



**NEW ZEALAND
INTELLECTUAL
PROPERTY OFFICE**

Modernising the Plant Variety Rights Fees Structure

Targeted consultation paper





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ISBN Online: 978-1-99-100855-8

July 2021

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

New Zealand Government

Table of Contents

Background	3
Fee types	3
The PVR scheme is operating at a deficit, so the Plant Variety Rights (PVR) Office is reviewing fees.....	5
There are a variety of options for changing the fees structure	8
Application and renewal fees.....	8
Tiered renewal fees.....	8
Examination and test trial fees	10
Grouping plant varieties into different fee categories.....	10
Fixed/variable fees model for growing trials	10
Direct charging for costs incurred	11
Other considerations.....	12
Public and private benefits.....	12
Broader impacts	13
Legislative changes.....	13
Next Steps	13

Background

1. The Plant Variety Rights Act 1987 (PVR Act) provides for the grant of intellectual property rights known as plant variety rights (**PVRs**). PVRs give plant breeders exclusive rights over their new plant varieties for a limited time.¹ The recently introduced PVR Bill extends these rights to include the right, aligning the regime with UPOV 91.²
2. PVRs are currently granted by the Plant Variety Rights Office (**PVR Office**) after an examination process. A new variety protected by a PVR is known as ‘a **protected variety**’.

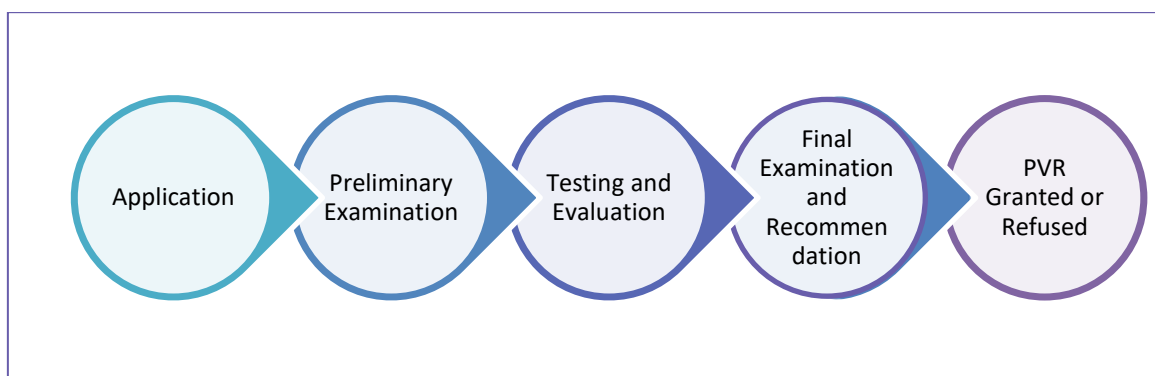


Diagram 1: Overarching PVR Process

3. The grant of PVRs is intended to act as an incentive for domestic plant breeders to develop new varieties of plants, and for foreign plant breeders to permit their new plant varieties to be available in New Zealand. New Zealand is required by its international obligations to provide a regime for providing intellectual property rights for new plant varieties.³
4. The PVR regime established by the PVR Act is administered by the Intellectual Property Office of New Zealand (**IPONZ**), a business unit of the Ministry of Business, Innovation and Employment (**MBIE**). IPONZ also administers legislation in relation to other registered intellectual property rights, including the Patents Act 2013, the Trade Marks Act 2002, and the Designs Act 1953.

Fee types

5. The Plant Variety Rights (Fees) Order 1999 permits the PVR office to charge four main types of fees based on the stages of a PVR application. The four main types include:
 - i. **Application fee** – this is the initial fee payable when an application is submitted; it covers the acceptance of the application, a preliminary examination for newness and the denomination, document checks, and arrangements for testing. The fee also includes administration costs and several of the fixed costs required to maintain the

¹ The current terms under the PVR Act are 23 years from grant for woody plants or their rootstock, and 20 years from grant for all others.

² The PVR Bill can be found online at www.legislation.govt.nz.

³ World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights.

PVR Office. Currently there are two different application fees depending on the type of plant variety.

ii. Testing stage:

A) Examination fee – this fee covers the cost of determining whether the variety meets the criteria for the grant of a PVR (e.g. whether the variety is distinct, uniform, and stable (DUS)); this fee is charged when *another party* carries out a growing trial and related data collection, and is applied to each examination period.

