

Coversheet: Review of the Plant Variety Rights Act 1987 – outstanding policy issues

Advising agencies	<i>Ministry of Business, Innovation and Employment</i>
Decision sought	<i>Agree further policy decisions in the review of the Plant Variety Rights Act 1987</i>
Proposing Ministers	<i>Minister of Commerce and Consumer Affairs</i>

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

Summarise in one or two sentences

The Plant Variety Rights (**PVR**) Act 1987 is under review. In November 2019, Cabinet agreed to policy decisions to reform the PVR regime, but a small number of additional policy issues have arisen since. Options to address these were set out in an Outstanding Issues discussion document (**the discussion document**) which we consulted on from August to October 2020. This second regulatory impact assessment has been prepared in relation to these outstanding policy issues. These issues relate to:

- outstanding issues relating to the Treaty of Waitangi provisions, some of which were anticipated in the 2019 Cabinet paper
- operational issues arising from a parallel review of the processes of the Plant Variety Rights Office¹ (**PVR Office**) – these aim to improve the effectiveness and operational efficiency of the regime.

Outstanding Treaty issues

In November 2019, Cabinet agreed that a Māori Advisory Committee (**the Committee**) would be established to (among other things) make a determination on whether the grant of a PVR would adversely affect kaitiaki relationships with taonga species. With this delegation of a statutory decision-making power to the Committee, the Cabinet paper acknowledged that further policy decisions would be required to clearly set out the processes around how these decisions would be reached and what review options would be available. This RIS addresses these issues, which include:

- what factors the Committee will consider when making a determination
- whether – and if so, what – investigative powers the Committee will have
- what will constitute a determination
- what options for review of a determination will be available

¹ The PVR Office is part of the Intellectual Property Office of New Zealand. It examines applications for a PVR in relation to a new variety and determines whether or not a PVR should be granted.

- what options will be available for objections to the grant of a PVR in relation to kaitiaki interests, after the grant has been made

Operational issues

The PVR Act is over 30 years old and there have been very few amendments to it during this time. The plant breeding industry has changed considerably, with most breeding now carried out by private companies (as opposed to Crown Research Institutes). The complexity of plant breeding has also increased considerably with advances in breeding techniques, meaning increasingly subtle differences may need to be tested to ensure that, among a crowded field, a new variety is genuinely 'new' (ie. distinct from all other known varieties).

The PVR Act review presented an opportunity to review the processes of the PVR Office. Discussions with the PVR Office, combined with a survey of a sample of PVR system users identified a number of issues for consideration and this RIS addresses these, including:

- whether certain information provided by breeders with their application should be kept confidential
- clarifying how growing trials should be carried out and the role of the PVR Office in directing the details of growing trials
- a reluctance by some rights holders to provide protected material for use as comparators in growing trials (needed to assess whether a proposed new variety is distinct from other known varieties).

Summary of Preferred Option or Conclusion (if no preferred option)

How will the agency's preferred approach work to bring about the desired change? Why is this the preferred option? Why is it feasible? Is the preferred approach likely to be reflected in the Cabinet paper?

Summarise in one or two sentences

Our proposed approach aims to:

- provide a decision-making framework in relation to Māori interests that is both mana-enhancing and reflects the principles of natural justice
- modernise certain operational features of the how the PVR Office functions (including the powers of the Commissioner of PVRs) in relation to Plant Variety Rights (**PVR**) applications.

Outstanding Treaty issues

In most instances where a preferred approach was indicated in the discussion document, we are recommending that this be reflected in the Cabinet Paper. These include:

- empowering the Committee to take an investigative approach to decision-making
- setting out a list of factors for the Committee to consider when making a decision
- requiring a unanimous decision, though permitting the Chair of the Committee to accept a majority decision if this can't be achieved
- providing that the Committee can reconsider a decision in the light of new information.

The main issue on which we are recommending a change to our preferred option is in relation to when an objection to the grant of a PVR can be made on the grounds of kaitiaki interests. Previously we considered that this could only happen if, for some reason, the Committee had not had the opportunity to consider the application in the first place. But the strong view of submitters – with which we now agree – is that kaitiaki interests should be considered in the same way as other grounds for objections after a grant, and so we now recommend that there be no restrictions on when such an objection can be made.

Operational issues

Where preferred options were indicated in the discussion document, these are reflected in the Cabinet paper. Submitters were generally comfortable with these, considering that these simply reflected what the current practice of the PVR Office is. The notable recommendations are that:

- it be made clear that growing trials are compulsory and that the PVR Office be empowered to direct the details of growing trials
- the Commissioner of PVRs be clearly empowered to request protected material from rights holders for official purposes, such as for use as a comparator in growing trials.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Monetised and non-monetised benefits

Outstanding Treaty issues

Breeders and Māori will benefit from further clarity about how the Māori Advisory Committee will operate. The recommended options meet our obligations under the Treaty of Waitangi and reflect the principles of natural justice, while providing the Committee flexibility to develop its own processes consistent with tikanga Māori.

We acknowledge that court action is generally rare in the PVR regime. Either issues are resolved between parties, or are simply not resolved. Having a first-stage review of the Committee's determination and allowing objections after grant in all circumstances provides parties with low cost alternatives to court action, increasing the prospects of satisfactory resolution of their issues.

Operational issues

These changes aim to clarify PVR Office processes in relation to the examination of applications for PVRs and the testing of proposed new varieties in growing trials. As submitters pointed out, these proposed changes actually reflect the current reality of how the PVR Office operates. These processes have evolved over the years in response to changes in the industry. While they are not inconsistent with the current legislation, clarification of these processes will reduce uncertainty for breeders. To this extent, the proposed changes around growing trials will not mean significant changes for breeders.

More clearly empowering the PVR Office to require rights holders to provide protected material for use as comparators in growing trials should benefit PVR applicants by providing the PVR Office with better information with which to assess an application. The

proposals also include measures to address concerns that those being required to provide this material have raised.

The introduction of a general right to be heard whenever the Commission of PVRs exercises either a specific decision-making power under the Act or their discretion, should also benefit breeders applying for PVRs by providing more opportunity for their concerns to be resolved during the application process.

Where do the costs fall?

Monetised and non-monetised costs; for example to local government or regulated parties

Outstanding Treaty issues

As noted in the RIS with the 2019 Cabinet paper, the establishment and functioning of the Committee will result in compliance costs for both Māori and breeders (in terms of time involved in engagement with the Committee). The costs of these proposals – and how these will be met – are currently being considered as part of a wider review of PVR fees being conducted by IPONZ.

Operational issues

These provisions largely reflect how the regime is operating in practice and so should not result in increased costs for breeders. However, empowering the Commissioner of PVRs (through the PVR Office) to direct the types of growing trials necessary for an application, including requesting plant material from third parties to run comparative trials, could result in additional costs for those breeders that might not have complied with requests in the absence of explicit authority.

What are the likely risks and unintended impacts? How significant are they and how will they be minimised or mitigated?

Outstanding Treaty issues

There are a number of questions around how the Committee will operate in practice. This relates to the procedures the Committee will follow as well as how it would make determinations on the impacts on kaitiaki relationships. This has created some uncertainty for breeders and Māori. This uncertainty is particularly manifest when it comes to the requirement on breeders to seek to engage with kaitiaki, and in relation to how the Committee will operate in practice. Some of these procedural issues will be addressed at a high level in legislation. Like in other Intellectual Property (IP) statutes (ie the *Patents Act 2013* and the *Trade Marks Act 2002*) these procedural issues would generally be addressed in the Terms of Reference for the Māori Advisory Committees. Once the Committee is established, it will (i) develop guidelines on engagement to support breeders and (ii) work with the Commissioner of PVRs to finalise the Terms of Reference to clarify how the Committee will operate in relation to applications that come before it.

Operational issues

These provisions largely reflect how the regime is operating in practice and so it is not anticipated that there will be any risks or unintended consequences. Empowering the Commissioner to direct the type of growing trial that must take place could give rise to disputes around these directions (though clarifying the processes around growing trials

should also reduce the disputes elsewhere). It is proposed in the paper that a general right to be heard before the Commissioner exercises a discretionary decision be included in the regime, and this would provide a low cost avenue for consideration of these disputes should they arise.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

How confident are you of the evidence base?

Outstanding Treaty issues

We have consulted on these issues with both industry stakeholders and Māori organisations and individuals, and we are confident that we have sufficient information from this engagement to support our analysis. However, we acknowledge that there is still a degree of uncertainty with how the Treaty provisions in the regime will work out in practice. This is not surprising as this is an entirely new element to this regime. Although we are confident that the provisions being put in place to protect kaitiaki relationships with taonga species are sufficient for that purpose, we cannot be certain about all aspects of how the provisions will operate in practice.

Operational issues

The recommendations relating to the operational issues are based on information provided by the PVR Office and a survey conducted of a sample of PVR users to identify issues with the operation of the regime followed by public consultation on these issues and how they might be addressed. Industry stakeholders did not have any significant concerns with these recommendations, and so we are confident that we have sufficient information from this engagement to support our analysis.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Quality Assurance Assessment:

Reviewer Comments and Recommendations:

Impact Statement: Review of the Plant Variety Rights Act 1987 – outstanding policy issues

Section 1: General information

1.1 Purpose

The Ministry of Business Innovation and Employment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.

1.2 Key Limitations or Constraints on Analysis

This Regulatory Impact Statement (**RIS**) covers two distinct sets of issues:

- Outstanding Treaty of Waitangi issues
- Operational issues relating to the PVR Office.

It is the second RIS relating to the Plant Variety Rights (**PVR**) review and therefore needs to be considered in the context of the decisions previously made by Cabinet.

In November 2019, Cabinet agreed a range of reforms to the PVR regime [DEV-19-MIN-0301 refers] (**the 2019 Cabinet paper**)² in order to:

- meet the Crown's obligations under the Treaty of Waitangi (**the Treaty**) in relation to taonga plant species
- meet New Zealand's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**)³ in relation to the 1991 Revision of the UPOV⁴ Convention (**UPOV 91**)
- modernise a regime that is over 30 years old, regulating a sector that has changed significantly in this time.

These reforms are set out in detail in the 2019 Cabinet Paper and accompanying Regulatory Impact Statement (RIS)⁵.

² <https://www.mbie.govt.nz/assets/policy-decisions-for-the-review-of-the-plant-variety-rights-act-1987.pdf>

³ The CPTPP is a free trade agreement involving 11 Asia-Pacific countries, including New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Peru, Singapore, and Vietnam. See <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/>

⁴ UPOV (Union Internationale pour la protection des Obtentions Végétales) is the French Acronym for the International Union for the Protection of New Varieties of Plants. The UPOV convention provides for the protection of new varieties by an intellectual property right commonly referred to as Plant Breeder's Rights or Plant Variety Rights.

⁵ <https://www.treasury.govt.nz/publications/risa/regulatory-impact-assessment-review-plant-variety-rights-act-1987>

The November 2019 Cabinet Paper

The decisions from the 2019 Cabinet paper that are relevant to the current RIS are those relating to meeting the Crown's obligations under the Treaty. These were informed by the recommendations of the Waitangi Tribunal in its report *Ko Aotearoa Tēnei (the Wai 262 report)*⁶. The current RIS does not consider any issues relating to New Zealand meeting its obligations under the CPTPP. The operational issues relating to the PVR Office fall under the third aim – namely to modernise the PVR regime – but do not follow on from any decisions in the 2019 Cabinet paper.

The key decision Cabinet made was to establish a Māori Advisory Committee (**the Committee**) that would make a determination on whether or not the grant of a PVR would adversely impact kaitiaki relationships with taonga species. Specifically, Cabinet agreed that:

- rather than defining terms such as 'kaitiaki' and 'taonga', the new legislation would refer to 'indigenous plant species' and 'non-indigenous plant species of significance'⁷ to indicate when kaitiaki interests need to be considered
- applicants would have to indicate if their proposed new variety involved plant material from either of these groups, and disclose any engagement they had with kaitiaki prior to the application for a PVR being made
- the Committee would be appointed by the Commissioner of PVRs and members would be required to have relevant expertise including in relation to mātauranga Māori, te ao Māori, tikanga Māori and taonga species
- a new power would be introduced to allow a PVR grant to be refused if kaitiaki relationships would be negatively affected and the impact could not be mitigated to a reasonable extent
- the legislation set out a process for considering kaitiaki relationships,
- decisions of the Committee would be subject to judicial review, with no appeal rights.

Cabinet also noted that:

- legislation might include a list of factors to be taken into account when considering kaitiaki relationships
- further consideration be given to whether the IPONZ hearings process would be suitable as a first stage review of decisions of the Committee.

Outstanding Treaty of Waitangi issues

A number of issues requiring further policy decisions flowed from the decisions Cabinet made in 2019, or have otherwise been raised during the policy process. These include:

- What information shared pre-application be confidential? (Raised by plant breeders.)
- Should Māori have a greater role in the appointments process? (Raised by Māori.)
- What process would the Committee follow when considering an application and

⁶ Ko Aotearoa Tēnei Volume 1, Chapter 2, accessed from <https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>

⁷ Non-indigenous species of significance refers to species that were brought to New Zealand on the migrating waka and are considered taonga species by Māori

what would constitute a determination? (Noted by Cabinet and raised during the policy process.)

- Should there be any other avenues for a review of a determination? (Noted by Cabinet and raised during the policy process.)

These mainly arise because Cabinet agreed that the Committee would have a statutory decision-making power. This necessitates clear expectations about how the Committee will function – consistent with the principles of natural justice and our obligations under the Treaty – being set out in the legislation.

