

# PLANT SELECTORS' RIGHTS IN NEW ZEALAND — DO YOU KNOW THE FACTS?

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## INTRODUCTION

Although the Plant Selectors' Rights (or PSR) scheme has been in operation in New Zealand for ten years now there are still people in the industry who are unaware of the implications of Plant Selectors' Rights, or have misunderstandings about its operation. This paper is designed to explain the facts.

## PLANT VARIETIES ACT 1973

The original Act governing the operation of PSR, the Plant Varieties Act 1973, was prompted by Sam McGredy, the international rose breeder, who wanted to gain some form of protection for his new rose cultivars and to prevent piracy. Initially protection was available only to roses but it is now possible to gain PSR in New Zealand for any type of plant, other than fungi, algae, and bacteria.

A grant of PSR gives a breeder the exclusive right to reproduce for sale and to sell reproductive material of his new cultivar (or license others to do so). He is thus able to control the distribution and marketing of the reproductive plant material (i.e. plants, buds, cuttings, seeds, rootstocks) and in doing so may recoup his breeding costs and hopefully make a profit from the collection of royalties.

**Criteria for Rights.** To be eligible for Rights a cultivar has to meet five criteria: (1). It must be new. In PSR terms this means that it must not have been sold in New Zealand for more than one year before application or overseas for more than four or six years (depending on the type of plant). Rights are not available to existing cultivars.

(2). It must have an acceptable name. This is normally a fancy name which must conform to guidelines for international usage. If a cultivar is also protected in other countries it should have the same name in all countries.

(3). It must be *distinct* from all other cultivars of common knowledge by one or more morphological, physiological, or other characteristics. For example, plant height, flower colour, disease resistance.

(4). It must be sufficiently uniform.

(5). It must be *stable* or remain true to its description after repeated propagation or reproduction.

With vegetatively propagated fruit and ornamental cultivars uniformity is not usually a problem although the stability of some sports is questionable. Note that horticultural merit is not taken into consideration.

To assess the criteria of distinctness, uniformity, and stability the cultivar is test grown, preferably alongside existing similar cultivars, and a detailed description of its characteristics is prepared. For ornamentals and fruit this examination process may occur in one of four ways:

- (1) Centralised trials, e.g. for rosès where an applicant supplies plant material which is grown and tested at Palmerston North. An officially appointed Advisory Panel inspects the cultivar and assesses its eligibility for Rights.
- (2) A Ministry of Agriculture & Fisheries (MAF) officer inspects plants on an applicant's property and/or government research station and prepares a detailed description over a full growing season (the most common procedure).
- (3) The applicant supplies all technical and descriptive data to the Plant Varieties Office. This procedure is followed for applications from MAF or DSIR (Department of Scientific and Industrial Research).
- (4) If a report is available from an overseas testing authority this can be accepted if the description is checked against plants growing under NZ conditions.

The last three options are each followed by assessment by an independent expert — someone with a specialised knowledge of existing varieties.

**Fees.** The current fees payable are set out in Table 1. A renewal fee must be paid annually to keep a grant of PSR valid, up to a maximum of 15 or 18 years (depending on the type of plant).

**Table 1.** List of fees payable in connection with an application for Plant Selectors' Rights (\$NZ)

	Orchids, Fruit	Other Ornamentals Forest & Nut Trees
Application for grant	100	100
Examination or test trial fees	200 <sup>1</sup>	100 <sup>1</sup>
Notice of grant	100	100
Annual renewal	70	70

<sup>1</sup> - Reducible if all data supplied by applicant.

**Development of the scheme.** Since the scheme was opened up in 1980 to allow protection for any type of fruit and ornamental plant there has been a steady number of applications for PSR received (see Table 2). Roses account for a considerable proportion of the ornamental applications (67% in 1984)

whereas most interest in PSR for the fruit crops has been for apples. The total number of grants valid is given in Table 3.

