



## COVERSHEET

<b>Minister</b>	Hon Dr David Clark	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Plant Variety Rights Regime Fees Review 2022: release of discussion document and reprioritisation of funding	<b>Date to be published</b>	11 May 2022

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
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April 2022	Review of Plant Variety Rights Fees Discussion Document	MBIE
6 April 2022	Plant Variety Rights Regime Fees Review 2022: release of discussion document and reprioritisation of funding DEV-22-MIN-0078 Minute	Cabinet Office

### Information redacted

**NO**

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**NEW ZEALAND  
INTELLECTUAL  
PROPERTY OFFICE**

# **Review of Plant Variety Rights Fees**

Discussion document



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# How to have your say

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## Submission process

The Ministry of Business, Innovation and Employment (MBIE) is seeking written submissions on proposed changes to fees charged for the Plant Variety Rights regime.

This consultation paper includes some questions you may like to respond to in your submission. The questions are listed in the boxes throughout this document and listed in full in section 2 of this document (Summary of Questions). Your submission does not need to answer all or any of these questions. Where possible, please include evidence to support your views, for example, references to facts and figures, or relevant examples.

All fees proposed are GST exclusive.

Discussion documents in relation to these matters will be available on MBIE's website at:

<https://www.mbie.govt.nz/have-your-say/>

Please send your written submission on the proposals and questions raised in this document by **5.00pm on 20 May 2022**. Please include your name, or the name of your organisation, and contact details. You can make your submission by:

- attaching your submission as a Microsoft Word or PDF attachment and sending to [mail@iponz.govt.nz](mailto:mail@iponz.govt.nz); or
- mailing your submission to:  
PO Box 9241  
Marion Square  
Wellington 6141  
New Zealand

Please direct any questions that you may have in relation to the submission process to:

[mail@iponz.govt.nz](mailto:mail@iponz.govt.nz)

## Next steps and implementation

Once we have considered the submissions, we will develop final proposals. If these proposals are approved, they will form the basis of revised regulations under the legislation that regulates the fees considered in this document. Please see the *Purpose of this document* section for a proposed timeline of key milestones.

## Use of information

The information provided in the submissions will be used to inform MBIE's proposed option, and advice to Ministers. We may contact submitters directly if we require clarification of any matters in submissions.

Except for material that may be defamatory, MBIE may post PDF copies of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). By making a submission, we will consider that you have agreed to us posting your submission on the MBIE website, unless you clearly specify otherwise in your submission.

### **Release of information**

Submissions are subject to the *Official Information Act 1982*. Please tell us as part of your submission if you have any objection to the release of any information in the submission, which parts you consider should be withheld, and include your reasons for withholding the information. MBIE will consider any objections you note and consult with you when responding to requests under the *Official Information Act 1982*.

Please indicate on the front of your submission if it contains confidential information and mark the text accordingly. If you wish to make a submission which includes confidential information, please send us a separate version excluding the relevant information for publication on our website.

### **Private information**

The *Privacy Act 2020* establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE as part of your submission will only be used to help inform the development of policy advice in relation to this review. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that we may publish.

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## Contents

How to have your say .....	3
Purpose of this document .....	7
Proposed timeline for reviews .....	7
Guidance considered in this review .....	8
How to use this document .....	8
Executive Summary .....	9
Section 1: Summary of proposed changes .....	9
The Plant Variety Rights Office performs an important role .....	9
Fees need to be reviewed .....	9
How will this affect businesses and consumers .....	10
Section 2: Summary of questions .....	12
Background .....	13
Section 3: Overview of the PVR Office and its funding .....	13
The PVR process .....	13
Plant Variety Rights in New Zealand .....	14
Fee types .....	14
PVR expenditure and revenue .....	15
Impact of Crown funding on the proposed fees structure .....	17
Ensuring accessibility of the PVR regime .....	18
Section 4: Modernising the PVR fee structure .....	19
Review scope and key assumptions .....	19
Targeted consultation .....	19
Analysis of fee structure .....	19
Option 1: Status quo .....	20
Option 2: Full cost recovery .....	20
Option 3: Interim partial cost recovery (preferred option) .....	21
High level comparison of fees between existing and modernised fee structure .....	21
Proposed options for PVR fees .....	24
Section 5: Application fees .....	24
One application fee to apply to all plant varieties .....	24
Section 6: Trial (field evaluation) and variety examination fees .....	25
Charging a variety examination fee in all cases .....	25
Changing the categories used for variety examination fees .....	27
Changing the categories used for trials (field evaluation) fees .....	28
Section 7: Grant renewal fees .....	31
Annual renewal of grant – tiered renewal fees .....	31

Section 8: Enabling the PVR Office to recover costs incurred outside of standard PVR application and granting process .....	33
Updating the ability to direct charge for third party costs incurred by the PVR Office on behalf of the applicant .....	33
Expanding the types of work for which the PVR Office can charge an hourly rate .....	33
Section 9: Compulsory licence application fees .....	35
Section 10: Next steps.....	37
Period of transition .....	37
Consultation next steps.....	37
Proposed timeline for reviews .....	38
Appendix One: Summary of targeted consultation feedback.....	39
Appendix Two: Comparison of proposed fees with and without increased Crown funding ..	43
Appendix Three: Plant Variety Rights unit cost, proposed fee, and current fee .....	44

## Purpose of this document

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To develop this document, the Ministry of Business, Innovation and Employment (MBIE) reviewed the current cost of services delivered by the Intellectual Property Office of New Zealand (IPONZ) through the Plant Variety Rights Office (PVR Office) and the fees charged to fund it. As part of this process, MBIE ran an initial targeted consultation to seek feedback from users of the regime on impacts the fee increases would have on their business and where best to apportion the costs to ensure an equitable fee model.

This document outlines the proposed changes to the fees structure and level of fees, the issues and options that have been taken into consideration and key questions to help us understand the impacts of the options on your business and to help you to formulate your views and any submission you make.

Your feedback on the proposals in this document will be used to help the Minister of Commerce and Consumer Affairs to make the final decisions on the structure and level of the fees charged by the PVR Office.

The objectives of the review of fees are to ensure that:

- the PVR Office is funded sustainably;
- users meet an appropriate portion of the cost given the benefit they receive; and
- both fees and the Plant Variety Rights (PVR) regime are transparent and equitable, while maintaining business certainty for users of the regime.

**All proposed fees are stated as GST exclusive.**

We welcome your written submissions on the proposals included in this document. Once we have considered your submissions, we will provide advice to the Ministers who will take final proposals to Cabinet for consideration.

## Proposed timeline for reviews

Due date	Action
Mid-April 2022	Release of discussion document
20 May 2022	Deadline for submissions to MBIE
June 2022	Report to relevant Ministers on submissions and final proposals for changes to fees
July 2022	Seek approval from Cabinet for proposed changes
October 2022	Governor-General makes Order in Council to make the regulations to set the fees
November 2022	Fees implemented, including any transitional arrangements



## Guidance considered in this review

This review takes into account existing guidance on setting charges, including The Treasury's [Guidelines for Setting Charges in the Public Sector](#) and the Office of the Auditor General's [Good Practice Guide: Charging fees for public sector good and services](#). The principles set out in these documents are reflected in the options for adjusting fees, where relevant.

## How to use this document

The remainder of this document is structured into eight sections as outlined below. We have included questions for your consideration throughout the document and a summary of all the questions is provided in section 2 (**Summary of Questions**). We welcome any other relevant comments or information that you wish to provide.

Section	Content
<b>Overview</b>	
Section 1	Summary of proposed changes to Plant Variety Rights Office fees
Section 2	Summary of questions
<b>Proposed options for Plant Variety Rights Office fees</b>	
Section 3	Overview of the Plant Variety Rights Office and its funding
Section 4	Modernising the Plant Variety Rights fee structure
Section 5	Application fees
Section 6	Trial (field evaluation) and variety examination fees
Section 7	Grant renewal fees
Section 8	Enabling the PVR Office to recover costs incurred outside of standard PVR application and granting process
Section 9	Compulsory licence application fees
Section 10	Next steps
Appendices	Appendix One: Summary of targeted consultation feedback Appendix Two: Comparison of proposed fees with and without increased Crown funding Appendix Three: Plant Variety Rights unit cost, proposed fee, and current fee

# Executive Summary

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## Section 1: Summary of proposed changes

### The Plant Variety Rights Office performs an important role

PVRs are intellectual property rights which give breeders and growers exclusive rights over new varieties of plants for a limited time. The PVR Office sits within IPONZ and administers, evaluates and grants PVRs.

A grant of a PVR may be made if a variety meets the requirements of being new, distinct, uniform, and stable (DUS) and having an acceptable denomination. The PVR Office determines this for each variety by examining the potential variety to see if the requirements for a grant of a PVR are met. To show that a variety is distinct, uniform, and stable, the PVR Office will organise a growing trial for that variety. This may occur over a period of several years.<sup>1</sup>

There are a range of benefits stemming from the PVR regime. By providing a tool to control the commercialisation of a variety, PVRs encourage investment and effort into plant breeding while also giving New Zealanders access to overseas-bred varieties. As a result, farmers, horticultural producers, and home gardeners gain access to an increased number and range of improved types of plants, including new varieties that enhance food diversity and tackle climate change, drought, floods, new pests, and disease.