Operational issues

The second set of issues in this RIS is unrelated to the 2019 Cabinet paper, though does also respond to third aim of the review listed above, namely to modernise a regime that is over 30 years old. As such, they are not constrained by previous decisions. They arise from four main sources: (i) a survey of PVR stakeholders asking open questions about PVR Office processes, (ii) feedback from the PVR Office, (iii) the policy process, and (iv) the consultation that was carried out on the outstanding issues discussion document.

Breeders raised issues relating to:

- Confidentiality of origin and breeding information after an application has been filed
- The provision of protected material for use as a comparator in growing trials, and their concerns about the potential for misuse of this material.

The PVR Office raised issues in relation to the current legislative settings concerning growing trials, specifically whether a growing trial should be required for all applications and what role the PVR Office should play in directing how growing trials should be carried out. The PVR Office also noted that the current provisions around when trial and examination fees should be payable were not working.

The policy process also raised two further issues for consideration:

- Whether there should be a general right to be heard in relation to decisions made by the Commissioner?
- Where appeals to a decision of the Commissioner should be heard?

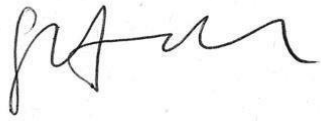
The evidence base

The content of this analysis has been informed by public consultation. This has included a survey conducted of a sample of PVR users to identify issues with the operation of the regime, and public consultations through the release of a discussion paper setting out the issues and options for addressing them. In some instances, the discussion paper indicated a preferred option. During the public consultation, MBIE held two public (virtual) meetings/hui, one focussing primarily on the operational issues and the other on the outstanding Treaty issues.

We also consulted with the Legislation Design and Advisory Committee on key elements of the proposals, particularly in relation to the decision-making function of the Committee.

For the scope and significance of the issues, our view is that this process was sufficient to inform our analysis.

1.3 Responsible Manager (signature and date):

A handwritten signature in black ink, appearing to read 'SH', is positioned above the printed name and title.

Susan Hall (Manager)
Corporate Governance and Intellectual Property Policy
Building, Resources, Markets
Ministry of Business Innovation and Employment

3 March 2021

Section 2: Problem definition and objectives

2.1 What is the current state within which action is proposed?

PVRs are a form of intellectual property right which provides plant breeders with exclusive rights in relation to the reproductive material (e.g. seeds or cuttings) of the variety concerned. The aim of the regime is to incentivise the development of new varieties of plants for the benefit of society, meeting the needs of growers and consumers, providing improvements such as higher yields, better disease resistance, better taste, new colours.

The main crop groups that PVRs are sought for are fruit crops, arable and vegetable crops, pasture plants, ornamental plants and fungi. New Zealand is considered a world leader in some sectors, such as kiwifruit, apples and pasture plants.

The PVR Act is now over 30 years old and much has changed in this time. Prior to the 1990's, a greater part of national plant breeding activity was carried out by Government owned entities. Over the years since the PVR Act came into force, plant breeding has advanced considerably with the development of new breeding techniques leading to a significant increase in the number of new varieties. The role of private breeding companies and Crown Research Institutes has significantly increased and what was called Government breeding has essentially ended. Originally the PVR Office sat within the Ministry of Agriculture and Fisheries, moving to the then Ministry of Commerce in 1991 and to IPONZ in 2003.

These changes have increased the demands from the industry for a more proactive role from the PVR Office to assist with applications and testing. Stakeholders that we engaged with during the review have a positive view of the pragmatic and constructive role the Office plays in processing applications for PVRs.

There are approximately 1300 current PVR grants, and around 110 applications each year. Plant breeding is an international activity with broadly 60% of PVR applications from foreign breeders and 40% from national activity.

The current Act makes no mention of the Treaty of Waitangi and meeting our obligations in relation to the Treaty has been a significant element of the review. These obligations arise when breeding the new proposed variety has involved indigenous plant material sourced from New Zealand⁸. To put this in context, we estimate that approximately seven per cent of PVRs relate to indigenous plant species, and most of these will be in the category of ornamental plants (e.g. flaxes). This will equate to about 7-10 applications each year being considered by the Māori Committee.

2.2 What regulatory system(s) are already in place?

The PVR Act and accompanying regulations provide the statutory framework for the PVR regime. New Zealand is a member of UPOV 78, which is the previous version of the international agreement on plant variety rights, and the PVR Act reflects the obligations under UPOV 78. The current version of the international agreement is UPOV 91. Under the CPTPP, New Zealand is required to align our regime with this agreement to the extent

⁸Obligations also arise in relation to 'non-indigenous species of significance', but there are only a small number of these and very few attract PVRs.

it can while also meeting our obligations under the Treaty of Waitangi. The current Act makes no mention of the Treaty of Waitangi.

In November 2019 Cabinet made a number of decisions about the shape of the new regime including how we meet both our CPTPP obligations in relation to UPOV 91 and our Treaty obligations. Broadly speaking, these decisions include extending the scope and coverage of PVRs, limiting the exceptions to the rights, and extending the term of the right for woody plants to align our regime with UPOV 91. The decisions relating to our Treaty obligations have been discussed in Section 1.2.

It should be noted that there are some links with the broader whole-of-government response to Wai 262 – Te Pae Tawhiti. The PVR review was already well-advanced when Te Pae Tawhiti was announced and so, combined with the timing requirements of our CPTPP obligations, the review proceeded on its own track and was not rolled into this wider work.

The PVR regulations and fees are also being comprehensively reviewed. We anticipate consulting on these while new legislation is before select committee, and seeking policy decisions in late 2021.

In addition, an assessment of the whole intellectual property regulatory system is also underway which will identify any areas of the system that need strengthening.

2.3 What is the policy problem or opportunity?

In Section 1.2, we noted that Cabinet made policy decisions in November 2019 to meet the three main aims of the PVR review, namely to:

- meet our obligations under the Treaty of Waitangi
- meet our obligations under CPTPP
- modernise a regime that is over 30 years old.

In relation to our Treaty obligations, the driver for that work was addressing the fact that the PVR Act did not provide protection for kaitiaki relationships with taonga species as required by the Treaty (and as set out in the Wai 262 report). As we discuss below, further policy decisions are required to effectively implement the November 2019 decisions. These form one of the two strands of work that this RIS addresses.

No further policy work (relating to primary legislation) is required in relation to meeting our CPTPP obligations.

While the 2019 decisions addressed some issues relating to modernising the regime, they did not address operational issues relating to the PVR Office. Feedback on these was sought through a separate process and the issues raised form the second strand of work that this RIS addresses.

Outstanding Treaty obligations

In Section 1.2 we set out the decisions Cabinet made in November 2019 to meet our Treaty obligations in the PVR regime.

These decisions left a number of further questions unanswered, some of which were noted by Cabinet, others which were raised by stakeholders and Māori, and some which arose

from the policy process.

The questions that flow directly from the November 2019 Cabinet paper are:

- What should the definitions of 'indigenous plant species' and 'non-indigenous plant species of significance' be?
- What process should the Committee follow when making a determination?
- What should the Committee's role be in relation to mitigations of any adverse impacts on kaitiaki relationships?
- What, if any, a first stage review of a decision of the Committee should involve?

Additional issues considered in this current RIS in relation to Treaty matters are:

- Should any information exchanged between breeders and kaitiaki prior to an application for a PVR being filed be kept confidential? (This issue was raised by some breeders concerned that they do not benefit from provisions protection of their new variety prior to filing their application.)
- Should the appointment process be enhanced in any way beyond what Cabinet agreed? (This issue was raised by claimants in the Wai 2552 inquiry hearing on the PVR review and referred to by the Tribunal in its report⁹.)
- How should the standard PVR process of allowing objections to the grant of a PVR after it is made apply to matters relating to kaitiaki interests? (This issue arose as part of the policy process.)

Not addressing these questions presents risks to the new regime for considering kaitiaki relationships. Cabinet's decisions delegate a statutory decision-making power to this Committee. It is important that processes consistent with natural justice are set out in the legislation. It is also important that these processes meet our obligations under the Treaty. In the context of processes for the consideration of PVR applications, this obligation is to consider kaitiaki interests in a meaningful and mana-enhancing way that facilitates protection of those interests.

The status quo also provides no clarity for parties as to how the matters will be considered, potentially leading to lack of trust in the process. Similarly, the lack of a low cost first-stage review process and no avenue to raise objections after grant (as with other IP regimes) could lead to high costs on parties (if they chose to seek judicial review), or dissatisfaction in the regime (if they chose not proceed with judicial review but considered they had not had sufficient opportunity to raise their concerns).

Finally, some Māori submitters considered that the current appointments process was not sufficient to meet our Treaty obligations. They considered that members of the Committee should be appointed by Māori.

In summary, the primary driver for the proposals relating to the outstanding Treaty issues is to ensure due process in consideration of PVR applications relating to kaitiaki interests to give all parties confidence in the system, and to meet our obligations under the Treaty.

Operational issues

The driver for the operational issues addressed in this RIS is primarily a matter of

⁹ Accessible from <https://waitangitribunal.govt.nz/news/tribunal-releases-report-on-the-cptppa/>

regulatory stewardship. The issues raised from our survey of PVR stakeholder and discussions with the PVR Office reflect a regime that has not adapted to changes in the plant breeding industry over the last 30 years.

For the purposes of the operational provisions, the status quo is the current arrangements in the PVR Act. The main issues raised with the current arrangements (and that are addressed in this RIS) are:

- Lack of a clear mandate to (a) require growing trials and (b) direct how these trials should take place. While the PVR Office has adapted over the years to taking a more proactive role in relation to growing trials – with support from plant breeders – the legislation has not kept up with these changes. (Source: PVR Office.)
- Lack of a clear mandate to request protected material for use as comparators in growing trials (Source: PVR Office) and lack of security as to how this material will be used. (Source: stakeholders.)
- Lack of a general right to be heard in relation to decisions by the Commissioner. (Source: policy.)
- Whether the District Court is still the appropriate place for appeals to decisions of the Commissioner. (Source: policy.)

The pragmatic and constructive nature of the PVR Office’s relationship with plant breeders has meant that operational matters have adapted to some extent to respond to these changes, but the legislation itself needs modernising to be fit-for-purpose for the future. A failure to do this is likely to lead to increasing inefficiencies and a reduction in effectiveness over time if not addressed. We now set out in greater detail the specific issues this RIS addresses.

Outstanding Treaty issues

The outstanding treaty issues relate to:

- Issue 1: The assessment of kaitiaki relationships and the definitions of key terms
 - Rather than referring to taonga species, Cabinet agreed the new legislation refer to ‘indigenous plant species’ and ‘non-indigenous species of significance’ to indicate when kaitiaki interests need to be considered.
 - These terms were not defined in the 2019 Cabinet paper, but Cabinet noted that that the term ‘non-indigenous species of significance’ only refers to a small number of species.
 - During our previous engagements on this issue, we identified a list of plant species this definition would apply to. We heard from Māori that this list may change over time (for example as new information comes to light through research) and therefore it is necessary that any definition should be adaptable.
- Issue 2: Disclosure obligations and confidentiality
 - Cabinet agreed the PVR regime will require breeders to disclose the outcome of any engagement they had with kaitiaki during the breeding programme.
 - It is expected that breeders working with varieties derived from indigenous species or non-indigenous species of significance will engage with kaitiaki

during the breeding programme to ensure the grant of a PVR would not adversely impact kaitiaki relationships.

- Submitters expressed a lot of concern around sharing information with kaitiaki or the Committee prior to an application being made. Breeders were especially concerned that engagement with kaitiaki prior to application could jeopardise their application both in New Zealand and overseas. For example, sharing information about the breeding programme could result in the variety being 'in the public domain' and, therefore, not eligible for patent protection in the United States of America.
- Issue 3: The appointment of the Committee
 - Cabinet has agreed the Committee will be appointed by the Commissioner of PVRs who must consider the candidates knowledge of mātauranga Māori, te ao Māori, tikanga Māori and taonga species.
 - This approach works well for the Māori Advisory Committees in other IP statutes. However, given the pivotal role of the Committee under this regime, we consider the appointments process needs to be strengthened to ensure the right candidates are appointed to the Committee.
 - Given the decision-making role of the Committee, ensuring the Committee members have the necessary knowledge and skills to make decisions on complex and technical issues will be critical to the operation of the regime.
 - Māori stakeholders expressed concern that the Committee would not be able to act autonomously if members were appointed by the Commissioner. They perceived the current appointments process as creating a hierarchy in which the Commissioner would be able to control the operation of the Committee. They also expressed a strong desire for Māori to play a role in the appointment process.
 - The Legislation Design and Advisory Committee (**LDAC**) recommended including a separate appointment process for the Chair of the Committee. LDAC considered this was necessary to demarcate the Committee's facilitation role and decision-making role, as well as ensure the Committee has the necessary expertise to make judicial decisions.
- Issue 4: The Committee's decision-making process
 - Under the new regime, the Committee must determine whether the grant of a PVR will adversely impact kaitiaki relationships and whether this impact can be reasonably mitigated. Cabinet agreed that the legislation will set out processes for considering kaitiaki relationships.
 - Cabinet noted that the legislation may include a list of factors for the Committee to consider when making a determination. A list of factors is necessary to provide clarity to applicants and kaitiaki as well as for guiding the Committee's determinations.
 - The approach to decision-making colours the information the decision maker has access to. Advisory committees in the other IP statutes take an administrative approach where their decisions are made on the information provided with the application. Given the Committee has a decision-making

role, the Committee may need to be empowered to take alternative approaches to decision-making in order to make a fully informed decision.

