problem?

12. These new regulations should:
 - i. be clear and understandable and provide certainty for PVR applicants, PVR owners, and third parties without imposing unnecessary costs or complexity on these groups
 - ii. appropriately balance the interests of PVR applicants, PVR owners, third parties and the public
 - iii. allow the Commissioner to implement the provisions of the PVR Bill efficiently and transparently
 - iv. be consistent, to the extent practical, with the regulations for the other intellectual property legislation administered by IPONZ.

Section 2: Deciding upon an option to address the policy problem

13. The following analysis for the regulations to accompany the PVR Bill is in two parts:
 - i. options for regulations dealing with those administrative procedures which are the same as, or very similar to, the procedures in other intellectual property legislation administered by IPONZ (**common procedures**); and
 - ii. options for regulations that will deal with procedures specific to the PVR regime.

What criteria will be used to evaluate the options?

14. MBIE considers that the regulations should:
 - i. meet the objectives set out above
 - ii. provide certainty for plant breeders, third parties and the public about their rights and obligations under the regulations
 - iii. ensure that decisions made by the Commissioner under the regulations are made in a timely fashion, and are fair and transparent for plant breeders, third parties and the public
 - iv. avoid imposing unnecessary costs and complexity on the Commissioner, plant breeders, third parties and the public

2.1 Regulations for the common procedures

15. The common procedures include processes regulating proceedings before the Commissioner such as hearings, oppositions and revocations. They also include administrative procedures such as those relating to the registration or assignments of PVRs and PVR applications.

What scope will options be considered within?

16. The PVR Bill will require regulations to implement its provisions. As described earlier in this document, the current PVR Regulations are no longer fit for purpose, and a new set of regulations will be required.

What options are being considered?

17. In developing these regulations there are essentially two options (in addition to the status quo, i.e. retaining the current PVR Regulations):
 - i. draft a new set of regulations from scratch without reference to regulations developed for other intellectual property legislation administered by IPONZ
 - ii. base the common regulations, to the extent possible, on relevant provisions of the Patents Regulations 2014.

Option (i) Retain the PVR Regulations (the status quo)

18. The PVR Regulations have a number of inadequacies. They do not reflect the fact that IPONZ currently conducts its operations online; rather they assume that all interactions with the Commissioner are on paper. There are provisions in the PVR Act which reference matters prescribed in the regulations, where the PVR Regulations are silent.
19. There are also many procedural and administrative issues relating to such things as extensions of time limits where the regulations are also silent, or leave matters largely to the discretion of the Commissioner. These include procedures for objections to grant of a PVR, cancellation and nullification of a PVR, and hearings before the Commissioner.
20. This is undesirable. It leaves plant breeders and others who interact with the Commissioner uncertain of their rights and obligations under the regulations. It may

also lead to disputes if those who interact with the Commissioner question the right of the Commissioner to make particular decisions, or impose particular requirements.

21. The lack of procedures for resolving disputes, for example, between the Commissioner and PVR applicants, or between PVR owners and third parties challenging the validity of granted PVRs, can lead to long drawn-out proceedings. This can impose unnecessary costs on the parties concerned including the Commissioner. The Commissioner has no explicit power to bring proceedings to a close and make a final decision.

Option (ii) – draft a new set of regulations

22. MBIE considers that this option is not a viable option and that option (iii) is the only one worth pursuing. While option (ii) would likely meet the last three criteria set out above, it would not meet the first of the objectives set out above of allowing the Commissioner to implement the provisions of the PVR Bill in an efficient and cost-effective manner.
23. Providing a completely new set of regulations is likely to impose significant implementation costs on IPONZ if procedures under those regulations are significantly different from the procedures currently implemented by IPONZ for other intellectual property legislation. It would not be possible for IPONZ to adapt existing processes. As IPONZ runs an all-electronic system there could be significant IT costs. There would also be additional costs in developing and maintaining staff training material and information for persons using the PVR regime.
24. The costs of operating and maintaining the PVR regime are recovered from fees charged to PVR applicants and PVR owners. The number of applications received each year is small, around 100 applications per year. As a result, high implementation costs could have a significant impact on the fees paid by PVR applicants and PVR owners.
25. On this basis, option (ii) has not been considered further.