The PVR regime also directly supports New Zealand's wider international reputation to uphold intellectual property protection principles and support economic viability to breeders and growers regardless of business size. This view aligns with the core principle of the International Union for the Protection of New Varieties of Plants (UPOV) that anyone can be a plant breeder with equal access to plant variety protection regimes.

### Fees need to be reviewed

In order to operate, the PVR Office charges fees for the activities it must undertake to assess whether an application meets the requirements for the grant of a PVR. Fees are charged for applications, examinations of varieties and growing trials, among other services. When setting fees for services provided by the government, the principle is that the government should do so at a rate that is no more than necessary to recover the costs.

The *Plant Variety Rights Act 1987* gives the power to make regulations to prescribe fees and charges (section 38(1)(k)) by Order in Council. The current PVR fees are set in *Plant Variety Rights (Fees) Order 1999* (Fees Order) and were last adjusted in 2002. At that point, the regime was receiving a relatively higher number of applications and over-recovering its costs. Therefore, fees were reduced accordingly.

Costs incurred by the PVR Office include personnel to carry out the services, outsourced growing trials, variety collections, travel, office expenses and departmental overheads. Adjustments to fees are now required because over time, the number of applications has fallen while costs have increased. The primary increase is due to costs from external service providers. The PVR Office's reliance on a small number of external service providers to carry out testing and examination activities has resulted in the increase of costs. When fees were last set, external providers who were contracted to conduct growing trials provided these services for free or with minimal charges under their own public good principles. However, this

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<sup>1</sup> Information regarding the arrangements for growing trials is available at IPONZ (2022, March 8). *PVR Technical Guidance: Arrangements for growing trials for the testing of distinctness, uniformity and stability*. <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/arrangements-for-growing-trials-for-the-testing-of-distinctness-uniformity-and-stability/>

practice has changed significantly over the past 20 years and due to the small domestic market, there are limited numbers of external providers who are able to carry out the work.

In addition, personnel costs and overheads to support the system in a digital environment have increased over time. The cost structure in this document represents the minimum level of fees possible to maintain a credible international PVR regime.

This current review takes into account how expenditure has changed over time and changes that will occur as a result of the *Plant Variety Rights Bill* (the PVR Bill). The PVR Bill is currently being considered by Parliament. A further fees review will occur in three years to ensure fee settings are sustainable and equitable and take into account the public good benefits arising from the regime.

### **How will this affect businesses and consumers**

This document proposes adjustments to both the fee structure and its levels. The proposed modernised fee structure reflects feedback received during targeted consultation (see Appendix One for a full summary), which emphasised the importance of transparency for users, certainty for potential applicants, and the idea that costs of the regime should be equitably allocated to each service.

Proposed fee levels within the modernised fee structure are presented throughout this document to best understand users' preference on how costs are allocated. Irrespective of how costs are allocated, it is necessary for PVR fees to increase as costs have risen and volumes decreased since the fees were last updated.

MBIE recognises that COVID-19 has presented a range of challenges to businesses in New Zealand, including in some cases decreased revenue in the face of continued or increased fixed costs. There is a small risk that the new fee levels might discourage people who would want to apply for a PVR as increased costs may increase the duration it takes for companies to recoup their investment in new plant varieties. Deterring PVR applications may diminish innovation and reduce domestic availability of overseas varieties, which would negatively impact on agricultural, horticultural, viticulture, and wider industries, as well as on the individual consumer's access to varieties of plants.

However, adjusting fees to account for the costs of running the regime is necessary to ensure the continued integrity, operation and maintenance of the PVR regime in New Zealand.

MBIE understands that an accessible PVR regime contributes to a level of wider public good. Additionally, the proposed Māori Advisory Committee is an important aspect of the regime under the PVR Bill which recognises the Crown's Te Tiriti o Waitangi obligations and the importance of recognising and protecting the kaitiaki relationship with plants. As such, development of the new fee structure and fee levels has taken into account the potential impact of significant fee increases on users of the PVR regime.

To address these issues, MBIE has internally reprioritised \$0.500 million per annum of interim funding which will be used over the next four years to ensure that public and private benefits are appropriately distributed and reflected in the PVR fees. Despite additional Crown funding, fees will still rise to recognise increased costs since the fees were set in 2002. However, this increase will be kept within a more equitable range to maintain users' accessibility and ensure the wider benefits of the PVR regime continue to support New Zealand. As a point of comparison, Appendix Two shows the difference between the fee level proposed and fees set at full cost-recovery, without the additional Crown funding.

Over the next three years, MBIE will conduct further analysis on the economic public good benefits to determine the optimal balance between Crown funding and users paying for the PVR regime.

A full summary of Plant Variety Rights unit costs, proposed fees, and current fees is included as Appendix Three to this discussion document.

## Section 2: Summary of questions

This table summarises all of the questions asked throughout the document.

Questions for submitters	
1.	Do you agree with the proposal to set a single application fee? If not, why not?
2.	What are your views on decoupling the trial fee and examination fees?
3.	Does the modernised fee structure provide more certainty and transparency about which fees will be charged during the PVR application process?
4.	Do you agree with the proposal to set a single variety examination fee for all varieties through the modernised fee structure? If not, why not?
5.	Do you prefer the existing trial (field evaluation) fee categories (table 9) or the proposed modernised categories (table 10)?
6.	Are there other trial (field evaluation) categories that should be considered?
7.	Are there any issues with the modernised trial (field evaluation) categories (table 10) that MBIE should be aware of?
8.	Do you agree in general with a tiered approach to renewal fees? Why or why not?
9.	Do you agree with the proposed tiers for renewal fees? If not, why not?
10.	Can you suggest any alternative ways renewal fees could be charged?
11.	Do you agree that the ability for the PVR Office to direct charge should be amended to include non-routine testing costs or other specific direct charges it incurs on the applicant's behalf? Why or why not?
12.	Do you agree with the proposal to update the types of work for which the PVR Office can charge applicants on a contractually agreed hourly rate? If not, why not?
13.	Can you suggest alternative ways to recoup the costs of variety examinations that require work over and above what is usually done by the PVR Office?
14.	Do you agree with the proposed compulsory licence fee? If not, why not?
15.	Do you agree with the proposal to align the Hearing process and fee with the wider IPONZ current process? If not, why not?
16.	Do you agree with the proposed transition arrangements for PVR fees? If not, why not?

## Background

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### Section 3: Overview of the PVR Office and its funding

The *Plant Variety Rights Act 1987* (PVR Act) provides for the grant of intellectual property rights known as PVRs. PVRs give plant breeders exclusive rights over their new plant varieties for a limited time.<sup>2</sup> The recently introduced PVR Bill aims to modernise the regime and implement:

- the Crown's obligations under the Treaty of Waitangi in relation to the PVR regime; and
- New Zealand's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in relation to the 1991 version of the International Union for the Protection of New Varieties of Plants<sup>3</sup> (UPOV 91).

New regulations are being drafted to reflect the changes proposed in the Bill. The regulations will include the schedule of fees for PVRs and will take into account changes to the Act, including the introduction of a new hearings process (see Section 9 for more details). The PVR Bill and Regulations are estimated to come into force in September, while the fees will be updated to follow soon after in November, with a transition period between where the current fees structure will broadly apply until the new fee structure comes into force. MBIE is aiming to minimise the impact that this period may have by implementing the new fees as soon as possible.

The objectives of the review of fees are to ensure that:

- the PVR Office is funded sustainably;
- users meet an appropriate portion of the cost given the benefit they receive; and
- both fees and the Plant Variety Rights (PVR) regime are transparent and equitable, while maintaining business certainty for users of the regime.

#### The PVR process

The PVR Act is administered by IPONZ, a business unit of 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*.

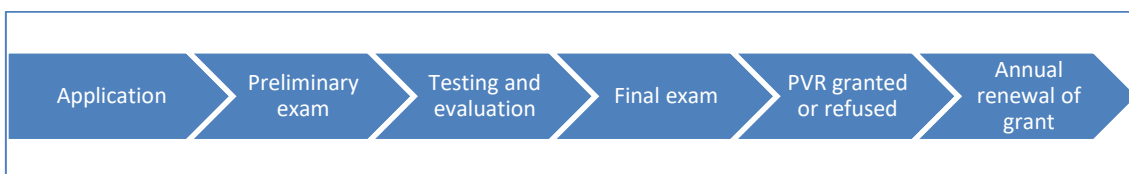
PVRs are currently granted by the PVR Office after an examination process, which includes testing in a growing trial carried out by the PVR Office, the applicant or another approved testing provider. A new variety protected by a PVR is known as 'a protected variety'. Diagram 1 on the following page shows the lifecycle of a PVR from the PVR Office perspective.

#### **Diagram 1: Overarching PVR process**

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<sup>2</sup> 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.

<sup>3</sup> The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization based in Geneva, Switzerland. UPOV was established in 1961 by the International Convention for the Protection of New Varieties of Plants. UPOV 91 strengthens plant breeders' rights with the aim of increasing innovation in plant breeding.



