It's been 30 years since there was a serious look at New Zealand's Plant Variety Rights legislation – but that is all about to change, says Chris Barnaby

A new Plant Variety Rights Act is coming up this year

A MAJOR REVIEW of the NZ Plant Variety Rights Act, begun in 2017, is nearing completion, Chris Barnaby from the Plant Variety Rights Office told delegates at the IPPS Conference in Hamilton recently.

The proposed changes coming through will affect many in the garden industry, he said, "because a lot of you are involved in using or dealing with protected varieties.

"Many of you grow them, many of you have other contacts with that side of the business. And I think that it is important that you are aware of what is happening and what will occur."

Three drivers shaping the review

There are three main drivers shaping the review, said Chris. First, the current law is more than 30 years old and is considered outdated because a lot has changed over that period with business practices, propagation technology, and how breeding functions.

Second, increasingly the drafting of law these days has Treaty of Waitangi obligations, and this has become more of a focus for the current Government.

There were "a number of elements that affected plant variety protection" in the Wai 262 claim concerning NZ flora and fauna, set out in a report released in 2011. "I think that was one of the key components that pushed the current review along."

The third major driver was the need for New Zealand to comply with international standards regarding plant variety protection in order to meet the requirements of the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP) by the end of this year.

Discussions on the PVR review began in earnest in 2017 and there was consultation with industry and Maori in 2018, said Chris.

Passed by the end of this year

"Some of you have been involved in that. We've tried to reach as many people as possible and we've tried to work with a whole wide range right across primary industry, including a nursery and ornamentals group."

The Bill went to Parliament in May 2021 and is now before a Select Committee.

The aim is to have it passed by the end of this year and the new regulations introduced for the middle of 2022.

A Maori Committee for taonga species

A major change proposed under the new legislation is to be the formation of a Maori Committee to oversee all applications for variety rights protection involving taonga species.

At this stage a formal definition of taonga species is not available however the species included in this group are likely to be all native or indigenous plants and a very limited number of others that arrived on migratory waka, such as kumara.

Chris Barnaby, Assistant Commissioner for Plant Variety Rights

"So what will happen is that if you make an application for a variety belonging to a taonga species the application will first go to the Maori Committee and all matters relating to the Treaty and kaitiaki (cultural guardianship) relationships between iwi will be addressed in that committee," said Chris.

"If approved by the Maori Committee, it will then go into the usual system as we have now and will look at the standard criteria that exist at the moment.

"The Maori Committee will only look at taonga species. It will have no role in non-taonga species. To just put this into perspective, currently around 10% of applications are for native species, so in effect 90% of applications will be unaffected by this provision."

The PVR Office was currently receiving only about six to 10 applications per year involving native species.

Chris noted that exactly how the Maori Committee will work and what it will practically do have not yet been finalised.

Adopting international protocols

The second major change under the new legislation is for New Zealand to adopt the latest provisions of UPOV, the International Union for the Protection of new Plant Varieties. The 1991 UPOV Convention is the standard for the CPTPP trade agreement.

Chris said the 1991 Convention gives a plant breeder more opportunities to assert rights by moving the focus from just protecting against unauthorised commercial propagation to a wider cover against commercial exploitation, like the unauthorised exporting, importing or stocking of protected varieties.

The concept of Essential Derivation

Another major change under the new legislation will be the adoption of a new concept called "Essential Derivation," which Chris said came about from the rise of genetic engineering in the late 1980's.

"There was concern that people could take a (protected) variety and change it slightly and have a new variety. In effect they have piggybacked on all the work and benefit of the initial or original breeder.

"So it was decided that the person who created the second variety would own it but the two of them would have to have a conversation around commercialisation. So it's not about ownership of the second variety it's about sharing commercialisation."

Chris said Essential Derivation was a murky area and subject to ongoing discussion at international level. The concept was formulated in 1991 but even now is not fully defined by those who have had it in law for a long period.

Royalties from harvested material possible

Another change under the new legislation is the possibility of extending breeders' rights to "harvested material," opening the door slightly to the possibility of collecting royalties on plant products where it is difficult or impossible to exert rights at propagation level.

This concept arose mainly from the cut flower trade in the 80's and 90's when there was an explosion of cut flower production in Central and South America, which at that time had no variety protection law, and huge volumes of cut flowers from varieties bred by Dutch companies were pouring into North America.

Chris gave an example of a person who owns a protected banana variety in NZ that is, say, being grown in a Pacific Island nation which does not have a plant variety protection system.

If those bananas were exported to New Zealand the variety rights owner could potentially collect royalties on the imported fruit because they had not been able to exert their rights at propagation stage.

Farm-saved seed will still be allowed

The last of the major changes coming through under the new legislation, said Chris, relates to farm-saved seed "which in the arable industry and the seed industry is of huge significance."

"Farm-saved seed will still be allowed; there will be no change regarding that at all. But what has been provided for is the possibility for industry and breeders and those involved agreeing to the collection of royalties on farm-saved seed.

"From a seed company view, it has long been a problem in the arable industry, particularly for cereals, where a significant percentage of a crop that is planted of a protected variety has come from farmers saving seed. They have not bought new seed so in effect every year the seed companies will tell us they only get about half the revenue from the planted crop that they should do. Industry has long identified this as a problem and this is a step towards addressing it."

Administrative changes and costs

Chris said there has also been a "significant review" around the administration and processes underlying the PVR system, but most will be invisible to users.

"The way PVR actually functions and operates will not really change. We felt that it is important that we don't want any dramatic operational change because the system as it functions now appears to be working okay and there's no reason to have any major restructuring."

The new legislation does, however, attempt to address concerns expressed by groups such as patent attorneys that the current legislation is very light on process around objections and what happens in areas of disputes.

"There will also be some improvements in how we organise testing arrangements," said Chris, "also around requesting of plant material, taking into account the difficulties of importation.

Fees are likely to increase. "A consultation paper will be going out to interested parties in the near future and there'll be a discussion about what level of fees are appropriate. We have not increased fees since 2002. I don't think there are many organisations that have 2002 revenue and 21st century expenses."

What about NZ plants being bred overseas?

After his presentation Chris was asked from the floor by a delegate how the new law would be applied to breeders overseas working with NZ native plants.

"There is a mass of New Zealand plant material in England and America, a whole host of things like hebes being bred by breeders there. How do they get around applying for plant variety and protection?"

"You're exactly right," said Chris, "and we're well aware of that.

"And the only practical solution is that if it's a foreign-bred NZ native plant variety it will still go to the Maori Committee but it will have to be treated differently because if the breeder is not a NZ resident then it's almost impossible for them to comply with any requirements that are set by the committee.

"So we are aware of that issue and it will have to be addressed by the committee, but it is a significant one and I certainly agree with you that it is something that is an issue."

Another delegate questioned whether all existing PVRs on NZ native plants would now be reviewed.

"No, it's not retrospective," said Chris. "Nothing will change. If you own a variety now there will be no change."