Option (iii) – Regulations adapted from the Patents Regulations 2014

26. Under this option, the common regulations would be based on relevant provisions of the Patents Regulations 2014. The PVR Bill contains a number of provisions which are the same as, or very similar to, provisions in the Patents Act 2013. These include provisions relating to the filing of applications, opposition to grant, restoration of lapsed applications and PVRs, and revocation of PVRs.
27. Some of the provisions in the PVR Bill are also similar to those in other intellectual property legislation administered by IPONZ. These include provisions relating to such things as hearings before the relevant Commissioner, and some administrative provisions.
28. On this basis, it is proposed that the common regulations be adapted from, as far as practicable, the relevant provisions of the Patents Regulations 2014. This approach avoids the need for IPONZ to establish separate systems for PVRs. It makes more efficient use of IPONZ resources, as it enables the PVR regime to share resources with those provided for the other intellectual property legislation administered by IPONZ, in particular, the Patents Act 2013.

What did submitters say?

29. Nearly all of the submitters who commented on this issue generally supported option (iii). These submitters did not give any detail on why they supported it.
30. One submitter opposed option (iii), citing the differences between the examination processes for patents and PVRs and supported option (ii). However, the regulations are concerned with the procedural requirements for examination such as time limits rather than the way the Commissioner conducts the examination.
31. Although most submitters supported option (iii), some emphasised the need to account for differences between the patent and PVR regimes when adapting the Patents Regulations. MBIE acknowledges these concerns, and will ensure that, in adapting the Patents Regulations, the differences between the patents and PVR regimes are accounted for.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

32. Option (iii) meets all four of the criteria described above, and is therefore MBIE's preferred option.

2.2 Regulations for PVR specific procedures

33. These regulations relate to those provisions in the PVR Bill where there is no direct equivalent in the Patents Act 2013. These relate mainly to procedures for examination of PVR applications, where the procedure is quite different to the examination procedures in the Patents Act and regulations. The issues the regulations relate to are:
 - denominations
 - time limits for providing information and propagating material during examination
 - time limits for paying trial and examination fees
 - growing trials conducted overseas
 - procedure for considering compulsory licence applications
 - time limits for providing information propagating material after grant
 - procedure for objections before grant of a PVR.

2.2.1 Denominations

34. When a plant breeder applies for a PVR to be granted over a new plant variety that they have developed, the applicant must supply a denomination. The denomination is a 'generic' name for the variety which must be used when propagating material of a variety protected by PVR is marketed, even after expiry of the PVR. One of the criteria for granting a PVR is that it must have a denomination that meets the requirements set out in the PVR Bill.
35. If the Commissioner considers that the denomination provided by the breeder does not meet the requirements of the Bill, the Commissioner will object to it. The applicant must then provide a replacement denomination within a period prescribed in the regulations. If a replacement denomination is not provided within the prescribed period, the PVR application lapses. Third parties may also object to a denomination.
36. The PVR Act requires a denomination to be submitted, and that it must be approved by the Commissioner. The PVR Regulations allow the Commissioner to request a replacement denomination if the originally submitted denomination is not approved, but do not prescribe a time period in which the replacement must be provided. This could

have the effect of unnecessarily delaying grant of the PVR if the applicant is slow to provide a replacement denomination.

What options are being considered?

37. There are two viable options:
 - i. require a replacement denomination to be provided within a prescribed period (**preferred**)
 - ii. do not set a time period for providing a replacement denomination.

Option (i): Require a replacement denomination within a prescribed period

38. Under this option, the applicant must submit a replacement denomination within a prescribed period of being notified that the Commissioner objects to the denomination originally provided. If a replacement denomination is not provided within the prescribed period, the application would lapse.
39. MBIE proposes that the prescribed period be three months from the date of notification, and that this period can be extended by up to one month if the applicant requests an extension before the expiry of the three month period.
40. The main advantage of this approach is that an acceptable denomination will be provided relatively quickly after a PVR application is filed. This will give ample time for third parties to object to any replacement denomination submitted by the applicant before a PVR is granted.
41. Another advantage is that a PVR on the application can be granted promptly once the Commissioner is satisfied that the other criteria for granting a PVR are met. This will avoid unnecessary delays in grant of the PVR.
42. A disadvantage of this approach is that applicants may be put to the time and expense of developing a replacement denomination even though a PVR may not ultimately be granted. However, the applicant will still have to provide an initial denomination when the application is filed, or shortly afterwards, even though, at the time of filing, there is no guarantee that a PVR will be granted.