The PVR Office’s objective is to provide a tool to control commercialisation of a plant variety in New Zealand. The granting 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 to have a plant variety rights regime due to its international commitments, under the UPOV Convention. It is also required by the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

### Plant Variety Rights in New Zealand

Alongside supporting New Zealand’s international obligations, the PVR regime has wide societal benefits. For instance, protected varieties or cultivars are used in pastoral farming, arable farming, vegetable production, fruit growing and ornamental or gardening industries.

PVR volumes are currently approximately 122 applications, 350 to 380 varieties under various stages of examination and testing, and 1,277 renewals a year. Although these volumes are relatively low compared with PVR regimes internationally, PVRs in New Zealand help to support varieties which have a key role in agricultural and horticultural exports that contribute greatly to the New Zealand economy.<sup>4</sup>

### Fee types

Under the Fees Order, the PVR Office charges four main types of fees based on the stages of a PVR application. The four fee types include:

- a. **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 PVR Office. Currently there are two different application fees depending on the type of plant variety.
- b. Testing process:
  - i. A **trial (field evaluation) fee** which covers the collection and field observation as well as the cost of data assessment and review (examination fee) when a growing trial is carried out by the PVR Office. Currently, the organisation arrangement and types of growing trial will vary for different plant species and different procedures will apply; **or**
  - ii. An **examination fee**, which covers the cost of data assessment and review. This is only paid when a growing trial is carried out by another party (including a foreign entity).

<sup>4</sup> Pasture varieties are critical to both the dairy industry and the meat and wool industry, contributing to the combined export value of \$28 billion. Arable exports are valued at \$236 million for the 2019 season, with clover and ryegrass seeds, a number of which being protected varieties, contribute a combined \$80 million in value to the New Zealand economy.

- c. **Annual grant (renewal) fee** – this is an annual fee to keep the grant of a plant variety right active for the upcoming year. 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 Fees Order also sets out a fee for a request for a compulsory licence, and an hourly rate fee for recouping costs for searching and photocopying services, and to charge for costs incurred in setting up an overseas growing trial. However, these processes are used very irregularly.

These fees are set out in the Fees Order and Schedule to the Fees Order as set below:

**Figure 1: Fees Order**

<b>Order</b>	
<b>1 Title and commencement</b>	
(1)	This order may be cited as the Plant Variety Rights (Fees) Order 1999.
(2)	This order comes into force on 1 July 1999.
<b>2 Fees</b>	
(1)	The fees specified in the <a href="#">Schedule</a> must be paid in respect of the things referred to in that schedule.
(2)	If, at the request of an applicant, the Commissioner arranges an overseas test trial of a variety, the applicant must pay to the Commissioner the costs incurred in relation to the trial.
(3)	If the Commissioner or any other employee of the Plant Variety Rights Office undertakes any search or photocopying for a person, the person must pay to the Commissioner a fee for the time spent in doing so calculated at the rate of \$50 per hour.
<b>3 Fees to be exclusive of GST</b>	
	The fees prescribed by <a href="#">clause 2</a> are exclusive of goods and services tax (if any).
<b>4 Consequential revocations</b>	
	The following orders are revoked:
(a)	Plant Variety Rights (Fees) Order 1991 (SR 1991/37):
(b)	Plant Variety Rights (Fees) Order 1991, Amendment No 1 (SR 1995/88).

**Figure 2: Schedule to the Fees Order**

Item	Herbage, agricultural crops, vegetables,	Fruit or nut	Other
	fungi	plants	plants
	Fee	Fee	Fee
	(\$)	(\$)	(\$)
Application for grant	500	500	350
Examination of data (including any material)	600	300	230
Test trial by Plant Variety Rights Office—		500	450
grasses and white clover (per year)	3,200	—	—
wheat, barley, oats, forage brassicas, ryecorn, triticale, and peas (per year)	2,300	—	—
grass endophytes	1,500	—	—
potatoes—			
first year	1,600	—	—
each later year	500	—	—
Annual grant fee	160	160	160
Request under <a href="#">section 21(1)</a> of the Act (compulsory licences and sales)	600	600	600

### PVR expenditure and revenue

Fees under the PVR Act were last adjusted in 2002. At that point, the regime was receiving a relatively higher volume of applications as the industry was in a growth phase, and was over-recovering costs, so the fees were reduced. The volume of applications has now declined to a lower sustained level, following the pattern of most national PVR regimes in other parts of the world.



The combination of declining volume over the last 20 years, rising costs, and costs incurred for work outside the normal application process which fees can't be charged has resulted in a forecast operating deficit of approximately \$0.892 million per year.

At current volumes, the annual expense of the PVR Office is \$1.384 million against revenue collected of \$0.438 million. Table 1 below, outlines the annual revenue of the PVR Office by fee type, contrasted with the expense of undertaking the activities and maintaining the PVR regime. Low application volumes (122 applications in 2021/22, 87 in 2019/20, and 111 in 2018/19) means that there is little opportunity to leverage economies of scale (with any significant increase in volumes) 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	Management support, MBIE overheads, education, Māori Advisory Committee	Total
Total revenue from fees	\$300,072	\$137,730	-	\$437,822
Total expense	\$341,789	\$451,860	\$600,306	\$1,393,955
Surplus / (deficit)	(\$41,697)	(\$314,130)	(\$600,306)	(\$956,133)

The costs to the PVR Office are broken into categories Table 2 on the following page. Of these categories, the highest costs relate to personnel and contracts in relation to growing trials and examinations. Together these make up about 72 per cent of the costs. The remainder of the costs are largely fixed and independent of the number of applications filed. Table 3 on the following page shows a breakdown of revenue generated by fee type.

**Table 2: Costs of running the PVR regime**

\$000s	Total cost
Personnel	572
Outsourced growing trials	358
Variety collections	97
Travel	59
Māori Advisory Committee	20
Office expenses	2
MBIE overheads	286
<b>Total expenses</b>	<b>1,394</b>

**Table 3: Current revenue from fees**

\$000s	Total revenue
Application fees	96
Examination fees	14
Growing trial fees	124
Renewal fees	205
<b>Total revenue</b>	<b>438</b>

Expenditure for the regime has increased since 2002 for two reasons:

- First, the costs of these services have 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.
- Second, the strong preference is for PVR Office to be primarily responsible for variety testing arrangements. The PVR Office has regular communication with applicants and industry and has consistently heard over many years that PVR testing is not compatible with commercial activity and a more centralised approach improves testing outcomes. PVR applicants have supported and cooperated in this strategy, but this has resulted in the cost of testing varieties and the contracting of third parties for testing services falling on the PVR Office.

The resulting deficit has been mitigated by the surplus position of the IPONZ Memorandum Account (which includes revenue recovered from fees of other intellectual property (IP) regimes, such as patents and trademarks, offset against their costs). However, this arrangement is unsustainable, as applicants for other IP rights are cross-subsidising the costs of the PVR regime to some degree.

Cross-subsidising the costs of the regime is not sustainable and should be avoided as continuing to do so means costs of the PVR regime are not solely being borne by users, who receive the benefits of the regime. This goes against the guidelines set out by the Treasury<sup>5</sup>.

### **Impact of Crown funding on the proposed fees structure**

This fees review attempted to balance the need for increased fees with the public good provided by the regime and recognising that the fees have not been adjusted for 20 years. As such, fees will not initially be raised to full cost recovery levels. MBIE internally reprioritised \$0.500 million per annum of interim funding over the next four years to ensure that public and private benefits are appropriately distributed and reflected in the PVR fees.

<sup>5</sup> The Treasury (March 2022) *Guidelines for Setting Charges in the Public Service 2017*

Despite the additional Crown funding, fees still need to increase to recognise that costs are higher than when the fees were set last in 2002. However, the increases will be kept within a more equitable range to ensure the regime remains accessible to users and to ensure the wide benefits of the PVR regime continue to support New Zealand. As a point of comparison, Appendix Two shows the difference between the fee level proposed and fees set at full cost-recovery.

Overall, the interim funding from the Crown of \$0.500 million will reduce the level of costs that will need to be recovered from fees. The table below outlines the current costs and what the proposed increase of \$0.894 million from fee revenue will cover. This is further discussed in Section 4.

**Table 4: Summary of proposed and current expenditure and revenue**

\$000s	Proposed fees	Current fee
Revenue - Crown	500	-
Revenue from fees	894	438
Expenditure	1,394	1,394
Over/ (under recovery)	-	(956)

### Ensuring accessibility of the PVR regime

An accessible PVR regime contributes to a level of wider public good. Although many of the public benefits of the PVR regime include supporting New Zealand’s international obligations and reputation, an accessible PVR regime also has wider societal benefits. For instance, protected varieties, or cultivars, are used in pastoral farming, arable farming, vegetable production, fruit growing, cut flower and gardening industries. Collectively these activities contribute to a significant element of the New Zealand economy.<sup>6</sup>

Additionally, the Māori Advisory Committee in the proposed *Plant Variety Rights Bill* (the Bill) is an important aspect of the regime under the PVR Bill which recognises the Crown’s Te Tiriti o Waitangi obligations and the importance of recognising and protecting the kaitiaki relationship with plants.

<sup>6</sup> Pasture varieties are critical to both the dairy industry and the meat and wool industry, contributing to the combined export value of \$28 billion. Arable exports are valued at \$236 million for the 2019 season, with clover and ryegrass seeds, a number of which being protected varieties, contribute a combined \$80 million in value to the New Zealand economy.