- Given the likely size of the Committee (less than 5) and the nature of the decision they make, transparency around how a decision is reached will be important.
- The regime will allow the Committee to consider actions that can mitigate adverse impacts to allow a grant of a PVR. It is envisaged that the breeder and kaitiaki will come to an agreement on these actions prior to the Committee considering the application. It is unclear, however, what role the Committee should play where there is no agreement before an application is considered.
- Issue 5: Mitigations and conditions of grant
 - As part of the determination that the Committee makes, they must take into consideration any steps the breeder can take into account to mitigate adverse impacts. The role of the Committee in considering these mitigations requires further clarification.
- Issue 6: The post-determination review process
 - Cabinet has agreed that the Committee's determination relating to the impact on kaitiaki relationships may only be challenged by judicial review. In doing so, Cabinet has agreed an appeal would not be available for these determinations.
 - Consideration needs to be given to whether any first stage review processes should be available, in accordance with principles of natural justice, to parties wishing to contest the Committee's determination on the impacts on kaitiaki relationships.
 - In other IP statutes, such as the Patents Act, the Commissioner of Patents must not exercise any of the Commissioner's discretionary or other powers under that Act adversely to any person without giving the person an opportunity of being heard. Given the desire for decisions relating to impacts on kaitiaki relationships to rest solely with the Committee, the process for considering appeals, reviews and objections to a determination need to be tailored to ensure the policy rationale behind the original policy decisions are not undermined.
- Issue 7: Objections after grant
 - Consideration also needs to be given to how the regime would consider objections after a PVR grant on the basis of impact on kaitiaki relationships. Cabinet has agreed a grant should be nullified where it can be shown kaitiaki relationships were adversely impacted by the grant. The process for allowing this, and the basis on which an objection can be made, needs to be further clarified.
 - Objections after the grant of a PVR are generally filed by third parties where they consider that the conditions for a grant were either not met at the time the grant was made, or are no longer being met.
 - The new regime will introduce provisions for nullification of a grant whereby

a grant can be revoked where it can be established that the conditions of grant were not met at the time of grant. In addition to this, grants can be cancelled if it can be shown that a variety no longer meets the conditions of grant.

Addressing these issues will be integral to achieving one of the key objectives of the regime – protecting kaitiaki relationships with taonga species in accordance with the Treaty of Waitangi. Uncertainties will also affect the efficiency of the regime overall which may result in fewer breeders seeking PVRs or innovating to create new plant varieties.

As Cabinet agreed that this Committee would have a decision-making power, it is also important that the legislation sets out the high-level framework – consistent with the principles of natural justice and our obligations under the Treaty – under which the Committee will operate.

Evidence supporting our analysis has come from our public consultation on these issues, including holding a virtual hui and consultation with the Legislation Design and Advisory Committee. Given the limited scope and significance of these issues (in relation to the reforms that have already been agreed), we have assessed that this evidence is sufficient to support our options analysis.

Operational issues

There are a small number of issues relating to how the PVR Office considers applications for PVRs. They arose from both a survey of stakeholders and discussions with the PVR Office. Addressing these issues is expected to better reflect changes in the industry over the last 30 years and improve the effectiveness and efficiency of the application process.

The operational issues relate to:

- Issue 8: Information available to the public
 - Information about the origin and breeding of a new variety becomes publicly available after grant. There are concerns that publication of this information can help competitors and prevent breeders from fully disclosing this information in their application.
- Issue 9: Provision of propagating material requested by Commissioner
 - In some cases, testing of a new variety requires growing of comparator varieties to test for distinctness. However, the legislation is not clear as to whether or not the Commissioner can request protected material from third parties for use either as a comparator in a growing trial, or for use in a reference collection.
 - There is sometimes a reluctance from breeders to provide material for either of these purposes. The main concern of breeders relates to the security of plant material provided when the trial is being conducted by a third party (who may be a competitor).
- Issue 10: Conducting growing trials
 - Growing trials are necessary for the examination of all applications for the grant of a PVR, whether that it be carried out by the Commissioner, a third

party or overseas (meaning the PVR Office relies on a foreign test report).

- However, the legislation is not explicitly clear about whether growing trials are mandatory, who may conduct these trials and the form of trial necessary. This gap in the law has led to confusion and disputes.
- In practice, the Commissioner directs the types of growing trials necessary for each application. Different jurisdictions have different approaches to who may run growing trials depending on a range of domestic factors.
- Issue 11: Payment of trial and examination fees
 - Currently applicants must provide the trial/examination fee within a prescribed period after the application is made, but no period is actually prescribed for the payment of this fee. When growing trials commence can vary. For example, they might start a considerable amount of time after the fee has been paid (meaning that the PVR Office is holding on to that fee for all that time). Or they may get underway before the fee is paid (which can give rise to a situation where the applicant withdraws the application if a grant is looking unlikely and leaves the PVR Office with no easy way to collect the fee, especially from overseas applicants).
- Issue 12: Hearings and appeals
 - There is no general right to be heard in relation to decisions of the Commissioner under the PVR regime – aggrieved parties of such decisions are required to appeal the Commissioner’s decisions to the District Court.
 - A right to be heard before a discretionary decision is made (or other decisions making powers are exercised) is available in other IP statutes. The absence of such right to be heard is inconsistent with principles of natural justice.
 - In light of this, consideration is also given to the appropriate court to hear appeals to a decision of the Commissioner.

Evidence supporting our analysis has come from (i) our public consultation on the issues, including holding a virtual meeting, and (ii) ongoing conversations with the PVR Office. Given the limited scope and significance of these issues (in relation to the reforms that have already been agreed), we have assessed that this evidence is sufficient to support our options analysis.

2.4 What do stakeholders think about the problem?

The principle stakeholders fall into three groups:

- Plant breeders and researchers involved in the development and commercialisation of new plant varieties and applications for the grant of PVRs in relation to these new varieties
- Agents who act on behalf of (usually overseas) PVR applicants
- Māori organisations and individuals with an interest in the protection of taonga species (a key group being claimants in the Wai 2522 “TPP” Waitangi Tribunal enquiry which considered the PVR review in a Stage 2 hearing in December 2019).

Outstanding Treaty issues

All stakeholders have an interest in these issues as they will introduce new provisions to the regime. Breeders are concerned that these provisions may discourage those that work with plant varieties that would be affected by these provisions from applying for PVRs.¹⁰ They have emphasised that providing certainty is critical. We acknowledge that proposals considered here will not provide all the certainty they seek. Further clarity will be provided when the Committee is up and running through its Terms of Reference and the kaitiaki engagement guidelines it will develop to support breeders.

Legal organisations recognised the importance of having a sound legislative framework for the Committee. However, there were two issues with our proposals that came through submissions:

- These proposals elevate kaitiaki interests above the interests of other groups (eg breeders) and that this is inconsistent with the Wai 262 report that called for a 'balancing of interests' between the different groups
- That only providing for judicial review of the Committee's determinations and not a full appeal on the merits was not consistent with natural justice principles.

While these concerns relate primarily to decisions from the 2019 Cabinet Paper, they remain relevant to the discussion of the current issues.

The main concern raised by some Māori submitters was that the members of the Committee should be appointed by Māori and have the mandate of the iwi they represent.

A final key issue of note is the mixed (and sometimes strong) views on the issue of definitions in the new regime. Some (amongst both breeders and Māori) wanted to see definitions of 'kaitiaki' and 'taonga' in the legislation. Our view (supported by some submitters) is that it is for Māori to determine who *kaitiaki* are and which species are *taonga*. As such, we do not propose to define these terms in this legislation. Instead, we have identified two groups of plant species – indigenous species and non-indigenous species of significance – with which a kaitiaki relationship could exist. We have used these groups as triggers to indicate when an application must be referred to the Committee for consideration.

Operational issues

Stakeholders (mainly from the first two groups) generally reported that the PVR Office takes a pragmatic approach to the issues raised in the discussion paper, but were supportive of the view that greater legislative clarity on these issues would be helpful. None of the issues raised generated any significant concern or controversy, and where preferred options were indicated, these generally had majority support. We did not hear any evidence that has caused us to change our preferred options.

¹⁰ The Treaty provisions will mainly apply to indigenous plant species sourced in New Zealand. These make up around 7 per cent of all current PVRs, and so will only apply to around 7-10 applications each year, out of a total of approximately 140.

2.5 What are the objectives sought in relation to the identified problem?

When we consulted on the Options Paper in 2019, we consulted on the overall objectives of the PVR regime. Cabinet agreed that these should reflect the following:

- Promoting innovation and economic growth by incentivising the development and use of new plant varieties while providing an appropriate balance between the interests of plant breeders, growers and others so that there is a net benefit to society as a whole.
- Compliance with New Zealand's international obligations.
- Compliance with the Treaty of Waitangi through the recognition and protection of kaitiaki relationships with taonga species and associated mātauranga Māori.

We are also of the view that the objectives should capture the need for an efficient and effective system that reflects the importance of having a regime that minimises regulatory and business compliance costs and provides certainty.

In relation to the specific issues considered in the RIS, the relevant objectives are:

- Meeting our obligations under the Treaty
- Having an efficient and effective system for consideration of PVR applications.

In relation to the Treaty issues, we note that there is some tension between these objectives. The new process for consideration of kaitiaki relationships with taonga species will increase both costs and uncertainty for both breeders and Māori. However, it is clear that we have an obligation to implement a Treaty compliant regime and the regulatory burden must be considered in light of this obligation. The weighting of the criteria against which the options for addressing these Treaty issues are assessed reflects this trade off by assigning a double weighting to the criterion relation to Treaty compliance (namely that the process facilitates meaningful and mana-enhancing consideration of kaitiaki interests in PVR decision-making processes).

The operational issues refer to processes that are separate from those being put in place to meet our obligations under the Treaty. The objectives sought by addressing these issues are a more efficient and effective system for assessing PVR applications against the five standard criteria for the grant of a PVR¹¹. An efficient system is one in which the processes relating to PVR applications are as streamlined and clear as possible, and in which the obligations on all parties involved in a PVR application are clear so reducing the need for disputes. An effective system will be one which provides for comprehensive consideration of PVR applications and which results in robust and reliable decisions in relation to PVR grants.

¹¹ The five standard criteria of a PVR grant are that the variety is new, distinct, uniform, stable and has an acceptable denomination (variety name)

Section 3: Option identification

3.1 What options are available to address the problem?

Outstanding Treaty issues

This section sets out the options considered in relation to the following Treaty issues:

- Issue 1: The assessment of kaitiaki relationships and the definitions of key terms
 - Issue 1.1: Defining 'indigenous species'
 - Issue 1.2: Defining 'non-indigenous species of significance'
- **Issue 2**: Disclosure obligations and confidentiality
- Issue 3: The appointment of the Committee
 - Issue 3.1: Strengthening the appointments process through the appointments criteria
 - Issue 3.2: Appointing the Chair of the Committee
- Issue 4: The Committee's decision-making process
 - Issue 4.1: Factors the Committee considers when making a determination
 - **Issue 4.2**: The Committee's approach to decision-making
 - **Issue 4.3**: What constitutes a valid determination?
- **Issue 5**: Role of the Committee in relation to mitigations of impacts on kaitiaki relationships
- **Issue 6**: The post-determination review process
- **Issue 7**: Objections after grant in relation to matters of kaitiaki interests.

There are no provisions protecting kaitiaki interests in the current legislation. Where Cabinet has made high-level decisions on an issue in the 2019 Cabinet paper, these decisions have been identified as the *status quo* for the purposes of this RIS.

Only those issues highlighted in red above are considered further in the impact analysis tables in Section 4. The remaining issues are either just minor refinements of decisions Cabinet has already made in the 2019 Cabinet paper (which would have been considered in the previous RIS), or are otherwise of minimal regulatory impact:

- On the issue of definitions: Cabinet agreed in the November 2019 that these terms would be used. The term 'indigenous species' is already a well-established term and plant breeders would mostly know what this means even in the absence of a definition (and, indeed, many pieces of legislation simply do not define it). We are recommending a definition for clarity, but do not consider this issue has significant regulatory impact. The list of 'non-indigenous species of significance' will be prescribed in regulations and consulted on when we consult on the new regulations.
- On the issue of appointments: after some consideration of the issues raised by Māori (which we discuss in the relevant subsection below), we are only proposing some minor amendments to what Cabinet agreed in November 2019.
- On the issue of factors for the Committee to consider: we do not think there is a significant difference in the regulatory impact of the options assessed. All will involve factors for the Committee in some way. The key question is where these factors should sit (i.e. primary or secondary legislation) and we address this in the discussion in the relevant subsection below.

For these reasons, we consider that the narrative explanation for these issues provided in this section will suffice.

Are the options mutually exclusive, or do they or some of them work in combination?

The issues considered in this section are interrelated and build on decisions in the 2019 Cabinet paper. As such, some of the options work in combination to promote greater transparency and clarity around the Committee's assessment of impacts on kaitiaki relationships.

Has relevant overseas experience been taken into account?

Overseas experience has not been taken into consideration as the overarching framework within which these issues arise are unique to New Zealand.

Have non-regulatory options been considered? If not, why not?

Non-regulatory options have been considered in very limited circumstances. Given the regime delegates decision making powers to an appointed body, a lot of the options considered below are regulatory in nature.