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

43. Under this option, if the Commissioner objects to a denomination no time limit would be set for submission of a replacement denomination. The applicant would have to submit a replacement denomination before a PVR could be granted, but otherwise there would be no limit on when a denomination could be submitted.
44. A disadvantage of this approach is that an applicant could delay grant unnecessarily by not submitting a replacement denomination even when the Commissioner is satisfied that all the other criteria for grant are met. Once a replacement denomination is submitted, the Commissioner must approve it, and the Bill provides that third parties must be given an opportunity to object to any new denomination submitted.
45. The only advantage of this option is that applicants could avoid incurring the costs of developing a denomination until they knew that a PVR would be granted on their application.

What did submitters say?

46. Most submitters who commented on this supported the proposal (option (i)). One submitter suggested that the approach followed in Regulation 161(a) of the Patents Regulations be followed – i.e. a one month extension if it is reasonable in the circumstances, and longer extensions in exceptional circumstances. Another suggested an extension of up to 12 months.
47. MBIE notes that it intends to include a regulation modelled on Regulation 161 of the Patents Regulations in the new PVR regulations that will allow for limited extensions of time to file a replacement denomination. MBIE does not consider that a case has been

made for extensions longer than one month in normal circumstances. Longer extensions, such as the 12 months suggested by one submitter could risk unnecessarily delaying grant.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

48. Option (i) meets all of the criteria set out in above. The prescribed period proposed (three months plus the possibility of a one month extension) was considered reasonable by most submitters, and is unlikely to unnecessarily delay grant of a PVR.
49. Option (ii) does not meet criteria (iii) and (iv) above as it would not result in decisions to grant a PVR being made in a timely fashion, and might limit the time that third parties have to object to the replacement denomination.

2.2.2 Time limits for providing information and propagating material

50. Examination of a PVR application involves growing trials where the variety that is the subject of the application is grown to determine whether the variety is eligible for grant of a PVR. For some plant species, the growing trials are arranged or conducted by the Commissioner. For these trials propagating material of the variety will be required by the Commissioner.
51. The Commissioner may also require information from the applicant (in addition to that provided when the application was filed) in order to complete examination of the application.

What options are being considered?

52. The periods prescribed need to provide applicants, third parties and the Commissioner with a degree of certainty as to how the examination process is progressing and when it is likely to end. Growing trials can extend over two or more growing cycles of the plant species concerned. The nature of the information and propagating material required can vary considerably depending on the plant species.
53. In light of this, MBIE considered that it was not feasible to propose discrete options (other than the status quo). Instead MBIE set out a proposed approach, and invited submitters to give their views on this proposal.

The status quo

54. The current approach taken in the PVR Regulations provides for two sets of time periods for providing information and propagating material. One set runs from the date that a PVR application is filed, the other from the date the Commissioner requests the information or propagating material. In addition, the time period depends on whether the growing trial is arranged by the Commissioner or by the PVR applicant.
55. The time limits can be extended under 'exceptional circumstances' if the growing trial is arranged by the applicant. In all other cases, extensions of time are at the discretion of the Commissioner, with no grounds specified for extensions, and no limits on the number and length of extensions.
56. There seem to be no good reasons for providing different prescribed time periods depending on who is carrying out the growing or providing different criteria for

extensions of time. It is also undesirable to provide for extensions of time without specifying grounds for extension or limits on the length of any extension.

57. This can lead to uncertainty for PVR applicants as to whether times can be extended and how long an extension they might get. Third parties with an interest in the variety covered by the application may be left uncertain as to when a PVR will be granted.

What did MBIE propose?

58. MBIE proposed the following:

- i. The prescribed period for providing information and propagating material should be a minimum of one month and a maximum of 12 months from the date of the request. This allows the Commissioner to set time periods of less than 12 months if the Commissioner considers that the nature of information or material requested justifies a shorter period.
- ii. Extensions of time of up to 12 months can be granted if the request for extension is made before the time period ends. The request will be granted if the Commissioner considers that the extension is reasonable in the circumstances.
- iii. There is no limit on the number of extensions that can be granted.

What did submitters say?