## Section 4: Modernising the PVR fee structure

### Review scope and key assumptions

In order to calculate the cost of the services provided by the PVR Office, MBIE conducted an analysis of expenditure type, time spent by staff on different activities and volumes of each service delivered. Direct and indirect costs were allocated across fee bearing services to derive a unit cost for each service or type of transaction.

We have based the assumptions about future volumes on a historical view (taking into account the impact of COVID-19) across variety types and services provided.

### Targeted consultation

In addition to internal analysis, the PVR Office undertook targeted consultation with users of the PVR regime to understand the existing PVR fees structure and options for ensuring more equitable allocation of costs. Breeders/growers, industry bodies and agents (such as intellectual property lawyers) provided feedback through written submissions and a workshop. A summary of the targeted consultation feedback can be found as Appendix One.

This process led to the development of the modernised fee structure proposed in this document. This structure aims to increase transparency for users, create certainty for potential applicants and ensure the costs of the regime are equitably allocated to each fee type. In setting fees, one of the important principles is ensuring they are set and managed in a way that is administratively fair and equitable.<sup>7</sup>

### Analysis of fee structure

To assess the appropriateness of a new PVR fee structure, MBIE assessed the fee structure options against the following criteria:

- Financial sustainability – is the fee structure financially sustainable for the operation of the PVR Office?
- Administratively fair/equitable – does the fee structure fairly/equitably reflect the costs of administering a PVR?
- Supports service delivery – does the fee structure support the delivery of the activities required to grant a PVR?
- Accessibility of the regime – does the fee structure support user accessibility in applying for and holding a PVR?
- Alignment with Treasury guidance – does the fee structure align with the guidance on setting charges in the public sector?

The three fee structure options that were considered were as follows:


- Option 1: Maintaining the status quo
- Option 2: Full cost recovery fee level
- Option 3: Interim partial cost recovery fees with \$500k Crown funding per annum for four years

Table 5 on the following page sets out MBIE's assessment of the options against each of the above criteria. This is followed by a high-level analysis of each option.

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<sup>7</sup> Office of the Auditor General. (August 2021). *Setting and administering fees and levies for cost recovery: Good practice guide*. Controller and Auditor-General, Tumuaki o te Mana Aroake. Page 8.

**Table 5: PVR fee structure options analysis**

Options analysis		Financially sustainable	Administratively fair / equitable	Supports service delivery	Accessibility of the regime	Aligns with Treasury guidance
Option 1	Status quo				✓	
Option 2	Full cost recovery	✓	✓	✓		✓
Preferred Option 	Interim Partial Cost Recovery (\$500,000 Crown Funding)	✓	✓	✓	✓	✓

**Option 1: Status quo**

The status quo has ensured consistent access for users to the regime over the years and this has supported New Zealand’s international obligations and reputation, as well as wider societal benefits.

However, the current fee levels support an unsustainable operating deficit of approximately \$0.892 million per year. At current volumes, the annual expense of the PVR Office is \$1.384 million against revenue collected of \$0.438 million and as such, is not financially sustainable and does not support services that are delivered.

Historically, the resulting deficit has been mitigated by the surplus position of IPONZ’s memorandum account. This is not fair/equitable for other IP right holders as they are essentially cross-subsidising the costs of the PVR regime to some degree. This cross-subsidisation is not sustainable and should be avoided as this goes against the guidelines set out by the Treasury<sup>8</sup>.

**Option 2: Full cost recovery**

Moving to a full cost recovery model would ensure that the fees charged across the granting process is paid for by the applicant for specific plant varieties. This approach aligns with Treasury’s fee setting guidance.

However, to maintain a viable regime, there is a level of fixed costs that need to be maintained regardless of the level of volumes of applications. Higher volumes provide for economies of scale and the fixed costs can be reduced across a greater number of users. Volumes in New Zealand are low and have fallen since 2002. This has resulted in fewer applications across which to spread fixed costs. A full cost recovery model would therefore result in significant increases for all fee payers and some significant rises in fees for some varieties.

<sup>8</sup> The Treasury (March 2022) *Guidelines for Setting Charges in the Public Service 2017*

The PVR Office has estimated that such a significant increase in fees across the board would likely have a negative effect and reduce applications by roughly half. This aligns with comments recorded at the 11 August 2021 workshop with the PVR Technical Focus Group (TFG), with industry representatives and experts noting that substantial increases in fees driven by a full cost recovery model would present a cost prohibitive barrier for some companies. This would especially impact small to medium sized businesses and breeders who engage with the regime. Further feedback from the targeted consultation can be found as Appendix One.

Ultimately, maintaining the PVR regime on a full cost-recovery basis would undermine the policy objectives of the regime, as it would necessitate substantial fee increases, thereby presenting a barrier to applicants, which is against the principles of UPOV-91.

### **Option 3: Interim partial cost recovery (preferred option)**

MBIE believes there is an element of public good of the PVR regime. As an interim measure until further analysis on public-private good can be completed, MBIE has reprioritised \$0.500 million per annum of Crown funding across the costs of the PVR regime for the next four years. The further analysis is explained further below

Since PVR fees have not been reviewed since 2002, the interim increase in Crown funding will not shoulder all costs for PVR applicants, with fees still needing to increase. However, by keeping fee increases within a more equitable range, this Crown funding will help to maintain users' accessibility, support the PVR Office's service delivery and ensure the wide benefits of the PVR regime continue to support New Zealand's economic activity.

This option aligns with Treasury's guidance that regimes that recover costs through third party charges may be full or partial cost recovery, especially when circumstances of full cost recovery lead to a situation where the pursuit of cost recovery undermines the policy objective.

#### *Economic analysis and future fees reviews*

Further work is required to quantify the economic and/or public good benefits to ensure that the PVR regime is sustainably funded and still achieving the policy intent over the long term. MBIE will commission economic analysis to better understand the benefits of the PVR regime to both applicants and the wider public. This economic analysis will inform the next review of fees in three years and will guide a longer-term approach to the administration of fees.

This type of bespoke economic analysis of a regime's public good is not often required. However, as the PVR regime is relatively small in scale and the New Zealand marketplace is populated by a diverse group of small to medium sized businesses; a more in-depth analysis has been deemed necessary to establish longer term fee settings. The in-depth analysis was initially outside the scope of this fees review and as a result is unable to be aligned to the current legislative work programme.

In line with this economic analysis, MBIE will monitor the impact of the proposed changes to fee levels by analysing volumes of PVR and the annual expenditure against the revenue received through fees on an annual basis. As a result, MBIE will update its costing model accordingly.

### **High level comparison of fees between existing and modernised fee structure**

As the existing fee structure has been in place for a number of years, MBIE felt it important to provide a comparison of proposed fees between both the existing and modernised fee

structure where the increase in fees differ. Irrespective of the fee structure, fees are set to increase as costs are currently under-recovered.

Throughout the remainder of this document, the proposed fee changes (under Option 3) are discussed alongside key questions to help us understand the impacts of the options on your business and to help you to formulate your views and any submission you make.

Table 6 below provides a total fee comparison for more frequently applied for species/groups. The numbers have taken into account the number of seasons testing, noting that the cost of the examination is currently included in the test trial fee.

**Table 6: Total fee comparison for more frequent species/groups**

Crop	Current total fees	Proposed total fees
Ryegrass (two testing seasons)	\$6,900	\$13,995
Cereals (two testing seasons)	\$5,100	\$9,815
Potatoes	\$2,100	\$3,795
Apple	\$800	\$1,395
Blueberry	\$1,000	\$3,595
Rose	\$950	\$1,500
Ornamentals	\$950	\$2,895

As a high-level point of comparison, both the existing and modernised fee structure are discussed by relevant fee area in Table 7 below and continued on the following page. Additionally, a full summary of Plant Variety Rights unit costs, proposed fees, and current fees is included as Appendix Three to this discussion document.