Key features of the options considered

Issue 1: The assessment of kaitiaki relationships & the definitions of key terms

In the 2019 Cabinet paper, Cabinet agreed that the legislation define 'indigenous species' and 'non-indigenous species of significance' to indicate when kaitiaki interests must be considered, but did not agree definitions. (Non-indigenous species of significance refer to species that were brought to New Zealand on the migrating waka and are of significance to Māori.) While we did not present formal options on these in the discussion document, we sought people's views as to how we should approach them. In the case of the non-indigenous species of significance, we proposed a short list that would be placed in regulations.

Issue 1.1: In defining 'indigenous plant species' we considered:

- *Status quo:* no definition in legislation, leaving the term open to interpretation by the Committee and defined in guidance material
- *Option 1:* defining "indigenous plant species" as meaning any plant species that occur naturally in New Zealand or has arrived in New Zealand without human assistance¹²
- *Option 2:* defining "indigenous plant species" as meaning any species either endemic to New Zealand or arrived in New Zealand without human assistance (**preferred option**).

Option 1 was the preferred option outlined in the discussion paper. Option 2 was suggested by submitters as an alternative to Option 1 as providing greater clarity. Some submitters felt the definition referring 'species that occur naturally in New Zealand' would introduce additional ambiguity that would be avoided by instead referring to species that are 'endemic to New Zealand'. 'Endemic' is a familiar concept to plant breeders and has a clear meaning of 'found only in New Zealand'.

¹² Derived from the definition of "indigenous forest species" defined under section 4 of the *Climate Change Response Act 2002*.

Given that the definition will determine which applications are considered by the Committee, having a clear definition would be integral to the regime operating effectively to protect kaitiaki interests. As such, Option 2 is now our preferred option.

Issue 1.2: In defining 'non-indigenous species of significance' we considered:

- *Status quo*: no definition in legislation, leaving the term open to interpretation by the Committee and defined in guidance material produced by the Committee
- *Option 1*: prescribing a list of species in regulations (**preferred option**).

Like with Issue 1.1 a definition is necessary to adequately protect kaitiaki interests. Although the *status quo* (no definition) would provide flexibility for meaning of the term to apply to non-indigenous species that either came with Māori on the migrating waka or arrived in New Zealand after the migration and which have become part of Māori culture, Option 1 (a list prescribed in regulations) would provide greatest certainty for all parties as to which species fit within this definition. Option 1 still allows for additional species to be added to the prescribed list at a later date (for example if subsequent research identifies some further species that arrived on the migrating waka) which provides a degree of flexibility.

Issue 2: Disclosure obligations and confidentiality

Concerns were raised by plant breeders about the protection of any information shared prior to an application for a PVR being filed. There are two concerns here:

- That information shared could be used for commercial gain
- That information shared would be considered in the public arena and potentially prejudice an application for a plant patent in the United States (which has a 12 month disclosure criterion).

We note that, once an application has been filed, the breeder has the benefit of provisional protection for their new variety.

In considering issues of confidentiality of information exchanged during pre-application engagement, we considered:

- *Status quo*: confidential information not protected in legislation (would need to be protected under contract law, i.e. kaitiaki and breeders would need to enter into confidentiality agreements as part of the pre-application engagement process)
- *Option 1*: imposing an obligation of confidentiality under the PVR Act on both breeders and kaitiaki in relation to any confidential information disclosed between the two parties during any engagement prior to an application being filed (**preferred option**).

The *status quo* is a non-regulatory option which places the onus on breeders and kaitiaki to protect their interests through contractual agreements. By empowering breeders and kaitiaki to design their own contractual arrangements to drive engagement, the breeders and kaitiaki can have greater assurance around the confidentiality of their information as well as access to a wider range of remedies. However, the *status quo* may deter breeders from using taonga species in breeding programmes and/or disincentivise small breeders and kaitiaki from engaging early because they may lack resources or legal support to develop appropriate contractual arrangements to protect confidential information.

Option 1 is more equitable as it protects all parties affected by the new requirements equally. Protections for confidentiality would help to encourage breeders and kaitiaki to engage early in the breeding process.

Issue 3: The appointment of the Committee

Cabinet made decisions about the appointments process for the Committee in 2019. In the outstanding issues discussion document we considered a number of possible refinements to this process to strengthen the appointments process and ensure the Committee had (collectively) the appropriate expertise to make determinations on the issues that would come before it.

Issue 3.1: To further strengthen the appointments process through the appointment criteria, we identified four options:

- *Status quo:* Retain a high level appointment criteria (knowledge of tikanga Māori, mātauranga Māori, te ao Māori) agreed to by Cabinet and used in other IP statutes
- *Option 1:* Consideration of whether a candidate has the mana and standing in the community, skills, knowledge, or experience to participate effectively in the committee and contribute to achieving the purposes of the committee. A criteria similar to this has been used in the *Te Urewera Act 2014* (together with Option 1, this was our preferred option in the discussion paper)
- *Option 2:* Consideration of a candidate's legal or adjudication experience
- *Option 3:* Consideration of the Committee's overall knowledge and experience as a whole.

These options are not mutually exclusive. Following engagement, enhancing the *status quo* with the criteria in Option 1 and 3 is our preferred option as this strengthens the appointments process by ensuring the Committee has the requisite knowledge, skills and experience to recognise, understand and protect kaitiaki relationships in the plant breeding environment.

Option 2 was supported by the LDAC as it would ensure the Committee has the appropriate skills to make lawful decisions and reduce the risk of the Committee's decisions being challenged. However, we are concerned (as were some submitters) that this requirement would significantly reduce the pool of eligible candidates. We note further that our preferred option does not preclude the Committee accessing legal support if needed (either through IPONZ, or from a third party).

Issue 3.2: Following discussions with LDAC, we also considered the following options for appointing the Chair of the Committee (which we canvassed with stakeholders during the consultation process, but did not include in the discussion paper):

- *Status quo:* Like the other IP Māori advisory committees the Chair would be selected by the Committee members (**preferred option**).
- *Option 1:* The Chair of the Committee is appointed separately (preferably by the APH Cabinet process) and will be required to have adjudication experience.

Option 1 was supported by LDAC. Aside from the determinative nature of the Committee's work (and the prospect of judicial review), a key reason behind LDAC's view was that, at the time, we considered the Committee would also play an active facilitation role. Under this proposal, the Chair would only sit when the Committee was performing its

determinative role to help keep these roles distinct.

Our view on the facilitative role the Committee will play has changed following our engagement. We heard some concerns that requiring the Committee to facilitate engagement between breeders and kaitiaki would put Committee members in a difficult position and create a legitimate risk of pre-determination. Although the Committee would have flexibility to determine its own processes, our view is that its role would be primarily determinative, with the necessary investigative powers to match. The facilitative role would be limited to responding to queries and producing guidelines. In doing so the risk of pre-determination is minimised, and there is no need to demarcate the roles of the Committee through the Chair.

Given our concerns around adopting the APH appointment process and requiring legal or adjudication experience, we do not consider Option 1 would be appropriate for this regime. Members of the Trade Marks Māori Advisory Committee satisfied us that they have the necessary processes and expertise to make decisions and the ability to appoint their own chair gives them greater flexibility. As committee members come and go, it will be important that the right person with the appropriate knowledge, skills and experience plays the role of the Chair.

Issue 4: The Committee's decision-making process

In 2019, Cabinet agreed that:

- the Committee would have a decision-making function in relation to kaitiaki relationships
- that the legislation would set out the process for making these decisions, noting that this might include a list of factors for consideration
- these decisions would only be subject to judicial review.

However, the process itself was not considered and so the recent discussion document considered options for this.

Issue 4.1: the factors the Committee considers when making a determination

In November 2019, Cabinet noted that the legislative processes relating to how the Committee makes a determination on the impact of PVR grant on a kaitiaki relationship may include a list of factors for the Committee to considered when making such a determination. We consider such a list essential for three reasons:

- Cabinet agreed to delegate a statutory decision making power to the Committee and it is important that the scope of this decision-making power be clearly delineated; a list of factors form part of this
- To clearly signal to the parties involved the issues the Committee will be taking into consideration
- To guide the courts if they are asked to judicially review a determination of the Committee.

During the engagement, it has been brought to our attention that the Committee may need to consider kaitiaki relationships in the absence of an identifiable kaitiaki. In such instances, evidence or views of a kaitiaki may not be present. A non-exhaustive list would provide the Committee with sufficient guidance and flexibility to determine the impacts on

kaitiaki relationships across a wide range of applications.

However, in situations where kaitiaki are identified, there are certain factors that need to be considered (such as any agreement already reached between the breeder and kaitiaki). Given these circumstances, we propose there should be a non-exhaustive list of factors the Committee *may* consider, as well as a list of factors the Committee *must* consider when there is an identifiable kaitiaki. This strikes an appropriate balance between recognising kaitiaki interests when a kaitiaki is present and providing the Committee with sufficient flexibility to assess the impacts on kaitiaki relationships generally.

The final question is whether the list should be in the primary legislation, or placed in regulations. As noted above, Cabinet has delegated a statutory decision-making power to the Committee. These decisions affect both the private property rights of individuals and the cultural rights of our Treaty partners. It is therefore important that the scope of this power is clearly delineated, and Parliament is the appropriate body to do this. While this may raise concerns that this approach may lack flexibility, we note also that the list is non-exhaustive. While there are some factors we think must be considered, the Committee will still have some scope to consider other issues as it sees fit.

We considered the following options, and, in light of the discussion above, our preferred option is indicated:

- *Status quo*: the Committee is free to determine what factors it considers when making a determination
- *Option 1*: provide a non-exhaustive list of factors in the PVR Act that the Committee may consider (i.e. the prescribed factors would be provided for guidance purposes only)
- *Option 2*: in addition to option 1, provide a non-exhaustive list of factors in the PVR Act that the Committee must consider where kaitiaki has been identified (i.e. a mixture of mandatory and non-mandatory factors) (**preferred option**).

Issue 4.2: Committee's approach to decision-making

The discussion document considered two options for the approach the Committee could take to decision-making: (i) an administrative approach (i.e. an approach based on consideration of the information provided with the application, and (ii) an investigative approach (under which the Committee would be empowered to request further information from the parties and convene hui if necessary).

Taking into account the status quo of the 2019 Cabinet decisions, we considered three approaches the Committee could take when assessing the impact of a grant on kaitiaki relationships:

- *Status quo*: the Committee is free to determine its own approach to decision-making but lacks any powers that could support an investigative approach
- *Option 1*: an administrative approach in which the Committee must make a decision on the information provided by the applicant in the application
- *Option 2*: empower the Committee to take an investigative approach where the Committee can seek further information or convene a hui when necessary (**preferred option**).

Our preferred option has not changed as a result of our engagement. Submitters were largely supportive of Option 2. In particular, members of other IP Māori advisory

committees noted that further engagement with applicants would make their role easier and if they had the ability to seek further information, they would. Obtaining further information around the engagement, nature of kaitiaki relationship and breeding process will be critical to the success of this regime.

Issue 4.3: What constitutes a valid determination?

In addition to requiring the Committee to provide reasons with their determination, we considered the following options for what would constitute a valid determination:

- *Status quo*: the Committee is free to decide its own rules of procedure around what constitutes a determination of the Committee (eg those rules could set out that determinations could be based on a simple majority of members or require the unanimous agreement of the members)
- *Option 1*: provide in the legislation that a determination is reached by a unanimous vote
- *Option 2*: provide in the legislation that a determination is reached by simple majority vote
- *Option 3*: provide in the legislation that a determination is reached by unanimous vote, but the Chair may allow a simple majority vote in some circumstances if the Committee cannot reach an agreement (**preferred option**).

Our preferred option has not changed as a result of our engagement. Prescribing how the Committee will make a determination in legislation will provide greater clarity and transparency around the Committee's decision-making process.

Option 3 caters to situations where unanimous agreement, while desirable, may not be possible. It strikes the appropriate balance between the concerns raised by submitters and the consequences of the two other options set out below.

Where a small committee is making decisions about important issues, we consider it is important that the Committee strives to reach a unanimous agreement. However, submitters noted that a unanimous agreement may be overly burdensome and slow down the decision making process. As a result, Option 1 may adversely impact the operation of the regime by slowing down the process and prevent agreement being reached.

Given the small size of the Committee and the complexity of the evidence that will be presented, there is a risk that Option 2 may not lead to a well-reasoned determination.

Issue 5: Mitigations and conditions of grant

In 2019, Cabinet agreed that the threshold test in relation to kaitiaki relationships would include consideration of possible mitigations of any impacts the grant of a PVR might have on a kaitiaki relationship. However, the role of the Committee in relation to these mitigations was not considered.

The *status quo* is that the legislation is silent on the role that the Committee plays in relation to mitigations, noting that this means that there is no express power for the Committee to impose mitigations unilaterally. In the discussion document we considered whether the Committee should be able to unilaterally impose mitigations, e.g. in the absence of agreement between the parties. This was not our preferred option, however, on the basis that it is for kaitiaki to determine what might mitigate any adverse impact.

However, we also need to recognise that (as discussed above) there may be situations in which it is not possible to identify kaitiaki, but protection may nonetheless be required.

A subsidiary issue is, if a breeder agrees to undertake certain actions to mitigate any impacts (either following agreement with kaitiaki or subsequent to discussion with the Committee), how is this agreement formalised?