59. In general, submitters supported the principle of setting time limits for providing information and propagating material. Some, however, considered that the 12 month period for providing propagating material would be too short where propagating material had to be imported from overseas.
60. In such cases it can take significant time periods to get the material through the biosecurity procedures administered by the Ministry for Primary Industries. One submitter suggested that the Commissioner should have the power to set deadlines and extensions of up to 24 months for propagating material.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

61. The status quo does not meet the criteria set out above, in particular criterion (ii). It also does not meet criterion (iii) as the lack of guidance regarding the grounds for extension of time, and the length of extensions available may lead to a lack of transparency around decisions to grant extensions.
62. After considering the submissions, MBIE proposes that the arrangement of prescribed periods for providing information and propagating material should be as follows:
- i. For information requested by the Commissioner:
 - a. the time period shall be a minimum of one month and a maximum of 12 months from the date of request,
 - b. one extension of up to 12 months can be granted if the Commissioner considers it reasonable in the circumstances
 - ii. For propagating material requested by the Commissioner:
 - a. the time period shall be a minimum of one month from the date of request, and a maximum of 24 months from the date of the request,
 - b. extensions of up to 24 months can be granted if the Commissioner considers it reasonable in the circumstances.
63. MBIE considers that this modified proposal meets the criteria set out above. In particular it gives clear guidance to PVR applicants and third parties as to what time

limits can be imposed, the grounds for extension of those limits and the number and length of extensions available.

2.2.3 Time limits for paying trial and examination fees

64. As described earlier, the examination process for a PVR application involves a growing trial. Trial fees are intended to cover the costs of growing trials where the Commissioner makes the arrangements for growing trials. Examination fees cover the cost of examining the results of growing trials. More than one trial fee may be required, where trials extend over more than one growing season.

The status quo

65. The PVR Act requires trial and examination fees to be paid within a prescribed period, but no period is actually prescribed in the PVR Regulations. This is undesirable as it can leave applicants uncertain as to when fees must be paid, and may mean that the Commissioner has to delay making decisions until fees are paid.

What options are being considered?

66. The PVR Bill requires that the trial or examination fee be paid within a prescribed time after payment is requested. This was the approach supported by submitters in consultations on the development of the Bill. Where these submitters mentioned a time period, two months from the date of the request was the most common suggestion.
67. On this basis, MBIE proposes that the time limit be set at two months from the date of the request. MBIE considers that this period is long enough to allow applicants to make arrangements to pay trial and examination fees, but not so long as to risk unnecessarily delaying grant of a PVR.
68. Should extensions of this time be available? Granting extensions of time runs the risk that the growing trial of the applicant's variety could be delayed until the following year, or of unnecessarily delaying grant. Applicants, when they make a PVR application, will be aware that they will need to pay the trial and examination fees set out in the regulations, and will have ample opportunity to ensure that funds are available when payment is requested.
69. MBIE proposes that extensions of time for paying trial and examination fees should only be possible if the Commissioner is satisfied that there are genuine and exceptional circumstances³ justifying the extension.

What did submitters say?

70. Submitters generally agreed with the proposed approach. Some expressed reservations that longer extensions might be necessary where propagating material has to be imported. However, the Commissioner will only request payment of a trial fee if propagating material has actually been provided to the Commissioner. If propagating material has not been provided, the Commissioner cannot arrange a growing trial.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

71. MBIE's proposed option meets the criteria set out above. The status quo, however does not meet criteria **ii** and **iii**. It can leave applicants uncertain about when they need to pay trial and examination fees, and can result in delays in obtaining decisions from the Commissioner if fees are not paid promptly.

2.2.4 Growing trials conducted overseas

³ The term 'genuine and exceptional circumstances' is taken from Regulation 161 of the Patents Regulations 2014.

72. The PVR Bill permits the Commissioner to rely on a report of a growing trial conducted by, or under the supervision of, the authority of another country that is a UPOV member responsible for granting PVRs. The decision to rely on an overseas growing trial is made by the Commissioner. The applicant does not get a choice.
73. There may be PVR applications where there are two or more reports available to the Commissioner, from different overseas authorities. These situations can arise because the applicant has applied for a PVR in two or more UPOV member states. In these cases, which report should the Commissioner rely on?
74. The current PVR Act and regulations are silent on this matter. Current practice is that the Commissioner decides, but some applicants have taken issue with this. To avoid disputes it would be desirable to specify in the regulations which report the Commissioner should rely on.

What options are being considered?