**Table 7: High level comparison of existing and modernised fee structure (continues on following page)**

Discussion Document Section	Frequency of payment	Timing of payment	Existing fee structure - Current	Modernised fee structure – proposed
<b>Section 5:</b> Application Fees	One-off	At the point of application.	Two different application fees depending on the type of plant variety.	One application fee to apply to all plant varieties
<b>Section 6:</b> Trials (Field Evaluation) and Variety Examination Fees	One – off or annual	After the field evaluation has commenced (If over multiple years payment will be timed to	Trial (Field Evaluation) Fee applied when PVR Office arranges growing trials (field evaluations) as part	<ul style="list-style-type: none"> <li>Field Evaluation fee applied when the PVR Office arranges the growing trials (field evaluations) and collection of data for</li> </ul>

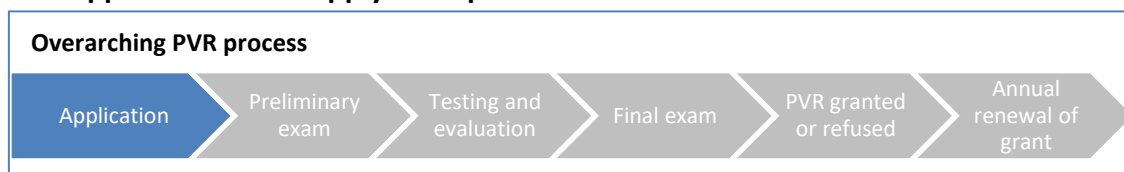
		when the evaluation begins each season).	of an application. This includes costs associated with variety examination (and if this fee is charged then a variety examination one is not).	an application (no longer including variety examination costs). <ul style="list-style-type: none"> <li>Change categories used for growing trials to reflect that trials may differ depending on whether a variety is an annual or perennial species, and the type of propagation.</li> </ul>
<b>Section 6:</b> Variety examination fees	Annual	After field evaluation has concluded and prior to final examination period	Fee applied only when the PVR Office examines the results of growing trials carried out by a third party.	Apply single fee to all applicants to cover the cost of the PVR Office examining the results of a trial regardless of who undertakes the trial.
<b>Section 7:</b> Annual renewal	Annual	Before expiration of PVR	Single renewal fee.	Introduce a tiered renewal fee.
<b>Section 8:</b> Enabling the PVR Office to better recoup costs incurred outside of standard PVR application process	As agreed with applicant	As agreed with applicant	<ul style="list-style-type: none"> <li>Search or photocopying at \$50 per hours (GST exclusive).</li> <li>Direct charge of cost to obtain foreign test trial report.</li> </ul>	<ul style="list-style-type: none"> <li>Enabling direct charging by the PVR Office for costs incurred during variety examination or growing trials.</li> <li>Direct charge of costs to obtain a foreign test trial report.</li> <li>Updating the rates and purpose of the hourly fee charged for time spent on additional work requested by applicants.</li> </ul>
<b>Section 9:</b> Compulsory licence	One-off	At the point of application	Single compulsory licence fee	<ul style="list-style-type: none"> <li>Single compulsory licence application fee</li> <li>New hearing fees in line with PVR Bill and based on IPONZ hearing fees</li> </ul>



# Proposed options for PVR fees

## Section 5: Application fees

### One application fee to apply to all plant varieties



The application fee is the initial fee payable when an application for a PVR is submitted; it covers the acceptance of the application, a preliminary variety examination for newness and the denomination, document checks, arrangements for testing and initial DUS assessment. The fee also includes administration costs and several of the fixed costs required to maintain the PVR Office.

Currently there are two different application fees depending on the type of plant variety. The fee is set at \$500 for herbage, agricultural crops, vegetables, fungi, and fruit or nut plants and \$350 for all other plants. As costs have risen since the last fees review, these fees no longer cover the overall cost of the activities performed by the PVR Office.

The modernised fee structure aims to create a single application fee which applicants would pay regardless of the plant variety category, as the costs of processing applications do not substantially vary by variety. This option not only simplifies the application fee process but also increases transparency as the proposed single application fee reflects the similar effort needed to process all plant variety applications. Adopting the modernised fee structure also increases equitability by removing potential cross-subsidisation between PVR application fees.

Table 8 below shows the modernised application fee structure and proposed fee level.

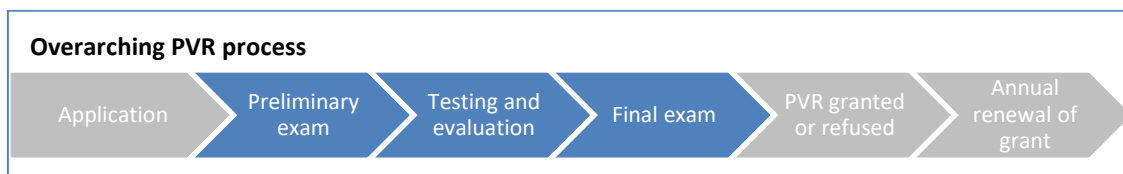
**Table 8:** Modernised application fee structure and proposed fee

Modernised application fee structure	Proposed fee
All plants	\$626

### Questions for submitters

1. Do you agree with the proposal to set a single application fee? If not, why not?

## Section 6: Trial (field evaluation) and variety examination fees



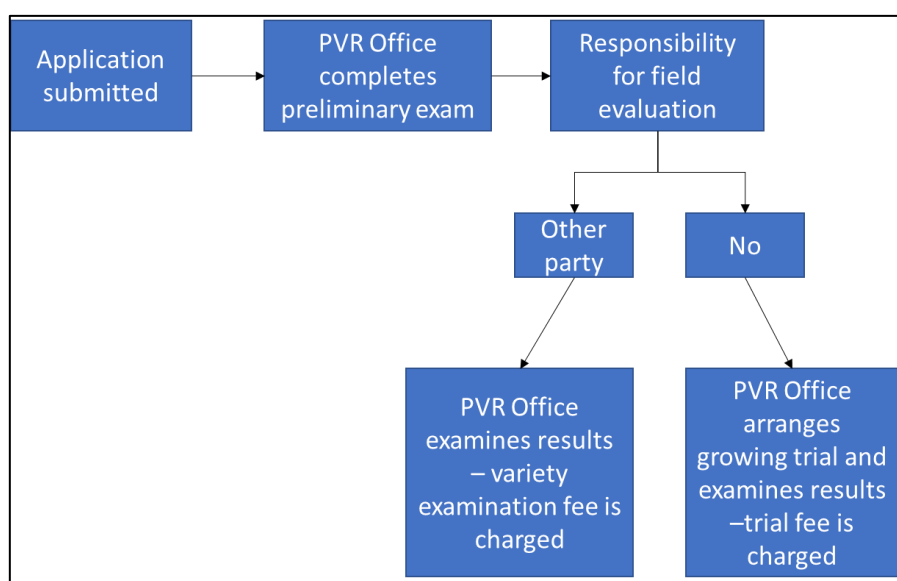
### Charging a variety examination fee in all cases

The existing fee structure provides for a trial **or** a variety examination fee to be charged to all applicants.<sup>9</sup> For instance, an applicant is charged:

- a trial fee, which covers the collection and field observation as well as the cost of data assessment and review (variety examination fee) when a growing trial is carried out by the PVR Office. Currently, the organisation, arrangement, and type of growing trial will vary for different plant species and different procedures will apply;<sup>10</sup> **or**
- a variety examination fee, which covers the cost of data assessment and review. This is only paid when a growing trial is carried out by another party (including a foreign entity).

The current fee structure charges an applicant **either** the trial **or** variety examination fee, because the trial fee includes the cost of the examination where trial evaluations are carried out by the PVR Office. This is summarised in Figure 3 below.

**Figure 3:** Current growing trial/variety examination fee charging process



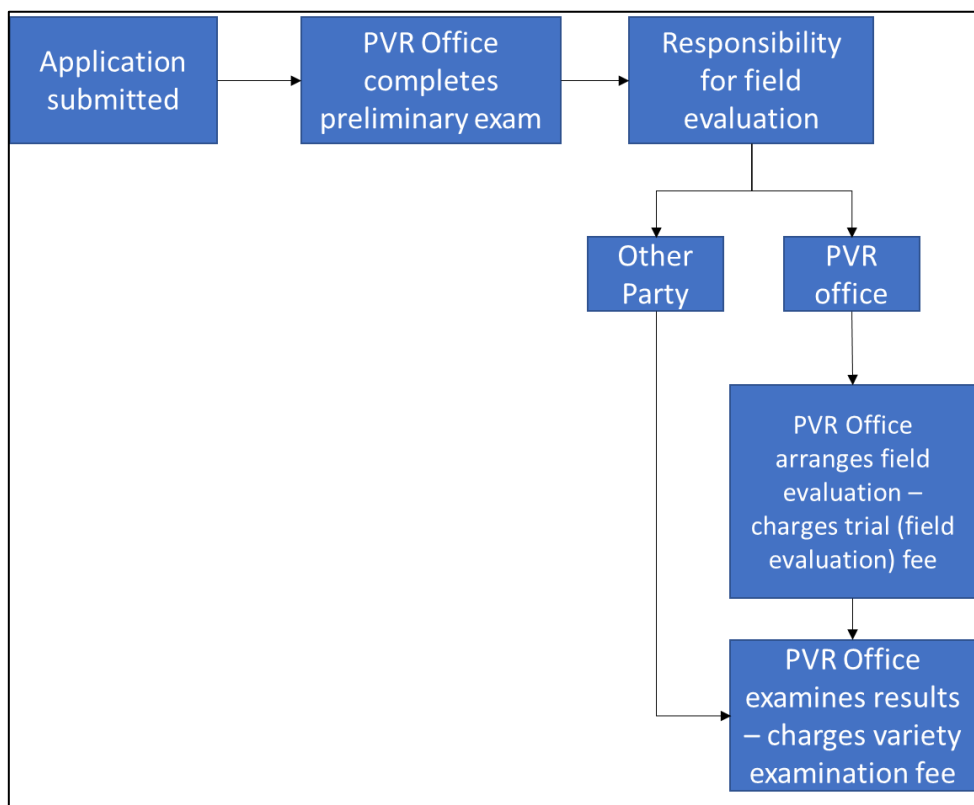
If the variety examination fee is charged, it is for most applications, only charged once. For a trial fee, the fee may be charged for every year that the trial is undertaken, in line with the growing season.

<sup>9</sup> If an applicant withdraws an application, the fee is not refunded.