B) (Or) Trial fee – this fee covers the cost when the PVR Office undertakes direct responsibility for the growing trial and field data collection itself. In addition, it includes the examination cost of determining whether the variety meets the criteria for the grant of a PVR (e.g. is the variety DUS). This fee varies depending on the type of plant variety and is charged for each growing season the variety is in trial.

iii. **Annual grant fee** – this is an annual fee to keep the grant of a plant variety right active for the upcoming year (referred to as a renewal fee in the remainder of this document). It is paid in the year following when a PVR has been granted to the rights holder. Currently all plant varieties pay the same for an annual grant fee, no matter how long the grant has been active, and regardless of the plant variety.

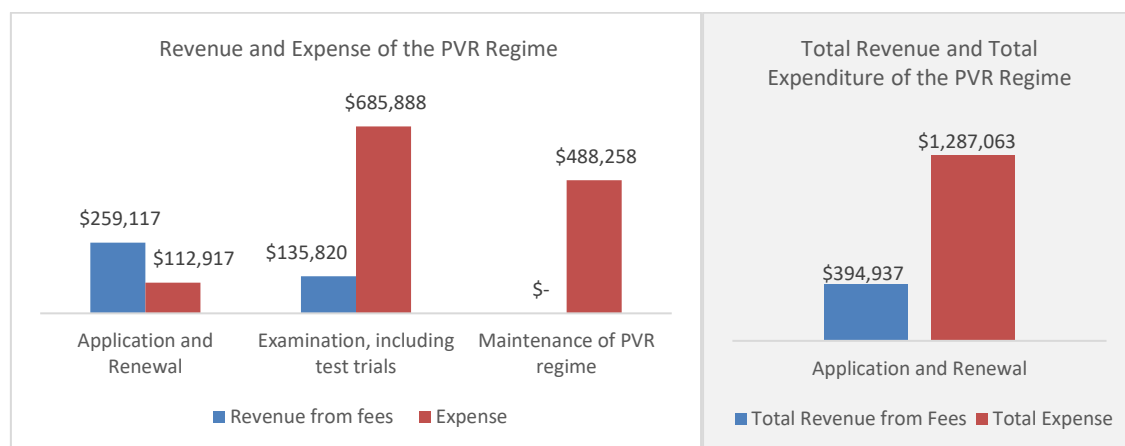
The PVR scheme is operating at a deficit, so the Plant Variety Rights (PVR) Office is reviewing fees

6. Fees for the plant variety rights regime under the PVR Act were last adjusted in 2002. At that point the regime was receiving a relatively higher volume of applications, in a growth phase, and over-recovering costs, so the fees were reduced. The volume of applications has now matured and declined to a lower sustained level, following the pattern of most national PVR schemes in other parts of the world.
7. The combination of declining volume over the last 20 years, rising costs and incurred costs for which there is no fee to charge has resulted in an operating deficit of approximately \$0.892 million per year.
8. At current volumes the annual expense of the PVR Office is \$1.287 million, against revenue collected of \$0.395 million. Table 1 below, outlines the annual revenue of the PVR Office by fee type, contrasted with the expenses of undertaking the activities and maintaining the PVR regime. Low application volumes (87 applications in FY 2019/20, and 111 applications in 2018/19) means that there is little opportunity to leverage economies of scale, with specific technical expertise required to assess different varieties.

Table 1: Current Revenue and Expenditure of the PVR regime

Type	Application and Renewal	Examination, including test trials	Maintenance of PVR regime	Total
Total Revenue from fees	\$259,117	\$135,820	-	\$394,937
Total Expense	\$112,917	\$685,888	\$488,258	\$1,287,063
Surplus / (deficit)	\$146,200	(\$550,068)	(\$488,258)	(\$892,126)

Graph 1: Current Revenue and Expenditure of the PVR regime



9. The costs to the PVR Office are broken into categories in Table 2, below. Of these categories, the highest costs relate to personnel and growing trials and examinations – together they make up about 72% of the costs. The remainder of the costs are largely fixed, and independent of the number of applications filed. Table 3 shows a breakdown of revenue generated by fee type.