75. Two approaches have been considered by MBIE:
- i. codify the current approach, where the Commissioner chooses which report to rely on
 - ii. the Commissioner uses the report nominated by the applicant.

Option (i) The Commissioner chooses which report to rely on

76. Under this option, if there are two or more reports from an overseas authority, the Commissioner chooses which one to rely on. The main advantage of this option is that the Commissioner can use their professional judgement to decide which report will give the greatest assurance that any PVR granted on the basis of the report will be robust.
77. A disadvantage of this approach is that it may impose significant costs on the applicant. Many overseas authorities charge a fee for the use of their reports. These costs can be up to many hundreds of dollars.
78. In such cases the Commissioner will pass the costs on to the applicant. There will be cases where the report that the Commissioner relies on will be the most expensive of the reports available.

Option (ii) Report nominated by applicant

79. Adoption of this option would mean that if there were two or more overseas reports, the Commissioner would rely on the report nominated by the applicant. However, the applicant's choice may be influenced by factors other than robustness of any granted PVR. For example, they may be tempted to nominate the cheapest of the reports in order to keep their costs down. Or they may choose the report that they consider is most favourable to them.

What did submitters say?

80. Most submitters agreed with the approach set out in option (i). Some argued that the issue ought to be the subject of negotiations between the Commissioner and the applicant. However, as noted above, the applicant may be motivated by considerations other than the robustness of any granted PVR. If the applicant disagrees with the Commissioner's choice of overseas test report, the Act provides that the applicant has the right to request a hearing before the Commissioner to resolve the issue.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

81. Option (i) best meets the criteria set out above. It helps ensure the integrity of the PVR regime by reducing the risk that PVRs are granted over varieties that would not meet the criteria for grant if the growing trial was conducted in New Zealand.

2.2.5 Compulsory licences

82. The PVR Bill provides that any person can apply to the Commissioner for the grant of a compulsory licence over a PVR. The current PVR Act also provides for the grant of compulsory licences. The PVR Act requires the Commissioner to give the PVR owner an opportunity to be heard before making a decision, but is otherwise silent as to the procedure to be followed.
83. The PVR Bill provides that both the applicant for a compulsory licence and the PVR owner must be given an opportunity to be heard, and leaves the procedure to the regulations.

What options are being considered?

84. Only one option (other than the status quo) was proposed by MBIE. This option involves adopting a procedure based on the pre-grant opposition procedure in the Trade Marks Regulations 2003.

The Status Quo

85. The PVR Act and the PVR regulations do not set out a procedure for dealing with compulsory licence applications. One consequence of this is that it is unclear to PVR owners just what the procedure is. Some PVR owners assumed that the lack of a defined procedure in the PVR Act meant that grant of a compulsory licence was almost automatic, with the only costs incurred by the applicant being the fee charged by the Commissioner. This was not actually the case.
86. The lack of a prescribed procedure can mean that proceedings may be unnecessarily protracted. This can occur, for example, because there are no time limits for either party to the application to provide evidence or other information to support their case.
87. Alternatively, as actually happened in a recent compulsory licence application, the parties can negotiate and agree on a suitable procedure. However, this can also result in additional time and costs in deciding the application.

MBIE proposal: base procedure on pre-grant opposition procedure in the Trade Marks Regulations

88. This involves a procedure based on the pre-grant opposition procedure in the Trade Marks Regulations 2003. This is proposed because, in a recent compulsory licence application, the parties agreed this approach, given the lack of a prescribed procedure in the PVR Act. This is a well understood procedure, and appeared to work well. As a result, MBIE proposes that the same approach be adopted in the PVR regulations, and does not propose any other options.
89. The proposed approach requires that when a compulsory licence application is filed, a copy of the application is sent to the PVR owner. The procedure then provides for both parties to provide arguments and evidence to support their position, with time limits imposed at each stage of the process. The time limits are extendible by up to three months if the Commissioner considers an extension reasonable in the circumstances. This protects the interests of the applicant and PVR owner while ensuring that the procedure is not subject to undue delays.
90. Once the arguments and evidence have been filed, the Commissioner will then offer both parties an opportunity to be heard before making a decision.
91. An advantage of this approach is that it is based on an existing procedure. As discussed in section 2.1 above, adapting an existing procedure will allow the Commissioner to implement the proposed compulsory licence procedure in an efficient and transparent manner.

What did submitters say?