We therefore have considered three options:

- *Status quo*: the legislation is silent on the role that the Committee plays in relation to mitigations, noting that there is no power for the Committee to impose mitigations unilaterally, or for any undertakings made by the breeder to be formalised as a condition for grant
- *Option 1*: the Committee has the power to unilaterally impose mitigations, and any undertakings made by the breeder (either imposed by the Committee or following agreement with kaitiaki or subsequent to discussion with the Committee) become a condition of the PVR grant if/when the grant is made by the Commissioner
- *Option 2*: the Committee cannot unilaterally impose mitigations, but any undertakings made by the breeder (either following agreement with kaitiaki or subsequent to discussion with the Committee) become a condition of the PVR grant if/when the grant is made by the Commissioner (**preferred option**).

Issue 6: a post-determination review process

In 2019, when agreeing that a decision would only be subject to judicial review, Cabinet also noted that consideration would be given to whether there should be a first stage review, prior to consideration in the courts.

In considering what kind of review process should be available to determinations made by the Committee, we considered three options in the discussion paper:

- *Status quo*: the legislation provides that an aggrieved party may only seek judicial review of the Committee's determination
- *Option 1*: a party affected by the Committee's determination (eg applicant or kaitiaki) has a right to be heard through the IPONZ hearings process before the Committee makes its determination
- *Option 2*: a party affected by the Committee's determination can, within a prescribed period of time (eg 10 working days) request the Committee to review its determination in the light of new information being provided by that party (**preferred option**).

Our preferred option has not changed as a result of our engagement. In addition, we propose to impose a 10 working day timeframe for seeking a review. Submitters felt quite strongly about the need for a process of this type before being required to go down the expensive and time-consuming route of judicial review.

LDAC raised concerns about Option 2 noting that it could remove the incentive to get the decision right first time and introduce another role that would further undermine the Committee's determination. Their concern was influenced by the many roles the Committee already has (in facilitation and determination). Introducing another role for the Committee to review their own determinations, could risk the integrity of the Committee's determination. On this last point we refer to our discussion above about our revised view of

the facilitative role.

They suggested that Option 2 would be alternatively served by the Committee issuing a provisional decision and inviting parties to comment. However, we note that in practice there would be nothing preventing the Committee from issuing a provisional decision for parties to comment on. This is not uncommon in other IP regimes.

Issue 7: Objections after grant

Once a PVR grant has been made, any party can object to the grant on various grounds, including that either (i) the conditions for the grant were not met at the time it was made, or (ii) the conditions for the grant are no longer met. Under UPOV 91 (which the 2019 Cabinet decisions align the PVR regime with), a grant may be nullified in the first instance (i.e. deemed never to have been made) or cancelled in the second instance.

The discussion document considered options for how after grant should operate where the kaitiaki relationship is adversely impacted. We considered three options:

- *Status quo*: a grant may be nullified on the basis that kaitiaki relationships are affected, but currently there are no policy decisions around the process for allowing this
- *Option 1*: provide that an objection after grant may be made but only where the Committee had not previously considered the kaitiaki relationship during the application stage
- *Option 2*: provide that an objection after grant may be made regardless of whether the Committee considered the application (**preferred option**).

Our preferred option has changed through our engagement.

Submitters were strongly of the view that all objections after grant should be treated the same. Such that, objections on the basis that the kaitiaki relationships were adversely impacted should be treated the same as the other conditions of grant not being met.

We consider this to be an equitable outcome, and while it provides kaitiaki another opportunity to object to a grant, we consider this to be necessary and justifiable so long as the party objecting to the grant is not acting frivolously or vexatiously (in which case the Commissioner would be able to refuse to consider the objection) and has new information which the Committee has not previously considered. These two safe guards would protect breeders from unsubstantiated objections.

We also note that, while the 2019 Cabinet paper only considered nullification of a grant, the legislation should also allow for cancellation of a grant if the conditions of the grant are no longer met. This would be the case if the breeder was no longer undertaking any agreement on mitigations reached as part of the condition of the grant.

With objections to a grant on the basis of the standard criteria either not being met at the time of the grant, or no longer being met at the time the objection is filed, nullification or cancellation follow automatically. However, the case of kaitiaki interests is somewhat different as it would be possible for agreement to be reached to remedy any grounds for objection. To this end, we consider that the Committee should retain some discretion when making a decision that a grant should be cancelled or nullified to give a breeder the opportunity to agree or reinstate conditions. We do not think it desirable that a grant be temporarily cancelled while a breeder works to meet conditions. This can create confusion

for third parties as to what they can do in the intervening period that the variety is 'off grant' and extra costs for breeders to go through the process of restoring a grant once the conditions are met.

Operational issues related to the granting of PVRs

This section sets out the options considered in relation to the following operational issues:

- Issue 8: Information available to the public
- Issue 9: Provision of propagating material requested by Commissioner
- Issue 10: Conducting growing trials
 - Issue 10.1: Whether growing trials should be mandatory
 - Issue 10.2: How the type of growing trial is determined
- Issue 11: Payment of trial and examination fees
- Issue 12: Hearings and appeals
 - Issue 12.1: Right to be heard in relation to decisions of the Commissioner
 - Issue 12.2: Where appeals of the Commissioner's decisions should be heard

These issues arose from a review of the operational processes of the PVR Office, and feedback from the PVR Office. This review was separate to the main PVR review from which the 2019 Cabinet paper and the outstanding Treaty issues discussed above arose. As such these issues are unrelated to the 2019 Cabinet decisions and so the status quo is the situation in practice under the current PVR Act.

All issues above are further considered in the impact analysis tables in Section 4.

Are the options mutually exclusive, or do they or some of them work in combination?

The issues are interrelated and impact the overall system within which plant variety rights are granted.

Have non-regulatory options been considered? If not, why not?

Non-regulatory options have been considered in very limited circumstances. Given the regime delegates decision-making powers and relates to the granting of property rights, many of the options considered were regulatory in nature.

Key features of the options considered

Issue 8: Information available to the public

In considering whether origin and breeding information should be treated confidentially we have considered three options:

- *Status quo*: All information is available to the public (**preferred option**)
- *Option 1*: Origin and breeding information must remain confidential to the plant breeder/PVR owner
- *Option 2*: Origin and breeding information must temporarily remain confidential until after grant of the PVR

The discussion paper did not indicate a preferred option.

When breeders submit an application for a PVR, they are required to provide information,

including on the origin and breeding of the new variety. This information is high-level and asks about how the variety was bred (e.g. seedling of unknown parentage, mutation, controlled pollination, open pollination) and, if relevant, what the parentage is. This information assists the PVR Office in classifying the new variety and in identifying comparator varieties to help determine whether the new variety is indeed a distinct new variety.

Some breeders raised concerns that this information can help competitors and so should remain in confidence, at least until the decision on the grant is made. If a grant is not made, then the information would remain as a trade secret. The PVR Office reports that this information being public may incentivise breeders to simply identify parents as 'unknown'. This can make the job of the PVR Office harder.

On the other side of the argument is the principle of transparency in IP regimes. This encourages further innovation and is seen as a quid pro quo for the grant of a right. In addition, the information requested is high-level, and, though it might give an indication of the breeders breeding programme, is unlikely to be enough information to initiate a potentially competitive breeding programme.

The concerns expressed above are not shared by all breeders. In the consultation on this issue, the majority of submitters supported the status quo. Some argued on the basis of the transparency principle, others that it would assist with the identification of 'essentially derived varieties'.¹³

The *status quo* promotes transparency and promotes further innovation. Given that the information we are considering is high-level, and that the majority of submitters supported retaining the status quo, this is our recommended option.

Although Options 1 and 2 might encourage applicants to provide more detailed and accurate information in their applications, this could hinder the development of new varieties. Transparency is an important element of all IP regimes – keeping information confidential would be inconsistent with the social contract under which IP rights are granted. (Property rights are granted in exchange for public disclosure of information that will encourage subsequent innovation).

Issue 9: provision of propagating material requested by the Commissioner

We considered two options relating to the provision of plant material by third parties for growing trials:

- *Status quo*: although the PVR Act gives the Commissioner with the authority to require a PVR owner to provide propagating material of a protected variety, the Act is otherwise silent on what lawful uses the Commissioner (or third parties acting under the authority or direction of the Commissioner) can use the requested material for (eg for use in holding comparative trials)
- *Option 1*: Amend the PVR Act to clarify that the Commissioner or third parties acting on the authority or direction of the Commissioner may use the propagating material provided upon request by a PVR owner for:
 - comparison purposes as a part of any growing trial, including growing trials

¹³ UPOV 91 extends the rights over a protected variety to varieties that are 'essentially derived' from that variety. An essentially derived variety retains many of the characteristics of the original variety and the intent of these provisions is to recognise the IP of the initial variety,

- undertaken by third parties
- making up a reference collection of varieties
- any other official purpose required or permitted under the PVR Act
(preferred option)

The discussion paper also canvassed whether and, under what conditions, the refusal to meet a request for provision of material should be sanctioned by cancellation of a grant. While submitters acknowledged that some form of sanction was necessary, they stressed that this must be flexible enough to allow for circumstances beyond their control (e.g. importation delays due to quarantine requirements). We also note that Article 22 of UPOV 91 is very restricted in terms of the grounds for cancellation of a grant, and so instead propose to rely on Article 17 which permits the imposition of conditions on a grant in the public interest.

During our engagement, breeders also expressed some concern around the security of plant material provided when a growing trial is conducted by a third party (who may be a competitor).

Taking both these subsidiary issues into account, Option 1 was refined as follows:

- provision of plant material on the request of the Commissioner will be a general condition of a PVR grant
- that a grant may be cancelled where such a request is not met without good reason
- that where a trial is being run by the applicant, the application will be lapsed where any material provided for comparison purposes is used other than as directed by the Commissioner.

Issue 10: conducting growing trials

Issue 10.1: whether growing trials should be mandatory for all applications

We considered two options for whether growing trials should be mandatory:

- Status quo: the PVR Act provides that the Commissioner may undertake or commission, or approve the applicant's undertaking or commissioning of growing trials, or may examine and evaluate the results of growing trials already conducted by a person or body independent of the applicant¹⁴
- Option 1: Amend the PVR Act to require growing trials in relation to all applications
(preferred option)

Our preferred option has not changed through the engagement. Growing trials are necessary for the grant of a PVR and they are a common part of all PVR regimes around the world. They are a common part of the New Zealand regime as well with the Commissioner directing the type of trial in each case. As such, clarification that such trials are mandatory will bring the legislation in line with established practices.

Issue 10.2: how the type of growing trial (e.g. who conducts the trial and under what conditions) is determined.

We considered four options:

¹⁴ Regulation 16 of the Plant Variety Rights Regulations 1988.

- *Status quo*: The legislation does not dictate how the type of growing trial is determined (*status quo*)
- *Option 1*: Applicants organise their own growing trials
- *Option 2*: Applicants have the option to conduct their own growing trials
- *Option 3*: The Commissioner directs the types of trial for certain species
- *Option 4*: The Commissioner directs the types of growing trials in all applications (**preferred option**).

Our preferred option has not changed through the engagement, though Option 4 has been refined by recommending that regulations prescribe the matters (i.e. features of a trial) that the Commissioner can direct.

Issue 11: Payment of trial and examination fees

We have considered three options for prescribing when the fees must be paid:

- *Status quo*: The PVR Act provides that the fees must be paid with a prescribed period after an application must be made
- *Option 1*: require the fees to be paid at the time of making the application (where the fee is not paid, the application would be deemed to have not been made)
- *Option 2*: require the fees are to be paid within a prescribed period after the Commissioner's request for payment of the fees, otherwise the application would lapse (**preferred option**).

The main issue here is that when growing trials actually get underway following the filing of an application can be very variable. Due to the seasonal nature of planting, it may be many months, or even a year before growing trials can commence. If these fees are required at the time of the application, this can mean the PVR Office holding on to these fees for some time. In addition, some growing trials take place over several years, and our preferred option would have the flexibility of collecting certain amounts each year.

Our preferred option benefits both breeders and the PVR office and it has not changed through our engagement.

Issue 12: Hearings and appeals

Issue 12.1: Right to be heard in relation to decisions of the Commissioner

We considered two options:

- *Status quo*: other than in two specific situations, the PVR Act does not provide any right for a person to be heard before a decision is taken
- *Option 1*: include a general right for a person to be heard before the Commissioner makes a decision or exercises a discretionary power (**preferred option**).

Issue 12.2: Where appeals of the Commissioner's decisions should be heard

In considering who should hear appeals, we considered two options:

- *Status quo*: the PVR Act provides that appeals should be heard by the District Court
- *Option 2*: amend the PVR Act to provide for appeals to be heard by the High Court, consistent with other IP regimes (**preferred option**).

The PVR Act currently only explicitly gives a right to be heard in relation to two specific

situations, and, furthermore, the regulations don't prescribe any process for these hearings. Appeals to decisions of the Commissioner go to the District Court.

It is likely that this arrangement results from the time the legislation was drawn up when the PVR Office was part of the Ministry of Agriculture and Fisheries and not within IPONZ. Nowadays, there is no reason not to have a general right to be heard whenever the Commissioner exercises their discretion (like s208 in the Patents Act), with regulations prescribing the hearings process. Absent such a process it probably made more sense for appeals to go to the District Court.

In addition, the legislation currently only provides for a right to be heard in relation to objections before grant and compulsory licences. The legislation should clarify the other situations in which parties should have a right to be heard (eg cancellation/nullification of a right).

With the introduction of a general right to be heard (as we recommend), we consider that appeals should go to the High Court in line with other IP regimes. Given that the High Court has the jurisdiction to hear appeal and infringement cases in other IP regimes we consider that this gives the Court a good understanding of fundamental IP principles and technical expertise to hear PVR cases.