**Table 2.** Number of applications received for Plant Selectors' Rights.

	1980	1981	1982	1983	1984	(1985 <sup>1</sup> )
Ornamentals	16	19	15	38	27	26
Fruit & nuts	1	32	17	9	9	16
Agricultural crops herbage, and pasture plants	13	8	14	14	12	13
<b>TOTAL</b>	<b>30</b>	<b>59</b>	<b>46</b>	<b>61</b>	<b>48</b>	<b>55</b>

<sup>1</sup> January to September, 1985

**Table 3.** Total number of grants of Plant Selectors' Rights valid as at 30 September, 1985

Ornamentals	134
Fruit and nuts	25
Agricultural crops, herbage and pasture plants	<u>66</u>
<b>TOTAL</b>	<b>225</b>

**Obligations of Rights holder.** Although the holder of a grant of PSR has certain rights, he also has certain obligations which result in the interests of the public being safeguarded. A rights holder must ensure that reproductive material of reasonable quality is available to the public in reasonable quantities at a reasonable price. If this is not done another person may apply for and obtain a compulsory license which would force the Rights holder to release the cultivar to other people. The purchaser of a plant of a cultivar with PSR is quite free to grow that plant in his own home garden, propagate it for non-commercial purposes, use it for human consumption, or in plant breeding but, of course, may not propagate from it for further sale.

**Labelling of cultivars with Rights** It is the responsibility of the Rights holder to protect his interests in his cultivar. This may include the appointment of licensees and the negotiation of licenses with propagators to bulk up and sell a protected cultivar, and the correct labelling of plants distributed. Obviously a purchaser cannot be blamed for infringing the Rights of a grant holder if he had no reason to believe that the cultivar was protected by PSR. This matter should be of major importance to plant propagators and distributors.

A protected cultivar should be so indicated on any label, in catalogues and advertisements, by using the words

“Protected by Plant Selectors' Rights”, or

“Protected under the Plant Varieties Act 1973”, or

“Protected”, if this term is commonly understood.

In a catalogue an abbreviation (e.g. “P”) may be used if

there is adequate explanation of the term.

If an application for Rights has been made for a cultivar but a decision has not been reached, the following wording is suggested:

“Plant Selectors’ Rights applied for”, or  
“Protection applied for”

It is also advisable to include wording to indicate the practical effect of Plant Selectors’ Rights: e.g. “Unauthorised Propagation Prohibited”, or similar.

It is incorrect to indicate that a cultivar is protected by Rights by using the words “Patented” or “Subject to plant patent rights” or the symbol ®. Using the word “Registered” is misleading, if not meaningless. It is also quite incorrect and, in fact, an offence under the Plant Varieties Act, to indicate that a cultivar is protected by Rights when it is not.

A list of protected cultivars appears in the NZ Plant Varieties Journal, published quarterly, and annually in the NZ Nurserymen’s Association July or August newsletter. Alternatively, it is possible to make enquiries direct to the Plant Varieties Office for up-to-date information.

#### OTHER FORMS OF PROTECTION

There are other forms of protection available to a breeder in order to control the marketing of his cultivar. In the past a few cultivar names have been registered as trademarks. While this prevents the use of that trademark for any other plant or plant product, it does not prevent unauthorised propagation and sale of the cultivar.

Civil contracts are used widely in the field of plant distribution. Depending on the terms of the contract a grower may agree to propagate for his own use but not sell any reproductive material, or not to propagate at all. On its own — that is, without PSR protection, a civil contract may be of limited value. In the case of cultivars that are protected by PSR, especially cultivars used by commercial growers, civil contracts may usefully supplement the Rights by assisting in the policing and management of the cultivar.