92. Most submitters who commented on this issue agreed with the procedure specified, although some considered that the time periods set out for each stage (two months, extendible by up to three months) was not long enough, given the complexity of the information that might need to be supplied. However, information required in trade

mark oppositions can be complex as well. MBIE considers the time periods are reasonable, particularly given the availability of limited extensions.

93. One submitter argued that the regulations should set out in detail the information required to be supplied by the parties. However, the Trade Mark Regulations (and similar procedures in the Patents Regulations) do not go into such detail. MBIE is not convinced that such detail is required, particularly as it is in the interests of the parties to the application to provide as much information as possible to support their positions.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

94. The procedure proposed by MBIE best meets the criteria set out above. In particular it meets criteria (ii) and (iii) set out above by providing a transparent procedure that appropriately balances the interests of the parties concerned together with the public interest. The status quo (no procedure specified) does not meet these criteria.

2.2.6 Objections before grant

95. The current PVR Act provides that any person can object to the grant of a PVR in relation to a PVR application, on the grounds specified in the Act. The PVR Act requires that the applicant and objector must be given an opportunity to be heard, but otherwise does not specify the procedure to be followed by the Commissioner.
96. The lack of a defined procedure is unsatisfactory. In the absence of defined timeframes, an objector (or applicant) could drag the procedure out by being slow to provide evidence or other documentation to support their position. This can unnecessarily delay grant, and impose unnecessary costs on the applicant and objector.
97. It is not in the public interest for grant of a PVR to be delayed unnecessarily. However, it is also not in the public interest for a PVR to be granted over a plant variety that does not meet the criteria for grant.
98. The PVR Bill also provides for objections before grant of a PVR, and leaves the procedure to the regulations.

What options are being considered?

99. The objection to grant provisions in the PVR Act and PVR Bill have similarities with the pre-grant opposition provision in the Patents Act 2013. On this basis, MBIE has proposed only one option: to base the procedure for objections to grant on the pre-grant opposition procedures in the Patents Regulations 2014.
100. Under this approach, when an objection to grant of a PVR is made, the Commissioner must provide the PVR owner with a copy of the objection. The procedure then allows for both parties to provide arguments and evidence to support their positions, with time limits imposed at each stage of the process. This protects the interests of the objector and PVR applicant while ensuring that the procedure is not subject to undue delays.
101. Once the arguments and evidence have been filed, the Commissioner will then offer both parties an opportunity to be heard before making a decision.
102. An advantage of this approach is that it is based on an existing procedure. As discussed in section 2.1 above, adapting an existing procedure will allow the Commissioner to implement the proposed compulsory licence procedure in an efficient and cost-effective manner.

What did submitters say?

103. Most submitters agreed with the proposal, although some considered that the time limits for completing each stage of the process (two months, extendible by a further three months if the Commissioner considers an extension reasonable in the circumstances) were not long enough. MBIE considers the time periods are reasonable, given that they are the same as the time periods set out in the pre-grant patent opposition procedure.
104. Another submitter noted that, in some cases, it may be necessary to complete growing trials before the Commissioner can make a decision. MBIE notes that the 'common regulations' described earlier in this document will allow for the Commissioner to convene a case management conference once both parties have filed their arguments and evidence. At this stage, the Commissioner can discuss the next steps in the

procedure with the parties, which might include an agreement to delay the Commissioner's decision until growing trials are complete.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

105. The procedure proposed by MBIE best meets the criteria. In particular it meets criteria (ii) and (iii) set out above by providing a transparent procedure that appropriately balances the interests of the parties concerned together with the public interest.

2.2.7 Time period for providing information or propagating material after grant of a PVR

106. The PVR Bill gives the Commissioner the power to request the following:

- i. information reasonably needed by the Commissioner to verify the maintenance of the plant variety to which a granted PVR relates, or for any other purpose related to that variety
- ii. propagating material of the plant variety to which a granted PVR or PVR application relates, if the Commissioner considers it necessary for the purposes of exercising or performing the Commissioner's functions, duties, or powers under the Bill

107. Propagating material of a variety that is the subject of a PVR or PVR application may be required, for example, as a reference variety in the examination of applications for PVR of other varieties of the same species.

108. The information or propagating material must be provided to the Commissioner within a time prescribed by regulations. If the PVR owner fails to provide the information or material within the prescribed time, without reasonable excuse, the Commissioner may cancel the PVR.