All submitters supported our preferred option in relation to hearings, and the majority of submitters supported our preferred option in relation to appeals.

3.2 What criteria, in addition to monetary costs and benefits have been used to assess the likely impacts of the options under consideration?

Outstanding Treaty issues

Our criteria for options analysis of proposals relating to Treaty compliance remain the same as those set out in the 2019 Options paper (and the Regulatory Impact Statement that accompanied the 2019 Cabinet paper).

For Treaty compliance, our criteria for options development and assessment are:

- facilitates meaningful and mana-enhancing consideration of kaitiaki interests in PVR decision-making processes;
- improves the clarity of procedures for plant breeders, the Committee, kaitiaki, the Commissioner and third parties
- minimises regulatory and business compliance costs.

In assessing the options, we assign a double weighting to criterion (a) as it directly responds to the guiding principles for giving effect to our Treaty obligations. Criteria (b) and (c) are secondary objectives and require us to consider the workability of changes we may seek in the specific context of the PVR regime.

Operational issues

The operational issues are considered against two criteria:

- Effectiveness of the PVR system
- Operational efficiency of the application and testing processes

3.3 What other options have been ruled out of scope, or not considered, and why?

Other than as already described in relation to how the options in Section 3.1 were arrived at, no further (significant) options were ruled out of scope or not considered.

Section 4: Impact Analysis

Marginal impact: How does each of the options identified in section 3.1 compare with taking no action under each of the criteria set out in section 3.2?

- Columns shaded in light blue indicate the recommended option.
- Options are assessed against the criteria with one or two + or – (see the **Key** below).
- However, we note that, for options relating to the outstanding Treaty issues (and as discussed above in Section 3.2), the first criterion has a double weighting as it directly responds to the problem definition (namely what is necessary to meet our Treaty obligations in the PVR regime). The tables below will reflect this as indicated by the following example: ‘++ (adjusted to ++++)’
- As discussed in Section 3.1, not every issue considered in the Treaty issues section has a corresponding impact analysis table in this section. This is because the issue considered is either just a minor refinement of a decision Cabinet made in 2019, or is otherwise of minimal regulatory impact. This was the case for Issues 1.1, 1.2, 3.1, 3.2 and 4.1 and so there are not corresponding tables for these issues in this section. All issues considered in the operational issues section have a corresponding impact analysis table in this section.

Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Issue 2: Confidentiality of information during pre-application engagement

	Status quo – confidential information not protected in legislation	Option 1 – legislation imposes an obligation on parties involved in pre-application engagement to keep information confidential
Meaningful and mana-enhancing consideration of kaitiaki interests	<p>0</p> <p>If confidential information is not adequately protected, this may discourage breeders from engaging with kaitiaki prior to lodging an application for a PVR. This would reduce the opportunity for kaitiaki interests to be considered at an early stage and not be mana-enhancing.</p>	<p>+ (adjusted to ++)</p> <p>Protecting confidential information should encourage breeders to engage with kaitiaki prior to lodging an application for a PVR. This will be more mana-enhancing for kaitiaki than the status quo.</p>
Improves clarity of procedures	<p>0</p> <p>Both the status quo and option 1 are equally clear.</p>	<p>0</p> <p>Both the status quo and option 1 are equally clear.</p>
Minimise regulatory and business compliance costs	<p>0</p> <p>Small breeders and kaitiaki may not have the resources to negotiate contractually binding agreements for protecting their confidential information</p>	<p>+</p> <p>Clarifying in legislation that this information is confidential will reduce any costs the parties may have incurred protecting the information by other means. It will also ensure that applications for plant patents in the USA will not be prejudiced by the sharing of this information.</p>
Overall assessment	<p>The status quo does not provide adequate protection for confidential information shared pre-application.</p>	<p>This is our recommended option.</p>

Issue 4.2: The Committee's approach to decision-making

	Status quo – the Committee is free to determine its own process, but lacks any empowering provisions to request information or convene hui	Option 1 – Legislation provides that the Committee take an administrative approach to decision-making	Option 2 – Legislation empowers to take an investigative approach to decision-making
Meaningful and mana-enhancing consideration of kaitiaki interests	<p>0</p> <p>Under the status quo, while the Committee can determine its own process, it has no power to request further information from parties or convene hui. Should it wish to take an investigative approach, it is not empowered to do so. This will leave the Committee more reliant on the information provided by breeders with the application. An investigative approach was considered by Māori as consistent with tikanga and the Crown's Treaty obligations. So while the freedom of approach is mana-enhancing, the impact of this is reduced by the lack of these powers.</p>	<p>- (adjusted to --)</p> <p>Limiting the approach in this way is not mana-enhancing for Māori as it leaves the Committee reliant on the information provided by the breeder with their application. The voice of kaitiaki will not be considered on an equal footing.</p>	<p>++ (adjusted to ++++)</p> <p>Under this option the Committee would take an active role in reaching a decision and be empowered to request further information and convene hui. This would give both parties an equal opportunity to have their views considered by the Committee, and, as such, meets this criterion. Māori considered this approach consistent with tikanga and the Crown's Treaty obligations.</p>
Improves clarity of procedures	<p>0</p> <p>The lack of any prescribed process for decision-making means the status quo does not provide clarity to breeders and kaitiaki.</p>	<p>+</p> <p>Both options 1 and 2 provide more clarity for breeders and kaitiaki than the status quo.</p>	<p>+</p> <p>Both options 1 and 2 provide more clarity for breeders and kaitiaki than the status quo.</p>
Minimise regulatory and business compliance costs	<p>0</p> <p>Under the status quo, breeders have to disclose certain information in relation to their engagement with kaitiaki at the time they file their application for the PVR. Breeders and kaitiaki could incur additional costs responding to requests from the Committee.</p>	<p>+</p> <p>This option minimises costs for both breeders and kaitiaki compared to the status quo.</p>	<p>-</p> <p>While the status quo does not rule out an investigative approach, this option may still lead to increased costs for both breeders and kaitiaki by comparison as the Committee will be empowered to request further information of convene hui.</p>
Overall assessment	<p>The lack of prescribed process in the status quo is not desirable.</p>	<p>This option is limited and not mana-enhancing.</p>	<p>This is our recommended option, primarily because it is mana-enhancing for Māori.</p>

Issue 4.3: – What constitutes a valid decision of the Committee?

	Status quo – the legislation is silent on what constitutes a valid decision and so this is for the Committee to determine	Option 1 – unanimous decision required	Option 2 – majority decision required	Option 3 – unanimous decision preferred but Chair may allow majority decision
Meaningful and mana-enhancing consideration of kaitiaki interests	<p>0</p> <p>The status quo leaves the Committee to determine its own process in relation to each application before it: either unanimous or majority decision making.</p>	<p>+ (adjusted to ++)</p> <p>Given the small size of the committee, requiring a unanimous decision would subject the application to the most rigorous scrutiny of the options considered. However, it was noted that this could be overly burdensome and slow down the decision-making process, and potentially could result in the Committee being unable to reach a decision. Unanimous decision was considered by one submitter as more consistent with tikanga.</p>	<p>- (adjusted to --)</p> <p>Some submitters considered this was preferable to a unanimous decision as it is similar to any judicial panel and will likely mean fewer delays. However, it may mean less scrutiny of an application. As this option only provides the lesser form of scrutiny that the status quo provides, it is marginally worse than the status quo.</p>	<p>+ (adjusted to ++)</p> <p>This is an improvement on the status quo. While it may not attract the rigour of option 1, it will guarantee a decision by permitting majority decision if unanimity cannot be reached. This option was preferred by most including Māori submitters, and so we consider this on a par with Option 1 in relation to this criterion.</p>
Improves clarity of procedures	<p>0</p> <p>The status quo does not give clarity as to how a decision is reached.</p>	<p>+</p> <p>Prescribing the process the Committee must follow will be clearer than the status quo, and equal across options 1-3.</p>	<p>+</p> <p>Prescribing the process the Committee must follow will be clearer than the status quo, and equal across options 1-3.</p>	<p>+</p> <p>Prescribing the process the Committee must follow will be clearer than the status quo, and equal across options 1-3.</p>
Minimise regulatory and business compliance costs	<p>0</p> <p>Costs for breeders will largely depend on the time taken for the Committee to reach a decision. This is difficult to assess anyway, but not prescribing how the Committee will reach a decision increases this uncertainty.</p>	<p>--</p> <p>Requiring a unanimous decision could mean that, in some instances, the Committee may take longer to reach a decision, potentially resulting in increased costs for breeders.</p>	<p>+</p> <p>Requiring only a majority decision is likely to be less time consuming than either options 1 or 3. As this is the least time consuming of the options available to the Committee under the status quo, it is a marginal improvement on the status quo.</p>	<p>-</p> <p>Although requiring a unanimous decision mean that, in some instances, the Committee may take longer to reach a decision, this could be curtailed by permitting a majority decision if it looks like unanimity will be hard to achieve.</p>
Overall assessment	<p>Given the significance of these decisions, it is important that how these decisions are reached is set out in legislation so that it is clear to all parties.</p>	<p>While this may subject the application to the most rigorous consideration, there is a risk of unnecessary delays (and even the possibility of no agreement) and the compromise option of option 3 was supported by most.</p>	<p>While preferable from a time point of view, this option does not recognise that seeking a unanimous decision is preferable overall.</p>	<p>This is our recommended option. It strikes an appropriate balance between the different considerations.</p>

Issue 5 – Role of the Committee in relation to mitigations of impacts on kaitiaki relationships

	Status quo – legislation is silent on role of Committee in relation to mitigations, but no power to formalise any agreements as a condition of grant	Option 1 – Committee can unilaterally impose mitigations, and mitigations (either imposed or agreed) become a condition of the PVR grant	Option 2 – Committee cannot unilaterally impose mitigations, but agreed mitigations become a condition of the PVR grant
Meaningful and mana-enhancing consideration of kaitiaki interests	<p>0</p> <p>The status quo does not prevent the Committee unilaterally imposing mitigations which we do not consider mana-enhancing as it takes decisions out of the hands of kaitiaki. It also does not provide any means to formalise any agreements reached in relation to mitigations, creating uncertainty for kaitiaki that these agreements will be honoured.</p>	<p>+ (adjusted to ++)</p> <p>This option is not considered as mana-enhancing as option 2 as it takes decisions around kaitiaki interests out of the hands of kaitiaki. However, it is preferable to the status quo as, in those cases where agreement is reached, that agreement can be formalised, providing greater certainty to kaitiaki.</p>	<p>++ (adjusted to ++++)</p> <p>This option is considered the most mana-enhancing as it leaves decisions around kaitiaki interests in the hands of kaitiaki. It also provides that where agreement is reached, that agreement can be formalised, providing greater certainty to kaitiaki than the status quo. It was supported by most submitters.</p>
Improves clarity of procedures	<p>0</p> <p>The status quo does not provide clarity to either breeders or kaitiaki as to how mitigations will be considered by the Committee. Nor does it provide a means to formalise any agreement reached.</p>	<p>+</p> <p>Both options provide greater clarity than the status quo, as the role of the Committee in relation to mitigations and the means to formalise agreement will be set out in the legislation.</p>	<p>+</p> <p>Both options provide greater clarity than the status quo, as the role of the Committee in relation to mitigations and the means to formalise agreement will be set out in the legislation.</p>
Minimise regulatory and business compliance costs	<p>0</p> <p>As with the previous issue, costs will largely arise from the time taken for the Committee to consider the issue before it.</p>	<p>0</p> <p>Providing that the Committee could unilaterally impose mitigations could shorten the process compared to Option 2. This option is similar to the status quo, which also permits (albeit tacitly) imposition of mitigations.</p>	<p>-</p> <p>Both options will increase compliance costs over the This option could result in higher costs for breeders as it may take longer for the parties to reach agreement. It is therefore less preferable to the status quo.</p>
Overall assessment	<p>Both options are preferable to the status quo.</p>	<p>Both options are preferable to the status quo, but this option is not as good as Option 2 because of its assessment against the first criterion.</p>	<p>This is the recommended option, primarily due to the assessment against the first criterion.</p>

Issue 6 – Post-determination review process

	Status quo – determinations may only be judicially reviewed	Option 1 – Legislation provide a right to be heard by IPONZ hearings panel before determination	Option 2 – Legislation provides a procedure to for Committee to review its determination where new information is provided
Meaningful and mana-enhancing consideration of kaitiaki interests	<p>0</p> <p>This option is consistent with the principle that decisions relating to kaitiaki interests should be made by Māori, and is thus mana-enhancing. However, as it is only available through the courts, accessibility issues reduce the impact of this.</p>	<p>0</p> <p>While it does provide a more accessible process than judicial review through the courts, the IPONZ hearings process is not well-placed to consider matters relating to kaitiaki interests. To be mana-enhancing, these issues need to be considered by Māori. On balance this is no better or worse than the status quo.</p>	<p>++ (adjusted to ++++)</p> <p>This option is consistent with the principle that decisions relating to kaitiaki interests should be made by Māori. It also improves accessibility for kaitiaki to challenge a determination of the Committee and is therefore more mana-enhancing than the status quo.</p>
Improves clarity of procedures	<p>0</p> <p>The status quo and all options are equally clear from a process point of view, i.e. what is available to the parties.</p>	<p>0</p> <p>The status quo and all options are equally clear from a process point of view, i.e. what is available to the parties.</p>	<p>0</p> <p>The status quo and all options are equally clear from a process point of view, i.e. what is available to the parties.</p>
Minimise regulatory and business compliance costs	<p>0</p> <p>By only providing for judicial review by the courts, this option imposes more costs on both breeders and kaitiaki than either options 1 or 2.</p>	<p>+</p> <p>By providing a first stage review of a decision of a decision of the Committee before going to court, both options 1 and 2 are an improvement on the status quo.</p>	<p>+</p> <p>By providing a first stage review of a decision of a decision of the Committee before going to court, both options 1 and 2 are an improvement on the status quo.</p>
Overall assessment	<p>This option is too costly for both breeders and kaitiaki if they wish to seek a review of a decision of the Committee.</p>	<p>This option is preferable to the status quo on the grounds of cost, but does not measure up well against the first criterion.</p>	<p>This is our recommended option. It provides a low cost first stage review which is better for all parties, while still meeting the principle that kaitiaki interests should be considered and determined by Māori.</p>