#### PLANT VARIETY RIGHTS BILL 1985

The Plant Variety Rights Bill 1985 has been drafted to improve the present legislation and is presently under study by a parliamentary Select Committee. One important provision will strengthen the rights of breeders of fruit and ornamental plants which under the present Act are rather inadequate. The Bill will extend the rights of a breeder to include the exclusive right “to propagate that variety for the purposes of the

commercial production of fruit, flowers, or other products, of that variety". This means that a grower will not be able to buy a few protected plants, bulk them up himself and sell the resulting cut flowers or fruit without permission of the Rights holder. Under the present Act this is quite legal as long as the product sold is not reproductive material.

Further major changes incorporated in the Bill are the introduction of provisional protection (a cultivar will be provisionally protected as soon as application is made), a period of sole rights (a period of 2 to 3 years following the issue of a grant during which time the Rights holder will have a monopoly and compulsory license applications will not be allowed), a change in the mechanism for making appeals, and several changes in terminology (Plant Selectors' Rights will become Plant Variety Rights etc).

### ADVANTAGES OF PLANT SELECTORS' RIGHTS

The Plant Selectors' Rights scheme thus exists to:

- (1) Encourage plant breeding. The development of a new cultivar usually involves several years selection and trialling and considerable expense before it is considered suitable for commercial release — the control of marketing and collection of royalties for PSR provides a reward for that financial input.
- (2) Encourage the release of overseas varieties in New Zealand. Many overseas breeders will not release their varieties in New Zealand without adequate protection from PSR legislation.
- (3) Allow NZ bred cultivars to be protected overseas. Similar schemes to Plant Selectors' Rights exist in Great Britain (Plant Breeders Rights), in the United States (Plant Variety Protection and Plant Patents) and in many other countries, especially in Europe (Plant Variety Rights). UPOV, the international plant breeders rights organisation, has 17 member countries of which New Zealand is one. The legislation of some countries only permits applications from other UPOV members. Because New Zealand is a member of UPOV, New Zealanders are able to apply for protection for their cultivars overseas (although most UPOV countries have a much more restricted list of plants eligible for Rights).

There have been claims that PSR, in fact, disadvantages the public. The legislation has been blamed for causing loss of genetic diversity and exploitation of the resources of Third World countries. These arguments are misdirected towards PSR and are more of a result of agricultural development and the Green Revolution. There is also a concern that PSR has

resulted in an increase in “cosmetic breeding” — the production of cultivars with very minor distinctive characteristics which represent little or no improvement in horticultural or agricultural merit. This is a problem faced by all Rights authorities and the question of “minimum distances” between cultivars is continually under discussion.

New Zealanders, in general, have benefited from the introduction of Plant Selectors’ Rights. An increasing number of cultivars (both overseas and local) are now available and further plant breeding is continuing, particularly in the horticultural sector. The breeding of improved plant cultivars which may contribute to the national agricultural and horticultural productivity is thus encouraged.

### REFERENCES

1. Bezar, H.J., H.C. Smith and F.W. Whitmore 1982. Plants stand up for their rights. Crop Research Division, DSIR. Agricultural Bulletin No. 8.
2. Guide to Plant Selectors’ Rights. 1983. MAF Media Services, Wellington, New Zealand.
3. Plant Varieties Act 1973. Government Printer, Wellington, New Zealand.
4. Plant Varieties Amendment Act 1979. Government Printer, Wellington, New Zealand.

### SHRINK WRAP — OUR EXPERIENCE

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The processing of open ground grown nursery plants in preparation for sale and despatch, is a very expensive and time consuming operation. This factor, coupled with the lack of customer appeal of the traditional “balled” plant, lead us to look at shrink wrap plastic as a means of speeding up this “processing” operation and to improve the plants’ appearance and handleability.

Our programme was to shrink a plastic cover to the outside of our field-balled plants, just prior to despatch, which would improve the packaging and handling of the product, as well as carrying the company’s logo and planting instructions. The shrink wrapping system was designed to allow the plants to be held for the normal length of time for balled products in garden centres and retail outlets, and to be easily and conveniently handled by the customer who would remove the film just like an ordinary polythene bag prior to planting.