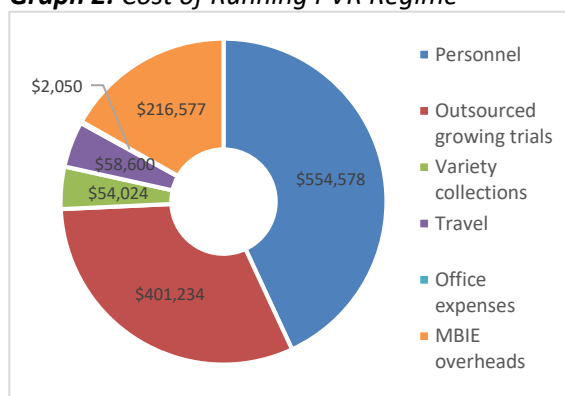
Table 2: Costs of running the PVR regime

	Total cost
Personnel	554,578
Outsourced growing trials	401,234
Variety collections	54,024
Travel	58,600
Office expenses	2,050
MBIE overheads	216,577
Total expenses	1,287,063

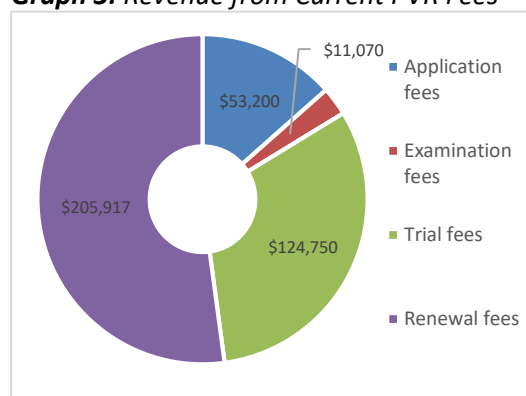
Table 3: Current revenue from fees

	Total revenue
Application fees	53,200
Examination fees	11,070
Trial fees	124,750
Renewal fees	205,917
Total revenue	394,937

Graph 2: Cost of Running PVR Regime



Graph 3: Revenue from Current PVR Fees



10. Expenditure for the regime has steadily increased for two main reasons:
- Firstly, an expectation by users and service providers has developed where the PVR Office should carry all or most of the cost of testing varieties and contracting third parties' services for variety testing and examinations.
 - Secondly, the costs of these services has increased. In the past, third parties provided a portion of these services for free or with minimal charges as they viewed this as a public good across the industry. However, this practice has changed significantly over the past 15 years, resulting in the PVR Office having to absorb the increased costs with limited ability to pass on these charges to applicants.
11. The resulting deficit is offset by the surplus position of IPONZ's memorandum account (which includes revenue recovered from fees of other intellectual property (IP) regimes, such as patents and trade marks, offset against their costs). However, this arrangement is unsustainable, as it means that applicants for other IP rights are essentially cross subsidising the costs of the PVR regime to some degree.

12. For these reasons, the PVR Office has commenced a review of the existing cost structure of the PVR regime by assessing the operational costs of the PVR Office, the activities it performs under the PVR Act, and how this should be recovered. As a first step, the PVR Office has developed a preliminary cost model to show which fees need to be increased. The preliminary cost model has worked through the average staff time against the key activities in order to allocate costs against these activities (e.g. application processing, examinations, test trial work, and engagement with the sector).
13. PVR Office staffing levels are already at the minimum level to maintain a credible international PVR regime with the current number of applications. Additionally, the PVR Office has worked to reduce overhead costs and other expenses.
14. The PVR Office relies on external providers to carry out testing and examination activities on its behalf as the Office does not possess land, cultivation equipment, or laboratories required to complete testing and examinations. Domestically the small number of suitable external providers leaves little room for price negotiation. As noted above, charges by these providers have significantly increased over the past 15 years.
15. If no change is made to the way fees are charged, the preliminary cost model shows that all fees will need to be increased. However, fees may not be increased equitably across all categories – for example species that have lower volumes of applications (e.g. edible fungi, certain ornamental species, or minor fruit species) will have a greater fee increase than the varieties that have a higher volume of applications (e.g. roses, potatoes, grasses, or apples). We want to explore the impact that a fee increase may have on your business.
16. Therefore, the PVR office is considering whether there is a more efficient, effective, and equitable way to fund the regime, and whether different charging mechanisms may better allocate the costs incurred to the breeders/growers who receive the most benefit from the PVR regime.

To gain a better understanding of how our proposed ideas would impact your use of the PVR scheme, through this discussion document we ask for your insight and comment to better improve the fee charging structure.