<sup>10</sup> New Zealand Intellectual Property Office. (2022, February 28). *PVR Technical guidance: Arrangements for growing trials for the test of distinctness, uniformity and stability*. <https://www.iponz.govt.nz/about-ip/pvr/technical-guidance/current/arrangements-for-growing-trials-for-the-testing-of-distinctness-uniformity-and-stability/>

MBIE proposes decoupling the variety examination fee and growing trial fee by creating a single variety examination fee which applicants would pay irrespective of who conducts a trial. This is outlined in Figure 4 below.

**Figure 4:** Modernised fee structure for trial (field evaluation) and variety examination fees



Discussions with the industry have demonstrated that the difference between the examination fee and the trial fee is not clearly understood. The modernised fee structure aims to create transparency about how costs are allocated to the different fees, as well as to increase certainty for applicants about the costs associated with a PVR application. Additionally, the term ‘trial fees’ is confusing to applicants. These terms will be renamed to field evaluation fees as this aligns more closely with activities undertaken by the PVR Office at this stage.

Decoupling trial (field evaluation) and variety examination fees means that a trial (field evaluation) fee would still apply when the PVR Office undertakes or arranges the growing trials and collection of data for an application. However, the variety examination fee would be charged separately to the trial (field evaluation) fee, rather than being incorporated into it.

Questions for submitters	
2.	What are your views on decoupling the trial fee and examination fees?
3.	Does the modernised fee structure provide more certainty and transparency about which fees will be charged during the PVR application process?

### Changing the categories used for variety examination fees

Currently, there are three different examination fees charged by the PVR Office when a growing trial is conducted by another party. The fee depends on the type of plant variety application:

- \$600 for herbage, agricultural crops, vegetables and fungi,
- \$300 for fruit or nut plants and
- \$230 for all other plants.

However, when the PVR Office completes an examination, the activities and time required are not substantially different between the category of variety.

The modernised fee structure proposal is to charge a single examination fee, regardless of variety type. This option removes potential cross-subsidisation between PVR applications as there is not a substantial difference between the costs of examinations across species. Table 9 displays the proposed variety examination fee within the modernised fee structure.

**Table 9:** Modernised variety examination fee structure and proposed fee

Modernised Variety Examination Fee Structure	Proposed Fee
<i>Charged to all applications (i.e. no longer reflected in growing trial fee)</i>	
All varieties	\$770

#### Questions for submitters

4. Do you agree with the proposal to set a single variety examination fee for all varieties through the modernised fee structure? If not, why not?

## Changing the categories used for trials (field evaluation) fees

Trial (field evaluation) fees are currently categorised as laid out in Table 10 below.

**Table 10:** Existing trial (field evaluation) categories

Existing Trial (Field Evaluation) Categories	Current Fees
Herbage, agricultural crops, vegetables, fungi	
Grasses and white clover (per year)	\$3,200
Wheat, barley oats, forage brassicas, ryecorn, tritcale, and peas (per year)	\$2,300
Grass endophytes, fungi	\$1,500
Potatoes	\$1,600 (\$500 for each following year)
Fruit or nut plants	\$500
Other plants	\$450

This categorisation has been in place since the fees were changed in 2002 and does not reflect the different costs that are incurred in the different trials and evaluation requirements for varieties belonging to different genera and species. Additionally, labelling the fees as trial fees is non-descript and has proven confusing to applicants in the past. Therefore, the modernised fee structure proposes both a shift from trial to field evaluation fees and shifting to the following categories to improve transparency:

**Table 11:** Modernised Field evaluation categories

Modernised Field Evaluation Categories
Agricultural and vegetable crops
Seed propagated varieties (cereals, peas, forage)
Vegetatively propagated varieties (potatoes, hops) - year 1
Fruit and nuts
Strawberry varieties per year
All other varieties – year 1
Other varieties - year 2+
Ornamentals, trees and other plants
Roses per year
All other varieties – year 1

Other varieties - year 2+
Pasture plants and amenity grasses, including clover per year
Fungi and grass endophytes per trial

The aim in changing the plant grouping categories is to reflect the costs more accurately. The costs of a growing trial are influenced by both time and expertise needed to complete a specific growing trial. The proposed categories improve transparency and equitably allocate operational costs across the different plant varieties' trials. However, it is recognised that adjusting fees within the existing categories may be preferable to applicants as this may provide a sense of consistency to businesses.

Below, Table 12 below and Table 13 on the following page display the difference between the proposed fees within the existing categories and the proposed fee within the modernised growing trial categories.

**Table 12:** Proposed trial (field evaluation) fees under current growing trial categories

Existing Trial (Field Evaluation) Categories	Proposed Fees	Total Payment (Includes Examination Fee)
Herbage, agricultural crops, vegetables, fungi		
Grasses and white clover (per year)	\$6,300	\$7,070
Wheat, barley oats, forage brassicas, ryecorn, triticale, and peas (per year)	\$4, 210	\$4,980
Grass endophytes, fungi	\$2,800	\$3,570
Potatoes	\$2,400	\$3,170
Fruit or nut plants	\$1,270	\$2,040
Other plants	\$635	\$1,405

**Table 13:** Proposed field evaluation fees under modernised growing trial categories

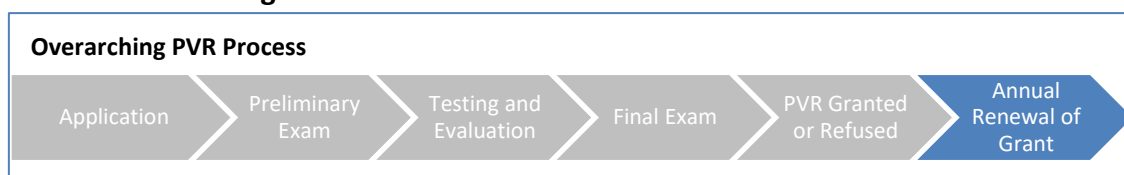
Modernised Field Evaluation Categories	Proposed Fees
Agricultural and vegetable crops	
Seed propagated varieties (cereals, peas, forage)	\$4,210
Vegetatively propagated varieties (potatoes, hops) - year 1	\$2,400
Fruit and nuts	
Strawberry varieties per year	\$125
All other varieties – year 1	\$2,200
Other varieties - year 2+	\$800
Ornamentals, trees and other plants	
Roses per year	\$105
All other varieties – year 1	\$1,500
Other varieties - year 2+	\$700
Pasture plants and amenity grasses, including clover per year	\$6,300
Fungi and grass endophytes per trial	\$2,800

#### Questions for submitters

5.	Do you prefer the existing trial (field evaluation) fee categories (Table 9) or the proposed modernised categories (Table 10)?
6.	Are there other trial (field evaluation) categories that should be considered?
7.	Are there any issues with the modernised trial (field evaluation) categories (Table 10) that MBIE should be aware of?

## Section 7: Grant renewal fees

### Annual renewal of grant – tiered renewal fees



The renewal fee is charged annually to keep the grant of a PVR active for the upcoming year. It is paid in the year following granting of a PVR to the rights holder and is currently set at \$160 for all varieties. The existing fee structure is that PVR grant holders pay the same fee, no matter how long the grant has been active.

The purpose of a renewal fee is to provide an incentive for a PVR grant holder to allow their PVRs to cease if their protected varieties are not providing them with a reasonable return, meaning the variety can be used by anyone. It also ensures the PVR Office has an accurate record of valid protected varieties and allows the PVR Office to track the varieties which have been surrendered and are potentially no longer in the market.

The modernised fee structure proposes a different rate based on the age of a PVR grant. For example, renewal fees would start at a lower rate and increase the longer a PVR is kept in force. Rather than increasing each additional year the PVR is held, fees would increase at regular intervals or 'tiers'. The rationale for structuring the renewal fees in this way is that it:

- reduces barriers to entry of the PVR regime by reallocating some of the costs incurred by the PVR Office to PVR users who have had the benefit of the regime for longer; and
- incentivises PVR grant owners to surrender varieties if they are no longer receiving a benefit from them.

Structuring the annual renewal fees based on tiers increases equitability by recognising that it may take several years before a species is able to provide sufficient return on investment. This approach slowly scales costs onto users as a variety has had a chance to become established as profitable to the PVR grant holder. This tiered approach to renewal fees also mirrors international property rights best practice for patent and trade marks internationally.

Without tiering renewal fees, applicants would need to pay higher fees to cover all costs from the first year of renewal. This initial higher cost of renewing a PVR could discourage applications from some domestic breeders as well as across certain species. Tiering annual renewal fees aligns with international best practice, due to its reduction of up-front costs for obtaining a PVR.

On the following page, Table 14 illustrates the proposed renewal fees within the existing and proposed fee structures.



**Table 14:** Proposed renewal fees in existing and modernised fee structure

Renewal fees	Proposed Fees	
	Existing Fee Structure	Modernised Fee Structure
1-5 years	\$429	\$270
6-10 years		\$400
11-15 years		\$530
16 years and over		\$700

#### Questions for submitters

- |            |   |
|------------|---|
| <b>8.</b>  | Do you agree in general with a tiered approach to renewal fees? Why or why not? |
| <b>9.</b>  | Do you agree with the proposed tiers for renewal fees? If not why not?          |
| <b>10.</b> | Can you suggest any alternative ways renewal fees could be charged?             |

## Section 8: Enabling the PVR Office to recover costs incurred outside of standard PVR application and granting process

In the past, applicants have asked the PVR Office to complete additional work beyond what is normally covered by the PVR application and grant process. This is one of the pressures that has led to the substantial deficit position of the PVR Office. MBIE proposes to expand the mechanisms contained in the Fees Order to recoup these costs through:

- direct charging for cost incurred at the request of an applicant,
- expanding the types of work for which the PVR Office can charge an hourly rate, and
- updating the hourly rates to reflect the skill set that is providing the service.