Issue 7: Post grant objections on the ground that the kaitiaki relationship has been adversely impacted

	Status quo – grant may be nullified if kaitiaki relationships affected, but no procedures exist around this	Option 1 – Limit post grant objections to situations where the Committee has not previously considered the impact	Option 2 – Permit post grant objections regardless of whether or not the Committee has previously considered the impact
Meaningful and mana-enhancing consideration of kaitiaki interests	<p>0</p> <p>While the status quo is mana-enhancing as it provides for a grant to be nullified if it is later found that kaitiaki relationships are impacted, the lack of any process around this reduces the impact.</p> <p>[Note that we also recommend that under Options 1 and 2, as well as providing for nullification, these will provide for cancellation if a breeder is no longer meeting the conditions of the grant in relation to agreed mitigations.]</p>	<p>- (adjusted to - -)</p> <p>While this option provides due process to any post-grant objections, it is less preferable to the status quo. This is because it limits the availability of post-grant objections when compared to post-grant objections in relation to the five main conditions for a PVR grant.¹⁵</p>	<p>++ (adjusted to ++++)</p> <p>This option treats the (re)consideration of kaitiaki interests post grant in the same manner as the five main conditions for a PVR grant.</p>
Improves clarity of procedures	<p>0</p> <p>The lack of any prescribed process as to how a grant may be nullified if it is later found that the kaitiaki relationships are impacted means the status quo does not provide clarity to breeders and kaitiaki.</p>	<p>+</p> <p>Both options 1 and 2 increase clarity for both breeders and kaitiaki as they will set out clear processes for objections after grant to be made.</p>	<p>+</p> <p>Both options 1 and 2 increase clarity for both breeders and kaitiaki as they will set out clear processes for objections after grant to be made.</p>
Minimise regulatory and business compliance costs	<p>0</p> <p>While this doesn't provide any process for post-grant consideration of kaitiaki relationships, neither does it restrict them in the way that Option 1 does. Permitting greater opportunity for post-grant consideration, means that breeders may find themselves involved more often in such a process, entailing costs for them.</p>	<p>+</p> <p>By limiting the opportunity for post-grant consideration of kaitiaki relationships compared to the status quo, this option will be preferable to the status quo in relation to this criterion.</p>	<p>0</p> <p>Option 2 has similar opportunity for post-grant consideration as the status quo.</p>
Overall assessment	<p>While providing for nullification of a grant, the status quo neither provides for a process for post-grant objections, nor does it provide for cancellation.</p>	<p>While this option would address the short comings of the status quo, by limiting the availability of post-grant objections to grants not previously considered by the Committee, it is not as mana-enhancing as the status quo.</p>	<p>This option both addresses the short comings of the status quo and is mana-enhancing. It is, therefore, our recommended option.</p>

¹⁵ The five main criteria of a PVR grant are that the variety is new, distinct, uniform, stable and has an acceptable denomination (variety name).

Issue 8 – Information available to the public

	Status quo – all information available to the public	Option 1 – Origin and breeding information kept confidential	Option 2 – Origin and breeding information kept confidential temporarily
Effectiveness of PVR system	<p style="text-align: center;">0</p> <p>IP rights come with a responsibility to share that innovation to encourage further innovation.</p>	<p style="text-align: center;">--</p> <p>There are no compelling grounds to keep this information confidential in perpetuity. IP rights come with a responsibility to share that innovation to encourage further innovation.</p>	<p style="text-align: center;">-</p> <p>IP rights come with a responsibility to share that innovation to encourage further innovation. Information could be made public once a grant is made, but other breeders would still be denied this information in the period (often many years) between application and grant.</p>
Operational efficiency of applications and testing process	<p style="text-align: center;">0</p> <p>PVR office reports that some breeders withhold breeding and origin information, reducing efficiency of application and testing process.</p>	<p style="text-align: center;">+</p> <p>May improve efficiency if it encourages the small number of breeders who withhold some information to provide more information with the application</p>	<p style="text-align: center;">+</p> <p>May improve efficiency if it encourages the small number of breeders who withhold some information to provide more information with the application</p>
Overall assessment	<p>Breeders receive many of the benefits of a grant from the time of application (e.g. provisional protection), and so, on balance, the principle of transparency is considered more important than the small efficiency gains the PVR office may achieve under Option 2.</p>	<p>No case for this option</p>	<p>Breeders receive many of the benefits of a grant from the time of application (e.g. provisional protection), and so, on balance, the principle of transparency is considered more important than the small efficiency gains the PVR office may achieve.</p>

Issue 9 – Provision of propagating material requested by the Commissioner

	Status quo – Plant material can only be required for use in growing trials	Option 1 – Applicants and grantees be required to provide propagating material for comparison and reference purposes
Effectiveness of PVR system	<p style="text-align: center;">0</p> <p>A lack of plant material for comparison and reference purposes can result in a less robust testing process. We note that in most instances breeders are happy to provide material for this.</p>	<p style="text-align: center;">+</p> <p>Having the material necessary for comparative growing trials alongside the candidate variety will improve the robustness of the testing process.</p>
Operational efficiency of applications and testing process	<p style="text-align: center;">0</p> <p>The lack of any express authority to request plant material for comparison and reference purposes can hinder the efficiency of the testing process for the PVR office as it can be harder and more resource intensive for the office to try and obtain suitable material.</p>	<p style="text-align: center;">+</p> <p>Having explicit authority to request material from breeders will improve the efficiency of the testing process.</p>
Overall assessment	<p>Clear case for change.</p>	<p>This is the recommended option, though we note stakeholders concerns around (i) the security of material provided to the PVR Office, and (ii) issues beyond the control of breeders when it comes to timing to respond to a request. We therefore propose that this option is refined as follows:</p> <ul style="list-style-type: none"> • It be made a general condition of a PVR grant that material be provided on request of the Commissioner for official purposes, including for comparison and reference purposes • That a grant may be cancelled if such a request is not met without good reason • That if a trial is being run by the applicant, then the applicant will be lapsed if any material provided for comparison purposes is used other than as directed by the Commissioner.

Issue 10.1 – Growing trials: optional or compulsory?

	Status quo – growing trials are not compulsory	Option 1 – growing trials are compulsory
Effectiveness of PVR system	<p style="text-align: center;">0</p> <p>Growing trials are necessary in all applications and in practice this is what happens.</p>	<p style="text-align: center;">0</p> <p>Growing trials are necessary in all applications and in practice this is what happens, so no change expected here.</p>
Operational efficiency of applications and testing process	<p style="text-align: center;">0</p> <p>In practice growing trials take place in all applications, though the lack of express recognition of this in the legislation can create some uncertainty for breeders and give rise to disputes (though we understand these are rare).</p>	<p style="text-align: center;">+</p> <p>Will make it clear to breeders and reduce the opportunity for disputes.</p>
Overall assessment	<p>In practice growing trials take place in all applications, but current legislation creates some uncertainty around this issue.</p>	<p>Recommend that the legislation clarify that growing trials (whether undertaken by the Commissioner, a third party or an overseas testing agency) are compulsory for all applications.</p>

Issue 10.2 – Growing trials: who should run/direct the trial?

	Status quo – Commissioner can only direct trials if insufficient information	Option 1 – Applicants organise their own growing trials	Option 2 – Applicants have the option of conducting their own trials	Option 3 – Commissioner directs type of trial for certain species	Option 4 – Commissioner directs type of trial for all applications
Effectiveness of PVR system	<p>0</p> <p>Current operational reality is that the PVR Office directs which type of trial takes place</p>	<p>--</p> <p>Due to the increasing complexity of testing, this is likely to reduce the effectiveness of the testing process</p>	<p>-</p> <p>Similar to Option 1, though applicant could ask PVR Office to undertake trial, reducing the issues with that option</p>	<p>-</p> <p>Would reflect current practice for those species identified, but uncertainty would remain for remaining species</p>	<p>0</p> <p>Would reflect current operational practice</p>
Operational efficiency of applications and testing process	<p>0</p> <p>Current operational reality is that the PVR Office directs which type of trial takes place, though the lack of express recognition of this in the legislation can create some uncertainty for breeders and give rise to disputes (though we understand these are very rare).</p>	<p>--</p> <p>If the testing carried out by the applicant is not satisfactory, PVR Office will have to conduct further tests.</p>	<p>-</p> <p>Similar to Option 1, though applicant could ask PVR Office to undertake trial, reducing the issues with that option</p>	<p>-</p> <p>Would reflect current practice for those species identified, but uncertainty would remain for remaining species</p>	<p>+</p> <p>Would reflect current operational practice, but provide more certainty to both breeders and the PVR Office</p>
Overall assessment	<p>In practice PVR Office directs which type of trial takes place, but current legislation creates some uncertainty around this issues.</p>	<p>This option would be considerably worse than the status quo.</p>	<p>Similar to Option 1, though applicant could ask PVR Office to undertake trial, reducing the issues with that option</p>	<p>Would reflect current practice for those species identified, but uncertainty would remain for remaining species, meaning this option is less desirable than the status quo</p>	<p>Would reflect current operational practice, but provide more certainty to both breeders and the PVR Office, and so is the recommended option.</p> <p>We note that this option would:</p> <ul style="list-style-type: none"> • Clarify that this includes relying on foreign test reports • Prescribe the details of what conditions the Commissioner can direct when a trial is conducted by a third party.

Issue 11 – Payment of trial and examination fees

	Status quo – fees paid in prescribed period after application	Option 1 – fees paid at time of application	Option 2 – fees paid in prescribed period after Commissioner’s request
Effectiveness of PVR system	<p style="text-align: center;">0</p> <p>Non-payment of fees can lead to a trial being delayed. It is important that the obligations on applicants are clear in the legislation.</p>	<p style="text-align: center;">--</p> <p>It is not necessarily clear at application what fees will be required. This could delay the application being filed with potentially adverse consequences for breeder in relation to issues such as novelty, priority filing and provisional protection</p>	<p style="text-align: center;">+</p> <p>This option avoids potential delays to applications being filed and provides certainty to breeders about what fees are needed and when they need to be paid.</p>
Operational efficiency of applications and testing process	<p style="text-align: center;">0</p> <p>When growing trial can get underway is very variable. Tying the payment of fees to the application date is not flexible enough to accommodate this variability and is inefficient.</p>	<p style="text-align: center;">--</p> <p>Delays can also hinder PVR Office processes. In addition, this could result in fees being paid a considerable time before a trial can actually get underway. Which, in turn can mean the Office having to either hold funds for a long period of time, or having to reimburse funds if an application is withdrawn.</p>	<p style="text-align: center;">++</p> <p>This option promotes operational efficiency as the Commissioner can make the request once the details (including timing and nature) of the trial are known.</p>
Overall assessment	<p>The status quo is clearly unsatisfactory. Linking payment of trial/examination fees to the time of application is not efficient.</p>	<p>This option is also unsatisfactory. Linking payment of trial/examination fees to the time of application is not efficient, and more so by requiring the fees on application (rather than in a specified time after).</p>	<p>This is the recommended option, primarily because it is the most efficient option for both breeders and the PVR Office.</p>

Issue 12.1: Right to be heard in relation to a decision of the Commissioner

	Status quo – right to be heard only exists in relation to two particular processes¹⁶	Option 1 – Legislation provides a right to be heard before decision made
Effectiveness of the PVR system	<p style="text-align: center;">0</p> <p>There is currently only an explicit right to be heard in relation to two PVR processes, and no supporting regulations setting out how a hearings process should proceed. Instead, the PVR Act provides for appeals to be heard at the District Court. This is not consistent with natural justice principles, not consistent with other IP regimes and can result in less well-informed decision-making.</p>	<p style="text-align: center;">++</p> <p>Providing for a right to be heard in relation to all decisions of the Commissioner is consistent with natural justice principles and will result in better decisions being made. [We note that the forthcoming discussion document setting out proposed changes to PVR regulations will include consideration of a hearings process based on that in the Patents Regulations.]</p>
Increasing operational efficiency	<p style="text-align: center;">0</p> <p>The quality of decision-making is directly related to the operational efficiency of the PVR system. Poor decision making can lead to more disputes about those decisions.</p>	<p style="text-align: center;">+</p> <p>If better decisions are made in the first instance by the Commissioner, this should, in turn, reduce the possibility of appeals of the Commissioner's decisions.</p>
Overall assessment	<p>The status quo does not meet natural justice principles, is not consistent with other IP regimes, and increases the likelihood of poor decision-making.</p>	<p>There is a clear case for introducing a general right to be heard in the new legislation.</p>

¹⁶ Under the PVR Act, there is only an express right to be heard in relation to (i) objections before grant (s6), and (ii) compulsory licence applications (s21).