Q1	If PVR fees were to double or triple, would this deter you from using the PVR scheme?
Q2	If PVR fees were to double or triple, how long would it take for your business to recoup this investment?
Q3	If PVR fees were to double or triple, what effect do you think there would be on the usage by foreign breeders?

There are a variety of options for changing the fees structure

17. This document outlines the opportunities to change the way the regime is funded. Options include: changing the way the application and renewal fees are charged, adding a variable fee to examinations for more time-consuming or complex applications, and adjusting where cross-subsidisation may occur between plant varieties.
18. Each of these options are displayed below and explained in the following section. If you have any additional ideas, please feel free to include them in your submission.

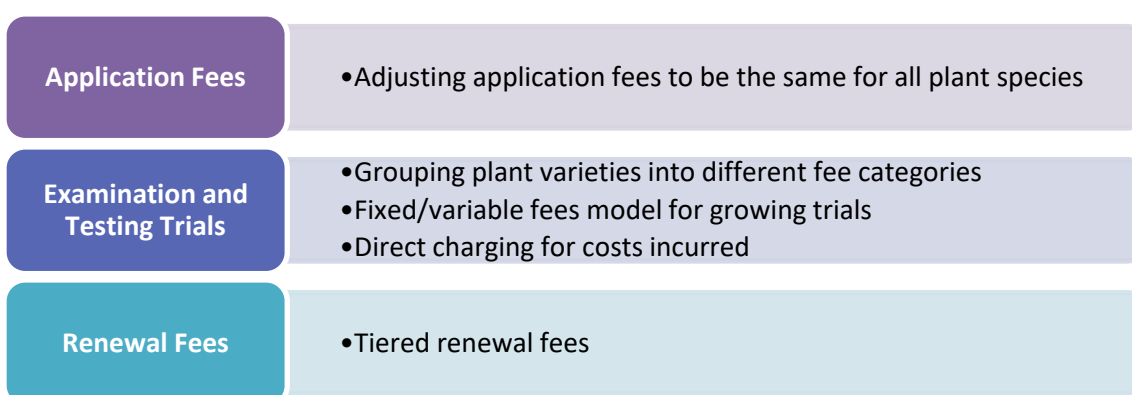


Diagram 2: Preliminary Options for Changing the PVR Fees Structure by Fee Area

Application and renewal fees

19. The preliminary cost model has determined that the staff costs to process PVR applications is much the same regardless of the plant species involved. This activity covers the administration work to assess the application, such as checking that all information required by the Act and regulations has been filed, and the preliminary examination to determine newness, formalities, and arrangements for DUS testing, as well as an initial assessment of DUS. This fee also includes a level of overhead support costs.
20. Currently, the application fee depends on the species to which the variety that is the subject of the application belongs to. It is proposed that this fee be the same fee for all plant species as the initial processing of applications does not vary much across different applicants.

Q4	Should the application fee be the same for all plant species? If not, why not?
Q5	Can you suggest a different approach from a flat application fee?

Tiered renewal fees

21. Renewal fees are the annual fees paid by PVR owners to keep their PVRs in force (up to the maximum term of a PVR). The current approach is to charge a fee that is the same throughout the PVR term. This is because it can take time to produce sufficient

quantities of seed or plants to serve the market, so initial returns to the PVR owner can be low. It may be some years before the PVR owner can gauge whether or not their protected variety will be commercially successful.

22. The purpose of a renewal fee is to provide an incentive for PVR owners to allow their PVRs to cease if their protected varieties are not providing them with a reasonable return. It also ensures the PVR Office has an accurate record of valid protected varieties and to track the varieties which have been surrendered and are potentially no longer in the market.
23. One option for changing the fee structure would be to introduce a tiered renewal fee, which could help spread the cost of the scheme based on the length of time a PVR has been held and renewed.
24. Under a tiered approach, renewal fees increase the longer a PVR is kept in force. Rather than increasing each additional year the PVR is kept in force, fees would increase at regular intervals or 'tiers'. For example, one renewal fee tier could be for years 1-5, the second tier for 6-10 years, the third tier 11-15 years, and the final tier anything greater than 15 years until the maximum term of the PVR was reached; the renewal fee would be more expensive the longer the PVR is held.
25. This would be similar to New Zealand's patent regime with the idea that more profitable PVR holders would possess their grant longer and pay a proportionately higher fee. This would encourage PVR owners to assess whether the value to them of maintaining their PVRs justifies paying the higher renewal fee. The effect of this approach is that PVR owners who benefit most from the PVR regime contribute more (through higher renewal fees) to the costs of running the regime than those who are getting less benefits.
26. Weighting the cost of renewals on the length of time a PVR grant is held could also help to reduce the up-front costs of obtaining a PVR. Currently, the renewal fees are less expensive than the application for a PVR. As the application fee is paid up front, this can create a barrier to entry for a breeder who may not know whether their variety will be successful and meet the requirements for a grant of a PVR.