Application of hourly rates would be for work carried out at the request of the applicant and subject to a written contract. No charges would be incurred by the applicant before they were agreed upon.

### Updating the ability to direct charge for third party costs incurred by the PVR Office on behalf of the applicant

There may be situations where the applicant requests non-routine specialist testing for a variety which needs to be obtained from a third party. For instance, if the applicant requests additional testing of a particular characteristic (e.g. assessment of a physiological characteristic such as the level of metabolite) which is outside of standard practice, this would require additional or special requirements such as a laboratory.

The ability to direct charge in these situations (if requested and agreed by the applicant) ensures that the costs of the application fall on the applicant, rather than being subsidised by all applicants. This will increase equitability of the PVR fees and minimise uncertainty surrounding costs for applicants.

Currently, section 2(2) of the Fees Order allows the PVR Office to recover costs incurred if it organises an overseas growing trial of a variety. It is not proposed to change this approach.

#### Questions for submitters

- |     |  |
|-----|--|
| 11. | Do you agree that the ability for the PVR Office to direct charge should be amended to include non-routine testing costs or other specific direct charges it incurs on the applicant's behalf? Why or why not? |
|-----|--|

### Expanding the types of work for which the PVR Office can charge an hourly rate

The Fees Order allows the PVR Office to recover \$50 per hour for any time spent undertaking a search or photocopying for a person (section 2(3)).

This proposal expands the types of work for which the PVR Office can charge an hourly rate based on the expertise of the person undertaking the services and update the rates that might be charged. The types of work which the PVR Office can charge for would cover additional research and international consultation as commissioned by an applicant. This may include research into new testing methodologies or to review of international best practice.

The rates at which the work would be charged will depend on the skill set of who is doing the work – whether it is the Commissioner, a technical expert or administrative support. The proposed rates are outlined in Table 15 on the following page.

**Table 15:** Variable fee category and hourly rate for complex variety examinations

Consulting Fee Category	Hourly Rate Fee
Commissioner	\$165
Technical Expert	\$100
Administrative Support	\$65

Application of hourly rates would be subject to prior agreement with the applicant and no additional charges would be incurred by the applicant before they were agreed upon. As such, this would not be considered a routine practice.

This will help to ensure costs of a complex requests which are outside the standard expectation of an examination or growing trials would be charged on to that specific applicant. This would ensure a more equitable PVR regime as outlier work carried out by the PVR office would not be cross-subsidised by the general standard applications.

Questions for submitters	
12.	Do you agree with the proposal to update the types of work for which the PVR Office can charge applicants on a contractually agreed hourly rate? If not, why not?
13.	Can you suggest alternative ways to recoup the costs of variety examinations that require work over and above what is usually done by the PVR Office?

## Section 9: Compulsory licence application fees

After at least three years following the date a PVR is granted, any person may lodge an application for a compulsory licence for the variety concerned. A compulsory licence may authorise the licence to undertake production, reproduction, selling, importing, or exporting of a protected plant variety or any other activities which are restricted under the PVR Act.

A compulsory licence application fee is used when a variety's availability is perceived to be restricted and not widely available to the public. For example, if a fruit was sold in New Zealand but the plant was not available to grow in New Zealand, an individual may make a compulsory licence application to the PVR Office to gain access to grow this fruit.

A compulsory licence application fee must be accompanied by payment of the prescribed fee (currently \$600 for all species) and a detailed explanation as to why a compulsory licence should be granted. The explanation must be substantive and should include supporting documentation from at least one other party. The existing PVR compulsory licence fee is equivalent to a hearing fee within other intellectual property regimes.<sup>11</sup> Before deciding on a compulsory licence application, the PVR Office must provide the grant holder the opportunity to be heard.

During the earlier targeted consultation, a concern was expressed that compulsory licence application fees should be higher because they set in motion a process which is very expensive for respondents, and the current fee is disproportionate to the costs experienced by the PVR grant holder.

As such, the PVR Bill sets out a new hearings process, which follows a compulsory licence application being pursued. Upon receiving a compulsory licence application, the PVR Office must consider whether it is in the public interest to grant a compulsory licence, in addition to several other criteria. This would follow a similar process to current preliminary analysis and informing concerned parties and rights holders. If all parties involved are not able to agree, a hearing process would be initiated.

As Compulsory Licence Applications for PVRs are lower in volume and higher in complexity than other IP areas, fees need to be increased to cover costs. Due to the current infrequent usage of the compulsory licence application, MBIE proposes aligning the PVR Office hearing process with the wider IPONZ process. Such proceedings include:

- an opposition to a PVR
- an application to revoke a PVR
- a hearing on the exercise of the Commissioner's discretion, including a decision to refuse a patent application for registration.

Once the evidential stages of a proceeding are complete, the case will be passed to an independent Assistant Commissioner who will hear both parties before issuing a formal written decision, which will normally include an award of costs to the successful party.

Costs associated with both the proposed compulsory licence application fee and hearing process are described in Table 16 on the following page.

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<sup>11</sup> Further details regarding wider IPONZ hearings processes, with Patents as the example, can be found here: [Patent hearings | Intellectual Property Office of New Zealand \(iponz.govt.nz\)](https://www.iponz.govt.nz/patent-hearings)

**Table 16:** *Proposed compulsory licence and hearing fees*

Item	Fee
Compulsory licence application (Paid by applicant, not PVR holder)	\$1,000
Notices of opposition by opponent	\$350
Application for revocation	\$350
Request for hearing	\$850

#### Questions for submitters

- |     |  |
|-----|--|
| 14. | Do you agree with the proposed compulsory licence fee? If not, why not?  |
| 15. | Do you agree with the proposal to align the Hearing process and fee with the wider IPONZ current process? If not, why not? |

## Section 10: Next steps

### Period of transition

MBIE acknowledges that when a new fees structure is introduced there will be applications underway with assumptions that the current examination and growing trial fees are in place. Therefore, MBIE proposes that prior to the new fee levels being brought into force, any applications in the system would be charged fees at the current fee levels for examination and growing trials until the PVR is granted. As such, applications made after the revised fees are brought into force would be charged according to the new fees structure.

To inform stakeholders of any transitional arrangements, IPONZ will leverage existing communication channels, including the Quarterly PVR journal.

### Questions for submitters

- |     |  |
|-----|--|
| 16. | Do you agree with the proposed transition arrangements of fees? If not, why not? |
|-----|--|

### Consultation next steps

Your feedback on the proposals in this document will help the Minister of Commerce and Consumer Affairs to make the final decisions on the structure and level of the fees charged by the PVR Office.

The objectives of the review of fees are to ensure that:

- the PVR Office is funded sustainably;
- users meet an appropriate portion of the cost given the benefit they receive; and
- both fees and the Plant Variety Rights (PVR) regime are transparent and equitable, while maintaining business certainty for users of the regime.

### All proposed fees and levies are stated as GST exclusive.

We welcome your written submissions on the proposals included in this document. Once we have considered your submissions, we will provide advice to the Ministers who will take final proposals to Cabinet for consideration.

### Proposed timeline for reviews

Due date	Action
<b>Mid-April 2022</b>	Release of discussion document
<b>20 May 2022</b>	Deadline for submissions to MBIE
<b>June 2022</b>	Report to relevant Ministers on submissions and final proposals for changes to fees and levies
<b>July 2022</b>	Seek approval from Cabinet for proposed changes
<b>October 2022</b>	Governor-General makes Order in Council to make the Regulations that set the fees and levies
<b>November 2022</b>	Fees implemented, including any transitional arrangements

## Appendix One: Summary of targeted consultation feedback

### *Impact of fee increases generally*

The targeted consultation paper sought to understand the overall impact on the industry of significant fee increases.

Submitters were asked whether they would be deterred from using the PVR regime should fees increase. There was no consensus on this question, with 25 per cent of submitters stating they would be deterred, 25 per cent of stating they would not be deterred, 25 per cent of saying they would somewhat be deterred, and the remaining 25 per cent stating they had no comment as they were not direct users of the PVR regime.

Regardless, the majority of the submitters agreed that any increase in PVR fees would impact the usage of the regime by foreign breeders, especially if they don't consider the size of the market in New Zealand justifies the higher fees. 37.5 per cent of submissions mentioned that an increase in fees would not deter foreign breeders so long as New Zealand was still seen as a valuable market for them.

The length of time submitters believe would be needed to recoup the investment was varied and dependent on the plant variety and market conditions. The time ranged from being able to recoup quickly to 15 years.

A plant variety being commercially successful was identified as a significant factor which would reduce the length of time needed to recoup their investment.

Factors that would lengthen the recovery period, included:

- need to recoup fees of multiple applications with low success rates; and
- delays caused by the plant importing system.