Issue 12.2: Where appeals of the Commissioner’s decisions should be heard

	Status quo – appeals heard by District Court	Option 1 – appeals heard by the High Court
Effectiveness of the PVR system	<p style="text-align: center;">0</p> <p>In the absence of a more general right to be heard, it may have made more sense to have appeals go to the District Court as it may be expected that more appeals would be made. However, the District Court has less experience with IP cases.</p>	<p style="text-align: center;">+</p> <p>Providing that appeals are heard at the High Court would be consistent with other IP regimes. The High Court has also been where the only two PVR infringement cases of recent times have been heard. As a result, the High Court has more experience with IP cases and is likely to be better placed to consider PVR appeals.</p>
Increasing operational efficiency	<p style="text-align: center;">0</p> <p>There is little to asses against operational efficiency here, though an argument can be made that, as most IP lawyers will be more familiar with taking cases at the High Court, having PVR cases heard at the District Court may be less efficient.</p>	<p style="text-align: center;">+</p> <p>There is little to asses against operational efficiency here, though an argument can be made that, as most IP lawyers will be more familiar with taking cases at the High Court, providing the same for PVR cases may be more efficient.</p>
Overall assessment	<p>The status quo is not consistent with other IP regimes, and a principle of this review has been to look for consistency where it makes sense.</p>	<p>While there is not much to choose between these options, we are recommending this option for consistency with other IP regimes. It was also preferred by the majority of submitters.</p>

Section 5: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

We have indicated our recommended options in relation to each issue in the narrative discussion in Section 3.1 and in the Impact Analysis tables in Section 4.

Outstanding Treaty Issues

In relation to the outstanding Treaty issues, the main objective is to meet our obligations under the Treaty. This is expressed through the first criterion for analysis of options that proposals provide for meaningful and mana-enhancing consideration of kaitiaki interests. While acknowledging the importance of clarity for breeders and minimising compliance costs, and reflecting its importance, this criterion was given a double weighting.

Cabinet had previously agreed (in November 2019) to delegate a statutory decision-making role to the Committee. It is important the scope of this decision-making power is clearly set out in legislation. To be mana-enhancing, all parties need to have confidence that they will be heard in a consistent and fair manner, and Parliament is the appropriate body to set this scope of this power. The recommended options put in place processes for the consideration of kaitiaki interests that reflect natural justice principles and meet our Treaty of Waitangi obligations, while also giving the Committee sufficient flexibility to adopt processes consistent with tikanga.

Following the submissions we received on our discussion document and the discussions we had at our hui during the public consultation we are confident that the package of options recommended to address the outstanding Treaty issues will meet the desired objective. We also note that, while it did not consider these specific options, the Waitangi Tribunal considered the November 2019 Cabinet paper along with our engagement with Māori in a three day hearing in December 2019¹⁷ and found that our process and policy outcomes were consistent with our obligations under the Treaty.

Operational issues

The legislative processes relating to the examination of applications for PVRs had not been reviewed in over 30 years and had not kept pace with the significant changes to the plant breeding industry in this time. And while the PVR Office has responded as pragmatically as it could in the face of this, our survey of PVR users, combined with feedback from the Office, highlighted a number of issues that needed addressing. Some of these would improve the efficiency and effectiveness the regime, and in other cases the response was more a matter of regulatory stewardship, ensuring the legislation caught up with best practice.

The recommended package of options has broad support from stakeholders, and we are confident that it will update the operational processes relating to the examination of PVR applications to better reflect the current realities of the plant breeding industry.

Stakeholder views on the Treaty proposals

Broadly speaking we anticipate that stakeholders will be comfortable with the package of

¹⁷ This hearing was Stage 2 of the Wai 2522 enquiry.

proposals presented in the Cabinet paper, though we do note that breeders have expressed concerns around how the Treaty provisions will work in practice. They are concerned about the additional costs and uncertainty with the Treaty provisions and, in particular, how the Māori advisory committee will operate. They are also concerned about the costs associated with the establishment and operation of the Committee.

Given the transformational change the regime is going through, this is not surprising. While the legislation will set the broad framework, more detailed operational matters will be set out through, for example, the terms of reference for the Committee and the engagement guidelines for breeders and kaitiaki that the Committee will be required to develop. Breeders and Māori will have further opportunities for engagement on these matters during the implementation stage of this review.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties (<i>identify</i>)	Comment: <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts</i>	Evidence certainty (<i>High, medium or low</i>)
Additional costs of proposed approach compared to taking no action			
Regulated parties (plant breeders and growers)	Ongoing: Increase in application fees as PVR Office will incur more costs in assessing applications for PVRs (see below), and to address shortfall in cost recovery Uncertainty about Treaty provisions may deter some breeders from seeking PVRs.	IPONZ has initiated a fees review to consider these (and other) other issues. Fees have not been reviewed in over 20 years and no longer cover the costs of the regime. Annual revenue is currently of the order \$0.4 - \$0.5 million against the allocated appropriation of \$1.193 million. The review investigate the extent to which fees need to rise and how the Committee will be funded.	High
Regulators (PVR Office)	Ongoing: Additional processes for PVR Office relating to PVRs for taonga species, financing the Māori advisory committee.	As a guide, the Trade Marks Māori Advisory Committee costs around \$32k per annum. The PVR Committee will consider fewer applications, but each is likely to take more time. We estimate only 7-10 applications each year will be considered by the Committee. Set up costs	Medium

		may, however, be higher as Committee will need to produce guidelines for breeders and kaitiaki in its first year. IPONZ has initiated a fees review to consider these (and other) other issues.	
Māori	Ongoing: Engagement with breeders during the pre-engagement phase and keeping up to date with applications will impose some costs to iwi/hapū (monetary and non-monetary)	Unknown at this stage.	Low
Wider government	None anticipated		
Other parties	None anticipated		
Total Monetised Cost	The fees review currently underway will address both the lack of cost recovery in the PVR regime and the additional costs of the Committee.	Current fees do not recover the costs associated with PVR applications, and breeders will see increases in PVR fees. The extent of these will be determined as part of the fees review.	High
Non-monetised costs	The additional processes relating to the Committee will also impose non-monetary costs on both breeders and kaitiaki.	Give the small number of applications that this will apply to, we assess this is as low.	Medium
Expected benefits of proposed approach compared to taking no action			
Regulated parties	Ongoing: Greater certainty about application and testing process.	Low impact	Low
Regulators	Ongoing: Greater certainty about application and testing process	Low impact	Low
Māori	The recommended options form part of the wider aim of the review relating to making the PVR regime Treaty compliant. They are designed to provide protection to kaitiaki relationships to taonga species as required under Article 2 of the Treaty and as set out in the Wai 262 report.	In the context of the wider concerns that Māori have about the protection of their taonga, the reforms here will have low impact.	Medium

Wider government	None anticipated		
Other parties	None anticipated		
Total Monetised Benefit	Monetised benefits are considered negligible		
Non-monetised benefits	Modernisation of processes will improve clarity for breeders.	As the reforms largely reflect current practice, we assess this impact as low.	

5.3 What other impacts is this approach likely to have?

Nothing further to add.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The recommended package of options will be given effect through a new piece of legislation, the Plant Varieties Bill (**the Bill**).

Regulations and fees

New regulations will be required to support the primary legislation. Like the primary legislation, the PVR regulations have not been reviewed in over 30 years and there are significant gaps in their coverage (e.g. in relation to the processes required to support various provisions in the Act). A comprehensive review of these is underway. The approach being taken is to be guided (where appropriate) by the Patents Regulations as there are many similarities in the processes supporting each regime and these are also the most recent example of IP regulations. Aligning with these regulations will also aid implementation of new processes for PVRs as existing IT systems can be adapted, rather than needing the development of new systems.

As we have noted in the previous section, a fees review is also underway. The two key issues this review needs to address are (i) that there is under-recovery of costs in the regime, and (ii) there will be additional costs relating to the establishment and running of the Māori Committee. If the review results in either an increase in the appropriation or a shift from third party to Crown funding within the current appropriation, then a budget bid will be necessary following this review.

The intention is to have a discussion document covering proposals both for changes to the regulation and to fees while the Bill is before Select Committee.

Implementation

IPONZ will be the main party implementing the new regime. Implementation issues will broadly fall into two categories:

Systems changes

Some changes to IT systems and other processes will be needed to reflect operational changes to the regime. Given that the Patents regime is being used as a guide to these changes – and that IPONZ systems are already configured to those processes for patents – we do not anticipate these changes to be particularly onerous. With adequate preparation, we think it unlikely that more than 3-4 months will be required after the new legislation is enacted to bring these changes on line. It is likely that costs associated with these changes can be absorbed within IPONZ's current IT work programme.

Implementation of the new Treaty provisions

These are a significant change to the regime and is important that they are rolled out in a manner that gives all parties adequate time to adjust to the new requirements. IPONZ already has experience establishing and supporting Māori Advisory Committees in the patents and trade marks regimes. It will be important that the Committee be established as soon as possible after enactment so that it can begin the work of finalising its Terms of Reference and producing guidelines on engagement with kaitiaki for the benefit of breeders. This will be a significant change for breeders who are working with new varieties that will require consideration by the Committee and will be important that they have sufficient time to understand the new obligations. We envisage that commencement of the

provisions relating to the consideration of applications by the Committee will be some time (possibly 1-2 years) after the Bill is enacted.

We do not consider the ongoing costs of the Committee will be too significant. The Trade Marks Māori Advisory Committee has running costs of around \$32k per annum. And while the PVR Committee will be considering only 7-10 applications each year, each application is likely to take up considerably more time to assess. However, the establishment of the Committee will require some additional resources over and above the usual recruitment process. A key job for the Committee will be drawing up guidelines for breeders on engagement and the Committee is likely to require additional resource from IPONZ to support this work.

Timeframes

The CPTPP requires the new regime to be in place by 30 December 2021. COVID-19 has significantly delayed these further policy decisions and the drafting of legislation. Despite these delays, it will be important that New Zealand demonstrates a genuine effort to meet our obligations.

It is now anticipated that new legislation will be introduced in May 2021. It is at least hoped that the legislation will be enacted this year, though implementation will take us into early 2022. The review of the fees and regulations will be completed in time for the new regime to come into force at that point.

MBIE will work closely with MFAT to keep our trading partners informed with our progress on the PVR review. New Zealand is required to report regularly to the CPTPP Commission on progress towards meeting our transition period obligation in this area.

6.2 What are the implementation risks?

As already noted, the main implementation risks are concerned with how the new provisions relating to Treaty compliance will actually work in practice. Most breeders we spoke with recognise the importance of fulfilling our obligations under the Treaty. Their main concern is the uncertainty generated by these new provisions.

How easy will it be for breeders to identify kaitiaki to engage with? What happens if more than one kaitiaki are involved and they have conflicting views on the impacts of the breeding programme and the grant of a PVR? How will the Māori Advisory Committee actually function and how much will it cost to run?

In relation to these matters, the main concern breeders have raised is that, if the costs of engaging with the Committee (both monetary and non-monetary) appear too onerous, then breeders will simply not apply for PVRs and will instead operate outside the PVR regime.

In response to these valid concerns, the first thing to note is that there is still some way to travel with the implementation of the provisions relating to Treaty compliance. At this stage, all we have is the legislative machinery for the Treaty provisions. Matters such as the Terms of Reference for the Committee and the guidelines on engagement with kaitiaki for breeders are still to be developed. And how the Committee will be funded – and whether this will impose additional costs on breeders (and, if so, what these will be) – is being considered as part of the fees review.

However, it is also important to keep the scale of these risks in perspective. Only around seven percent of current PVRs relate to plant varieties that would (under the new Treaty provisions) be considered by the committee. This equates to about 7-10 applications a year out of a total of around 110 that would go to the Committee. All other applications will follow largely the same processes that breeders are well familiar with.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

There are already very strong relationships in place between the PVR Office and plant breeders and between the PVR Office/IPONZ and the intellectual property policy team at MBIE. Through the course of the review MBIE have built and established relationships with Māori.

The main channel for monitoring how these changes are working in practice will be through the PVR Office. They have regular and ongoing engagement with plant breeders, both as applications are in train, and through regular “Technical Focus Group” meetings, which bring together representatives (include lawyers) from across the plant breeding and PVR sector.

In respect of changes made to support Treaty obligations, feedback from the Māori Committee and breeders will assist to identify any early issues, particularly in relation to how well engagement between breeders and kaitiaki is going and whether any additional support is required. All of IPONZ’s application processes are now fully online. This will include details of all applications that are considered by the Committee, communications between the Committee, applicants and kaitiaki (where relevant) and determinations of the Committee.

MBIE (policy) has regular engagements with IPONZ/PVR Office and any issues that arise with the new regime will soon become apparent.

7.2 When and how will the new arrangements be reviewed?

There are no specific arrangements proposed for a formal review of the new regime. As noted elsewhere, the great majority of PVR applications under the new regime will follow processes that are familiar to plant breeders. The regular and well-established relationships described above will provide ample opportunity for stakeholders (including the PVR Office) to raise concerns with how these processes are working out.

It is the new provisions relating to consideration of certain applications by the Māori Committee that create the most uncertainty (though again we note that these only amount to around seven percent of PVR applications each year). We consider that the natural feedback loops that already exist due to the well-established relationships described above will provide ample indication of any issues that may be emerging.

However, consideration could be given to a more formal survey of both those plant breeders who work with indigenous plant species (or other species of significance to Māori) and Māori (including those with kaitiaki relationships with these plant species) after, say, 2-3 years of operation of the new provisions to get a more comprehensive picture of how these provisions are working in practice.