109. The PVR Act has similar provisions, except that the information and material must be supplied within a time specified by the Commissioner. However, the PVR Act and PVR Regulations do not provide any guidance on what the prescribed time should be or what, if any, extensions of that time may be available.

What options are being considered?

110. Two options were considered:

- i. set a minimum time limit 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's request

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

111. Under this option the Commissioner would set a minimum time, with no upper limit. Setting a minimum time limit ensures the Commission will give PVR owners a reasonable time to respond to requests from the Commissioner. MBIE considers that one month would be a reasonable minimum.

112. The Commissioner could set the time period, subject to the minimum time limit based on the Commissioner's assessment what would be a reasonable time for complying with the request. This provides a flexible approach. It takes account of the fact that PVR owner's ability to respond to requests may vary depending on the plant variety or species involved.

113. This approach also enables the Commissioner to set a time limit that takes account of when the Commissioner may need the information or propagating material. For

example, the Commissioner may need the information or material in time to be included in growing trials in relation to applications for PVR.

114. A disadvantage of this approach is that it relies on the Commissioner having sufficient information to determine what might be a reasonable time to respond to the request. This could lead to disputes if the Commissioner and PVR owner disagree on what is a reasonable time.

Option (ii) Set maximum and minimum time limits

115. This option involves setting maximum and minimum time limits for a PVR owner to provide information or material requested by the Commissioner. It was proposed that the minimum time period be one month from the date of the request, and a maximum of 12 months, with no provision for extension.
116. This approach also enables the Commissioner to set a time limit that takes account of when the Commissioner may need the information or propagating material. For example, the Commissioner may need the information or material in time to be included in growing trials in relation to applications for PVR.
117. An advantage of this approach is that it reduces the likelihood of disagreements between the Commissioner and PVR owner as to what is a reasonable time to respond.

What did submitters say?

118. The general tone of submissions was that, if a maximum time period was set, there should be provision for extension. It was pointed out by some submitters that there may be significant delays in obtaining propagating material if it had to be imported, and some propagating material might only be available on a seasonal basis. Some submitters suggested that the approach should be the same as that taken for the provision of information and propagating material prior to grant.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

119. After considering the submissions, MBIE considers that the arrangement of prescribed periods for providing information and propagating material after grant of a PVR should be as follows:
- i. For information requested by the Commissioner:
 - a. the time period be a minimum of one month and a maximum of 12 months from the date of request,
 - b. one extension of up to 12 months can be granted if the Commissioner considers it reasonable in the circumstances
 - ii. For propagating material requested by the Commissioner:
 - a. the time period be a minimum of one month from the date of request, and a maximum of 24 months from the date of the request.
 - b. extensions of up to 24 months can be granted if the Commissioner considers it reasonable in the circumstances.
120. This approach is the same as the approach taken in relation to requests for information and propagating material required to examine a PVR application.

Section 3: Delivering an option

How will the new arrangements be implemented?

121. The new PVR regulations will be implemented by IPONZ. The implementation process will include:
- i. making appropriate changes to the IPONZ IT systems to implement the new PVR Act;
 - ii. placing information on its website about the new regulations, and how they will work once the new PVR Act is in force;
 - iii. developing, in consultation with stakeholders, guidelines on how IPONZ will administer the regulations;
 - iv. publicising the regulations once they are gazetted together with the date that the new PVR Act and regulations will formally enter into force.

How will the new arrangements be monitored, evaluated, and reviewed?

122. The operation of the new PVR regime will be monitored as part of IPONZ's normal reporting processes. This will include seeking the views of major stakeholders on the way that IPONZ is implementing the regulations. The Bill's provisions will only apply to PVR applications filed after entry into force. Due to the time needed for growing trials, and the low number of PVR applications, it will be some years before the full impact of the new regulations can be assessed.
123. The views of stakeholders regarding the implementation of the regulations will be sought through annual sessions of the Plant Variety Rights Technical Focus Group. This group includes the Commissioner, representatives of MBIE's intellectual property policy team, and representatives of plant breeders.
124. Technical Focus Group meetings provide an opportunity for plant breeders to express their views on how the plant variety rights regime is operating, and any problems that stakeholders consider may have arisen. In addition, stakeholders can also raise issues with the Commissioner at any time. This allows any issues to be dealt with promptly, rather than waiting for periodic reviews of the Act or regulations.