Half of the submitters believed that foreign breeders' usage of the PVR regime in New Zealand would be negatively affected by such an increase in fees.

The remainder believed there would be limited impact on foreign breeder usage as they see the New Zealand market as valuable and have already decided to apply for PVR rights in New Zealand.

One submitter recommended expanding consultation to include foreign breeders to enable fuller understanding of any impact.

### *Application fees*

The consultation sought submissions on whether the application fees should be the same for all plant species and whether there were preferable alternatives to this.

All submitters supported a universal application fee for all plant species. Several submissions highlighted that a universal application fee is justified as the actual processing time and costs for the applications were similar or any differences would be relatively small.

No alternative approaches from the flat application fee approach were suggested as submissions supported a flat application fee as the most equitable approach. One submission offered the reasoning that it should only be a flat application fee as long as the costs of processing different applications is the same. If some applications incurred more costs for the PVR Office then these applicants should be charged more.



### *Renewal fees*

A majority of submissions (62.5 per cent) agreed with the proposal to tier renewal fees, increasing with the age of the grant. There was support for paying higher fees later in the life of a PVR if the variety was successful.

Of those that agreed with a tiered approach, there was support for the proposed tiers. No alternatives were proposed.

Several submissions noted that this tiered approach may create difficulties as many varieties are far more valuable in their early years after which popularity often begins to wane. One submission noted that the applicant already takes significant business risk at the front end of the process.

### *Trial and examination fees*

62.5 per cent of submissions supported grouping together plants where the costs of trials and examinations were similar. A significant proportion of submissions noted that fees should reflect the costs of trials and examinations.

There was little comment on the specific makeup of the categories other than one submission suggesting the categories of:

- Ornamentals (annuals and short-term species)
- Ornamental trees
- Fungi
- Algae

In addition to this, one submission raised questions about where forestry legumes and peanuts would fit.

The consultation paper proposed charging a variable fee where an initial examination determines that further specialist work is required. Half of submissions supported this proposal while half did not. Half of submissions included submissions that supported and disagreed with the proposed variable fee, noting it was important that applicants both consent to any fee and understand the full cost before they are charged.

Responses that disagreed with the proposal noted two main issues:

- that novel varieties (such as being the first variety in a species) may be charged more and as a result would subsidise varieties which would come after them; and
- that a type of variable of charging regime makes costs uncertain for applicants.

Alternatives to this proposal were third party or applicant-run trials or a general fixed fee for time consuming applications.

If the trial fees charged by the PVR Office were to substantially increase, over half of submissions suggested that the use of overseas test reports as an alternative would increase. Other suggestions included allowing applicants to do their own testing and conducting trials close to an assessor to keep costs down.

### *Direct charging*

All but one of the eight submissions supported giving the PVR Office the ability to charge for costs directly incurred on behalf of the applicant (such as costs incurred when buying foreign

reports or for specific breeder-requested travel). One of the submissions added that support for direct charging was as long as applicants are advised of any likely costs.

The submission that did not support this proposal suggested these costs should be factored into the set fee structure to provide certainty to users.

### *Wider impacts*

To understand the impact of a change in fees, the consultation document sought to understand both the benefits from the grant of plant variety rights as well as other costs the submitters considered when applying for a plant variety right.

Benefits identified:

- Promotes innovation and development of varieties suitable for use in New Zealand
- Provides a return on investment for New Zealand breeders
- Allows unauthorised use to be stopped. Under the new Act, this will also include being able to prevent export of plant material
- Providing protection for overseas breeders so they bring their varieties into New Zealand
- Stimulates and drives investment in plant breeding research and development
- Provides incentive, through royalties, to breeders to continue to find plants that will solve the challenges growers face including climate change, new pests and disease, more specific end use characteristics.

Other costs submitters consider when applying for plant variety rights:

- The risk/cost of not having PVR protection
- Importation costs
- Diagnostic fees
- Breeding costs
- Marketing costs, including labelling, branding and promotion
- Commercial testing
- Royalties owed to original breeders

Other mechanisms to obtain a return on investment in breeding or importing included:

- Branding;
- Commercial contracts;
- Exclusive supply to one customer;
- Closed loop marketing; and
- Trade marks.

Several submissions mentioned that the above alternative mechanisms to obtain a return on investment even in combination with one another do not provide the level of protection of a PVR.

### *Māori Advisory Committee*

Submissions were sought on an equitable way to apportion the costs of establishing and operating the Māori Advisory Committee that will be established through the PVR Bill currently being considered by Parliament.

75 per cent of submissions proposed that it should be Crown funded due to the committee's establishment stemming from Crown's Te Tiriti obligations.

Other reasoning noted in submissions was the low amount of applications that would likely go through the committee process as this would lead to high fees if only users of the committee paid or result in other applicants paying for the cost of the committee.

## Appendix Two: Comparison of proposed fees with and without increased Crown funding

PLANT VARIETY RIGHTS - PROPOSED FEES			
	Full cost recovery	\$500,000 Crown	Difference
	Proposed fee	Proposed fee	
<b>Applications</b>			
<i>All varieties</i>	\$770	\$625	\$145
Herbage, agriculture, vegetable and fungi			
Fruit and nut			
All other plants			
Applications made but later withdrawn (no refund)			
<b>Examinations</b>			
<i>All varieties</i>	\$3,940	\$770	\$3,170
Agriculture and vegetable crops			
Fruits and nuts			
All other plants (incl ornamentals)			
<b>Growing trials by PVRO</b>			
<b>Agriculture and vegetable crops</b>			
- seed propagated varieties (cereals, peas, forage)	\$12,500	\$4,210	\$8,290
- vegetatively propagated varieties (potatoes, hops)	\$3,310	\$2,400	\$910
<b>Fruit and nut</b>			
- strawberry varieties	\$290	\$125	\$165
- all other varieties- year 1	\$4,530	\$2,200	\$2,330
- all other varieties- subsequent year annual charge	\$1,310	\$800	\$510
<b>Ornamentals</b>			
- roses	\$130	\$105	\$25
- all other varieties- year 1	\$3,600	\$1,500	\$2,100
- all other varieties- subsequent year annual charge	\$700	\$700	\$0
<b>Grasses, white clover</b>	\$11,200	\$6,300	\$4,900
<b>Grass endophytes, fungi</b>	\$5,400	\$2,800	\$2,600
<b>Annual grant fee</b>			
<i>Single fee OR</i>	\$430	\$430	\$0
<i>1-5 years</i>	\$325	\$270	\$55
<i>6-10 years</i>	\$475	\$400	\$75
<i>11-15 years</i>	\$650	\$530	\$120
<i>16 years and over</i>	\$875	\$700	\$175
<b>Other fees</b>			
Foreign test reports	at cost	at cost	
Compulsary license application		\$1,000	
Notices of opposition by opponent		\$350	
Application for revocation		\$350	
Request for hearing		\$850	
Hourly rate - Commissioner		\$165	
Hourly rate - Technical expert		\$100	
Hourly rate - Administration		\$65	

## Appendix Three: Plant Variety Rights unit cost, proposed fee, and current fee

PLANT VARIETY RIGHTS - PROPOSED FEES			
	Unit cost	Proposed fee	Current fee
<b>Applications</b>			
<i>All varieties</i>	\$626	\$625	
Herbage, agriculture, vegetable and fungi			\$500
Fruit and nut			\$500
All other plants			\$350
Applications made but later withdrawn (no refund)			\$500
<b>Examinations</b>			
<i>All varieties</i>	\$767	\$770	
Agriculture and vegetable crops			\$600
Fruits and nuts			\$300
All other plants (incl Ornamentals)			\$230
<b>Growing trials by PVRO</b>			
<b>Agriculture and vegetable crops</b>			
- seed propagated varieties (cereals, peas, forage)	\$4,209	\$4,210	\$2,300
- vegetatively propagated varieties (potatoes, hops )	\$2,419	\$2,400	\$1,600
<b>Fruit and nut</b>			
- strawberry varieties	\$124	\$125	\$500
- all other varieties- year 1	\$2,129	\$2,200	\$500
- all other varieties- subsequent year annual charge	\$807	\$800	\$500
<b>Ornamentals</b>			
- roses	\$104	\$105	\$450
- all other varieties- year 1	\$1,449	\$1,500	\$450
- all other varieties- subsequent year annual charge	\$699	\$700	\$450
<b>Grasses, white clover</b>	\$6,304	\$6,300	\$3,200
<b>Grass endophytes, fungi</b>	\$2,797	\$2,800	\$1,500
<b>Annual grant fee</b>			
<i>Single fee</i>	\$429	\$430	\$160
<i>Tiered fee structure</i>		OR	
<i>1-5 years</i>		\$270	
<i>6-10 years</i>		\$400	
<i>11-15 years</i>		\$530	
<i>16 years and over</i>		\$700	
<b>Other fees</b>			
Foreign test reports		at cost	at cost
Compulsary license application	\$1,000	\$1,000	\$600
Notices of opposition by opponent	\$350	\$350	New
Application for revocation	\$350	\$350	New
Request for hearing	\$850	\$850	New
Hourly rate - Commissioner	\$165	\$165	New
Hourly rate - Technical expert	\$100	\$100	New
Hourly rate - Administration	\$65	\$65	New
Hourly rate - searching/ photocopies		\$0	\$50

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