Q6	What is your view on introducing a tiered renewal fee to maintain a PVR grant, with the fee rising with the age of the grant?
Q7	Do you agree with the proposed tier levels of 1-5 years, 6-10 years, 11-15 years, and 15+ years? If not, why not?
Q8	Alternatively, what would you suggest as tier levels?

Examination and test trial fees

Grouping plant varieties into different fee categories

27. Currently, examination and test trial fees for the different plant varieties are grouped into the following categories:
- Herbage, agricultural crops, vegetables, fungi
 - Fruit or nut plants
 - Other plants
28. For centralised testing trial fees, the category for herbage, agricultural crops, vegetables and fungi is further broken down into:
- Grasses and white clover
 - Wheat, barley, oats, forage brassicas, ryecorn, triticale, and peas
 - Grass endophytes
 - Potatoes
29. We are proposing to adjust the categories of plant variety groups in order to minimise the level of perceived cross-subsidisation by grouping variety groups that require similar level of resource and personnel time together.
30. The plant variety groups proposed are:
- Agriculture and vegetable crops (includes wheat, barley, oats, potatoes, peas, triticale, rye, forage brassicas)
 - Fruit and nuts
 - Ornamentals, trees, and other plants
 - Pasture plants and amenity grasses (includes grasses, clover)
 - Fungi (includes grass endophytes)

Q9	Do you have a view on the plant variety categories for setting the fee structure of examinations and test trials?
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Fixed/variable fees model for growing trials

31. Fees can be set as fixed or variable. Current PVR fees for examinations and trials are fixed. This means that the examination and test trial fees from applications which take less time or cost less are subsidising those which might take more time or cost more.
32. The advantage of fixed fees is that applicants will know the fees they will be charged before filing their application. Because the fees are known in advance, they are collected by the PVR Office before it incurs any expense. However, the disadvantage is that it is difficult to relate the fee level to the actual costs of a trial or examination.
33. Variable fees are based on the actual costs to process an application (e.g. the number of hours spent), and means there would be no cross-subsidisation between applications. However, variable fees create uncertainty for applicants as the fee would not be known until the completion of the trial and examination.

34. One option to improve the transparency and equity of the fee model would be to move to a hybrid model where there is a fixed baseline examination fee which is charged to all applicants based on the plant species that is the subject of a PVR application, as well as a variable fee. The variable fee (for example, an hourly rate) could be charged if the initial examination process determined that further specialist work was required by the PVR Office. This would be done in consultation with the applicant once the PVR Office determined further specialist work was required.
35. A hybrid model would mean that straightforward applications pay one examination fee, but if an application requires additional examination beyond the usual, and the applicant still wanted to proceed with the application, they would need to make an additional payment to cover the costs of examining the plant variety. This approach could also be applied to the test trial fees where testing and evaluation are beyond the usual.
36. Additionally, this would mean that applicants would pay actual costs of the trial or examination. This would reduce cross-subsidisation between complex and straightforward applications. Additionally, since the variable fees for more complex applications would be decided in consultation between the PVR Office and PVR applicants, there would be more flexibility for applicants to decide whether to pursue further specialist work or have the PVR Office arrange this.
37. This change would not impact applicants who have their plant varieties independently tested, as they would only be charged an examination fee.

Q10	What is your view on giving the PVR Office the ability to charge a variable fee where initial examination determines that further specialist work is required?
Q11	Can you suggest an alternative charging regime for specialised or time-consuming applications?
Q12	If the trial fees charged by the PVR Office were to substantially increase, what other options for organising growing trials can you suggest?

Direct charging for costs incurred

38. There will be some instances where through the examination process the PVR Office will incur direct costs that can be directly attributable to an application. For example, there are instances where the PVR Office will decide to rely on a trial report produced by an overseas PVR authority. Some jurisdictions charge for the provision of a trial report, others do not. Currently the regulations do not allow the PVR Office to directly on-charge this cost. Allowing direct charging means that the PVR Office would obtain the report, and if there was a fee it would recoup the cost from the applicant in addition to charging the examination fee.
39. Another example would be allowing direct charging to recoup travel costs that are undertaken by the PVR Office, in agreement with the applicant in order to meet additional growing trial evaluations. The fees regulations would allow for the PVR

Office to recover these costs at actual and reasonable cost and would be agreed to by the applicant prior to cost being incurred.

40. Similar to variable charges, direct charging for costs incurred would allow for more of the cost to be charged by the PVR Office for complex applications that require additional work and keep costs down for more straightforward applications. Moreover, direct charging for additional work would be decided in consultation between the PVR Office and applicants, which would allow for more flexibility for applicants to independently pursue further specialist work or have the PVR Office arrange this depending on the costs.

Q13	What is your view on the ability of the PVR Office to charge you directly for costs occurred on your behalf, with no margin applied i.e. international exam reports, or specifically requested travel of the PVR staff?
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Other considerations

Public and private benefits

41. In determining proposals to set fees to recover costs, there needs to be consideration of who benefits and to what extent (i.e. equity across those who benefit) from the grant of plant variety rights. This means forming a better understanding of the public and private benefits of the PVR regime to ensure costs are appropriately distributed and are reflected in its fees structure.
42. For instance, beyond PVR applicants' direct benefit to the scheme for an individual plant variety right, the PVR regime has wider benefits for New Zealand, including:
- international reputation and connection;
 - compliance with international requirements through trade agreements⁴;
 - the economic contribution of PVRs both domestically and through export trade;
 - flow on effects of innovation domestically;
 - new varieties help expand biodiversity, help NZ adapt to climate change, and help NZ find varieties that are more resistant or tolerant to new/introduced pests and diseases; and
 - benefit to New Zealand as a whole through the continued availability of varieties of plants for use in the agriculture, horticulture, and other sectors.
43. In general it is more equitable to charge those who benefit directly or singularly from a good or service, but there are some circumstances where other options besides cost recovery through fees would be appropriate (i.e. introduction of a levy). However, the capacity to charge less than full cost within the PVR scheme depends on the availability

⁴ This obligation is a result of the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is an international legal agreement between all the member nations of the World Trade Organization (WTO).

of funding as well as the impact of rising costs on PVR applicants and wider New Zealand.

Q14	What are the benefits that you regard as the most important from the grant of plant variety rights?
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Broader impacts

44. The PVR Office is aware that breeders and variety importers do not usually look at the cost to obtain a PVR in isolation. The PVR cost is just one component along with the costs of marketing, labels, quarantine, propagation, and so on. A rise in cost in any of these elements will result in an increase in the cost of variety commercialisation and may have a broader overall impact.

Q15	Besides PVR Office fees, what other costs do you consider when applying for a plant variety right?
Q16	If PVR protection is too costly for you or your business, what other mechanisms would you use to obtain a return on your investment in breeding or importing a new variety? (i.e. branding, first mover advantage, and contracts)

Legislative changes

45. The Plant Variety Rights Bill, which is currently under consideration in Parliament, proposes that a Māori Plant Varieties Committee (MPVC) be established.⁵ The proposed functions of the Committee include considering whether a PVR application may have an adverse effect on the kaitiaki relationship with that plant variety, or whether a proposed denomination is likely to be offensive to Māori. The number of applications that this affects is likely to be between six to nine per year.
46. The establishment cost of this Committee is likely to be in the range of \$50,000-\$75,000. This is based on the estimated cost of recruiting MPVC members, writing and publishing guidelines, and the establishment of MPVC policies and procedures.
47. The annual cost of the Committee is estimated to be \$20,000. This is based on the number of MPVC members, per daily rate, travel costs, and number of applications being assessed by the MPVC.

Q17	What is an equitable way to apportion the costs of establishing and operating the Committee?
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Next Steps

48. Feedback obtained from this consultation will be used to develop a detailed proposal for the future fees structure and the fee levels. A discussion document on the setting of fees is likely to be released in October 2021. It is anticipated that the new fee structure could come into force by July 2022.

⁵ Plant Variety Rights Bill cl 55

